NATURE CONSERVATION (SCOTLAND) BILL

TOM EDWARDS & ALASDAIR REID

SPICe briefing

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The Nature Conservation (Scotland) Bill [as introduced] Session 2 (2003) (the Bill) was introduced on the 29 September 2003.

This briefing is in three parts:

- the first part looks at biodiversity
- the second part looks at the provisions of the Bill on conservation and enhancement of natural heritage, which would be achieved through changes to the SSSI system
- the third part looks at the new measures the Bill would introduce to protect Scotland's wildlife

KEY POINTS OF THIS BRIEFING

PART 1. BIODIVERSITY

- biodiversity means the variability among living organisms
- the Bill would provide for statutory recognition for biodiversity and would oblige public authorities to "further the conservation of biodiversity"
- the Bill would provide a statutory basis for a Scottish Biodiversity Strategy

PART 2. SITES OF SPECIAL SCIENTIFIC INTEREST

- the designation of Site of Special Scientific Interest (SSSIs) was created in 1949. Since then, designated sites have been given increased protection, notably under the Wildlife and Countryside Act 1981
- the SSSI system is designed to protect a Scotland's rare wildlife and the most important wildlife habitats. SSSIs cover approximately 13% of Scotland. As at March 2002 there were 1,447 SSSIs in Scotland.
- problems have been identified with the way the current system operates, notably that it does not sufficiently protect sites against damage, and there is a lack of incentives to actively manage sites
- the Bill would give new powers to government to act in the public interest protect SSSIs
- these powers would affect the freedom of private individuals to manage their land so it is important that there are sufficient checks on these powers to ensure they are used fairly
- these powers include: a requirement for SNH to consent to allow certain operations to take place on SSSI land; extended compulsory purchase powers and extended powers for Ministers to make Nature Conservation Orders (NCOs) to protect SSSIs; new powers to make Land Management Orders (LMOS) to enforce management of an SSSI and restoration orders to restore damage to an SSSI; and the power to impose increased penalties for damaging SSSIs

PART 3. PROTECTION OF WILDLIFE

The Bill proposes amendments and repeals to Part 1 (Wildlife) of the Wildlife and Countryside (1981) Act covering:

- offences involving recklessness
- new controls on possession of wildlife specimens obtained illegally outwith Britain
- protection for capercaillie during the breeding season and enhanced protection for cetaceans and basking sharks
- extended controls on the use of snares
- offence of possession of pesticides without reasonable excuse
- new provisions setting out the powers of government Wildlife Inspectors

GENERAL OUTLINE

The Bill builds on an existing legislative framework, most notably the Wildlife and Countryside Act 1981, and also Part 12 of the Criminal Justice (Scotland) Act 2003. The Bill deals with specific aspects of nature conservation, in three parts.

1. The conservation of biodiversity

2. The conservation and enhancement of natural heritage through an improved system for notifying and protecting Sites of Special Scientific Interest (SSSIs)

3. The protection of wildlife through enhancements to species protection measures

CONSULTATION PROCESS

The proposals contained in the Bill have been developed over the last five years, and informed by two earlier consultations. *People and Nature: A New Approach to SSSI Designations in Scotland* (Scottish Office 1998), and *The Nature of Scotland* (Scottish Executive 2001). Since the consultations, policy work has been undertaken in collaboration with key stakeholders to convert policy objectives into specific legislation. In particular, the Scottish Executive has developed proposals in conjunction with the Expert Working Group on SSSI Reform (EWG) and the Scottish Working Group of the Partnership for Action against Wildlife Crime (PAW).

This process culminated in the publication of a draft Bill for consultation in March 2003 (Scottish Executive 2003a). The draft Bill did not contain provisions dealing with wildlife crime, but was accompanied by a policy statement setting out the Executive's intentions in this area. A total of 144 responses to the consultation were received. The majority supported its fundamental principles and overall vision. General comments on the draft Bill included (Scottish Executive 2003b):

- the full title of the draft Bill suggests it makes provision for the conservation of the natural heritage as a whole rather than only the part of it concerned with biodiversity and nature conservation…As the Bill only concerns nature conservation and biodiversity aspects of the natural heritage, this should be clearly stated (SNH)
- the marine environment should be included in the bill, with the emphasis on biodiversity and use of exploitable resources (UK Environmental Law Association) (UKELA)
- there should be clarification on the extent to which the proposals relate to the marine environment, particularly with reference to intertidal SSSIs (Shetland Islands, Dundee, Glasgow City, and Fife Councils, International Fund for Animal Welfare, Plantlife Scotland and British Bryological Society)
- the draft bill should be amended to include a new clause to provide statutory underpinning of Ramsar sites (designated under the Ramsar Convention for the protection of wildfowl and wetlands). This would ensure consistency with the Countryside and Rights of Way Act 2000 (CRoW) in England and Wales (RSPB)
- of particular importance is the need for all European Union designations (Natura 2000) to be fully designated as SSSIs. Given the proposals for the future of SSSIs it is essential that such designation provides the management and legal basis upon which land managers can properly engage with competent authorities (Scottish Landowners Federation) (SLF)
- there is a strong need for a single coherent set of provisions on nature conservation i.e. the law should be consolidated (UKELA)

- the Bill does not deliver a robust and radical vision outside of protected sites and species, there is a lack of wide-ranging protection measures with relevance to the wider countryside (Scottish Agricultural College) (SAC)
- the Bill is not sufficiently far reaching in setting out a policy for a sustainable future, and has missed the opportunity to extend duties to the private sector (Dr Paul Dearing)
- there is too great an emphasis placed on economic needs and socio-economic expectations; it should be made clear that the Bill concerns nature conservation, not sustainable development (Woodland Trust Scotland) (WTS)
- this Bill would effectively nationalise all designated land and any other land in which Scottish Natural Heritage claims an interest by removing the freedom to manage land from its occupiers and giving it to the state (People Too)
- there should, at all times, be a supposition that the established practices of land managing and conservation and the individual manager involved, take priority over any other interest unless it can be proved that they have been breaking the law (Scottish Countryside Alliance)

PART 1. BIODIVERSITY

WHAT IS BIODIVERSITY?

