

TRANSPORT AND WORKS (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 1 – Orders Authorising Works Etc.

Procedure for making orders

Section 4: Applications

19. This section describes the process for the making of applications. Subsection (1) provides the Scottish Ministers with the power to make on application an order. The application has to be made in accordance with rules that will be made under this section.
20. Subsection (2) provides details of the matters on which the Scottish Ministers can make rules relating to the application, the documentation and information to be submitted in support of the application, the notice and publication arrangements and the conduct, scope and manner of the pre-application consultation.
21. Subsection (3) enables the rules to require the Scottish Ministers to provide an opinion on the information to be supplied with an application. This power could be exercised to scope the environmental information required in connection with a development. The subsection also covers publicity for that information.
22. Subsection (4)(a) provides that the rules under the section can require compliance with directions in relation to matters concerning relevant authorities providing information for a project and pre-application consultation. Subsection (7) provides a non-exhaustive list of those bodies who may be required to provide information.
23. The ability for the Scottish Ministers to set fees for the making of applications is contained within subsection (6).

Section 5: Cases where other Member States are affected

24. This section clarifies the position in respect of the international obligations of the Scottish Ministers to ensure that other Member States of the European Economic Area (which includes the nations of the European Community plus Norway, Iceland and Lichtenstein) are notified of developments that are likely to affect them or are provided with information on request if they are likely to be significantly affected by any proposed development.
25. Subsection (1) provides the Scottish Ministers with power to make rules regarding the provision of information, the consultation process and how the Scottish Ministers will notify other Member States of matters relating to their decision.

26. Subsection (2) confirms the context for the actions of the Scottish Ministers, as described within the rules. Subsection (3) provides the reference for which states constitute a Member State.

Section 6: Orders made otherwise than on application

27. This section enables the Scottish Ministers to make an order to allow them to take whatever steps they believe are necessary or expedient to address the circumstances where a promoter or operator fails to comply with the terms under which authorisation of an order has been given or a promoter or operator abandons or neglects the works subsequent to their authorisation by an order. It also allows the Scottish Ministers to get rid of spent provisions in an earlier order and to bring forward themselves an order to authorise the construction and operation of works under section 1.
28. Subsection (1) sets out the circumstances in which the Scottish Ministers may act. Subsection (2) provides powers for the recovery of any costs incurred by the Scottish Ministers in suspending or discontinuing any operations under subsection (1) or in addressing any abandonment or neglect of any works. Subsection (3) provides details of the publication arrangements to which the Scottish Ministers must adhere if they act under the powers of this section.

Section 7: Model provisions

29. This section enables the Scottish Ministers to issue and publish guidance to prospective applicants on the provisions that may be incorporated within their draft orders. Subsection (2) provides that different guidance may be issued for example to reflect the different circumstances of different types of project.

Section 8: Objections and representations

30. **Section 8** enables the Scottish Ministers to make rules in relation to objections made in respect of an application for an order (subsection (1)(a)(i)) or when they are making an order without an application being made to them (subsection (1)(a)(ii)). The power to make rules includes the ability to make provision in relation to representations.
31. Subsections (2) and (4) provide that the Scottish Ministers must take any objection into consideration before deciding whether or not to make an order, unless they decide to hold an inquiry or hearing, in which case, they must consider the report from the inquiry or hearing before making an order. Subsection (3) enables the Scottish Ministers to disregard an objection if it is withdrawn or they consider it to be frivolous or trivial or it relates to compensation. Subsection (5) states that rules may allow the Scottish Ministers to waive some of the rules under this section which would otherwise apply. In addition, the rules may allow the Scottish Ministers to require compliance with certain rules which would not otherwise comply. Subsection (8) enables the Scottish Ministers to make rules in respect of representations.

Section 9: Inquiries and hearings

32. This section allows the Scottish Ministers to hold an inquiry or hearing into an application or a proposal for an order. It obligates, under subsection (3), the Scottish Ministers to hold an inquiry or hearing if it is requested by, and there is a valid objection from, a local authority or National Park authority or Transport Partnership in whose area works would be carried out, or a navigation authority affected by any works proposed by the order, or Network Rail Infrastructure Limited (if the proposed works affect the construction or operation of a railway) or someone subject to a compulsory purchase of their interest in land.

Section 10: Procedure at inquiries and hearings

33. This section allows the Scottish Ministers to make rules to regulate the proceedings of an examination, which may take the form of an inquiry or hearing.
34. Subsections (1) and (2) describe the matters which the rules may regulate. Subsections (3) and (4) ensure that for consistency of approach particular provisions of the Local Government (Scotland) Act 1973 which apply in respect of an inquiry or hearing under that Act will apply in similar circumstances to an examination carried out under the provisions of the Act.
35. Subsection (5) requires the Council on Tribunals to be consulted on the making of any rules under this section.

