

# 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 38 Ramsar Sites*

250. [Section 38](#) makes provision in relation to wetland sites designated as being of international importance in relation to the objectives of the Ramsar Convention.
251. Subsection (1) requires the Scottish Ministers to give SNH notice of any wetland designated in Scotland.
252. Subsection (2) requires SNH, on receipt of such a notice from the Scottish Ministers, to notify the owners and occupiers of the site, the relevant planning authority, any relevant National Park Authority, every relevant statutory undertaker and any relevant regulatory body.
253. Subsection (3) provides a full reference to the Ramsar Convention, including subsequent amendments, and provides that the terms of section 38 are also to apply in relation to any successor convention which replaces Ramsar.
254. It should be noted that the principal legal protection given to Ramsar sites in Scotland is provided by means of the SSSI and Natura 2000 systems. The provisions of this Act and the Conservation (Natural Habitats &c.) Regulations 1994 should therefore be consulted in relation to any activities or operations which might impact upon wetlands designated under the Ramsar Convention. Consideration should also be given to relevant provisions in the [Water Environment and Water Services \(Scotland\) Act 2003 \(asp 3\)](#).

##### *Section 39 Acquisition of land by SNH*

255. Subsection (1) provides that SNH may acquire all, or any part, of land defined under subsection (2), either by agreement with the owner or compulsorily. Where land is acquired by compulsory purchase, SNH requires the prior authorisation of the Scottish Ministers.
256. Subsection (2) defines the land that may be acquired under subsection (1). SNH is entitled to acquire:
- land which is an SSSI;
  - any other land to which an NCO or LMO applies; or

- any other land which is contiguous to or associated with an SSSI or with land to which an NCO or LMO applies.
257. Subsection (3) provides that SNH may only acquire land compulsorily where it is necessary to secure the conservation, restoration or enhancement of a protected natural feature. “Protected natural feature” is defined in section 58(1) and means a natural feature which is specified in an SSSI notification or is protected by the terms of an NCO.
258. Subsection (4) provides that the power to acquire land under this section is to include the power to acquire a servitude or other right in or over land by the creation of a new right. This ensures that rights (other than simple ownership of the land) can also be acquired where this is important to achieving the objectives specified in subsection (3).
259. Subsection (5) provides that the [Acquisition of Land \(Authorisation Procedure\) \(Scotland\) Act 1947 \(c.42\)](#) applies in relation to any compulsory acquisition of land by SNH under this section. This applies procedures for acquisition, as well as provisions relating to compensation. SNH is to be treated under the 1947 Act as if it were a local authority.
260. Subsection (6) clarifies the ability of SNH to manage land acquired under this section. Whilst SNH already has powers under the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#) to acquire, hold or dispose of land, subsection (6) puts it beyond doubt that SNH is entitled to keep SSSI and related land under its direct management, where it considers this to be the most appropriate solution.
261. Subsection (7) ensures that, where SNH has purchased land compulsorily and it subsequently wishes to dispose of the land, or any interest in the land, it may only do so on terms which achieve the purpose for which the land was originally acquired. It would not, therefore, be legitimate for SNH to dispose of such land for purposes which it does not consider would secure the conservation, restoration or enhancement of the protected natural feature.

#### ***Section 40 Restoration orders***

262. Subsection (1) provides that, where a person is convicted of an offence under section 19(1), or an offence under 19(3) or (4), 27(1) or 36(2), which has resulted in damage to an SSSI or land subject to an NCO, the court which convicts the person may require him/her to carry out operations necessary to restore, so far as is reasonably practicable, the natural feature to its former condition. The order may also specify the time within which restorative action must take place and the extent of the restoration required.
263. Subsection (2) requires the court to have regard to any representations made by SNH in relation to the manner in which restoration of the natural feature should take place.
264. Subsection (3) allows the person against whom a restoration order was made to make an application to the court requesting that the order be discharged or modified. The court may do so if it believes there has been a change in circumstances that has made the compliance or full compliance with the restoration order either impracticable or unnecessary.
265. Subsection (4) specifies that a person subject to a restoration order, who fails (without a reasonable excuse) to comply with the terms of the order is guilty of an offence. A person guilty of an offence under this subsection will be liable on summary conviction to a fine of up to £40,000, and on conviction on indictment to a fine (that is, to a fine which can be set at whatever level the Court thinks fit, including in excess of £40,000, having had regard to the facts of the case).