Biological diversity, shortened to biodiversity, is the term given to the variety of living things on earth. The United Nations Convention on Biological Diversity (CBD) (1992) definition is:

> *Biodiversity is the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*

In June 1992, the Convention on Biological Diversity was signed by the UK and 158 other governments at the Earth Summit, which took place in Rio de Janeiro. It entered into force in December 1993 and was the first treaty to provide a legal framework for biodiversity conservation.

In the CBD (1992) contracting Parties undertook to conserve and sustainably use biodiversity, and are required to develop national biodiversity strategies and action plans. These should also be integrated into broader national plans for environment and development.

Key provisions of the CBD (1992) are:

- *to establish protected areas to conserve biological diversity whilst promoting environmentally sound development around these areas*
- *to rehabilitate and restore degraded ecosystems and to promote the recovery of threatened species in collaboration with local residents*
- *to respect, preserve and maintain traditional knowledge of the sustainable use of biological diversity with the involvement of indigenous peoples and local communities*
- *to prevent the introduction of, to control and to eradicate alien species that could threaten ecosystems, habitats or species*
- *to control the risks posed by organisms modified by biotechnology*

BIODIVERSITY IN PART 1

Biodiversity Duty

Part 1 of the Bill provides for statutory recognition and protection for the variety of all living things, including the habitats that support them and genetic variation within species. The intention is to emphasise biodiversity as both an essential resource for sustainable development and a measure of success in delivering sustainability.

A new general biodiversity duty would apply to all Scottish public bodies and office holders. The Bill would oblige public authorities to “further the conservation of biodiversity” in the course of exercising their functions, but without prejudice to the proper exercise of those functions. This aims to underpin existing good practice, but is not intended to be an overriding duty.

In conjunction with this, public bodies would be required to have regard to the Rio Convention on Biological Diversity (CBD) (1992) and to act with reference to the aims and objectives of the new Scottish Biodiversity Strategy (Scottish Biodiversity Forum 2003).

In their consultation responses (Scottish Executive 2003b), many bodies[1] welcomed the intention to *further* the conservation of biodiversity, but wanted clarification of what "to further" would actually mean. They also wanted the duty to contain a degree of proactivity, the Biodiversity Strategy to include measurable targets, and clarification as to which public bodies would be included in this definition.

Two bodies[2] sought the addition of a clause that states clearly that "biodiversity" (a term not used previously in Scots law) has the meaning given in the CBD (United Nations 1992). They also believe that the biodiversity duty could be strengthened by requiring public bodies to report on actions taken to further biodiversity in any statutory annual reporting function that they have; they would prefer "comply with" or "act in accordance with" instead of "have regard to" in 1(2).

Biodiversity Strategy

Section 2 of Part 1 would provided a statutory basis for a Scottish Biodiversity Strategy or strategies. A draft strategy called *Towards a Strategy on Scotland's Biodiversity* was developed by the Scottish Biodiversity Forum and consulted on in the spring of 2003. In the light of consultation responses, the strategy is now being revised to include an implementation plan. The strategy is currently in draft form, and is due to be launched in May 2004. Once the strategy has been designated, Ministers are obliged to report back to Parliament on its implementation every 3 years.

Towards a Strategy on Scotland's Biodiversity (Scottish Biodiversity Forum 2003)

This proposed strategy for the protection and enhancement of Scotland's biodiversity resource would set out a 25-year vision, which aims to:

- halt the loss of Scotland's biodiversity and continue to reverse previous losses by targeted action for species and habitats
- raise awareness of the many benefits of biodiversity by significantly increasing the number and range of people contributing to its conservation and enhancement

The above aims are founded on 3 key principles:

- provision of a framework for action
- promoting the conservation, enhancement and sustainable use of Scotland's biodiversity by placing people at the heart of the strategy
- gathering, developing and applying the best available knowledge to assist people in understanding, caring for, enjoying and making wise use of Scotland's biodiversity

[1] RSPB, Scottish Environment LINK (LINK), National Trust for Scotland (NTS), Scottish Landowners Federation (SLF), Butterfly Conservation (Scotland), WTS and Scottish Native Woods (SNW)
[2] SNH, WTS

PART 2. SITES OF SPECIAL SCIENTIFIC INTEREST (SSSIs)

BACKGROUND

SSSIs cover approximately 13% of Scotland and range in extent from 0.1ha to almost 30,000ha (the Cairngorms). As at 31 March 2002, there were 1,447 SSSIs in Scotland, covering 1,007,260ha. There are over 10,000 owners and occupiers of SSSIs in Scotland. A map of SSSIs in Scotland is available on the SNH (2002a) website here. The SSSI system is designed to conserve and enhance Scotland's flora and fauna, together with significant geological and geomorphological[3] features.

Current Legal Framework

The SSSI designation was created by the National Parks and Access to the Countryside Act 1949. The Act required SSSIs to be notified to local authorities and the Secretary of State so that they could take account of the special interest in the site in planning decisions. The mechanism was only advisory and did not stop damage from being done to these sites. Owners and occupiers of SSSIs were not notified under the 1949 Act since, at that time, land management operations such as farming or forestry were not perceived to be a danger to Britain's natural heritage, in contrast to large scale post-war development projects which were held to represent a significant threat. To decide what is "special" about a site, the conservation agencies use detailed selection criteria (Nature Conservancy Council 1989). These include the size, fragility and naturalness of sites and the rarity of the species or habitats they support.

Part II of the Wildlife and Countryside Act 1981 (WCA) changed the SSSI system. The main change was to give greater legal protection to SSSIs and to allow conservation agencies to make compensation payments (management agreements) to owners/occupiers for any changes to the management of an SSSI which might damage the features for which it was notified. In addition, it ensured there was involvement of landowners/occupiers in the notification and management of the site. The Act required the conservation agency (now SNH in Scotland) to notify every owner and occupier of the land, the local planning authority, and the Secretary of State for the Environment. Once notifications have been sent, the area becomes an SSSI and must be treated as such by the owner, even if the owner is appealing against notification. After the site is notified, the owner or occupier has three months in which to make representations or objections. The site must be confirmed as an SSSI or withdrawn within 9 months. In the absence of confirmation or withdrawal the notification lapses after 9 months.

