

NATURE CONSERVATION (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Conservation and Enhancement of Natural Features

Chapter 1 – Sites of Special Scientific Interest

Operations affecting sites of special scientific interest

Section 13 Operations by public bodies etc.

92. Subsection (1) prohibits a public body from carrying out any operation which is likely to damage any natural feature by reason of which an SSSI notification has effect, unless certain conditions are met. These are that either:
- SNH has given explicit written consent to the operation in accordance with section 13(4);
 - the provisions of section 14(1) apply (i.e. consent has effectively been given in some other form or the operation is necessary in an emergency); or
 - the provisions of section 14(2) apply (i.e. the operation satisfies the conditions set out in subsection (3) allowing the public body to proceed in the face of a refusal of consent by SNH).
93. Contravention, without reasonable excuse, of this section is a criminal offence under section 19.
94. Subsection (2) provides that the obligations imposed by subsection (1) apply whether or not the operation would take place on land within an SSSI. This means that operations by a public body which would be likely to damage the protected natural features of an SSSI are controlled under section 13 even where they take place outwith the formal boundary of the site. What matters is whether the operation is likely to damage the protected natural features. Where the operation is taking place is not relevant.
95. It is important to note in this context that public bodies, unlike private land managers, are required to do more than merely seek consent for operations on the formal ORC list for a site. The effect of not limiting this provision to ORCs is intended to require public bodies need to be more pro-active in their approach. Public bodies must, for example, assess potential risks to any SSSI (including an SSSI on adjacent land to that on which they intend to carry out operations) when planning and carrying out any operation. In this sense, public bodies must take responsibility for anticipating any potential threat to a site, whilst private owners and occupiers are not obliged by section 16 to think beyond the ORC list notified to them by SNH or to consider the impacts of their activities on a neighbouring SSSI. The activities of public bodies are regulated by sections 13 and 14.

For more on the position of private owners and occupiers, see the notes on section 16, below.

96. Subsection (3) requires that an application for SNH's consent to an operation must specify the nature of the operation, provide details of the proposed dates on which the operation will start and finish, and define the land on which the public body proposes to carry out the operation.
97. Subsection (4) provides that where SNH has received an application as specified under subsection (3), it may either consent to the operation or refuse its consent. Where SNH consents to the operation it is entitled to do so subject to such conditions as it sees fit.
98. Subsection (5) makes it explicit that any conditions imposed under subsection (4) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of time (for example, outwith the breeding season for important species). The types of conditions which may be imposed by SNH are not however limited to the examples given in subsection (5).
99. Subsection (6) obliges SNH to provide written advice to the public body when giving or refusing consent to an operation. Such advice must include advice on how to minimise the type of damage to the protected natural feature by reason of which an SSSI notification has effect. The provision of such advice is not optional and this section ensures that SNH will provide appropriate conservation and ecological advice and guidance to other public bodies which will allow them to carry out a permitted operation in the most appropriate and least damaging manner.
100. Subsection (7) requires SNH to provide reasons for either refusing consent or giving consent subject to conditions. This is intended to ensure the transparency and openness of decision-making and to make it easier for decisions by SNH to be challenged by the public body in question where it believes SNH has wrongly refused consent or imposed unreasonable conditions.
101. Subsection (8) ensures certainty by deeming any application for consent under section 13 to have been refused if SNH has failed to respond within 28 days of the date of application. Where SNH neither gives nor refuses consent, and the application is therefore treated as having been turned down, the public body has the option of proceeding under section 14(2)(a).

Section 14 Operations by public bodies etc.: authorised operations

102. Subsection (1) sets out details of the situations in which SNH consent to an operation is not required by a public body. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
 - permission has already been given by a regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation. SNH consent is contained within the regulatory permission;
 - explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;

*These notes relate to the Nature Conservation (Scotland) Act
2004 (asp 6) which received Royal Assent on 11 June 2004*

