

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

SCOTLAND ACT 1998

EXPLANATORY NOTES

COMMENTARY

Part V: Miscellaneous and General

SECTION 111: Regulation of Tweed and Esk fisheries

Purpose and Effect

This section provides for the making of an Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Rivers Tweed and Esk - thus enabling continuation of whole river fisheries management, following the devolution of fisheries matters in Scotland.

General

This section provides a means to ensure continuation of a coherent legislative framework for the two Border rivers, applying consistently on both sides of the border. This is considered necessary in order to ensure effective fisheries management for the river systems, including their tributaries.

Salmon and freshwater fisheries management on the Tweed is governed by the Tweed Fisheries Acts 1857-1969, which provide for a River Tweed Council, drawn from the Tweed Commissioners, with rules particular to the Tweed governing fishing and applicable throughout the whole Tweed river system, including the Tweed Box (an area of inshore sea at the mouth of the Tweed at Berwick). In addition, certain provisions of Scottish public legislation governing salmon and freshwater fisheries also apply throughout the Tweed, even in England, and English fisheries legislation is disapplied.

For the Border Esk, fisheries management is governed in accordance with English legislation and Scottish legislation is disapplied, except for one provision (section 21 of the Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951) which makes it an offence in Scots law to take salmon illegally from the Esk in Scotland. Management of the Esk fisheries is a function of the Environment Agency.

The Scottish Parliament is able to exercise jurisdiction over the matters covered by this section but only within Scotland: the Scottish Parliament is restricted by virtue of section 29(2)(a) from making laws which would form part of the law of England. An Order in Council made under the present section enables common provisions to be made for the length of the Tweed and Esk Fisheries and to perpetuate the single fisheries regime which existed for these rivers before devolution.

Fisheries management applies to all freshwater species, and also to salmon, migratory trout and eels, which are not solely freshwater fish.

Further provision about the making of subordinate legislation is to be found in sections 112 to 115 and Schedule 7.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	634
LC	8-Oct-98	640
LR	2-Nov-98	113
L3	9-Nov-98	545

Details

Subsection (1) provides for provision to be made by Order in Council for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Border rivers (as defined in subsection (4)). This extends to fishing for all species commonly found in freshwater, including notably the two species of most commercial importance in these rivers (i.e. salmon and trout). It is intended that such an Order in Council would include provision to establish management structures and procedures for such bodies; to establish rules applying directly to fishing activity (e.g. permitted fishing gear, close seasons); to levy charges to recover the costs of fisheries management; to create offences and empower enforcement authorities for the river and its catchment area; and to regulate such activities as may impact on fishing (e.g. dams and offtakes).

Subsection (2) provides that an Order in Council under subsection (1) may exclude the application of section 53 in relation to any Border rivers function, and may confer power to make subordinate legislation. Section 53 would otherwise transfer to the Scottish Ministers any function of a Minister of the Crown so far as it is exercisable within devolved competence.

Subsection (3) provides that an Order in Council under subsection (1) may confer functions on a Minister of the Crown, the Scottish Ministers or a public body in relation to the Border rivers, provide for existing functions to be exercisable by some other person, and provide for functions to be exercisable concurrently or jointly with, with the agreement of, or after consultation with, some other person.

Subsection (4) contains definitions particular to this section. Definitions of the fish species rely on the Salmon and Freshwater Fisheries Act 1975. In that Act:

Eels includes elvers and the fry of eels.

Freshwater fish means any fish living in fresh water exclusive of salmon and trout and of any kinds of fish which migrate to and from tidal waters, and of eels.

Salmon means all fish of the salmon species and includes parts of salmon.

Trout means any fish of the salmon family commonly known as trout, including migratory trout and char, and also includes part of a trout.

This provides a comprehensive definition of fish species to be subject to management regulations made by Order in Council.

“The River Tweed” is defined by reference to section 39 of the Salmon and Freshwater Fisheries Act 1975, which in turn refers to the definition contained in the Tweed Fisheries (Amendment) Act 1859, as itself amended by any bye-laws amending that definition. Section II of the 1859 Act defines the Tweed to include “every river, brook or stream which flows into the said river, and also the mouth or entrance of the said river, as described and defined in the Act”. Section IV of that Act (as amended by a Byelaw dated 30 September 1863) made under the Salmon Fisheries (Scotland) Act 1863 defines the mouth or entrance of the Tweed (commonly known as the Tweed Box)

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

to include an area extending 5 miles out to sea and from the Scottish border to a point 7 miles south of the Queen Elizabeth pier in Berwick.

“The River Esk” is not otherwise defined in statute, and is therefore defined as being the river which, for part of its length, constitutes the border between England and Scotland; including its tributary streams (including the River Sark and its tributary streams) and such waters on the landward side of its estuary limits as are determined by an Order under subsection (1), together with its banks.

Subsection (5) provides that an Order under subsection (1) may modify the definition of the rivers Tweed and Esk contained in subsection (4) above.

This power has been exercised in making the Scotland Act 1998 (Border Rivers) Order 1999 ([S.I. 1999/1746](#)).