The Natural Heritage (Scotland) Act 1991 created a committee, the Advisory Committee on Sites of Special Scientific Interest (ACSSSI), to advise SNH following objections from an owner or occupier. Only objections as to whether proposed SSSIs meet the scientific criteria for designation are allowed. The Act requires the members of the committee to have appropriate scientific qualifications and experience. Since the ACSSSI was created in 1992, 33 notifications of new SSSIs or renotifications of existing SSSI that have been referred to it by SNH (approximately 1/5 of all notifications/renotifications which have taken place). In all but one instance, the ACSSSI has supported the scientific case for SSSI designation, although they have suggested minor amendments in some cases.

Notifications include a map of the boundary, a statement of the special interest of the site, a list of operations which would, in the agency's view, damage the site and a statement that the

[3] i.e. land forms

agency must be consulted about such listed operations. These are termed Potentially Damaging Operations (PDOs). In practice it has been possible to issue consents for the overwhelming majority of existing management practices at the time of designation. The Scottish Office (1998) explained:

> *SNH and its predecessors have routinely issued consents at the time of notification for all existing management practices. No one has been required to change their management as a result of SSSI notification. This practice has not always been desirable from the nature conservation perspective but it has reduced conflict and helped to maintain good relations with owners and occupiers and which has been beneficial in the long run.*

Notice must be given in writing to SNH by the occupier or owner at least four months before they intend to carry out any PDO. SNH will consider the implications of the proposals and may give consent, refuse consent, or suggest modifications which might avoid damaging the site. In practice, the majority of operations are consented to: since April 2001 SNH has been served 878 notices from owners/occupiers who intend to carry out a PDO and has withheld its consent for the operation to go ahead on just 14 occasions (1.6%) (SNH 2003a).

If SNH cannot consent to a PDO they may offer the owner or occupier a payment in return for a management agreement that protects the interest of the site. These may be a lump sum payment, an annual payment made over a number of years or a combination of both. The table below shows the number of management agreements in operation, and spending over the last 5 years:

Table 1 - Number of SSSI management agreements and cost 1999/2000 – 2003/04

Year	Number of active management agreements	Cost (£)
1999/2000	1217	3,613,000
2000/2001	1533	3,628,000
2001/2002	1564	3,913,000
2002/2003	1456	4,814,000
2003/2004	1315	N/A

Source: SNH (2003a)

If SNH has refused consent, and cannot agree on a management agreement with the owner, then after 4 months the owner could go ahead with the PDO. In this instance, SNH can ask Scottish Ministers to make a Nature Conservation Order (NCO) which stops the owner or occupier from carrying out the PDO. The owner or occupier can object to an NCO and a local inquiry must then be held.[4] As at 1 April 2003, there were 20 NCOs in force in Scotland[5] (SNH 2003a). NCOs also apply to third parties, not just owners and occupiers. There is a right of appeal against an NCO to the Court of Session. As a last resort, if an NCO is in place and the owner or occupier again serves notice of an intention to carry out the operation, SNH must offer

[4] under section 29 of the WCA

[5] This includes 11 NCOs which under Regulation 27 of the Conservation and Natural Habitats Regulations 1994 now have effect as if they were Special Nature Conservation Orders because they are on SSSIs which have subsequently been designated as Natura 2000 sites (Special Areas of Conservation under the Habitats Directive or Special Protection Areas under the Birds Directive). One SNCO under Regulation 22 of the Habitats Regulations is also included in the total.

a management agreement or to acquire the interest in the land. If agreement is not possible within 12 months, SNH may apply to Scottish Ministers for a Compulsory Purchase Order (CPO). To date, these powers have never been used in Scotland.

SNH collects figures on damage to SSSIs. The table below shows the number of instances and the extent of SSSI damage since 1998.

Table 2 - SSSI damage 1998/99-2002/03

	SSSI Damage Cases	Area Damaged (ha)
1998/99	24	475
1999/00	14	327
2000/01	19	1,084
2001/02	8	1,422
2002/03	13	500
Totals:	78	3,808

Source: SNH (2003a)

THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

Changes to the SSSI system in England and Wales have already been made by the Countryside and Rights of Way Act 2000, often referred to as CRoW. The main changes introduced by CRoW in respect of SSSIs are:

- improved protection and management of SSSIs
- new and enhanced powers for the conservation agencies (English Nature and the Countryside Council for Wales)
- a more structured approach to management advice and a new power to refuse consent for damaging activities; development of management schemes to help combat neglect, and the introduction of management notices. This is balanced by new appeal procedures
- to support these new powers the agencies have additional powers to enter land, and more flexible powers to purchase land compulsorily
- a statutory duty on public bodies to further the conservation and enhancement of SSSIs, both in carrying out their operations and exercising their decision-making functions
- increased penalties for deliberate damage to SSSIs of up to £20,000 in the magistrate's court and unlimited fines in the crown court; and a new court power to order restoration of the damaged special interest, where this is practicable
- a new general offence to apply to damage by any person, and extended byelaw making powers for the agencies, so that they may be applied on any SSSI, where appropriate (DEFRA 2000)

The Scottish Executive (2003a) pointed out that a distinct approach would be taken in Scotland:

> *Those familiar with nature conservation law in Britain will perhaps have expected that our Bill would simply mirror the Countryside and Rights of Way*

Act ("CRoW"), which came into force in England and Wales in 2000. Similarities do exist. But the draft Nature Conservation (Scotland) Bill offers a specifically Scottish approach to safeguarding our natural heritage.

RSPB Scotland (2003a) commented on the need for a distinctly Scottish approach:

> *Even when policy positions are the same, the draft Bill, at times, reads as though it has been drafted with the clear intention of not using wording from the CRoW Act. If correct, this is unfortunate, it makes comparisons difficult and, in cases where policy intentions are the same, future interpretation and operations will be easier if wording is the same. In this regard we believe a "specifically Scottish approach" can include learning lessons from England and Wales (where their approach is relevant) while differing where the circumstances require.*

FUNDING THE MANAGEMENT OF SSSIs

Some of the problems with the SSSI system identified above require changes to the law, and have been addressed in this Bill. Others, for example the change in the way SSSI management agreements are funded, will be implemented by changes to policy. This section looks at the developments in SSSI policy taking place in conjunction with this Bill.

The Scottish Executive (2003c) has set out its policy on funding for SSSIs, and in particular the guidelines which SNH will have to follow when considering the case for compensatory payments, in draft financial guidelines which accompanied the publication of the draft Bill. These guidelines will be revised and republished as a code under section 42 of the Bill. They replace "Financial guidelines for management agreements" published by the government in 1983 (Scottish Office 1983).

