

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## 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 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particular those set out in sections 14(2) and (3)) where consent to an operation is refused, conditioned, modified or withdrawn by SNH, or where the terms of a management agreement are unacceptable.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

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

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 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.