

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

Notification of sites of special scientific interest

Section 3 Duty to give notification of sites of special interest

31. Subsection (1) places a duty on SNH to notify, as a site of special scientific interest, any land which it considers to be of special interest by reason of its flora, fauna, geology or geomorphological features. These features are the “natural features” of the land and are defined as such, for the purposes of the Act, in subsection (2). It might be noted that in common usage the abbreviation “SSSI” is used for “site of special scientific interest” and that practice has been adopted in these Notes.
32. Where it considers a site to be of special interest SNH must notify that fact to the interested parties listed in section 48(2). Procedures to be followed by SNH in notifying an SSSI are set out in schedule 1 to the Act which is introduced by section 10.
33. Subsection (3) qualifies the duty in subsection (1) by requiring SNH to have regard to certain criteria and guidance when reaching a view on whether land is of special interest. Such guidance, covered by paragraph (b) of subsection (3), may be a formal document setting out SSSI selection criteria and issued under section 54. But guidance to SNH is also provided by subsection (3)(a). This requires SNH to have regard to the contribution which any individual SSSI is likely to make to the representativity of the overall SSSI series in Scotland.
34. When taken as a whole, the SSSIs notified in Scotland will form a coherent series of protected sites. To be properly representative of the diversity and geographic range of the natural features of Scotland it is considered that this series could, for example, include, at one end of the spectrum, sites which are exceptionally rare or unique and, at the other, an adequately representative sample of sites which are more widespread or common.
35. Subsection (3)(a) also requires SNH to give consideration to the Scottish contribution to the conservation of natural features at the British and European levels. In this sense the Act recognises that Scotland has a particular responsibility in relation to the conservation of sites, species and habitat types which are characteristic of, and more prevalent in, the more northern parts of the British Isles but which are not necessarily well represented elsewhere in Great Britain or the European Union.
36. The fact that a particular type of site may be fairly common in Scotland but unusual at a British or European level is a factor which SNH must take into account. In

particular this means that SNH, when evaluating the relative interest of a site, should give consideration to the status and conservation requirements of relevant species or habitat types against a wider British or European backdrop, as well as considering them within the context of Scotland.

37. On that basis a properly representative series could legitimately include a relative over-representation of certain features in relation to the natural heritage of Scotland, in order to ensure that an adequate Scottish contribution is made to the conservation of such natural features in Britain or Europe. It should not however under-represent natural features which are characteristic of Scotland simply because such features are common elsewhere. To do so would result in a series which would not be properly representative of the natural features found in Scotland, and such a series would therefore be at odds with the requirements of section 3(3).
38. Subsection (4) specifies that the notification given to interested parties as a consequence of the duty in subsection (1) must be accompanied by a number of supplementary items which specify the extent and special characteristics of the site, as well as providing such other general information as SNH believes appropriate. The accompanying documentation must in particular:
 - describe the site;
 - specify the natural features of the site which are regarded as being of special interest;
 - list any acts or omissions which are likely, in the opinion of SNH, to be damaging to those features of interest; and
 - specify the location and boundaries of the site and provide a map delineating the site.
39. Subsection (5) defines a shorthand, technical term by which the notification given to the interested parties by virtue of subsection (1) *plus* the detailed documentation specified in subsection (4) is to be known for the purposes of the Act. These items, taken together, constitute the “SSSI notification” for the area of land in question.
40. Subsection (6), in conjunction with section 48(2), defines the point in time when the SSSI notification has effect. From that point the site is formally an SSSI and benefits from the protective mechanisms set out in the subsequent provisions of the Act.
41. Subsection (7) provides a shorthand, technical term for the potentially damaging acts or omissions which are listed in the SSSI notification by virtue of subsection (4)(a)(iii). These acts or omissions are to be known as “operations requiring consent”. This term is further abbreviated for the purposes of these explanatory Notes as “ORC”.

Section 4 Site management statements

42. This section requires that each SSSI notification must be accompanied by a site management statement prepared by SNH. The site management statement does not form part of the SSSI notification, but is a separate document which provides practical guidance to the owners and occupiers of the SSSI in relation to conservation and enhancement of the protected natural feature. It may also contain other information, including information which promotes the understanding and enjoyment of the natural feature by the general public.
43. The role of the site management statement is to complement and expand upon the rather technical and scientific information in the SSSI notification. To that end, SNH can use a site management statement to provide information and advice, in non-scientific language wherever possible, setting out how land managers can best secure the long-term protection of the site. At a practical level it will, for example, allow SNH to assist land managers in planning and carrying out operations on the site in ways which are

consistent with, and sensitive to, the conservation needs of the SSSI. Overall, the site management statement is intended to assist owners and occupiers, and their employees or contractors, to manage the site responsibly and in the most effective manner.