Natural Care

The SNH Natural Care strategy provides payments to support the positive management of SSSIs. The aim is to secure assured arrangements for the management of 85% of the area of the SSSI series by March 2008 mainly through payments to support favourable conservation management. This will be done via a combination of SNH management agreements and other incentives, principally the Scottish Forestry Grants Scheme and the Rural Stewardship Scheme. SNH estimate that approximately 10% of the SSSI series is unlikely to need financial support through such measures e.g. because it consists of intertidal areas.

Full details of Natural Care are available on SNH's website (SNH 2001).

Ending compensatory payments

One of the criticisms of the SSSI system has been that large compensatory payments have sometimes been made to landowners for not going ahead with PDOs that they had no intention of going ahead with anyway. Hughes (1994) highlighted two cause célèbres:

> *John Cameron, was awarded £568,294 because SSSI notification prevented him from claiming afforestation and agricultural improvement grants at Glen Lochay; with interest the award was thought to amount to £900,000. John Cameron had acquired the land in the full knowledge that it was an SSSI and therefore subject to restrictions upon its use. The compensation payments for refusal of afforestation grants exceeded the original purchase price for the estate.*

Similarly, a farmer at Inverlocharig was paid £180,000 in compensation for not planting trees on the Beinn More- Stob Binnein SSSI.

In 1989 the rules were changed so that landowners could no longer claim large amounts of compensation for the refusal of afforestation grant where it was refused solely on conservation grounds.

The Scottish Executive (2003c) has said that it will end compensatory payments for not undertaking new projects, and explained the policy it now intends to apply on compensatory management agreements:

- *a land manager **should** be entitled to compensation through a management agreement if he can show that the exercise of SNH's or the Scottish Ministers' powers will cause him actual loss because he can no longer do something which is part of the established management of the land*
- *a land manager **should not** be entitled to compensation if the exercise of SNH's or the Scottish Ministers' powers prevents him from carrying out a new project which is not part of the established management of the land*
- *a land manager **should not** be entitled to compensation if he is refused consent or grant assistance for a project under another consent regime (eg he is refused consent under SEPA's discharge control system or is refused SFGS approval or an agricultural capital grant for a project which would damage an SSSI or Natura 2000 site)*
- *a land manager **should not** be entitled to compensation where any loss arises from a failure to comply with relevant regulatory regimes, or with standards of good farming practice*

The key factor determining entitlement to compensation in the future will be whether SSSI designation impacts on the *established* land management of the site. In the draft financial guidelines, the Scottish Executive (2003c) has identified several principles which could be used to determine whether an activity comprises part of the established management of a site but this would include any activity which was "part of the habitual pattern of use of that land in the preceding 10 years". If the designation of an SSSI requires the established management to change, compensation will still be available. What *is* being ended is the provision of compensation for activities which are not part of the established management of the site. Thus a proposal which radically alters the way in which the land has been managed will not lead to an offer of compensation if consent is refused. This is already the case with, for example, forestry grant schemes. Such grants are no longer given if they would have a detrimental conservation impact and compensation is no longer available. The Bill extends that principle to other situations in which landowners stand, in theory, to make money from a speculative development but where they cannot proceed because consent is refused. This is similar to the principle in the planning system that a planning authority is not liable for compensation for theoretical losses if it refuses planning consent to a developer. The developer does not have an automatic right to develop the site if public interest considerations dictate otherwise.

A problem which might arise with these arrangements is that an owner of an SSSI might legitimately want to change the established use of a site because a previous land use had

become uneconomical. The draft financial guidelines (Scottish Executive 2003c) also explain how these cases would be dealt with:

> *In some instances, the established management of the land may in future become uneconomic because of changed market circumstances, and the economically rational course of action for the land manager may be to convert from one land use to another or to withdraw the land entirely from management. In cases where continuation of the existing land use is essential to maintenance of the special interest of the site, SNH will normally try to enter into a voluntary management agreement which makes it worthwhile for the land manager to continue to manage the land in a manner consistent with its special interest.*
>
> *Where no such agreement is reached, and where conversion to another use or withdrawal of the land from management involve an operation requiring consent, SNH may be obliged to refuse consent, especially on a Natura 2000 site. It will then be an offence for the land manager to carry out the operation and he will be unable to effect the proposed change in land use.*
>
> *If it is clear (either before or after dispute resolution mechanisms have been attempted) that SNH will not reconsider its refusal of consent, and that the land manager is either not entitled to a compensatory payment or is not content that the compensatory payment offered makes it economically worthwhile to continue with his established land management, SNH may offer to enter into a lease or purchase the area in question so that they can take responsibility for its management in a manner consistent with its nature conservation interest if this has become economically unviable for the land manager. In exceptional circumstances where voluntary lease or purchase can not be agreed between SNH and the land manager, SNH may use its powers of compulsory purchase.*

Compensation will be available therefore, if an existing land use becomes uneconomical. It is clear though, that the compensation paid in such a case would be limited to the amount needed to support the existing land use, and not linked to what might be gained through development.

WHY IS THE BILL NEEDED?

A number of problems have been highlighted with the current SSSI system (Scottish Executive 2001, RSPB 2000):

- it has not guaranteed protection of sites against damage
- there is a need for improved controls on the activities of third parties on SSSIs
- there is little incentive for landowners to look after SSSIs: the main threat to SSSIs is from neglect and unsympathetic land management – SNH should have a power to secure positive management on SSSIs
- the lists of PDOs attached to SSSIs are too long and restrictive
- there are no opportunities for independent adjudication on management of SSSIs, and the system is seen as undemocratic
- landowners have sometimes been paid large sums in compensation for not going ahead with new projects which they may have had no real intention of going ahead with anyway. This is not a good use of public money

There is agreement on some of these issues, for example, the need to end overcompensation; to reduce bureaucracy, and to make decision making more accountable and democratic.

The contentious issue is increasing government powers (i.e. Scottish Ministers and SNH) to control the management of private land. The government, and environmental groups, would argue that these powers are necessary to protect the public interest in Scotland's wildlife and natural heritage.