- an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
 - an operation is carried out in accordance with a management agreement between SNH and the public body. In concluding the agreement SNH will have consented to the operation; and
 - an operation is carried out in accordance with some other, formally-agreed plan for the management of land which has been approved in writing by SNH. For example, a forest management plan setting out a programme for forestry operations and land management activity over an extended period of time. The operations specified within such a management plan could be consented to in advance by SNH if it were to decide to approve the plan and gave such approval in writing.
103. Subsection (2) allows public bodies to proceed with an operation, in certain closely defined circumstances, even where SNH has refused consent or has imposed conditions which are unacceptable to the public body. But it may only do so where all of the conditions set out in subsection (3) have been met. It should be noted that failure by SNH to take a decision within 28 days in response to an application under section 13(3) is deemed to be a refusal of consent and the provisions of this subsection would therefore apply.
104. Subsection (3) sets out the conditions which have to be met if a public body intends to proceed with an operation in the face of SNH opposition. The conditions are that:
- no action can be taken until the 28 day period for consideration of the original application has expired;
 - notice must be given to SNH of the proposed start date for the operation;
 - that start date cannot be less than 28 days from the date on which notice of the intention to proceed with the operation is given;
 - the notice given to SNH must set out what the public body has done, or proposes to do, in response to any advice which may have been received from SNH in relation to the operation;
 - the operation must be carried out in a manner which causes as little damage or disturbance to the natural feature specified in the SSSI notification as is reasonably possible in all the circumstances;
 - in seeking to avoid damaging or disturbing that feature the public body must have regard to any advice received from SNH; and
 - the public body must comply with its general duty in relation to SSSIs and the SSSI series, as set out in section 12(2)(c).
105. Subsections (4) and (5) govern certain situations in which a public body proceeds with an operation and that operation causes damage to a protected natural feature. The situations in question are where the operation has been carried out on the basis of permission from a relevant regulatory authority, where it is an emergency operation and where it has been carried out in the face of a refusal of consent from SNH or where conditions imposed by SNH have been set aside. In these cases, the public body is obliged to consult with SNH on how best to restore the damaged feature and it must, so far as is reasonably practicable, then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.

Section 15 Consent by certain regulatory authorities

106. **Section 15** sets out the procedures to be followed where the permission of a relevant regulatory authority is needed before an operation affecting an SSSI may be carried out. Relevant regulatory authorities are to be defined for the purposes of the Act in a separate order made by the Scottish Ministers. It is not intended that planning authorities should be treated as regulatory authorities in this context, since statutory requirements for planning authorities to consult SNH in relation to planning applications already exist separately in planning legislation.
107. Subsection (3) requires a relevant regulatory authority to notify SNH before deciding whether to permit any operation which would be likely to damage a natural feature specified in an SSSI notification. Such notification to SNH must specify the nature of the operation, the proposed dates of commencement and completion, as well as the land on which it is proposed to carry out the operation.
108. Subsection (4) specifies that the obligation to consult SNH applies even if the proposed operation would take place outwith the land of an SSSI. As with section 13(2), what matters is whether the operation would be likely to damage the site, not where it is taking place. Again, the Act places a special responsibility on regulators as public bodies to anticipate and assess potential risks to SSSI land in a pro-active sense and, where they are public bodies, in accordance with the general duty set out in section 12.
109. Subsection (5) prohibits the authority from deciding whether to give its permission until 28 days have elapsed from the date of the notification to SNH under subsection (2) unless SNH has notified the authority that it does not need to wait until then. This provision is intended to ensure that SNH has sufficient time to provide advice, without unnecessarily delaying a decision if one can be taken quickly. For its part, SNH will require to be sensitive to the needs of regulators, who are themselves normally obliged to respond to applications within statutorily defined timescales.
110. Subsection (6) requires the relevant regulatory authority to have regard to any advice received by SNH when deciding to give its permission for an operation, and, where it does give its permission, in deciding whether any conditions should be attached to its permission.
111. Subsections (7) to (10) govern the situation in which a relevant regulatory authority decides not to follow advice from SNH, where that advice is not to grant permission for an operation or where it advises the regulator to impose certain conditions. Where this happens, certain conditions are imposed automatically and the regulator is obliged to inform both SNH and the applicant of the situation. This includes the requirement on the regulator – in addition to setting out the nature of the permission given and any terms and conditions – to explain what it has done, or proposes to do, in consequence of the advice given by SNH. The regulator must make it explicit that it has taken its decision in the face of SNH advice.
112. The first automatic condition imposed via subsection (10) is that the operation cannot commence before the expiry of a 28 day period from the point at which the regulator has informed SNH that its advice has not been followed. The provision for a 28 day period between notice being given to SNH and the permitted start date for the operation allows SNH time, if necessary, to seek an interdict under section 45 and/or to advise the Scottish Ministers of the situation (in which case the Scottish Ministers would also have the option of prohibiting the operation by means of a nature conservation order).
113. The obligation on the regulator to make it clear to the applicant that permission has been granted in the face of opposition from SNH is intended to ensure that the applicant is aware of the possibility that the permission could be challenged and the operation prohibited. In such circumstances the applicant may, for example, wish to avoid incurring significant expenditure in connection with the proposed operation until the situation has been more fully resolved.