266. Subsection (5) allows SNH to carry out operations specified in a restoration order and to recover the costs of doing so where the conditions of the order have not been fulfilled. Such costs are recoverable from the person against whom the order was made.
267. Subsection (6) provides that a restoration order is to be treated as a sentence for the purposes of any repeal or review.

***Section 41 Signs etc.***

268. Subsection (1) allows SNH to put up, maintain or remove signs on any land or take any other action it considers necessary to provide information to the public about any land to which an SSSI notification, NCO, LMO, or byelaw made under section 20(1), relates.
269. Subsection (2) provides that it is an offence to damage or destroy any sign erected under subsection (1) or any other notice (for example, under section 48(10)) which has been affixed by SNH or the Scottish Ministers to an object on land for the purposes of giving notification under Part 2 of the Act. A person found guilty of an offence under this subsection is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale (currently £5,000).

***Section 42 Change of owner or occupier.***

270. This section applies where a person with an interest in land within a SSSI or interest in land to which an NCO or LMO relates, disposes of that interest. "Interest in land" is defined in section 58(1). It also applies where the owner of such land becomes aware that it is occupied by an additional or a different occupier.
271. Subsection (2) requires the person with an interest in the land to send a notice to SNH advising of the change of ownership or occupation. A notice must also be sent, in the case of disposal, to the person to whom the interest is disposed and, in the case of a change of occupation, to the new or additional occupier. The notice must be sent within 28 days of the date of the date on which the person disposed of the interest or became aware of the change in occupation.
272. Subsection (3) requires that the notice given to SNH specifies the land concerned and give details of the person to whom the interest was disposed. In the case of a change of occupier, the notice must specify the date of the change, to the best of the owner's knowledge, and the name and address of the new occupier so far as those details are known.
273. Subsection (4) requires that the notice given to the new owner or occupier must identify any land covered by an SSSI notification, NCO or LMO and draw the attention of the recipient to the existence of the notification or order. The notice must also, as far as reasonably practicable, be accompanied by a copy of all relevant documentation relating to the notification or order.
274. Subsection (5) clarifies that disposal of an interest in land takes place when the person disposes of it by way of sale, exchange, lease or through the creation of any servitude, right or privilege over that interest or by any other way (with the exception of the grant of a standard security).

***Section 43 Powers of investigation etc.: police***

275. This section provides certain powers, including powers of entry and investigation, which may be exercised by the police in relation to the investigation of SSSI offences. The powers conferred are broadly similar to those in section 19 of the 1981 Act, as amended by paragraph 16 of Schedule 6. A distinction is made in the Act between police powers (as here in section 43) and the powers of SNH and persons authorised by the Scottish Ministers (as in section 44 below).