44. SNH can make use of site management statements as evolving documents. The provisions in subsections (3) and (4) enable the statements to be reviewed and updated in a manner which ensures that they continue to fulfil their purpose effectively. That process of review may be initiated either by SNH or by the owner or occupier of land within the SSSI.

Section 5 Enlargement of sites of special scientific interest

45. This section permits SNH to enlarge an existing SSSI, by adding an additional area of land (the “extra land”) to the original site. SNH is permitted to do so only where the combined site, comprising the original site and the extra land, can be regarded as being of special interest. The principal purpose of this provision is to enable land, which ought reasonably to have been included within the original site at the time when that original site was notified, to be incorporated within the site at a later date.
46. This might take place, for example, when new data come to light demonstrating the value or importance of the extra land – whether in its own right as land of intrinsic special interest or as land which is not perhaps inherently of special interest in itself, but which is demonstrably important to the effective conservation and management of the existing SSSI. The procedure in section 5 enables this to happen without having either to notify the additional land as an entirely separate SSSI or to denotify the original site and then re-notify the whole of the larger area from scratch. The procedure is sufficiently flexible to cover both a significant enlargement of an SSSI (for example, where a significant area of extra land of special interest is added) or a minor outward adjustment to the boundary of the site (for example, where the size of the site is increased only in a minor sense, perhaps for reasons associated with the effective management of the existing site). It should be noted that changes and adjustments which decrease the size of the SSSI are covered by section 9.
47. Any debate about the merits or otherwise of the enlargement must relate to the case for including the *extra* land. Section 5 does not allow the case for the original site to be debated as part of the process for including the land. Notification of the change is therefore confined solely to interested parties (see section 48(2)) in relation to the extra land. Representations from interested parties are similarly confined to those which are relevant to the case for or against inclusion of the extra land. Representations in relation to the original site (such as, for example, arguments putting the case for its denotification) are not competent in this context.
48. The procedures associated with enlargement are otherwise essentially the same as for initial notification and the arrangements set out in Schedule 1 again apply. In addition, SNH must have regard to the selection criteria prescribed in section 3(3)(a) and in guidance under section 54 in making the case for the combined area of land, just as it would for a new SSSI.
49. Notification under this section must update the original SSSI notification to properly reflect the natural features of the combined land and the guidance provided to land managers via the site management statement must likewise be updated in order to cover the enlarged site. Provision for updating the ORC list in the SSSI notification covering the combined site is made separately in section 6 and other variations to the notification can be made separately using the power conferred by section 8.

Section 6 Review of operations requiring consent

50. This section regulates any review of the ORCs listed in an SSSI notification. The times at which the process of review and revision can be carried out are subject to the constraints which are set out in subsections (1) and (2).

