

Information

NATURE CONSERVATION (SCOTLAND) ACT 2004

INTRODUCTION

The Nature Conservation (Scotland) Act 2004 (“the Act”) received Royal Assent on 11th June 2004 and (with the exception only of the register provisions detailed under “SSSI Register” below) came into force on 29th November 2004. The Act sets down a series of measures designed to conserve and enhance the natural features of Scotland (natural features referring in this context to flora or fauna or geological or geomorphological features) in the context of the natural environment within a wider British, European and global context. According to the policy memorandum which accompanied the original bill: “One of the key aims of the Bill..... is to clarify the rights and obligations of both land managers and public authorities. The Bill seeks to provide certainty and fairness where previously there were grey areas and, sometimes, serious public concerns.”

The Act comprises three parts:

Part 1 introduces a general duty on public bodies to further the conservation of biodiversity in exercising any of their functions;

Part 2 introduces significant changes to the existing arrangements for the establishment and protection of Sites of Special Scientific Interest (“SSSIs”) by updating most of Part II of the Wildlife and Countryside Act 1981 (“the 1981 Act”); and

Part 3 extends the protection of birds, animals and plants by revising Part I of the 1981 Act.

Part 1: Biodiversity

This part of the Act sets out specific obligations upon public bodies and office holders to further the conservation of biodiversity so far as is consistent with the proper exercise of their functions. In so doing they must have regard to the Rio Convention and the Scottish Biodiversity strategy which was issued by the Scottish Ministers on 25th May 2004. There is an obligation on The Scottish Ministers within one year of publishing this strategy to publish lists of species of flora and fauna and habitats considered to be of principal importance. An amendment which would have obliged public bodies to take action specified in the strategy was considered but rejected.

The Rio Convention (formally the United Nations Environmental Programme Convention on Biological Diversity of 1992) defines biological diversity as “the variability among living organisms from all sources including inter alia terrestrial, marine and other aquatic ecosystems and ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

Part 2: Chapter 1: Sites of Special Scientific Interest

This part of the Act places a duty on Scottish Natural Heritage (“SNH”) to notify as an SSSI any land which it considers to be of special interest by reason of any aspect of its natural features. Such notification will be served on, amongst others, each owner and occupier of the land or any part of it, and every local authority and community council in whose area it is situated.

The criterion for notification is the contribution which the land would make to a series of sites of special scientific interest representative of the natural heritage of Scotland, Great Britain and the EU. This is arguably different from the previous objective (prior to the coming into force of the Act) of notifying sites which were of special interest in themselves. In identifying sites SNH must now also have regard to any guidance issued by The Scottish Ministers.

Notification will be accompanied by a document with a plan (“the SSSI Notification”):-

- (a) describing the land in question;
- (b) specifying the natural feature by reason of which SNH considers the land to be of special interest;
- (c) specifying acts or omissions which appear to SNH to be likely to damage that natural feature (“Operations Requiring Consent” or “ORCs”);
- (d) containing any other information SNH considers relevant; and
- (e) including a site management statement providing among other things guidance as to how the natural feature should be conserved or enhanced. Such a statement may include information to promote understanding and enjoyment by the public of the natural feature specified in the SSSI notification. The aim of this provision is to help make it clear where appropriate that the creation of a SSSI would have positive socio-economic impacts.

An SSSI Notification will (as prior to the Act) be subject to confirmation within twelve months failing which the Notification is treated as having been withdrawn. That period may be extended to a maximum of eighteen months where there has been a reference to the Advisory Committee or further extended with the agreement of every owner and occupier of land within the SSSI.

Representations made within three months (or such longer period as SNH allow) must, if not withdrawn, be referred to an Advisory Committee as prior to the Act. SNH is not obliged to

follow the advice given by the Advisory Committee, although it must take it into account in deciding whether or not to confirm the Notification.

SNH is given an additional power to notify additional land which is contiguous to or is associated with an existing SSSI and which, when considered in the context of the original SSSI is regarded as being of special interest. The same rules apply as for notification of the core SSSI and the additional land is considered to be part of it.

SSSIs existing prior to the coming into force of the Act are treated as having been notified under the Act and the potentially damaging operations (“PDOs”) pertaining to them are translated into ORCs. Any consent which has been given by SNH to carry out a PDO is carried forward into the new regime but any consent given by another body which permits a PDO is not and a fresh application for consent will require to be made.