For example, the Scottish Executive (2001) in summarising its proposals for SSSI reform said:

> *To ensure the effective protection of SSSIs, SNH will be able to refuse consent for certain operations, subject to the creation of an effective independent appeals mechanism for people who are prevented from undertaking particular projects on SSSIs […]*
>
> *There should be powers to ensure that the land is managed in a way which secures its conservation interests, including the use in exceptional circumstances of Land Management Orders and stiffer penalties for deliberate damage to SSSIs.*

In a joint publication, entitled "Time to Act – Saving Scotland's Wildlife" a consortium of 6 environmental NGOs[6] (Butterfly Conservation et. al 2001) called for the urgent improvement of the SSSI system:

> *A recent study shows the overall health of many SSSIs is declining. Less than half the sites are in good condition. Too many of our natural treasures are suffering from neglect, inappropriate management or unnecessary damage – in some cases this irreversibly destroys the aspect of the area that led to its designation. An improved system is required – to encourage sites to be properly managed. […] Scotland has a duty to provide the best possible care for these sites.*

It is important, however, that the Bill strikes the right balance between public and private interests (i.e. of owners and occupiers of land), and, that there are sufficient checks on these powers (e.g. rights of appeal) to ensure that they are used fairly. Some of these powers, for example the use of land management orders, would only be used as a last resort, following a failure to reach an agreement voluntarily.

Some organisations who represent land managers are concerned that the powers in the Bill would unfairly compromise the rights of private individuals. The Scottish Countryside Alliance (2003) in commenting on the draft Bill said:

> *This draft legislation continually refers to nature conservation, natural heritage policy, the bigger picture, holistic measures and overarching visions. We are concerned that these grandiose phrases mask the underlying intention, which is to give SNH and the Scottish Ministers, overall control of every part of Scotland's countryside. This would fundamentally undermine the right to private property, an individual's freedom to manage their own land and most importantly, the good practices that are currently employed all over Scotland which currently conserve and enhance Scotland's biodiversity.*

[6] Butterfly Conservation, National Trust for Scotland, Plantlife, RSPB Scotland, Scottish Wildlife Trust, WWF

[…]

We feel this section of the draft legislation provides SNH with too much power and ordinary land managers with too little. Most of all it forces land managers to justify their practices and imposes on them the opinions, perhaps biased, of a public body. We feel this is an unjustifiable imposition and we would like to see SNH work with land managers, not force them to carry out unproven conservation techniques at the whim of current science.

People Too[7] (2003) said:

The Bill theoretically nationalises all land within sites designated for conservation and/or any land in which SNH can claim an interest, by taking the freedom to decide land management away from those who currently manage it and giving it to SNH.

PART 2: CONSERVATION AND ENHANCEMENT OF NATURAL HERITAGE

Definition of Natural Heritage

The definition of natural heritage is given by section 56 as: "in relation to land, the flora, fauna and geological and geomorphological features of the land". This definition is different from that used in the Natural Heritage (Scotland) Act 1991 (c.28) which also includes reference to the "natural beauty and amenity" of land. SNH (2003b) said:

We feel that this could lead to serious confusion, which must be avoided. If the intention is to restrict the scope of the Bill, to those aspects of nature conservation [i.e. those defined in section 56], we consider the use of the term "natural heritage" inappropriate.

The following sections look at the main features of Part 2 of the Bill. *

Chapter 1: SSSIs

Notification and denotification of SSSIs

Section 3 of the Bill would impose a duty on SNH to notify Sites of Special Scientific Interest. SNH must notify "interested parties" [8] including every owner/occupier of the land in question.

The British Association for Shooting and Conservation: Scotland (BASC Scotland 2003) opposes the duty that would be placed on SNH to notify SSSIs and recommended that the requirement that SNH "must" designate SSSIs should be replaced with "may". However, it seems unlikely that there will be a significant number of new SSSIs designated, the Scottish Executive (2001) said "no major changes to the existing series [of SSSIs] is anticipated".

Schedule 1 of the Bill, introduced by Section 10, sets out, in detail, the procedure intended for notifying SSSIs. In summary, these are that SNH must publish details of the notification in a local newspaper and make information about the notification publicly available. This must include information about how to object to the notification and set a time-limit for making

[7] People Too is a group which aims to give a voice to the people of rural Scotland. Further information is on the People Too website: http://www.ileach.co.uk/peopletoo

[8] The "interested parties" are listed in section 49 (2)

objections, which must be at least three months. The site has SSSI status as soon as SNH makes a notification but within one year SNH must decide whether to confirm, withdraw or modify the notification. If there are objections from those with an interest in the land, unless they are frivolous[9], SNH must consult the ACSSSI as to whether the site meets the criteria for designation before confirming the SSSI.

There is no right of appeal against SSSI notification. An owner/occupier could seek judicial review of a decision to notify an SSSI, but no such cases have been brought in Scotland. Judicial review of the notification of an SSSI by English Nature has been sought. In one case (R v English Nature, Ex Parte Aggregate Industries 2003) the main challenge was that English Nature was not sufficiently independent and impartial to decide on objections to SSSI notification, and was in breach of Article 6 of the ECHR (right to a fair and impartial hearing). The court was satisfied, however, that English Nature's decision-making process had a number of procedural safeguards that, when taken together with the High Court's powers of judicial review, could be relied upon to produce a fair and reasonable decision.

In another case (Fisher v English Nature 2003) the decision to confirm an SSSI on an area which already had Special Protection Area (SPA) status was challenged because the SSSI notification was more onerous to landowners. The claim was that English Nature had acted irrationally; exceeded its jurisdiction, and were in breach of Protocol 1, Article 1 of the ECHR (right to peaceful enjoyment of property). The court found that English Nature had no discretion to decline to notify or confirm an SSSI, there was no doubt that the statutory criteria for confirming an SSSI had been fulfilled, and that the decision to confirm was not a disproportionate interference with the peaceful enjoyment of the claimant's property. Leave to appeal was granted, and the decision is currently being appealed.

Some organisations (e.g. ACSSSI 2003) were concerned that the Bill might require all existing SSSIs to be renotified, as happened under the WCA. Commenting on the draft Bill, People Too (2003) said that all SSSIs should be renotified "as these proposals materially alter the relationship between existing individual SSSI occupiers and the State". Schedule 5 of the Bill on transitional arrangements makes it clear that existing SSSIs would not need to be renotified.

Section 9 would create a formal power for SNH to denotify SSSIs. This has not existed in statute before. If it intended to denotify an SSSI, SNH would have to explain why the site was no longer of special interest.

A Statutory purpose for SSSIs?