Section 11: Making or refusal of orders under section 1

36. Subsection (1) provides for the circumstances to which this section relates namely when an application for an order has been made or there has been a proposal for an order without an application having been made.
37. Subsection (2) provides the power to make an order with or without modifications or not to make an order. Subsection (3) allows the Scottish Ministers not to make an order if they believe that there is another means by which the object of the order could be achieved. It is permissible under subsection (4) for the Scottish Ministers to make a determination to proceed with certain elements of a proposal whilst making a separate determination in respect of, or deferring consideration of, other matters within the application.
38. In those instances when the Scottish Ministers propose to make substantial modifications to an applicant's proposal the Scottish Ministers are, under subsection (5), under a duty to notify any person who is likely to be affected, to give that person a chance to make representations and to consider those representations.
39. Subsection (6) ensures that any order that is not subject to Parliamentary scrutiny comes into force when notice of the determination is published in the Edinburgh Gazette unless the order provides for a later date for its coming into force.

Section 12: Publicity for making or refusal of order

40. This section sets out the arrangements for the publicity for the making or refusal of an order.
41. A duty is placed on the Scottish Ministers to give notice to the persons as specified in subsection (1) and to publicise the notice in the Edinburgh Gazette, which is the official newspaper of record in Scotland and is the primary source for a range of official notices. The information that must be contained within the notice is set out in subsection (2). Subsection (3) ensures in those instances when there is a requirement for an order to be laid before the Scottish Parliament that the notice must advise that the order cannot come into force unless the Scottish Parliament by resolution approves the order.
42. Subsection (4), where it applies, also requires the notice to cover additional matters. Those matters relate to consideration of the environmental statement, a definition of which is provided within subsection (5).
43. Subsection (6) amplifies the information that must be contained within a notice in respect of certain environmental considerations. Subsection (7), supplemented by the definition in subsection (9), states that subsection (4) applies in relation to projects in a class as listed in the European Directives on the assessment of the effects of certain public and private projects on the environment.
44. Subsection (8) transposes an element of Directive [85/337/EEC](#) (as amended by Directive [2003/35/EC](#), which provides for public participation in respect of plans and

programmes relating to the environment and amends with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC) and means that any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of Directive 85/337/EEC (as amended) and rights capable of being impaired for the purposes of Article 10a(b) of the Directive and shall be able to challenge the substantive or procedural legality of decisions.

45. Subsection (9) provides the appropriate references.
46. Subsections (10) and (11) direct the Scottish Ministers to send a copy of their determination notice containing such information as relates to the environmental statement to persons who made an objection, those who made a representation or those that made both a representation and an objection.
47. Subsection (12)(a) directs, in those instances where the Scottish Ministers make a determination on an application, the promoter to make arrangements to publish in a local newspaper a copy of the Scottish Ministers' determination, the reasons for the determination, the matters taken into consideration and the extent of public participation in the process prior to the decision and information as to the right of challenging the decision. Under subsection (12)(b) the Scottish Ministers are obliged to publish similar information in respect of a development which they have promoted.
48. Once an order has been made the person who applied for the order or the Scottish Ministers, if they have made an order without an application being made to them, must place with the Scottish Parliament a copy of the order and such documentation as is described in subsection (13)(a) and deposit with the local authority and the National Park authority within whose area the proposed works are to take place a copy of the order and documents as described in subsection (13)(b). Subsection (14) dis-applies subsection (13)(a) for developments of national significance or otherwise considered by the Scottish Parliament under section 13.
49. Subsection (16) places a duty on a relevant authority to make the deposited documentation available for inspection by any person, free of charge at all reasonable hours.

Section 13: "Developments of national significance" etc.: special procedure

50. This section obliges the Scottish Ministers to seek an affirmative resolution for any order containing provisions which authorise a national development as designated within the National Planning Framework or if the order contains provisions which seek to amend a Private Act of the Scottish Parliament. The section also permits the Scottish Ministers to seek, if they so wish, an affirmative resolution for any order made under section 1.
51. Subsections (5) and (6) place a duty on the Scottish Ministers to publish certain information in the Edinburgh Gazette and a local newspaper once the Scottish Parliament has decided whether to approve an order.
52. Subsection (7) states that an order which seeks to amend, revoke or re-enact an instrument laid before the Scottish Parliament will be subject to affirmative procedure only if the order authorises works which constitute a different national development or amends a Private Act of the Scottish Parliament or the Scottish Ministers so direct.