114. The second condition is that the applicant is obliged, as a condition of the permission granted by the regulator, to carry out the operation in such a way as to minimise, as far as is reasonably practicable in all the circumstances, any damage or disturbance to the protected natural feature.

Section 16 Operations by owners or occupiers of sites of special scientific interest

115. Subsection (1) prohibits an owner or occupier of land within an SSSI from carrying out, or causing or permitting to be carried out an ORC, except with written consent from SNH. Contravention of this provision is a criminal offence under section 19. Consent is obtained on application under subsection (2). The requirement for consent is set aside in certain specified circumstances defined in section 17(1).
116. It should be noted that, by virtue of section 17(4), sections 16 and 17 do *not* apply to any public body which is the owner and occupier of SSSI land. This means that any operations carried out on SSSI land by, or on behalf of, a public body will be dealt with under the provisions of sections 13 and 14, rather than under sections 16 and 17. The effect of sections 16 and 17 is therefore limited to private owners and occupiers. This distinction between public bodies and private owners and occupiers is reflected in the notes which follow.
117. It should also be borne in mind that “public body” has a broad meaning in the context of the Act and that it encompasses any body which is carrying out functions of a public nature. Because of this, there may occasionally be circumstances in which a body which usually carries out functions in a private capacity may be responsible to carry out functions of a public nature in one area of activity (e.g. if a public body sub-contracts some of its functions to it). The body would be a “public body” in that context. Where a body has dual capacity the application of the Act will be determined by whether or not, in any particular circumstance, the body is acting in pursuance of its public functions or whether it is operating in a purely private capacity.
118. In contrast to public bodies, a private land manager is required by section 16 only to have regard to the ORC list notified to him/her by SNH. Whilst public bodies are obliged to be pro-active and to anticipate any potential risks, there is no strict legal requirement imposed by section 16 on private land managers to think more generally about non-ORC list operations which might be likely to damage the SSSIs natural features.
119. If an operation is not on the ORC list then consent is not required from SNH and the owner/occupier does not have to consult SNH. Neither is there any legal obligation on the owners or occupiers of neighbouring land to consult SNH about the potential impacts of operations on their land on adjacent SSSI land. It should be noted however that powers have been provided within the Act (in section 7, via nature conservation orders, and in section 45) which allow SNH or the Scottish Ministers to take emergency action to address potential threats from otherwise unregulated operations, should it prove necessary to do so. Private land managers, whilst not formally obliged to look beyond the immediate context of the ORC list, are advised to be generally aware of the existence of these special powers.
120. Subsection (2) specifies that an application for consent to carry out an ORC must detail the nature of the operation, set out the proposed dates of commencement and completion and define the land on which it is proposed to carry out the operation.
121. Subsection (3) provides that SNH may, on receipt of an application made under subsection (2), consent to or refuse permission for an operation. Where it consents to the ORC it may impose such conditions as it thinks fit.
122. Subsection (4) makes it explicit that any conditions imposed under subsection (3) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of

time (for example outwith the breeding season for important species). The conditions imposed by SNH are not however limited to the examples given in subsection (4).