If SNH consider that somebody is about to carry out an operation which does not require consent but which SNH considers may damage an aspect of natural heritage which has justified an SSSI notification, and there is urgency in the situation, SNH may with consent of The Scottish Ministers amend the SSSI notification by adding to the list of ORCs. There is no requirement to notify the land manager of this so that he has an opportunity of making representations.

Comment

It is noteworthy that the new regime allows SNH to notify omissions as ORCs as well as positive acts. The effect of this is that if the land manager does not wish to carry out the omission he must apply for consent not to do so. If that is refused he is left with the choice of committing an offence or carrying out the operation on the face of it at his own expense unless a management agreement is available (see below).

Operations by owners/occupiers of an SSSI requiring consent (ORCs)

Owners/occupiers are prohibited from carrying out or causing or permitting to be carried out ORCs except with specific consent of SNH (following an application by an owner/occupier) which consent should specify:-

- the nature of the operation;
- its duration; and
- the extent of the affected land.

Where SNH consent is given to operations, this may be with or without conditions. SNH has power to subsequently withdraw or modify such consents either following a six year review (see below) or with consent of The Scottish Ministers. SNH is required to offer to enter into a Management Agreement where it:-

- refuses to consent to an operation being carried out;
- makes its consent subject to conditions; or
- modifies or withdraws its consent **and**

it considers that it should offer to enter into such an agreement i.e. SNH will not always be obliged to enter into such an Agreement.

In deciding whether or not to offer an agreement SNH must have regard to the guidelines which were issued by The Scottish Ministers in October 2004 entitled “Financial guidelines for supporting the management of Sites of Special Scientific Interest Natura 2000 Sites”. These guidelines

stipulate that SNH should offer to enter into a Management Agreement only where (a) the ORC in question is one which is shown to be part of the established management of the land and (b) there is an impact on the land manager's activities such that ability of the land manager to earn income, by continuing with the established management of the land, is unavoidably reduced. The guidelines go on to clarify that an activity is part of the established management of the land if it has been part of the actual or habitual pattern of use of that land within the preceding 15 years or is part of the normal rotational pattern or use of the type of land in question.

Comment

We understand that since the coming into force of the Act many landowners are encountering a tougher approach from SNH – activities have been prohibited in many instances with no management agreement/compensation being offered.

SNH consent is not required in a number of cases, including the following:-

- (a) where a regulatory authority or planning authority has given explicit permission after the Act comes into force for an operation to proceed (in such cases the relevant authority will have already consulted SNH as an obligation is imposed upon the authority to do so either in terms of the Act or existing planning legislation);
- (b) where an operation is already covered by the terms of a Management Agreement between owner/occupier and SNH;
- (c) where an operation is required to be carried out under the terms of a Land Management Order; and
- (d) in emergency situations, subject to fulfilling certain conditions.

Comment

This is a reversal of the arrangements which were in place prior to the Act, whereby if it declined to agree to a PDO, SNH could offer a management agreement and if an agreement was not reached the operation could eventually proceed. Under the new rules, it is an offence to proceed without consent.

Six Year Review of Operations Requiring Consent

Once an SSSI is established, SNH must either on request of any owner/occupier of SSSI land or may when it thinks appropriate carry out a review of the ORCs specified in the SSSI Notification. This review is limited to every six years following designation unless agreed with the relevant owner/occupier. It should be noted that SNH cannot be obliged to carry out a review requested by an owner/occupier outwith the six year cycle. It should also be noted that the failure to object on the part of an owner/occupier within 28 days of any intimation of a review being made will be treated by SNH as agreement to proceed.

De-notification of SSSI

Where SNH considers that all or a part of an SSSI is no longer of special interest, it can revoke/modify the SSSI Notification having regard to certain criteria set out in the Act.

Appeals

An owner/occupier may appeal to the Scottish Land Court in connection with ORCs where an owner/occupier is aggrieved at:-

- a refusal of consent;
- conditions imposed in the Consent or by withdrawal/modification of an existing Consent;
- or
- a refusal by SNH to offer to the owner/occupier a Management Agreement.

Offences

It is an offence for any person to intentionally or recklessly damage any aspect of natural heritage in respect of which an SSSI Notification has been made. Defences are that:-

- reasonable precautions were taken;
- damage was not foreseeable; or
- reasonable practical steps to minimise damage have been taken.

