

Explanatory Notes to Nature Conservation (Scotland) Act 2004

2004 Chapter 6

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

NATURE CONSERVATION (SCOTLAND) ACT

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act sets out a series of measures which are designed to conserve biodiversity and to protect and enhance the biological and geological natural heritage of Scotland. In doing so, the Act provides the principal legislative components of a new, integrated, system for nature conservation within Scotland.
4. The Act also locates the conservation of biodiversity and of Scotland's natural environment within a wider British, European and global context. In relation to biodiversity in particular, it requires public bodies and office-holders to consider the effect of their actions at a local, regional, national and international level. Measures relating to the protection of species and habitats also recognise the importance of the wider international context. The Act does not, however, confer any extraterritorial powers on Scottish public bodies or office holders.
5. The Act is in 5 parts and contributes to the new system for nature conservation by means of a combination of both new measures and amendments to existing legislation.

- It introduces, in Part 1, a new general duty on all public bodies and office holders (referred to in these notes as "public bodies") to further the conservation of biodiversity;
- It makes significant changes, in Part 2, to the existing arrangements for the establishment and protection of sites of special scientific interest. In doing so, it replaces most of Part II of the existing Wildlife and Countryside Act 1981 (c.69) ("the 1981 Act");
- It extends in Part 3 the law in relation to the protection of birds, animals and plants by making significant amendments to the current provisions of Part I of the 1981 Act and by requiring production of a new code of guidance covering whale and dolphin watching and similar activities;
- It updates, also in Part 3, the provisions of the existing Protection of Badgers Act 1992 (c.51), in order to increase penalties for offences such as badger baiting and aims to ensure greater consistency between that Act and the 1981 Act;
- It requires, in Part 4, the creation by Scottish Natural Heritage ("SNH") of a code of guidance setting out recommendations, advice and information relating to fossils;
- It provides, in Part 5, for various supplemental matters including the publication of statutory guidance about the duty to further the conservation of biodiversity and SNH's functions under Part 2 and for minor and consequential amendments and repeals to a variety of other statutes.

RELATED INITIATIVES AND SUPPORTING INFORMATION

6.The Act should be read and understood in context. It forms part of a larger package of measures, including other environmental legislation, statutory and non-statutory guidance, administrative arrangements and schemes providing financial support, which together constitute the new system for nature conservation in Scotland.

7.Further information on the non-legislative measures which support the Act can be obtained from the Scottish Executive and from SNH. Reference is made in these Notes to supporting documentation which is of particular importance in understanding the effects of the Act. Details of how to obtain copies of that documentation is provided at appropriate points in the text.

8.It should be noted that changes to the Conservation (Natural Habitats &c.) Regulations 1994, which implement obligations arising from Council Directive 92/43/EEC ("the Habitats Directive"), will be necessary as a consequence of certain of the SSSI and species protection provisions in the Act. These will be effected separately, by regulations made under section 2(2) of the European Communities Act 1972 (c.68).

Part 1 Biodiversity

9.Part 1 of the Act deals with biodiversity.

10.Whilst the conservation of habitats (see the measures in Part 2) or of species (see Part 3) is relevant to the conservation of biodiversity, Part 1 of the Act, for the first time, makes specific provision for action to conserve biodiversity in its own right.

11.In essence, the Act requires attention not only to be given to the *means* (such as establishing protected sites or preventing the killing of wildlife) but also to the *ends* - that is, to the long-

term objectives underlying nature conservation legislation. The Act requires public bodies to do more than simply to adhere to prescriptive rules defining what may or may not be done in any given situation. It requires, and empowers, them at a general level to take appropriate positive action, within the context of their core functions, to further the conservation of the overall diversity, richness and extent of the natural world.

12. Public bodies operating in Scotland will, as a result, be obliged to give proper consideration to, and account for, the impacts which their activities and policies have on the overall balance and health of the natural biological environment, at a local, regional, national and international level. They will be required to act, in ways which are consistent with the exercise of their other statutory functions, in order to ensure that the conservation of that naturally-occurring biological diversity is encouraged and advanced.

13. In order to support and inform compliance with the new biodiversity duty, the Act invokes principles and strategies which are external to it - by establishing the 1992 Rio Convention on biodiversity and the new Scottish Biodiversity Strategy as the key points of reference to which all public bodies must have regard when acting to further the conservation of biodiversity. Copies of the Scottish Biodiversity Strategy, which was launched on 25 May 2004 and which will, in due course, be formally designated in terms of section 2 of the Act, may be obtained from: The Scottish Executive, Wildlife and Habitats Division, Victoria Quay, Edinburgh, EH6 6QQ (E-mail: biodiversity@scotland.gov.uk) or via the Scottish Executive website (www.scotland.gov.uk/biodiversity).

Part 2 The SSSI system

14. Part 2 of the Act creates a new system for conserving and enhancing specific areas of Scotland which are considered to be of particularly high quality in terms of their flora, fauna or geological or geomorphological features. Those features of the biological and geological natural heritage of Scotland are referred to in the Act collectively as "natural features" and the areas of land in question are sites of special scientific interest or "SSSIs".

15. The provisions within this Part are based upon, but significantly extend, develop and, ultimately, replace the existing SSSI system which was brought into being by Part II of the 1981 Act.

16. The intention is that the new SSSI arrangements will safeguard Scotland's biological and geological natural heritage by establishing a system designed to protect the natural features present on particular areas of land considered to be of special interest because of those natural features. The system is also intended to contribute to the conservation of the wider natural heritage of Great Britain and the member States of the European Union, by ensuring that the significance of natural features found within Scotland is considered in terms of their importance at a British and European level.