51. Subsection (1) gives SNH the power to review the ORC list when it thinks fit and obliges it also to do so on the request of any owner or occupier of the site. Subsection (2), however, limits the ability of SNH to carry out such a review more frequently than every 6 years, unless it has first obtained the consent of every owner or occupier. Thus, SNH can neither initiate reviews nor be obliged to carry out a review by an owner or occupier outwith the 6 year cycle, unless it has secured agreement from the owners and occupiers of the land affected.
52. Subsection (2) should be read in conjunction with the transitional provisions in paragraphs 3(a) and 5 of Schedule 5. These define the date on which the first 6 year period commences in relation to existing SSSIs and make special arrangements allowing SNH to conduct a structured programme of review of ORC lists during that initial 6 year period. SNH has been specifically tasked by the Scottish Ministers with reviewing those ORC lists which have been derived (as a consequence of paragraph 3(b) of schedule 5) from the PDO (“potentially damaging operations”) lists used for SSSIs under the 1981 Act. That review is to be undertaken in line with the policy that the new ORC lists should be more closely targeted and should deal with credible potential threats to the site, rather than (as has tended to happen in the past) simply listing all activities which might, theoretically, damage the site. Reserve powers exist, in section 7 and by using nature conservation orders, to cover the rare situations where activities which are genuinely detrimental to the SSSI interest have not been listed on an ORC list.
53. The 6 year period between ORC reviews reflects the existing site condition monitoring programme, which assesses the conservation status and condition of natural features across the SSSI series. It is this programme which yields the principal data which are required to inform a major review of the ORC list. There is nothing however to prevent more frequent reviews where there is mutual agreement between SNH and the owners and occupiers of the site that it would be sensible to do so.
54. Subsection (3) specifies that agreement to a review is given by owners and occupiers where *either* every owner and occupier explicitly consents *or* no reasonable objection to the proposal is received within 28 days. Where there are multiple owners and occupiers on a site and one individual seeks, without good cause, to block a review for which there is clear majority support amongst other owners and occupiers, it is unlikely that this will be regarded by SNH as a “reasonable objection”.
55. Subsection (4) enables SNH, in carrying out a review of the list of ORCs, also to review existing consents which it has given under section 16 of the Act allowing operations specified on the ORC list to be carried out. This is because a review of the ORC list may substantially alter that list and the detail of the particular operations specified in it, in order to ensure the protection of the site. Since ORC consents work, in practice, to modify the effect of the ORC list, it would be difficult to review that list without also considering the implications of existing consents. SNH may consider it would also be undesirable for consents to remain in place where it is clear that the operation is damaging the site and the consent is no longer consistent with the entry on the ORC list to which the consent originally related. Section 16 makes provision for the subsequent modification or revocation of ORC consents following a review under section 6(4).
56. Subsection (5) provides that SNH must amend the ORC list for any site where, on completion of an ORC review, it is of the opinion that operations should be added to or removed from the list or where it believes that an existing entry should be modified.

Section 7 Addition or modification of operations requiring consent: urgent situations

57. This section sets out the detail of a special procedure whereby SNH may, having obtained the consent of the Scottish Ministers, alter an ORC list for a site with immediate effect. This is an emergency measure which allows an unlisted operation to be added to the ORC list at very short notice where it becomes apparent that damage to the site may result if the unlisted operation is carried out. SNH may also modify any

existing entry on the ORC list in the same way (so that, for example, the existing entry is extended sufficiently to cover the operation which is posing a threat to the site).

58. SNH is limited in its power to change the ORC list on an emergency basis by subsection (2). This requires SNH to make a case to the Scottish Ministers explaining why it considers the alteration to the ORC list is necessary and why it considers the situation to be one of urgency. SNH cannot make the change to the ORC list unless the Scottish Ministers consent.
59. The effect of a change to the ORC list by means of section 7 is that the owner or occupier will be required to seek consent from SNH for an operation which may have previously been lawful. On receipt of an application for consent SNH may then be willing to allow the operation to proceed subject to conditions, or it may refuse consent. Applications for consent to carry out ORCs are dealt with in section 16 and appeals procedures are set out in section 18.

Section 8 Variation of SSSI notifications

60. This section enables SNH to vary certain aspects of the SSSI notification following the point at which the SSSI notification, and therefore the SSSI, has been confirmed under the terms of paragraph 10 of Schedule 1.
61. This section allows SNH to vary the description of the land and the list of features of special interest, as well as any miscellaneous “other information” contained in the SSSI notification by virtue of section 3(4)(a)(iv). It does not however allow SNH to vary the boundary of the SSSI (e.g. by enlarging the site) or alter the list of ORCs for the site. Separate procedures are provided in sections 5 and 6 in relation to these components of the SSSI notification.

Section 9 Denotification of sites of special scientific interest

62. This section provides a process by means of which an existing SSSI (or any part of an existing SSSI) may be denotified. The procedure set out in this section is in essence the reverse of the notification process specified in section 3. SNH must first determine that a site (or part of a site) is no longer of special interest, having applied essentially the same criteria as used for site selection and notification and restated in section 9(3). This includes a requirement to consider the contribution which the site makes to the SSSI series as a whole, both in relation to the natural features of Scotland and to those of Great Britain and of the member States of the European Union.
63. Having determined that the site, or part of the site, no longer satisfies those criteria, SNH must then give a revocation or modification notification to the interested parties in the same way as for an initial notification. In the case of a denotification, however, the information given to the interested parties, rather than detailing the special interest of the site, must set out SNH’s reasons for regarding the site or part of it as no longer being of special interest.
64. Where part only of the site is to be denotified, the interested parties are those individuals and bodies specified in section 48(2) who have an interest in relation to the particular part of the site which is to be denotified. SNH is not required to notify parties who have an interest in relation to other parts of the site only, although section 48(2)(k) gives it power to do so (and to inform other individuals and organisations who are not otherwise interested parties) where it may be appropriate to inform a wider audience of the proposed change. As with enlargement (see section 5), the denotification process is sufficiently flexible to cover scenarios ranging from the denotification of an entire site through to minor adjustments to the boundary of an SSSI.