Where damage is caused and a person is convicted of damaging an aspect of natural heritage protected by an SSSI Notification or Nature Conservation Order (see below), that person may be ordered by the Court to carry out restoration, failing which pay a fine of up to £40,000 in addition to any penalty which the Court may impose for the original offence. Directors of companies, partners in partnerships and officials in charge of unincorporated associations may be personally charged along with the body they control if personally involved in the commission of the offence by the company etc.

Comment

Prior to the Act only owners/occupiers could be prosecuted for damaging SSSIs. The extension of liability to any person is important for such as contractors and the casual visitor although successful prosecution of someone ignorant of the existence of the SSSI may prove difficult.

Acquisition of Land by SNH

SNH may compulsorily acquire all or any part of land which is a SSSI or to which a Nature Conservation Order or Land Management Order applies or which is contiguous to or considered by SNH to be associated with any such land. SNH may acquire such land only where it is necessary to secure conservation, restoration or other enhancement of any protected natural feature. Once such land has been acquired, SNH may manage it itself. If SNH disposes of land acquired or of any interest in it, SNH must do so on terms designed to achieve the purposes for which the land was originally acquired. It is not clear how that is to be achieved.

SNH Powers of Entry/Power to enforce

SNH are given extensive powers of entry to SSSI land but must give notice except where seeking evidence of an offence and also powers to enforce certain provisions of the Act by means of civil proceedings - for example, to obtain interdict or any other appropriate remedy to enforce compliance/prevent damage.

SSSI Register

The Act makes provision for the creation of a public register of SSSIs overseen by the Keeper of the Registers of Scotland. This Register will be open to inspection and reports in relation to the register may be obtained by the public against payment of a fee. As part of the registration process, where there is a change in the ownership or occupation of an SSSI, SNH must be notified by the

owner of such change within 28 days. This is the only provision of the Act which has yet to come into force.

Byelaws

SNH has power to make byelaws for individual SSSIs as if the land subject to such SSSIs were National Nature Reserves.

Chapter 2: Nature Conservation Orders

This part of the Act confers powers on The Scottish Ministers (subject to consultation with and having regard to representations of SNH) to make a Nature Conservation Order (“NCO”) which wholly or partially prohibits the carrying out, or carrying out in a particular way, of a specified operation on:-

- specified land (for example, an SSSI (or part thereof)); or
- land which is not an SSSI but is, in the opinion of The Scottish Ministers, of special interest by reason of any aspect of its natural features.

The purpose for which an NCO may be made is conservation of any natural feature by reason of which land (whether or not the land in question) is an SSSI or is otherwise considered by The Scottish Ministers to be of special interest or to facilitate compliance with an international obligation. An operation prohibited by the NCO is a “Prohibited Operation” and must stop immediately the NCO is made. Within one year of the NCO being made, The Scottish Ministers have power either to revoke or extend the NCO. If no action is taken by The Scottish Ministers, then the NCO ceases to have effect. Revocation may be in respect of the whole or any part of the land to which the NCO originally applied. The Scottish Ministers also have the power to amend the NCO to the effect of:-

- modifying operations - either prohibited or permitted under an NCO; or
- extending or restricting the area of land to which the NCO applies.

Comment

It should be noted that consultation by The Scottish Ministers is limited to SNH and not to any other interested party. Taking into account the powers given to SNH in any event, it is difficult to differentiate between the powers now given to SNH in terms of the Act and those given to The Scottish Ministers.

Chapter 3: Land Management Orders

This part of the Act provides for the circumstances and the manner in which SNH may apply to The Scottish Ministers for the making of a Land Management Order (“LMO”). The land in question will either be an SSSI, part of one, be contiguous to an SSSI or be considered to be otherwise associated with an SSSI.

LMOs will be made where:-

- it is necessary or expedient for the purpose of conserving, restoring or otherwise enhancing any natural feature specified in a SSSI notification;
- the owner/occupier refuses to enter into a Management Agreement;
- the owner/occupier has failed to comply with the terms of the Management Agreement; or
- the owner/occupier cannot be identified (following a 28 day notice period).

A LMO must include a description (with plan) of the land in question. The same people have to be notified as for an SSSI. A LMO may provide for making of payments by SNH to any person in respect of reasonable costs incurred by that person in carrying out the operation.

The Scottish Ministers have three months to make or refuse to make a LMO following application by SNH. Once a decision has been made, this must be published and notified to all interested parties.