Section 3 (2) also sets out the things SNH would have to have regard to in determining whether a site is an SSSI. These are:

> *(a) the extent to which giving notification under that subsection in relation to the land would contribute towards the development of a series of sites of special scientific interest in Scotland representative of the diversity and geographic range of—*
>
> *(i) Scotland's natural heritage*
>
> *(ii) the natural heritage of Great Britain*
>
> *(iii) the natural heritage of member States, and*
>
> *(b) any guidance issued under subsection (1) of section 42 so far as containing information of the description referred to in subsection 2 (a) of that section.*

[9] SNH decides whether objections are frivolous under section 21(6)(c)

Crofts (2003) points out that subsection 3(2)(a) provides the first ever statutory definition of SSSIs but thinks that it is unclear and needs to be radically improved if it is to be understood by all parties. For instance, he suggests that "there is no reference to fundamental issues such as rarity and uniqueness, threats and vulnerability of species and habitats" which should be included in the definition. He also makes the point that:

> *the geographic range is confused referring to Scotland, GB, and the EU, but ignores the global significance of species and habitats in Scotland, such as blanket mires, Atlantic oak woods and Caledonian pine ecosystem. It is therefore not clear whether the SSSI series relates to Scotland […] or to the wider geographical entities mentioned.*

Some respondents to the draft Bill consultation (e.g. Woodland Trust 2003, Plantlife 2003, SWT 2003, RSPB Scotland 2003) want this definition to be expanded into a more comprehensive statement of the statutory purpose for SSSIs. SNH (2003b) proposed that a description of statutory purpose in the Bill should mirror the definition agreed through the JNCC with the other countryside agencies of Great Britain:

> *The purpose of the SSSI system is to safeguard for present and future generations a series of sites, which are individually of high natural heritage importance, and in total represent the diversity and geographic range of habitats, species, geological and geomorphological features in Scotland, England and Wales (or Great Britain)*

The guidance which SNH uses at the moment to select SSSIs does not have a statutory basis (Nature Conservancy Council 1998). The current approach is for SSSIs to be designated on the basis of common criteria which apply throughout Great Britain, but subsection 3(2)(b) allows Ministers to adopt that guidance, and allows for the possibility of separate Scottish guidance in the future.

Operations Requiring Consent

Section 3 also sets out the documentation which would be required to accompany an SSSI notification. This includes operations which appear to SNH to be likely to damage the SSSI. These "Operations Requiring Consent" (ORCs) would be site specific and would replace PDOs.

Section 6 would establish a procedure for reviewing ORCs for new SSSIs notified under section 3. The first review would not normally take place within six years of the site's designation, without the consent of all the owners/occupiers of the land in question. Any subsequent reviews would not normally be at less than 6 yearly intervals. Schedule 5 would convert all PDOs attached to existing SSSIs into ORCs. It also provides that the 6 year period would not apply to these ORCs. This would be necessary to allow these ORCs to be reviewed. SNH's intention is to review all ORCs attached to existing SSSIs in the 6 years from 1 April 2005. Together, these provisions would implement the commitment to simplify and slim down the PDO lists. Section 7 would allow for emergency changes to be made to ORCs where SNH considers that a damaging operation was or was about to be carried out on a SSSI.

Section 16 would provide that owners/occupiers would have to obtain the consent of SNH if they wanted to carry out an ORC. SNH could either give its consent, refuse, or attach conditions to its consent. Where a consent was refused, withdrawn, or made conditionally, SNH could enter into a management agreement with the owner/occupier. SNH would also have to give reasons for refusing consent or for any conditions it attached to a consent. Section 17 sets out certain

circumstances where SNH's consent would not be required to carry out an ORC, including emergencies. If an SSSI was damaged by an owner/occupier, and they have been convicted of such an offence, they would have to restore it, based on the advice of SNH.

The SLF (2003) commented on the new arrangements for ORCs in their response to the draft Bill:

> *The SLF recognises that the draft Bill would provide powers to prevent activities which would genuinely damage SSSIs. This will be done primarily by specifying operations which require SNH consent. The draft Bill makes it clear that it would be an offence to carry out such operations without consent. It is also evident to the SLF that the draft Bill intends to close the loophole in the WCA, where operations which could damage or destroy an SSSI can be delayed but not prohibited if an owner or occupier insists on going ahead. The SLF accepts the need for legislation that allows for damaging activities to be blocked where this is genuinely necessary.*

Section 18 would give owners/occupiers a right of appeal to the Scottish Land Court against refusal, modification, or withdrawal of a consent by SNH, against a decision by SNH not to enter into a management agreement, and against the terms and conditions of any management agreement which SNH does offer. This would be a new right of appeal, which did not apply to the previous system of PDOs. The SLF (2003) expressed the concern that "adequate provision be made to ensure that the costs of such appeals for land managers do not make the better dispute resolution arrangements effectively redundant and inaccessible".

Commenting on the new appeal procedures to the Scottish Land Court introduced by the Bill, the UK Environmental Law Assocation (2003) said:

> *[…] The use of the Land Court will only be acceptable if there are clear changes to its composition to ensure that it has the expertise to deal with arguments based on ecology as well as agriculture and that it is seen as being a balanced tribunal, not one inevitably biased in favour of land managers. In this new role the Court is being asked to do something quite different from its current task, and it must change to reflect this. […] The membership of the Court must be visibly changed before it is acceptable as the appeal tribunal under this Bill, and to satisfy the requirement of being an "impartial" tribunal under article 6 of the ECHR. This could best be achieved by introducing a suitable provision into the Bill, specifying the interests and expertise to be held by at least some members of the Court, offering a guarantee that a range of backgrounds will be represented.*

RSPB Scotland (2003a) observed that the extension of the remit of the Scottish Land Court "is in effect the first step on the way to an 'environmental court' ".

Site Management Statements

Section 4 would require SNH to prepare a Site Management Statement to accompany new SSSI notifications. Similarly Schedule 5 would place a requirement on SNH to prepare a Site Management Statement for all existing SSSIs. These short statements would set out what the special features of the site were and set objectives for the management of the site. Although the statutory requirement to produce site managements is new, SNH has over a number of years voluntarily prepared statements for almost all existing SSSIs.