276. A police officer who has reasonable cause to suspect that any person is committing or has committed an offence may, without any requirement for a warrant, take a range of actions to search for and secure evidence. The power applies whether or not the identity of the suspected perpetrator is known.
277. The actions which the police officer is entitled to take are:
- to stop and search the suspect, if there are reasonable grounds for believing that evidence of the offence may be found on the suspect's person;
  - to search for, search or examine any thing which that person may be using, may have used or may currently have, or have had, in his/her possession if there is reasonable suspicion that evidence of the commission of the offence is to be found in or on that thing; and
  - to seize and detain for the purposes of proceedings any thing which may be evidence of the commission of the suspected offence.
278. It should be noted that, in contrast to section 19 of the 1981 Act, no specific power of arrest is provided in relation to SSSI offences.
279. In order to exercise the powers conferred under subsection (1), a police officer who has reasonable suspicion that an offence is being or has been committed may, under the terms of subsection (2), enter any land other than a dwelling or lockfast premises. This is a power of entry without any requirement for a warrant. The meaning of "land" for the purposes of this Act is set out in the Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 as including any "building and other structures, land covered by water, and any right or interest in or over land". Access may also be had to any body of water under the provisions of subsection (2) on the basis that the "land" in question includes any substructure below it and any column of water or air above it. It should be noted that access (without warrant) may be had to any building which is not lockfast, provided that building is not a dwelling.
280. Access to any lockfast premises or dwelling may only be effected under warrant and subsection (3) makes provision for the issuing of a warrant by a sheriff or justice of the peace. Where a warrant is issued to search premises or a dwelling, reasonable force may be used in order to enter the premises in question.
281. Subsection (4) makes further provision in relation to the validity and expiry of a warrant. A warrant continues in force until the purpose for which it was issued has been satisfied. A warrant may however be time-limited by the sheriff when it is issued. Where this is the case, the warrant ceases to be valid when that time-limit is reached.
282. Subsection (5) places an explicit requirement on any police officer entering land (whether or not on the basis of a warrant) to give evidence of authority to enter the land to the occupier of the land or to anyone acting on behalf of the occupier if asked to do so.
283. Subsection (6) provides that a police officer who enters any land in the exercise of powers conferred by section 43 (whether or not on the basis of a warrant) is entitled to be accompanied by any other person, in order for that person to assist the police officer in the exercise of the powers conferred on him/her. The police officer may also take onto the land any necessary machinery, equipment or other materials and may take and remove samples of any articles or substances from the land. The use of an assistant, machinery and equipment and the taking of samples can, by virtue of subsection (7), be regulated under the terms of a warrant.
284. Where land is unoccupied or the occupier is absent, a police officer who enters the land under section 43 is obliged by subsection (8) to leave the land as effectively secured against unauthorised entry as it was when the police officer entered.

### ***Section 44 Powers of entry: authorised persons***

285. This section enables a person who is authorised in writing by SNH to enter land, except for a dwelling or lockfast premises, at any reasonable time for the purposes set out in subsection (1).
286. Those purposes cover activities arising from the obligations and responsibilities placed on SNH under the Act. Thus, SNH has been given powers of entry which enable it to survey and assess land in order to determine, for example, whether to notify that land as an SSSI, whether to offer a management agreement to the owner or occupier or whether to propose an LMO. The full list of purposes is set out in paragraphs (a) to (l) of subsection 1.
287. Subsection (2) provides corresponding powers of entry for persons authorised by the Scottish Ministers. Fewer purposes are specified in paragraphs (a) to (c) of the subsection, since there are fewer instances in the Act – essentially only NCO and LMO powers – where the Scottish Ministers have specific functions which might potentially entail a requirement to enter land. As with the powers of entry conferred on SNH, a person authorised in writing by the Scottish Ministers may, enter land at any reasonable time, but only for purpose specified in this subsection.
288. Subsection (3) provides that the power to enter land by virtue of subsections (1) and (2) may – where the same purposes apply – be exercised in relation to any land other than the land in relation to which the power of entry is initially exercised. The practical effect of the provision is to allow an authorised person to enter other land – for example land which lies outwith the boundary of an SSSI or which is not covered by a particular NCO – on an incidental or consequential basis, in order to achieve the original purpose. Thus, for example, an authorised person carrying out an inspection of an SSSI with a view to determining whether or not the Scottish Ministers should make an NCO is entitled to enter not only the SSSI but other land, where it is necessary to do so in order to achieve the purpose of the inspection.
289. Subsection (4) makes it clear that persons authorised by SNH or the Scottish Ministers are not entitled to enter a dwelling or lockfast premises. Where an offence is suspected and there are grounds for believing that evidence of such an offence is to be found in lockfast premises or a dwelling, search warrants may be obtained by the police on the basis set out in section 43.
290. Subsection (5) ensures that the deliberate obstruction of a person authorised by SNH or the Scottish Ministers, whilst that person is exercising powers under this section, constitutes a criminal offence. The maximum fine for such an offence is level 5 on the standard scale. Obstruction of a police officer is already an offence under section 41 of the [Police \(Scotland\) Act 1967 \(c.77\)](#) and no further provision is made in this connection by the Act.
291. Subsection (6) introduces Schedule 4 which specifies in further detail the procedures which must be followed, and the constraints which apply, when the powers of entry set out in this section are exercised. Particular provision is made in Schedule 4 covering the issuing of warrants for entry to land, although as noted above there is no provision for SNH staff or other persons authorised under section 44 to enter or search lockfast premises or dwellings.

