

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 – Conservation and Enhancement of Natural Features**

##### *Chapter 4 - General and Supplementary*

##### *Section 48 Notices, applications etc.*

317. Subsection (1) specifies that any notice, notification, consent, request for review, proposal or application given or made in accordance with the terms of Part 2 of the Act must be in writing. Thus, a verbal request for consent to an ORC, for example, would not be valid and neither would a verbal consent given by SNH. This requirement for formal communications and decisions to be in writing may assist the resolution of disputes by providing more legal certainty than may be the case had events proceeded on the basis of verbal communication.
318. Subsection (2) defines the “interested parties” referred to at various points in Part 2 of the Act. The interested parties are those who are listed in paragraphs (a) to (k) and range from persons appearing to have a direct legal interest in the land through to the Scottish Ministers or SNH. “Interest” in relation to land is defined in section 58(1).
319. Subsection (2) also specifies that the date on which any notice or notification is deemed to take effect is the date on which the Scottish Ministers or, as the case may be, SNH receive a notice or notification. This provides certainty in relation to the precise date on which a notice or notification is held to take effect. The date of receipt by the Scottish Ministers or SNH can be identified precisely if evidence of receipt can be produced.
320. Subsection (3) ensures that a notice or notification is not invalidated in its entirety simply because any of the interested parties specified in this subsection have not received it. The provision covers situations in which any of the persons listed in paragraphs (a) and (f) to (k) of subsection (2), is mistakenly overlooked or for some other exceptional reason does not receive the notice or notification.
321. This might conceivably happen in the case, for example, of the owner or occupier of land on a large and complex SSSI. Although it is normally possible to determine who has an interest in a particular area of land, through both local enquiries and searches of registers of land, there may occasionally be instances where such information cannot be determined with absolute certainty. This provision is designed to try and prevent any unnecessary disruption and expense which may arise if the notification is rendered invalid.
322. The provision also ensures the continuing validity of existing SSSI notifications, made under section 28 of the 1981 Act are continued in effect by the transitional arrangements in Schedule 5. The 1981 Act did not require any of the persons in paragraphs (f) to (k) to be formally notified, although in recent years SNH has been doing so as a matter of good

administrative practice. Thus, for existing sites, the absence of a formal notification given to, for example, the local community council, will not invalidate the site. The same arrangement applies in relation to statutory undertakers, regulators, community bodies with an interest in the right to buy and other relevant persons, including those with a legal interest in the land. No formal requirement is imposed in the Act to retrospectively notify such interested parties in relation to existing sites. It is, however, expected of SNH that it will make every reasonable effort to ensure that everyone who requires to know of the existence of an SSSI will be given that necessary information.

323. The exemption provided for in subsection (3) does not, insofar as it relates to the owners and occupiers of land, represent an excuse for carelessness or poor practice on the part of SNH or the Scottish Ministers. In all cases, there is a clearly implied expectation that the notifying authority will take all reasonable steps to properly identify and notify the interested parties in relation to any area of land which is the subject of a notice or notification. The exemption should, therefore, only be invoked in cases where the notifying authority could not, in the circumstances, realistically have been expected to give notice or notification to the person concerned.
324. That general expectation – that all reasonable steps should be taken by the notifying authority – has been made a formal legal obligation in the Act where owners and occupiers are concerned. The requirement is set out in subsection (4)(a), in recognition of the particular significance of owners and occupiers in relation to protected land. The exemption in subsection (3) cannot therefore apply in relation to a failure to notify an owner or occupier unless SNH or the Scottish Ministers have taken all reasonable steps to notify all relevant owners and occupiers and have then actually taken action to notify each owner and occupier identified by that process. Further provision covering the action to be taken in relation to persons omitted in error from that notification exercise is made in subsections (11) and (12).
325. It might be noted that the reason an exemption has not been made in the case of a failure to notify the interested parties listed in paragraphs (b) to (e), is that it is inconceivable that SNH or the Scottish Ministers could not be aware, for example, of each other's identity or of the identity of the relevant planning authority for the area in question. This underlines the exceptional nature of the exemption provided in subsection (3) and, once again, emphasises the fact that it is intended to apply only to situations in which the notifying authority could not, in the circumstances, reasonably have been expected to have done things differently and thereby to have avoided the error.
326. Subsection (5) enables the Scottish Ministers by order to add to, remove or amend entries in subsection (2) which specify interested parties. This allows the list of interested parties to be updated in future, in line with changing circumstances and, for example, the effects of other legislation or land management practices.
327. Subsection (6) clarifies the point at which a notice or notification is deemed to have been given to any person. The giving of notice requires either the delivery of the notice or notification in person or its transmission by letter to the normal or last known address of the person. Arrangements are included which cater for the special case where the interested person is a corporate or public body. Subsection (10) covers the further special case in which the identity of the owner or occupier of the land is unknown.
328. Subsection (7) regulates the manner in which applications, proposals or consents are to be given or sent. The same arrangements as for the giving of notices or notifications (i.e. delivery in person or transmission by letter) apply. In addition, provision is made for transmission by other reasonable means (bearing in mind the requirement in subsection (1) that applications etc. must be made in writing). This is intended to cover, in particular, the making of requests and applications, and the giving of consents, by e-mail where this is the most appropriate and convenient method of communication. Subsection (8) clarifies the status of material transmitted by electronic means. E-mails, faxes and other electronic communications are to be treated as being in writing if they

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2004 (asp 6) which received Royal Assent on 11 June 2004*

are received in a form which is legible and is capable of being used for subsequent reference.

329. Subsections (9) and (10) cover the situation in which a notice or notification (or the offer of a management agreement under section 29(6)) must be given to the owners and occupiers of land and the identity of those owners and occupiers cannot reasonably be discovered. In such circumstances, special arrangements for the posting of a notice apply and where this is done, the notice, notification or offer is deemed to have been given or made as if it had been delivered to a person whose identity and address are known.
330. Subsections (11) and (12) make further provision in relation to the situation in which SNH or the Scottish Ministers fail or omit to give notice or notification to an owner or occupier in connection with an original SSSI notification, enlargement, denotification or the making of an NCO. The special exemption which protects the validity of the notice or notification in such circumstances is covered in subsections (3) and (4).
331. Where an omission of this kind has occurred, SNH (or the Scottish Ministers) must provide the owner or occupier with a copy of the notification or notice in question and any other information they consider appropriate in the circumstances. That copy and any additional information must be supplied as soon as SNH (or the Scottish Ministers) become aware of the identity of the omitted owner or occupier. It must also be provided if any person who should have received the original notice or notification draws the matter to the attention of SNH (or the Scottish Ministers) by making a request for a copy. SNH (or the Scottish Ministers) must then consider any representation made to them by the party in question and are obliged to take such action as they think fit having had due regard to the representations received.