123. Subsection (5) provides that SNH may, on completion of a review of ORCs and related consents under section 6(4), modify or withdraw consent to an operation by giving notice to the person to whom consent was given. SNH may also modify or withdraw consent where it considers that carrying out the operation even in accordance with the consent will damage the SSSI in a manner which was not foreseen at the time the consent was given. In the latter case, (i.e. where subsection (5)(b) applies) SNH may only modify or withdraw the consent with the agreement of the Scottish Ministers and this proviso is set out in subsection (6).
124. It should be noted that the modification or withdrawal of consent may affect the ability of a land manager to continue with the established management of the land and that this may, in turn, give rise to a right to a compensatory management agreement in accordance with subsection (9). SNH is required to have regard to the *Financial Guidelines* to be published as statutory guidance under section 54 in deciding whether it should offer to enter into such an agreement.
125. Subsections (7) and (8) define the point at which a modification or withdrawal of consent take effect. In the case of a modification or withdrawal under subsection (5) (a) (i.e. following an ORC review carried out under section 6(4)) the change does not take effect until the expiry of the deadline for any appeal against the decision or, where an appeal has been brought, the point at which it is withdrawn or finally determined. Appeals must be lodged, by virtue of section 18(2) within 28 days of notice being given by SNH.
126. In the case of a modification or withdrawal under subsection (5)(b), for which SNH has obtained the agreement of the Scottish Ministers, the change has immediate effect. This means that any operations covered by the consent must also cease (or be altered to reflect the modified consent) with immediate effect. An appeal must again be lodged within 28 days (see section 18(2)) but operations would only be permitted to resume in the originally consented form in the event that any appeal is determined in favour of the land manager.
127. Subsection (9) obliges SNH to offer to enter into a management agreement in certain specified circumstances. In doing so, SNH must act in accordance with the *Financial Guidelines* which are to be published as statutory guidance under section 54. Copies of the *Financial Guidelines* can be obtained from the address given in paragraph 18 of these notes.
128. The circumstances in which SNH is required to offer a management agreement are described in subsection (9) and are subject to two requirements.
129. Firstly, the obligation to offer an agreement can only apply where SNH:
 - refuses to consent to an operation being carried out;
 - makes its consent subject to conditions; or
 - modifies or withdraws its consent.
130. SNH must also have regard to the *Financial Guidelines* in determining whether it should enter into a management agreement. Where SNH considers that it should offer an agreement it must make such an offer on such terms and conditions as it thinks fit, having had regard to the formal guidance contained in the *Financial Guidelines*. The terms and conditions offered may include provision for any payments to the land manager which SNH, having had regard to the *Financial Guidelines*, consider appropriate in the circumstances.
131. Subsection (10) requires SNH to give an applicant reasons for a decision to make its consent subject to conditions, to refuse consent, to modify or withdraw its consent, or

not to offer to enter into a management agreement in pursuance of subsection (9)(a). This provision is intended to ensure the transparency and openness of decision-making and to make it easier for any aggrieved party to challenge such a decision in an informed and effective manner. Specific rights of appeal are dealt with in section 18.

Section 17 Operations by owners or occupiers of sites of special scientific interest: authorised operations

132. Subsection (1) specifies the particular circumstances in which a private owner or occupier does *not* require SNH's consent before carrying out an ORC. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
- permission has already been given by a relevant regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation;
 - explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;
 - an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
 - an operation is carried out in accordance with a management agreement between SNH and the owner or occupier. The exemption covers operations carried out directly by the land manager as well as those carried out on his/her behalf (for example, by a contractor). In concluding the management agreement SNH will have consented to the operation; and
 - the operation is necessary in order to comply with the requirements of a land management order ("LMO"). In seeking such an order, SNH will have identified ORCs which may need to be carried out and the order will include an appropriate consent to those operations. LMOs are covered in sections 29 to 37.
133. It might be noted that, for private owners and occupiers, there is no equivalent to the provision in 14(1)(e) allowing for operations in accordance with an agreed management plan for the site. This is intentional and reflects the fact that public bodies are under a general duty, by virtue of section 12, to conserve and enhance SSSIs. As a result they are accorded a greater degree of freedom and flexibility in managing SSSIs, but are also placed under the more onerous legal obligation to think beyond the limits of the ORC list provided by SNH and to guard against any potential damage to the natural features of the site.
134. Subsections (2) and (3) govern certain situations in which a land manager proceeds with an operation without SNH consent, either on the basis of permission from a relevant regulatory authority (given, for example, in the face of SNH opposition under sections 15(7) to (10)) or in an emergency situation, and that operation causes damage to the natural features of an SSSI. In these cases, the land manager is obliged to consult with SNH on how best to restore the site and he/she must then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.
135. Subsection (4) specifies that sections 16 and 17 do not apply to operations on SSSI land where the owner or occupier of the land in question is a public body and that public body is acting in the exercise of its functions. Sections 13 and 14 apply instead. This effectively means that operations carried out by public bodies are governed by

sections 13 and 14, whilst operations carried out by private land managers are covered by sections 16 and 17. The unusual circumstance in which a body may be exercising public functions in some situations and acting as a private owner or occupier in others is discussed above in connection with section 16.