### ***Schedule 4***

### ***Powers of Entry of Authorised Persons: Further Provision***

#### **Notice of entry to occupied land**

292. [Paragraph 1](#) specifies that notice must be given to the occupier (and, where practicable, also to the owner) of any land where a person authorised by SNH or the Scottish Ministers requires to enter the land for the purposes specified in section 44. The period

of notice – either 24 hours or 14 days – is specified with reference to the purpose for which entry is required. Notice is not required where a person authorised by SNH or the Scottish Ministers enters the land in order to ascertain whether an offence is being or has been committed.

### **Warrant for entry**

293. [Paragraph 2\(1\)](#) provides for situations in which entry to land by authorised persons is actively opposed by the owner or occupier, where it has proven impossible to give advance notice, as required under paragraph 1, or where giving notice would defeat the object of the proposed entry. In such circumstances, a person authorised by SNH or the Scottish Ministers may obtain a warrant for entry from a sheriff or justice of the peace. This sets aside the requirement for advance notice and the authorised person may also use reasonable force to effect entry to the land. In the event that the use of force is anticipated to be necessary, the authorised person may wish to request the assistance of the police. As already noted, a warrant cannot be granted to SNH staff and other authorised persons for entry to lockfast premises or a dwelling. Powers of entry and search in relation to lockfast premises and dwellings are available only to the police.
294. [Paragraph 2\(2\)](#) ensures that the sheriff does not grant a warrant simply on the basis that entry is opposed or expected to be opposed, unless he or she is satisfied either that, where paragraph 1 requires notice to be given, the required notice has in fact been given or that notice is not required because entry is necessary under section 44(1)(f) for the purposes of investigating a suspected offence.
295. In essence this means that SNH or the Scottish Ministers must have made genuine efforts to give notice of entry before seeking a warrant where the argument for the warrant is simply that entry has been refused or is likely to be refused. The granting of a warrant is not, however, subject to this requirement where the land is unoccupied (or the occupier is absent), where entry is necessary in order to investigate a suspected offence or where giving notice would defeat the object of gaining entry (for example, in cases where an NCO is being considered).
296. [Paragraph 2\(3\)](#) provides that the warrant continues in force until the purpose for which it was issued has been satisfied. A warrant may however be time-limited by the sheriff when it is issued. Where this is the case, the warrant ceases to be valid when that time-limit is reached.

### **Evidence of authority**

297. [Paragraph 3](#) requires that a person entering land by virtue of section 44 or under warrant must, if challenged by the occupier or someone acting for the occupier, be able to produce evidence of his authority to exercise the power of entry.

### **Supplementary powers**

298. [Paragraph 4](#) enables an authorised person who enters land by virtue of section 44 to take with them any other persons, or any machinery, equipment or materials, which they may require in order to assist them in the exercise of their powers in relation to the land, or in relation to the conduct of any investigation. Samples may also be taken and removed from the land. The terms of a warrant issued under paragraph 2 can make particular provision regulating the use of such assistants, machinery, equipment or materials or the taking and removal of samples.

### **Duty to secure land**

299. [Paragraph 5](#) requires a person who exercises powers to enter land, which is either unoccupied or land from which the owner is temporarily absent, to ensure that the land is secured against unauthorised entry when they leave the land. The land must be secured to the same degree as it was before entry took place.



## **Compensation**

300. Paragraph 6 sets out the extent to which SNH and the Scottish Ministers are liable in relation to damage which may result either from the exercise of the power of entry or from any subsequent failure to secure the land, as required in paragraph 5. Any dispute in relation to the amount of compensation is to be determined by arbitration.