The Scottish Ministers, where they think fit, may review a LMO. The first review must be within six years from the date on which the LMO was originally made.

LMOs or any amendments/revocations must be recorded in the General Register of Sasines/Land Register as appropriate.

An appeal procedure to the Scottish Land Court is provided for as are statutory offences (subject to a reasonable excuse defence) for breaching an LMO (again subject to a maximum £40,000 fine following proceedings without a jury or an unlimited fine following proceedings before a jury) and enforcement procedures by SNH, including power to carry out the work themselves at the owner's expense.

Part 3: Protection of Wild Life

Detailed changes to the Wildlife and Countryside Act 1981 (referred to below as the "1981 Act") were introduced for the purpose of "correcting a number of weaknesses and loopholes" in the part of the 1981 Act relating to offences against wildlife. Key changes are as follows:-

- (a) recklessness in relation to the killing, injuring or disturbance of wildlife is introduced as an offence in addition to the current offence of intentional killing, injuring etc;
- (b) self-locking snares or snares of any other type specified in an order made by The Scottish Ministers are outlawed; it is an offence to possess one (subject to a reasonable excuse defence). A proposal to ban all snares was considered at length but rejected and The Scottish Ministers have indicated they will consult on any future proposals for technical specifications relating to snaring; Snares must be checked at least every 24 hours and any trapped creatures (whether dead or alive) must be released;
- (c) it is an offence for anyone to knowingly cause or permit others to commit an offence against birds or animals; land managers must be vigilant to avoid crime being imputed to them as a result of the actions of others on their ground;
- (d) police officers have power to stop and search not only where an offence is being committed but also where an offence is suspected (with reasonable cause) of having been committed in the past. Dwellinghouses or dwelling or lockfast premises are excluded from the scope of this provision but there is also a power to enter premises and search (if necessary with reasonable force) if a warrant is obtained. There is also a power to take and remove blood and tissue samples of specimens and constables are entitled to take other people and machinery, equipment etc with them to investigate any alleged crime;
- (e) the Powers of Wildlife Inspectors to inspect premises have been clarified. Wildlife Inspectors have also been given power to take samples;

- (f) powers are provided to regulate the sale of undesirable non-native plant and/or animal species. The Rio Convention identified the threat of non-native species as one of the primary threats to biodiversity. It is an offence to sell, offer or expose for sale or possess or transport for the purposes of selling any species listed in a schedule to the Act (including for example Japanese knotweed in the case of plants and sika deer in the case of animals) or specified by an order of The Scottish Ministers. For convictions following proceedings without a jury the maximum fine imposable would be £40,000. For convictions following proceedings before a jury an unlimited fine could be imposed;
- (g) it is an offence to possess pesticides containing one or more of the eight active ingredients prescribed in the Possession of Pesticides (Scotland) Order 2005. A defence is available if it can be demonstrated that possession of the pesticide was for the purposes of doing anything in accordance with regulations under the Food and Environment Act 1985 or the Biocidal Products Regulations 2001;
- (h) the Act amended the licensing system to the effect that a licence in relation to the sale of dead or live birds or eggs will be granted only where there is no other satisfactory solution;
- (i) using a cage trap or net for gathering game birds for breeding continues to be allowed. The initial draft of the Bill appeared to prohibit this but according to the Deputy Minister this was not intended and was an error;
- (j) it is now a specific criminal offence to intentionally or recklessly disturb a wild bird while it is lekking and it is an offence to intentionally or recklessly harass any wild bird detailed in a schedule to the Act. At present the only bird so detailed is the White Tailed Eagle;
- (k) other offences have been widened. Interference with a nest is now an offence along with damage/destruction of a nest and in the case of the white tailed eagle the nest in question does not have to be in use at the time of interference provided it is habitually used;
- (l) the Badgers Act 1992 was amended so as to give additional protection to badgers, with cause or permit and attempt offences being introduced;
- (m) SNH are obliged to produce a Scottish Fossil Code, setting out recommendations, advice and information relating to fossils including information on activities likely to damage fossils and circumstances in which fossils should not be removed from land. We understand that this Code will be available for public consultation early in 2007. SNH are also bound to produce a code in relation to the watching of marine wildlife.

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This note is intended as a brief summary of The Nature Conservation (Scotland) Act 2004. No responsibility can be accepted for any action taken in reliance of this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice. If you do not wish to receive further briefing notes and similar information from us please write to us at the address given above requesting that your name be deleted from our database.

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