Section 18 Appeals in connection with operations requiring consent

136. [Section 18](#) sets out rights of appeal and the procedures to be followed in mounting an appeal against certain decisions by SNH. The distinction drawn between private owners and occupiers and public bodies remains relevant and the appeal mechanisms in section 18 are intended for use by private land managers. Public bodies have alternative options (including in particular those set out in sections 14(2) and (3)) where consent to an operation is refused, conditioned, modified or withdrawn by SNH, or where the terms of a management agreement are unacceptable. The general expectation is that public bodies should seek a negotiated solution when in disagreement with each other, and should not need to resort to the courts.
137. Subsection (1) specifies the circumstances in which a private owner or occupier may appeal to the Scottish Land Court if aggrieved by a decision by SNH to:
- impose conditions when giving consent to an ORC;
 - refuse consent to an ORC;
 - modify or withdraw any consent to an ORC;
 - refuse to enter into a management agreement in accordance with section 16(9); or
 - make a management agreement subject to terms and conditions (including the amount of any payment) which are unacceptable to the owner or occupier.
138. Subsection (2) specifies that an appeal under section 18 must to be made within 28 days of the date on which SNH notified the appellant of the decision being appealed.
139. Subsection (3) provides a failsafe arrangement which protects an applicant for an ORC in situations where SNH has failed to make a decision on the application within a reasonable period. Since the applicant cannot proceed with the operation in the absence of explicit consent without committing a criminal offence, this subsection provides a remedy if SNH fails to reach a decision on the application.
140. The solution provided in subsection (3) is that, if four months have elapsed since the application was lodged, the application will be deemed to have been refused, thereby enabling the applicant to refer the matter immediately to the Scottish Land Court. The four month period within which SNH must make a decision on the original application has been set at four months on the basis of practical experience in applying the provisions of the 1981 Act. That period can be extended by mutual agreement, in order to allow for situations in which, for example, negotiations are proceeding constructively but the issues are complex and a longer period is needed to reach a final agreement.
141. Subsection (4) provides a similar failsafe arrangement in relation to management agreements. If a land manager believes, on the basis of section 16(9), that SNH should have offered to enter into a management agreement, and if SNH has not done so within 4 months of the date of a decision to refuse, condition, modify or withdraw consent, the land manager is entitled to refer the matter to the Scottish Land Court.
142. Subsection (5) requires the Scottish Land Court to determine any appeal on its merits, rather than simply by way of judicial review. The Court is therefore empowered to look into the facts of the case and is *not* confined merely to examining whether, for example, SNH acted unreasonably or whether it failed to follow procedures correctly. In essence, the Scottish Land Court is entitled to examine the entire case from scratch and to reach its own decision based on its own reading of the information presented to it. The Court

*These notes relate to the Nature Conservation (Scotland) Act
2004 (asp 6) which received Royal Assent on 11 June 2004*

may dispose of the case by making such order as it thinks fit. In particular, the Court is able to:

- uphold the original decision by SNH;
- overturn the original decision and direct SNH to give consent;
- overturn the original decision to impose conditions on a consent and quash any or all conditions which SNH may have imposed;
- overturn the original decision and direct SNH to offer a management agreement; and
- overturn the original decision to impose conditions as part of a management agreement and quash any or all conditions which SNH may have imposed.

143. In addition, over and above the ability to quash conditions imposed by SNH, subsection (6) enables the Scottish Land Court to direct SNH as to the particular conditions which it should impose instead of those original conditions when consenting to an ORC or offering a management agreement in line with the ruling made by the Court. The Court consequently has significant powers to shape the detailed terms and conditions of any consent or management agreement, should it feel it necessary to do so. The ability to make any other order as the Court sees fit, in section 18(5)(f) extends that flexibility still further.