## **Section 45 SNH: power to enforce**

301. This section provides SNH with an explicit power to protect the biological and geological natural heritage of Scotland by means of civil proceedings. It allows SNH to apply to the court for interdict (or to seek any other appropriate remedy) in order to enforce compliance with particular sections of the Act or to prevent damage, more generally, to important natural features. Although it is arguable that SNH already has the necessary title and interest to be able to initiate civil proceedings, this provision puts the matter beyond doubt.
302. Subsection (1) provides a specific power for SNH to ask the sheriff or the Court of Session to require a public body to comply with its general, section 12, duty. That duty obliges public bodies to further the conservation and enhancement of SSSIs and to maintain or enhance the SSSI series. Where, therefore, a public body had failed to consult SNH, had failed to have regard to SNH advice or had not taken reasonable steps to fulfil its obligations in relation to the protection of SSSIs, it would be open to SNH to challenge those failings in court and to seek an appropriate remedy. Similar provision is made in relation to compliance by a regulatory body with the requirements of section 15. Any failure by a regulator to comply with its duties under section 15 could also be challenged via civil proceeding.
303. Subsection (2) makes more general provision for civil proceedings (whether or not proceedings under subsection (1) would be competent) where SNH believes that it is necessary to prevent operations from taking place on SSSIs or on similar land. SNH may apply to the sheriff or to the Court of Session for an order under subsection (2) where an actual or proposed operation is damaging or is likely to damage protected or important natural features.
304. The court is empowered to grant interdict or make any other order which is appropriate in the circumstances in order to safeguard any protected or important natural feature. “Protected natural feature” is defined in section 58(1) and means a natural feature specified in an SSSI notification or protected by an NCO. Any order made by the court can also give protection to any other natural feature which is of national importance. In practice, this may include a feature which is of high standard but which has not yet been formally notified in an SSSI notification – for example, a feature on land which is being considered as an SSSI. As with NCOs, it is possible under section 45 to take action to give interim protection to such natural features in advance of formal notification of an SSSI. Similarly, the power under section 45 can also be invoked in order to protect natural features on a Natura 2000 site which has not been “underpinned” via the SSSI system (i.e. it has not been notified as both an SSSI and a Natura site).
305. The power given to SNH under this provision does not prevent any other party which has title and interest in the matter from initiating civil proceedings as an alternative to, or in parallel with, any action which SNH may take. That right to take proceedings is specifically preserved and protected by subsection (4).
306. Subsection (5) provides that the relevant court to which application should be made will be either the sheriff court or the Court of Session. The choice of court will depend on the nature of the case and the parties involved. A local matter involving a private landowner might, for example, most appropriately be heard by the sheriff for the area. A major case involving alleged non-compliance by a public body might, by contrast, be more appropriate to the Court of Session.

***Section 46 Offences, penalties and time limits***

307. This section makes provision in relation to the prosecution of offences and the penalties which may be imposed.
308. Subsection (1) provides that a court must have regard, when imposing a fine for an SSSI offence, to any financial gain which the offence may have brought, or been likely to bring, to the offender. It is intended, for example, that in cases involving damage to SSSIs for commercial reasons (such as in the course of a development or construction project) the court should be able to impose penalties which adequately reflect the significance of the offence. The objective is to allow the courts to address situations in which the anticipated gains from damaging an SSSI would outweigh the likely penalties. This provision is designed to remove any incentive to commit an offence for financial gain.
309. Subsections (2) and (3) stipulate the deadline within which prosecutions for offences under Part 2 must be brought. Similar principles apply to wildlife offences under Part 1 of the 1981 Act, as amended by the Criminal Justice (Scotland) Act 2003 and paragraph 18 of Schedule 6 to this Act.
310. Summary prosecutions for SSSI offences must be brought within 6 months of the date on which sufficient evidence of the offence comes to the knowledge of the prosecutor (irrespective, subject to subsection (3), of when the offence actually occurred). If the prosecutor fails to take action within that 6 month period, the case automatically falls and no further action is possible.
311. In the absence of the provision in subsection (2), the terms of section 136 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#) would require a summary prosecution to be brought within six months of the date on which the offence was actually committed. In the case of environmental and wildlife offences, it can be some time before the offence is discovered and expert evidence is obtained. This provision therefore ensures that an offender cannot escape prosecution simply by covering up his or her actions for 6 months.
312. Liability to prosecution is not, however, open-ended. Where proceedings have not been instituted within 3 years of the date on which the offence was committed, the case will automatically fall and no further action will be possible. In the case of a continuing contravention of the law, which takes place over an extended period of time, the date on which the offence was committed is the last date on which the contravention occurred.
313. Subsection (4) specifies that any dispute in relation to the date on which sufficient evidence became available to the prosecutor should be settled by means of a signed certificate from the prosecutor stating the relevant date.