Section 10 Notifications relating to sites of special scientific interest: procedure

65. This section introduces Schedule 1, which sets out procedures to be followed in relation to the notification of SSSIs under section 3(1), and their subsequent enlargement (section 5) or denotification (section 9).

Schedule 1

Notifications relating to sites of special scientific interest: procedure

Application of Schedule

66. [Paragraph 1](#) applies Schedule 1 to the notification of SSSIs under section 3(1), the notification of enlargements under section 5 and the denotification of SSSIs under section 9.

Publication

67. [Paragraph 2](#) ensures that SNH must publish information describing the general effect of notifications under sections 3(1), 5(1) and 9(1). The objective is to ensure that the general public should reasonably be aware that an SSSI is being created, enlarged or removed. The minimum requirement is that information should be published in a local newspaper circulating in the area in which the SSSI is situated. SNH also has discretion as to other means of publicising the notification. The SNH website could, for example, provide a key mechanism for making such information publicly available. This provision allows SNH to give consideration to and to use other appropriate means designed to bring notifications are brought to the attention of a wider audience.

Content of notification

68. [Paragraph 3](#) details the information which must be given to the interested parties when SNH provides notification of an SSSI, its enlargement or denotification and which must also be contained in the related notice required under paragraph 2.
69. It is a requirement of paragraph 3 that any such notification, and any notice published under paragraph 2 in the press, on the internet or elsewhere, must name a place where the full notification can be inspected free of charge at any reasonable time and from where a copy of the relevant documentation can be obtained or purchased.
70. [Paragraph 3\(c\)](#) ensures that SSSI notifications, notifications of enlargement and denotifications, and related notices give information about the right to make representations to SNH. The formal date of notification is defined in section 48(2) and the deadline for the submission of representations cannot be less than 3 months after this date. SNH must also specify the manner in which representations are to be made (including, for example, the address to which they are to be sent and whether representations can be made by e-mail as well as by letter).

Confirmation or withdrawal of notification

71. [Paragraph 4](#) requires that an SSSI notification, notification of enlargement or denotification must be formally confirmed or withdrawn by SNH within one year of the date on which it was given. Provision is made to allow the period of one year to be extended in accordance with arrangements set out in paragraph 12. SNH is obliged to consider any representations which have been made in relation to the notification before confirming it. As noted above, representations must be made within the period specified in the notification and in the notice given under paragraph 2 which, by virtue of paragraph 3(c), cannot be less than 3 months.
72. [Paragraph 5](#) deals with the situation in which SNH fails to confirm a notification within the one year period (or within any period as extended by virtue of paragraph 12). If a notification is not formally confirmed by the deadline, it is to be treated as if it had been

withdrawn by SNH on the day on which the period allowed for confirmation expired. In such circumstances the notification no longer has any effect and the SSSI ceases to exist. It should, however, be noted that a failure to confirm the notification does not invalidate any effects it may have had during the period prior to non-confirmation – for example, if decisions under regulatory regimes or the planning system had been influenced by the existence of the SSSI.

Modification of notification

73. Paragraphs 6 to 8 enable SNH to modify a notification prior to confirmation. Notifications may be modified by amending the matters specified in the SSSI notification (defined in section 3(4)) and SNH is accorded a degree of flexibility in this connection during the period prior to the notification being confirmed.
74. Thus the description of the land, the natural features which are of special interest or the miscellaneous other information included in the SSSI notification may be added to, removed or amended. This may, for example, be done where SNH requires to correct part of the notification or accepts a particular point made by an objector. SNH may also amend the boundaries of the site to reduce its coverage, for example, where it considers that a particular area should in fact be excluded from the site. SNH is not however permitted to use its pre-confirmation power of modification to extend the boundaries of the site or to add to the ORC list. Separate procedures exist in sections 5, 6 and 7 to allow changes to these particular components of the SSSI notification. These powers can be used before as well as after confirmation.