Flexibility to change SSSI designations

Section 5 would allow SNH to enlarge SSSIs. Owners/occupiers would only be able to object to the extension and not to the renotification of the original land. Section 8 would allow SNH to change the content of an SSSI notification, i.e. to change the rationale for its designation. This flexibility to change the content of an SSSI notification was something which some environmental groups had felt was missing from the draft Bill.

Application to public bodies and regulatory authorities

Section 12 would impose a duty on public bodies to further the conservation and enhancement of SSSIs.

Sections 13 and 14 would apply to public bodies carrying out operations on SSSIs. Section 13 would provide that public bodies had to seek the consent of SNH if they intended to carry out an operation which was likely to damage an SSSI. The main difference between the application to public bodies and the application to private owners/occupiers is that public bodies could, under section 14, go ahead with an operation which was likely to damage an SSSI without the consent of SNH as long as they carried out the work in a way which minimised damage to the SSSI and carried out restoration work after completing the operation. There is no test within the legislation as to whether the action taken by public bodies is necessary or merely desirable. These provisions have changed from the draft Bill but the essential feature, which is that operations by public bodies could go ahead without the consent of SNH, remains. There is, however, provision for SNH to seek interdict or other appropriate remedy through civil proceedings (Section 46). Commenting on the draft Bill, SNH (2003b) said that "this calls into question the value of this entire section [i.e. section 13]".

Another difference is that the provisions would apply to public bodies whether or not the land was an SSSI, while they only apply to private owners/occupiers on an SSSI. Commenting on this provision in the draft Bill SNH (2003b) suggested that "it is not clear how [public bodies][10] will know which operations are likely to damage an SSSI interest, especially where work is being done on non-SSSI land.

Section 15 would provide that regulatory authorities (e.g. SEPA, the Forestry Commission) had to consult SNH before issuing consent for an operation which was likely to damage an SSSI. If SNH gives its consent via the regulator, an owner/occupier would not then have to seek the consent of SNH separately. The Scottish Landowners Federation (SLF 2003) endorsed this simplified consent mechanism.

Offences

Section 19 would create a new offence of intentionally or recklessly damaging the natural heritage interest of an SSSI and would provide for certain statutory defences. It is clear that the offence could be committed by "any person" and includes third parties. The test for establishing recklessness is essentially an objective one. Scots law does not require that the accused has actively realised the risk of their actions before it can be considered to be criminally reckless. An individual who has given no thought to a risk may be reckless. The argument would be that this very "thoughtlessness" is blameworthy: the accused really ought to have given thought to the risks (Jones 1996). Recklessness also implies an utter disregard for consequences and is more than simple carelessness or even mere negligence. To be reckless an action is one which must exhibit a level of gross and unacceptable negligence and involve conduct which no reasonable person would have engaged in, given the circumstances.

[10] the Draft Bill referred to statutory undertakers not public bodies

Section 19 would also create specific offences by private owners/occupiers of carrying out an ORC without the consent of SNH, and not restoring damage to an SSSI where for example they had not been able to seek the consent of SNH in an emergency. It would also create specific offences by public bodies of not seeking the consent of SNH before carrying out an operation, and of not restoring an SSSI where they carried out an operation for which SNH had refused consent.

The penalty for these offences would be a fine of up to £40,000 for summary convictions (a trial without a jury) and an unlimited fine for conviction on indictment (a trial with a jury). This would be a substantial increase on the current level of fines which can be imposed for damaging SSSIs. For example, if an owner/occupier carried out a PDO without the consent of SNH the maximum fine which could be imposed is £2,500 (level 4 on the standard scale). One of the reasons for increasing the penalties is that one of the motivations for damaging an SSSI may be financial gain, so there should be a possibility of imposing a higher fine to take account of this.

Although the Criminal Justice (Scotland) Act 2003 introduced the possibility of a custodial sentence for wildlife crime the Bill stops short of allowing a custodial sentence for damaging SSSIs. The Scottish Wildlife Trust (SWT 2003) and Crofts (2003) said that the Bill should allow for custodial sentences to bring the sanctions for damaging SSSIs into line with those for wildlife crime.

There have been difficulties in bringing prosecutions for offences of damaging SSSIs. For example, many SSSIs are in remote areas, so acts of damage may be unwitnessed. A successful prosecution has not been brought in Scotland for damaging SSSIs under existing legislation. However, the first successful prosecution, in England, for third-party damage to a Wiltshire Site of Special Scientific Interest (SSSI) was brought in February 2003 under new provisions introduced to the Wildlife and Countryside Act 1981 by CRoW (English Nature 2003). The offender was found guilty of damaging an area of nationally important grassland in the SSSI, by dumping spoil from an adjacent pond. They were fined £4000, and ordered to pay £1000 towards English Nature's costs. The Court also made a Restoration Order to make the offender restore the SSSI to its former condition.

Chapter 2: Nature Conservation Orders

Scottish Ministers already have a power to make Nature Conservation Orders (NCOs) under section 29 of the WCA. NCOs are used as a power of last resort to prevent damaging operations taking place on an SSSI. As at 1 April 2003, there were 20 of these Orders in force in Scotland[11] (SNH 2003a). For example, on Cobbinshaw Moss SSSI an NCO has been in force since 1994 to prevent Christmas tree planting and the construction of an ATV course.

Chapter 2 of the Bill restates the provisions which allow the Scottish Ministers to make an NCO. SNH (2003b) commented that "NCOs will no longer ordinarily be necessary to prevent damaging operations by owners and occupiers [because of the new provisions governing ORCs which mean that an owner or occupier will no longer be free to continue, unless stopped by an NCO, once 4 months have elapsed from giving notice]". They identified four situations where an NCO might still be required to prevent:

[11] This includes 11 NCOs which under Regulation 27 of the Conservation and Natural Habitats Regulations 1994 now have effect as if they were Special Nature Conservation Orders because they are on SSSIs which have subsequently been designated as Natura 2000 sites (Special Areas of Conservation under the Habitats Directive or Special Protection Areas under the Birds Directive). One SNCO under Regulation 22 of the Habitats Regulations is also included in the total.