17. A significant feature of the SSSI provisions in the Act is that they regulate the degree to which, and the manner in which, land management operations can be carried out on SSSIs. In certain circumstances, the Act provides for operations to be either restricted or prohibited if they are likely to damage the natural features on an SSSI.

18. This in turn, where the operations form part of the established management of the land, may give rise to SNH offering to enter into a management agreement with the land manager to a management agreement offered by SNH. In this connection the provisions of the Act (and in particular sections 16, 17 and 18, which affect the rights of private land managers) should be read in conjunction with the *Financial guidelines for supporting the management of Sites of Special Scientific Interest and Natura 2000 sites* (referred to in these notes as the "*Financial Guidelines*"). The guidelines are available from: The Scottish Executive, Wildlife and Habitats Division, Victoria Quay, Edinburgh, EH6 6QQ (E-mail: NCAct@scotland.gov.uk or via the Scottish Executive website: www.scotland.gov.uk/Topics/Environment/Countryside/Wildlife-Habitats). The *Financial Guidelines* will be issued as formal statutory guidance in terms of section 54 of the Act.

Part 3 Protection of Wildlife

19. Part 3 of the Act introduces Schedule 6, which in turn contains a package of amendments to the law on species protection and wildlife crime as set out in Part I of the 1981 Act. It also makes a range of broadly analogous changes to the Protection of Badgers Act 1992 (c.51), as well as significantly increasing penalties for offences involving badger-digging, badger-baiting and other acts of cruelty. In addition, Part 3 obliges SNH to prepare and issue a code covering the watching of cetaceans (whales, dolphins and porpoises), basking sharks and other marine wildlife.

20. The changes effected by these amendments to the 1981 Act build upon the increased sanctions and wider police powers already introduced via the Criminal Justice (Scotland) Act 2003 (asp 7), which came into force on 26 March 2003. In doing so, Part 3 and Schedule 6 to the Act seek to conserve Scotland's biological natural heritage by protecting birds, and certain animals and plants, *wherever* they occur and not simply within specified protected sites. In this sense, the species protection measures in Part 3 of the Act are intended to complement to the site protection measures in Part 2 and as a contribution to the overall goal of biodiversity conservation set out in Part 1.

Part 4 Scottish Fossil Code

21. The effective protection and conservation of Scotland's geological natural heritage is intended to be supported by the requirement in Part 4 for the production by SNH of a Scottish Fossil Code. This will provide guidance in particular in relation to the collection and removal of fossils and will offer a helpful point of reference against which good practice in terms of palaeontological fieldwork can be measured. Legal protection for important fossil sites is provided primarily by means of the SSSI system set out in Part 2 of the Act.

Part 5 - General

22. Part 5 of the Act contains a range of general technical and procedural provisions which support the interpretation and implementation of the provisions in the four preceding parts. A power to issue statutory guidance in relation to the biodiversity duty in Part 1 and in connection with certain aspects of the SSSI system in Part 2, including selection criteria for SSSIs and the *Financial Guidelines* covering management agreements, is provided in section 54. Minor and consequential amendments and repeals to other statutes are set out in Schedule 7, which is

introduced by section 57. The meaning of particular terms used in the Act is set out in section 58 (Interpretation).

COMMENTARY ON SECTIONS

PART 1 - BIODIVERSITY

Section 1 Duty to further the conservation of biodiversity

23. Section 1 places a general duty on public bodies and office-holders to further the conservation of biodiversity.

24. Public bodies and office-holders (collectively referred to in these Notes as "public bodies") are defined in section 58(1) as including all bodies which carry out functions of a public nature. Courts, tribunals or other bodies exercising judicial power are not, however, public bodies for the purposes of the Act. The Act extends to all public bodies which operate in Scotland.

25. All public bodies are required to comply with the duty when exercising any functions. The duty does not, however, override the proper exercise of those functions. This means that public bodies have a legal obligation to further the conservation of biodiversity in the course of carrying out their functions.

26. In exercising the duty, public bodies must have specific regard to the 1992 Rio Convention on Biological Diversity and to any Scottish Biodiversity Strategy designated by the Scottish Ministers under section 2 of the Act. Whilst compliance with the duty is obligatory, public bodies may have significant discretion in relation to the particular action which they consider to be necessary in any particular situation. The new duty is not intended to be narrow or prescriptive, but the purpose of it is to place the onus on public bodies to take direct responsibility for the impacts which their policies and operations may have on the natural environment.

27. Although the Act itself confers no extraterritorial powers, it should be noted that the duty to conserve biodiversity is not limited solely to the biodiversity of Scotland. It applies to biodiversity in a global sense and public bodies in Scotland do therefore need to consider the effect of decisions taken, or activities carried out, within Scotland insofar as those decisions or activities may have implications in relation to biodiversity conservation outwith Scotland. This might be illustrated by the example of a public body in Scotland which is considering whether to purchase products made from materials sourced from a tropical rainforest. The biodiversity implications of that purchasing decision would need to be considered by the public body.

Section 2 Scottish Biodiversity Strategy

28. This section places a specific duty on the Scottish Ministers to designate a strategy for the conservation of biodiversity, to be known as the Scottish Biodiversity Strategy. The designated Strategy may consist of a number of subsidiary individual strategies, should this be deemed appropriate by the Scottish Ministers.

29. Once designated, the Strategy must be published. The Scottish Ministers must then lay a report on its implementation before the Scottish Parliament every three years. The first report

must be made within three years of the date on which the Strategy is formally designated for the first time.

30. In addition, the Scottish Ministers must publish lists of particular species and habitats which they consider to be of principal importance in relation to conservation of biodiversity. The lists are to be published within one year of the formal designation of the Scottish Biodiversity Strategy and the Scottish Ministers are empowered to review, revise and republish the lists as they consider necessary.

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