***Section 47 Offences by bodies corporate etc.***

314. This section ensures that the directors and management of companies and other corporate bodies can be held personally responsible for offences carried out by the organisation, if that illegal act is committed with their consent or connivance, or where they have neglected to take action which would have prevented the illegal act. In such cases both the body corporate and the individuals responsible for directing and managing the affairs of that body (or who purport to act in that capacity) are liable.
315. Similar provisions are made in relation to the partners in a partnership and to the office bearers and members of an unincorporated association. In the particular case of a corporate body which is managed by its members, responsibility falls on each of its members, insofar as they have exercised or failed to exercise that management function. It should also be noted that, by virtue of subsection (1), an unincorporated association has legal personality for the purposes of a prosecution for an offence under Part 2 and it can be held liable in its own right.



316. Subsection (3) provides for any penalty imposed on a body corporate, a partnership or an unincorporated association to be recovered by civil diligence in accordance with section 221 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#).

***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 expence 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 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.

## **Section 49 Transitional arrangements**

332. This section introduces Schedule 5, which contains transitional and transitory provisions and savings consequential on the provisions of Part 2. In particular Schedule 5 rolls forward key elements of the existing SSSI system and provides, for example, for SSSIs notified under the 1981 Act to continue to have effect.

### **Schedule 5**

## **Part 2: Transitional Arrangements**

### **Interpretation**

333. In paragraph 1, the “relevant day” is defined for the purposes of Schedule 5 as the day on which the repeals of the SSSI and related provisions in Part II of the Wildlife and Countryside Act 1981 (listed in paragraph 4 of schedule 7) come into force.

### **Notifications under the 1981 Act**

334. [Paragraphs 2 and 3](#) ensure that existing SSSIs continue to have effect when the new arrangements in the Act come into force. Any SSSI notification which has effect immediately before the relevant day and which has been confirmed (where confirmation was necessary under the legislation in force at the time the site was notified) is to be treated as an SSSI notification given under Part 2 of the Act.
335. It should be noted that paragraph 3(a) has a “year zero” effect in relation to existing SSSIs which have been confirmed and they are to be treated as having been notified and confirmed under the Act on the commencement date of the new SSSI system created by the Act (i.e. the “relevant day”). References elsewhere in the Act (or in other legislation) to the date on which the SSSI was notified or confirmed will, therefore, for all existing SSSIs, be to the “relevant day” defined in paragraph 1, on which the new system takes effect. This is of relevance, for example, in relation to the ability of owners and occupiers to request a review of the ORC list for a site. SNH is not obliged to carry out such a review until 6 years from the relevant day, although in practice it will propose reviews during this period as part of the structured review programme which it has been asked to carry out.
336. Special reference is made to the [Wildlife and Countryside \(Amendment\) Act 1985 \(c.31\)](#) in paragraph 2(b) because prior to that Act no requirement existed to both notify and then confirm SSSIs.
337. [Paragraph 3\(b\)](#) has the effect of converting all existing lists of PDOs under the existing SSSI system into ORC lists under the new system. SNH has been tasked by the Scottish Ministers with reviewing and updating all lists converted in this way. Special arrangements are made in paragraph 5, which should be read in conjunction with the ORC review provisions in section 6, to enable a structured review programme to be carried out within the first 6 years following commencement of the new system.
338. Where SNH has given written consent to a PDO under the terms of the 1981 Act, that consent also continues in force, by virtue of paragraph 3(d), and is to be treated as a written consent under the new Act which permits the carrying out of the corresponding operation on the relevant ORC list (which itself will have been created from the old

PDO list). Consents may however be reviewed as part of the ORC review process in section 6(4) and may be modified or withdrawn under section 16(5).

