

NATURE CONSERVATION (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Conservation and Enhancement of Natural Features

Chapter 2 -Nature Conservation Orders

Section 23 Nature conservation orders

169. Subsection (1) empowers the Scottish Ministers to make a nature conservation order, which wholly or partially prohibits the carrying out, or the carrying out in a particular way, of a specified operation on specified land.
170. Subsection (2) specifies the purposes for which an NCO may be made. The purposes are: for the conservation of the feature(s) of interest of an SSSI or any other feature of natural heritage which the Scottish Ministers consider to be of special interest; or to facilitate compliance with an international obligation.
171. Subsection (3) specifies the land to which an NCO can apply, namely, land which is or forms part of an SSSI, any other land which the Scottish Ministers believe to be of special interest by reason by virtue of its natural heritage, land contiguous to or otherwise believed to be associated with an SSSI or other land considered to be of special interest, or any combination of the aforementioned land.
172. Subsection (4) allows Ministers to include particular conditions in the NCO. Those conditions may, for example, prohibit or permit the prohibited operation only at particular times, in a particular place, when carried out in a particular manner or in accordance with other specified conditions. Examples might include a ban on the operation being carried out during the breeding season, the permitting of limited operations on part of the site or a ban which permits traditional, low-impact methods of working but prohibits the use of heavy machinery.
173. Subsection (5) provides a defined shorthand term which can be used to refer to the operations which are banned under the terms of the NCO. These are to be known as “prohibited operations”.
174. Subsection (6) provides that an NCO comes into immediate effect on being made by the Scottish Ministers. Any operation prohibited under the NCO must cease immediately the NCO is made. Failure to do so is a criminal offence by virtue of section 27.
175. Subsection (7) defines the point at which an NCO ceases to have effect. The NCO falls unless it is confirmed in accordance with the provisions of Schedule 2 – whether that non-confirmation is explicit and represents a clear decision not to confirm the NCO or whether it occurs because the Scottish Ministers have failed to take a definite decision.

176. Where an NCO has been confirmed by the Scottish Ministers and continues in force in the longer term, it may be revoked under section 24. Where the Scottish Ministers decide to revoke an NCO, it ceases to have effect immediately, on the date on which the revoking order is made. During the parliamentary passage of the Act, Ministers made it clear that NCOs should not remain in place longer than is necessary.

Section 24 Amendment or revocation of nature conservation orders

177. This section allows the Scottish Ministers to amend an NCO or to revoke the NCO in whole or in part.
178. Subsection (1) provides that the Scottish Ministers may amend or revoke an NCO by order and that such an order will be known as an amending order or revoking order respectively.
179. Subsection (2) enables an amending order to: add to, modify or remove the prohibited operations specified in the NCO; modify the NCO in relation to the circumstances in which particular operations are not prohibited, in line with section 23(1)(b); and extend or restrict the area of land to which the order applies.
180. Subsection (3) provides that an amending order, like the original NCO and any revoking order, comes into immediate effect on being made by the Scottish Ministers.
181. Subsection (4) provides for an amended NCO to have effect as amended for as long as the amending order which amends it has effect.
182. Subsection (5) provides that a revoking order may revoke the NCO for part of the original area covered by the NCO (thereby, in effect, amending it by reducing its extent).
183. Subsection (6) provides that a revoking order, like the original NCO and any amending order, comes into immediate effect on being made by the Scottish Ministers.

Section 25 Nature conservation orders and related orders: procedure

184. This section introduces Schedule 2. Schedule 2 sets out the procedures that must be followed when NCOs, amending orders and revoking orders are made.

Schedule 2

Nature conservation orders and related orders: procedure

Application of schedule

185. Paragraph 1 clarifies that this Schedule applies to NCOs and to any amending orders and revoking orders which affect NCOs.

Consultation

186. Paragraph 2 requires the Scottish Ministers to consult SNH in relation to any proposed NCO, amending order or revoking order before making it. The Scottish Ministers must have regard to any representations made by SNH before they make the order.

Notification

187. Paragraph 3 requires the Scottish Ministers to give notice of the making of an order under this section as soon as practicable after making it. Notice must be given to the interested parties (see section 48(2)). The notice must also be publicised in at least one relevant local newspaper and by such other means (including the internet) as the Scottish Ministers think fit.
188. Paragraph 4 provides that a notice under paragraph 3 must set out the order or describe its general effect. The notice must also state whether the order has taken effect. This paragraph also provides that, where the notice does not set out the order, it must specify

where a copy of the order may be inspected free of charge and at all reasonable hours and how to obtain a copy of the order. Finally, sub-paragraph 4(c) provides that the notice must, where it relates to an NCO or amending order, specify the period during which and how representations may be made about the order. This sub-paragraph establishes that the period for such representations must be at least 3 months from the date on which the notice was given. This minimum period for representations is the same as that specified for representations in relation to the notification of SSSIs in Schedule 1.