Referral to Advisory Committee

75. Paragraph 9, together with section 21(6) to (8), sets out SNH's obligations in situations where representations (including objections to the site) have been lodged in accordance with paragraph 3(c).
76. Where any valid representation has been received and it relates to the natural features specified in the notification (e.g. it is an objection concerning the appropriateness or accuracy of the information contained in an SSSI notification by virtue of section 3(4)(a)(ii) or it concerns SNH's reasons for considering a site no longer to be of special interest) SNH cannot then confirm the notification until it has referred the representation to the Advisory Committee on SSSIs ("ACSSSI) and considered any advice received from ACSSSI.
77. The role and operations of ACSSSI are defined in section 21 (for which see paragraphs 153 to 162 of these notes). The need to allow sufficient time for ACSSSI to consider objections, and for SNH properly, in turn, to consider ACSSSI's advice, prior to expiry of the deadline for confirmation of the SSSI was one of the key reasons for extending the confirmation period from 9 months (under the 1981 Act) to one year (under this Act).

Notice of decision to confirm or withdraw

78. Paragraph 10 obliges SNH to give formal notice of any decision to confirm or withdraw a notification. Notice must be given to the interested parties (see section 48(2)) and must be publicised, including in at least one local newspaper and by any other means which SNH thinks fit, in accordance with the requirements of paragraph 2. A failure to give such notice within the deadline for confirmation leads, by virtue of paragraph 5, to the notification being deemed to have been withdrawn.
79. Paragraph 11 deals with the situation in which an objection to the notification has been referred to ACSSSI. In such cases the person who lodged the objection must be provided not only with notice of the confirmation or withdrawal of the notification but must also be given a copy of the advice which ACSSSI had given to SNH in relation to the matters raised by that objector.

Extension of period during which notification is to be confirmed or withdrawn

80. Paragraphs 12 and 13 provide for the extension of the period within which a notification must be formally confirmed or withdrawn. An extension may be made in the event of a referral to ACSSSI, but the extension can be for no more than an additional 6 month period. Thus the notification is required, in most situations, to be confirmed or withdrawn within no more than 18 months of the date on which it was originally given. If this does not happen it will be deemed (by virtue of paragraph 5) to have been withdrawn.
81. Where no objections have been received which are required under section 21 to be referred to ACSSSI, paragraph 13 does however allow for the period for confirmation or withdrawal to be extended for an unspecified period where this is by mutual agreement between SNH and all owners and occupiers of land within the SSSI in question. In such circumstances confirmation could take longer than 18 months. Such an agreement may, for example, be reached where SNH is engaged in constructive but very detailed negotiations with owners and occupiers and they are content with the progress of those negotiations.
82. Paragraph 14 specifies the manner in which agreement to an extension of the period for confirmation or withdrawal is to be obtained by SNH. Agreement is given either where every owner and occupier explicitly consents or where no reasonable objection is received within 28 days of SNH making a proposal for extension. The concept of reasonableness is applied here in order to prevent one individual from blocking an extension for petty reasons and thereby thwarting the wishes of the overwhelming majority of owners and occupiers of the site. A similar principle applies elsewhere in the Act, for example in relation to the review of ORC lists (see section 6(3)(b)).
83. Paragraph 15 requires SNH to inform the interested parties of any extension to the period for confirmation or withdrawal. This is particularly relevant to the situation foreseen in paragraph 14(b) where no reasonable objection is received.

Section 11 Effect of SSSI notification

84. Subsection (1) defines the point at which modifications to an SSSI notification, or alterations made to an SSSI notification by virtue of sections 5 to 9, take effect. Original SSSI notifications have effect from the date on which they are given (see sections 3(6) and 48(2)) and they have effect in their modified or amended form as of the date on which notice of the relevant change is given.
85. Subsection (2) provides that, where SNH gives notice (under paragraph 10 of Schedule 1) that it has withdrawn a notification of enlargement (given under section 5(1)), the original SSSI notification continues to have effect in its unaltered, original form. In other words, the notification reverts to the *status quo ante* and the situation continues as if the proposal for enlargement had never been made. It should be noted that this does not invalidate the effects which any notification given under section 5(1) may have had during the period between notification and withdrawal – for example where a decision by a regulatory body or under the planning system may have been influenced by the notice of enlargement.
86. Subsection (3) provides that an SSSI notification ceases to have effect when SNH gives notice (under paragraph 10 of Schedule 1) of its decision to withdraw the SSSI notification. It also provides that a denotification of a whole SSSI does not, in contrast to a partial denotification, have effect until the relevant notification under section 9(1) is confirmed. A default arrangement covering the situation in which SNH fails to take a decision is covered separately in paragraph 5 of Schedule 1.