339. [Paragraph 3\(c\)](#) makes provision in relation to notices of intent (i.e. notices that a person intends to carry out an operation on the PDO list for a site) under the 1981 Act which are submitted to SNH within the 4 month period prior to the relevant day (i.e. during the 4 months prior to the commencement date for the new SSSI system). In order to avoid the inconvenience involved if such notices were simply to be deemed to be void, provision has been made to ensure that they can be considered by SNH, post commencement, as if they are valid applications for ORC consent under section 16(2) of the Act. This arrangement applies only to notices of intent which remain unresolved on the relevant day. Where SNH has given written consent to the proposed operation, that consent remains valid under paragraph 3(d). Where SNH has refused to give consent, the notice of intent falls and cannot be considered as a valid application for ORC consent. The period of 4 months specified in paragraph 3(c) reflects existing arrangements in the 1981 Act.
340. [Paragraph 4](#) requires SNH to ensure, as soon as practicable following the relevant day, that all existing SSSIs have a site management statement, as provided for in section 4 of the Act. It may do so either by preparing a new site management statement or by adopting an existing statement.
341. [Paragraph 5](#) suspends the effect of section 6(2) in order to enable SNH to implement a structured review of ORCs. If this were not done, SNH would not be able to review ORC lists which had been converted from existing lists of potentially damaging operations for 6 years after the Act comes into force, unless it were able to secure the agreement of owners and occupiers under section 6. This would potentially prevent it from implementing a structured review programme across the SSSI series.
342. [Paragraph 6](#) clarifies, for the avoidance of doubt, that a consent given by regulatory body prior to the provisions of the Act coming into force is not to be regarded as a valid consent in terms of section 15 of the Act. In other words, where a consent has been issued by a regulator prior to the commencement of section 15, the safeguards built into section 15 will not have applied and SNH will not have been formally consulted about the application. The applicant for consent will therefore still require to obtain SNH consent separately before proceeding with an operation on an SSSI even though regulatory consent has been obtained.
343. [Paragraph 7](#) regulates the situation in which an SSSI is in the process of notification, but has not yet been confirmed at the point when the provisions of the Act come into force. In this circumstance the notification will proceed under the old arrangements of the 1981 Act and the relevant provisions of that Act continue to have effect for that purpose. Immediately it is confirmed, however, the SSSI will fall squarely within the terms of the new Act – paragraph 3(a) will convert it into an SSSI notified under the Act on the day confirmation is given under the 1981 Act.

### **Notifications under the 1949 Act**

344. A small number of SSSIs notified under the [National Parks and Access to the Countryside Act 1949 \(c.97\)](#) still exist. Paragraphs 8 to 10 allow for such notifications to continue in force, but in a more limited fashion than for SSSIs notified under the 1981 Act. 1949 Act sites were notified only to the planning authority for the area and, on a similar basis, they will have effect under the new Act only in relation to the general duty placed on public bodies by section 12.
345. SNH is empowered to revoke a 1949 Act site by the simple mechanism of giving notice to the interested parties. Any remaining 1949 Act sites can therefore, in due course, either be renotified by SNH under the new system or revoked.

### **Orders under section 29 of the 1981 Act**

- 346. [Paragraph 11](#) provides that NCOs made under the 1981 Act should continue to have effect. Again, the provision has a “year zero” effect and the NCO is to be treated as having been made and confirmed on the date the relevant provisions of the new Act are brought into force.
- 347. An NCO which has not yet been confirmed remains subject to the confirmation process set out in the 1981 Act until such time as it has been confirmed. The relevant provision of the 1981 Act continue to have effect for that purpose.
- 348. Despite that preservation of the 1981 Act provisions, the revocation of any 1981 Act NCO which has not yet been confirmed can be effected on the same basis as allowed in relation to NCOs under the new Act. Revocation will therefore have immediate effect.

### **Registers of notifications**

- 349. [Section 22](#) of the Act makes new arrangements for the provision and maintenance of, and access to, information about SSSIs, via a new SSSI Register under the authority of the Keeper of the Registers. Full development of the new Register may take some time so there may be a corresponding delay in bringing section 22 into effect. Paragraphs 12 and 13 therefore ensure that the existing arrangements set out in section 28(12) of the 1981 Act will continue in force until the new SSSI Register is operational.