Confirmation of orders

189. Paragraph 5 requires the Scottish Ministers to decide either to confirm or not to confirm an order to which this Schedule applies (i.e. an NCO, amending order or revoking order) within one year of the date on which the order is made. They must do so only after having considered any representations and after having considered any report which may have been submitted by a person appointed under paragraph 10 for the purposes of holding an enquiry or hearing representations. The period within which confirmation must take place may be extended by agreement, in accordance with paragraph 12.
190. Paragraphs 6 and 7 provide that the Scottish Ministers are entitled to make modifications to the order prior to confirmation and they may confirm an order which has been modified. Where modifications are made, however, any changes must be detailed in the notice of confirmation required under paragraph 8. The modifications which are made cannot have the effect of extending the area of land covered by the NCO.
191. Paragraph 8 requires the Scottish Ministers to give notice of their decision to confirm or not to confirm an order as soon as practicable after making that decision. Notice of this decision must be given to the interested parties and publicised in accordance with the notice requirements set out in paragraph 3.
192. Paragraph 9 provides that any modifications to an order will have effect as soon as notice of confirmation of the order in its modified form is given by the Scottish Ministers in accordance with paragraph 8.

Inquiry or other opportunity to be heard

193. Paragraph 10 provides that the Scottish Ministers must either cause a local inquiry to be held or appoint a person to hear representations if representations in relation to the order have been made within the period allowed for the lodging of representations and the representations are not subsequently withdrawn.
194. Paragraph 11 requires that any local inquiry, to be held as a consequence of paragraph 10, should be conducted in accordance with the relevant provisions of section 210 of the [Local Government \(Scotland\) Act 1973 \(c.65\)](#).

Extension of period

195. Paragraph 12 ensures that the Scottish Ministers may only extend, or further extend, the period in which an NCO must be confirmed with the express agreement of every owner and occupier to which the order relates. The period of time must be agreed by all parties and agreement is to be obtained in accordance with paragraph 13.
196. Paragraph 13 specifies that agreement to extend the period in which an NCO must be confirmed is obtained if the Scottish Ministers give notice of the proposed extension to every owner and occupier of the land to which the order relates and either every owner and occupier consents to the extension, or no reasonable objection is received within 28 days. This latter arrangement allows for extension in situations where either no-one feels strongly enough to bother responding or where a minority or respondents seek to block the extension for petty reasons in a way which is, for example, at odds with the clear desire of the majority of owners and occupiers.

197. Paragraph 14 requires the Scottish Ministers to notify the interested parties if they do extend or further extend the period within which an NCO must be confirmed.

Recording or registration of orders

198. Paragraph 15 requires that any order made under this Schedule and any notice given by the Scottish Ministers to confirm or not to confirm an NCO or amending order, be recorded in the General Register of Sasines or registered in the Land Register of Scotland, whichever is appropriate at the time of registration. All existing NCOs under the 1981 Act have been recorded or registered in the same way.

Section 26 Review of nature conservation orders

199. It is the intention that NCOs should not remain in place longer than is necessary. Section 26 both empowers and requires the Scottish Ministers to keep the number and impact of NCOs under review by requiring them to review each NCO at regular intervals to determine whether it should be amended or revoked. The Scottish Ministers may, for example, wish to amend or revoke an order which has become outdated or has outlived its usefulness.
200. Subsection (1) allows the Scottish Ministers to carry out a review of an NCO when they see fit, for the purpose of determining whether to amend or revoke the NCO. The provisions of subsection (1) enable the Scottish Ministers to carry out a review in response to requests for review from parties affected by the order, where it appears to the Scottish Ministers to be appropriate and reasonable to do so. They may take action to review an NCO at any time.
201. Subsection (2) supplements subsection (1) by obliging the Scottish Ministers to review each NCO at least every 6 years, if they have not already done so on a more frequent basis. This ensures that NCOs cannot be left in situ for extended periods of time without the Scottish Ministers being required to consider, at regular intervals, whether they remain relevant and necessary.

Section 27 Offences in relation to nature conservation orders

202. This section establishes that a criminal offence is committed, if an operation prohibited by an NCO is carried out (or is permitted or caused to be carried out) on land to which the NCO applies. The penalty for such an offence is a fine of up to £40,000 on summary conviction. On conviction on indictment, the Court is empowered to impose any fine (including one in excess of £40,000) which appears to it to be appropriate in the light of the facts of the case.
203. Subsection (2) states that it is not a valid defence to argue that the prohibited operation did not in fact cause damage to the natural features protected by the NCO. It is the carrying out of the prohibited operation which constitutes the offence in this case, not the causing of damage. Any argument that no damage was done is therefore irrelevant.

Section 28 Reports

204. This section requires SNH to include details of any NCO, amending order or revoking order made during the course of the reporting year in its annual report submitted under section 10(2) of the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#). This requirement is in addition to the registration or recording of orders in the Land Register or General Register of Sasines.