- third party damage
- operations on land adjacent to an SSSI which would damage the SSSI
- operations being carried out by a public body where SNH has refused consent
- operations authorised by a regulatory authority where SNH has advised to refuse permission

The Bill would give Scottish Ministers the power to make NCOs to prohibit operations on both SSSI and non-SSSI land. The Bill would also allow them to make an NCO to comply with an international obligation. This power might be used to prevent operations taking place on Natura 2000 sites (SACs and SPAs) which at present have not been underpinned by SSSI designation, although separate powers in relation to Natura 2000 sites also exist in the Conservation (Natural Habitats &c.) Regulations 1994. SNH (2003b) suggested that the nature of the international obligations referred to should be clarified. RSPB Scotland (2003a) thought that the wide definition in the Bill is required to anticipate "future obligations which the UK may agree to (but which by definition cannot be named). The Royal Institution of Chartered Surveyors in Scotland (RICS Scotland 2003) said that the provisions "appear to suggest that NCOs apply to all land in Scotland? In our opinion, this is a radical and unnecessary extension of government control on land, which has not gone through the rigorous SSSI selection procedure".

Schedule 2, introduced by section 25 sets out the detailed procedure for making an NCO. Where there are objections, a local inquiry would have to be held. Section 26 would require review of an NCO within the first six years after it is made (and repeated within at least six yearly intervals thereafter), when Scottish Ministers will decide whether it should be amended or revoked. SNH (2003b) expressed concern that the procedure for making an NCO was too complicated to allow them to be used as "stop orders" in an emergency situation. Section 7 provides for the making of urgent changes to the list of ORCs which will provide SNH with some emergency 'stop' powers on application to the Minister. Section 27 would bring the penalties for breaching an NCO into line with those for the general offence of damaging an SSSI contained in section 19 of the Bill.

Chapter 3: Land Management Orders

Land Management Orders (LMOs) are a new legal instrument created by this Bill. They provide a power of last resort where it is not possible to reach a management agreement for an SSSI or where the terms of a management agreement have been broken. The Scottish Executive (2001) explained the circumstances in which an LMO might be necessary:

> *SNH will in many cases have negotiated a management agreement with the land manager to secure the action necessary to maintain the site in favourable condition. There may, however, be circumstances in which SNH has not been able to negotiate a management agreement and where other incentives are not securing the protection of the site from degradation, even though its management does not constitute agricultural neglect or deliberate damage. We intend that in these circumstances SNH should have a reserve power to seek a Land Management Order from the appropriate Minister of the Scottish Executive. A Land Management Order would require the carrying out of action to ensure management which maintains the conservation interest of the site. Its requirements could be carried out either by the land manager (who would be entitled to a management agreement or conservation contract from SNH for the costs arising from the work concerned) or by SNH. If a land manager did not comply with a Land Management Order, SNH would have a power of entry to perform the necessary work and to charge the owner or occupier for costs incurred.*

The difference between an NCO and an LMO therefore, is that an NCO can be used to stop a damaging action happening, and LMO could be used to enforce positive management of an SSSI. The new power to make LMOs has been welcomed by environmental groups as an important innovation. The Scottish Countryside Alliance (2003) said that LMOs would "not simply prevent damaging activity but impose the undertaking of specific activity on that land, and will take land mangers to court if they are unwilling to undertake these orders." They think that, together with the other powers the Bill would give to SNH, that the power to request Ministers to make an LMO would be "an unacceptable amount of power for one public body to hold".

Section 29 would allow an LMO to be made on land adjoining an SSSI, as well as on the SSSI itself. SNH (2003b) explained that the description of land to which an LMO could be applied would not include Natura 2000 sites not underpinned by SSSIs and suggested that this could be achieved by using the same description as for NCOs (section 23 (3)). They also suggested that National Park Authorities should have the power to seek an LMO in a National Park. BASC Scotland (2003) argued against the possibility of using an LMO on non-SSSI land, and said that "if the land is so integral to the SSSI in question […] then it should itself be part of the SSSI". There may be circumstances where the use of an LMO outwith an SSSI could be justified, although that land did not warrant designation e.g. if an invasive plant such as rhododendron was spreading onto SSSI land from neighbouring land

An LMO could only be made where either: an owner/occupier refused to enter into a management agreement with SNH; the terms of a management agreement were not complied with; or where SNH had not been able to enter into a management agreement because the owner or occupier of land could not be traced. In these circumstances SNH could apply to the Scottish Ministers to make an LMO. Section 34 would provide a right of appeal against an LMO to the Scottish Land Court. The SLF (2003) said that without this right of appeal, they would have to object to LMOs "in the strongest terms". Section 36 would create an offence of failing to carry out the work required by an LMO. Section 36 would establish the same penalties for breaching an LMO as those for the general offence of damaging an SSSI contained in section 19 of the Bill, and for breaching an NCO.

Chapter 4: General and Supplementary provisions

Compulsory purchase

Compulsory purchase has never been used to protect an SSSI in Scotland (SNH 2003a). Section 38 would extend SNH's existing power to seek compulsory purchase of land designated as an SSSI (with Ministerial authorisation) to include land subject to an NCO, LMO and adjacent land. There would be a right of appeal to the Court of Session against compulsory purchase[12].

Subsection 3 of section 38 provides that SNH could seek compulsory purchase (with the authorisation of Ministers) "only where it is necessary to do so for the purpose of securing the conservation, restoration or other enhancement of any aspect of the natural heritage by reason of which an SSSI notification or NCO has effect". The provisions on LMOs impose conditions: that SNH must have tried and failed to agree a management agreement; or the terms of a management agreement have been broken, before an LMO can be sought. Although compulsory purchase would only be used as a power of last resort, there do not seem to be similar conditions in the Bill which specify when the power could be used.

[12] under Schedule 1, paragraph 15 of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) to which section 38(5) of the Bill refers

RSPB Scotland (2003a) supports the compulsory purchase provisions. They pointed out that a change to the types of land that could be the subject of an LMO was needed to ensure that these powers would allow compulsory purchase of Natura 2000 sites not underpinned by SSSIs. In the Bill, as currently drafted, these sites could not be subject to an LMO and therefore would not be covered by this compulsory purchase power. The Scottish Countryside Alliance (2003) is completely opposed to SNH having a power to seek compulsory purchase. RICS Scotlland (2003) said that the provisions "imply that compulsory purchase orders are available on any land in Scotland. Again as with [the provisions on NCOs] this seems to be a notably excessive measure."

Restoration Orders

Section 39 would provide a new power that the court could serve a restoration order on a person found guilty of damaging an SSSI or of breaching an NCO or LMO. This would require restorative action to repair damage to an SSSI, in so far as that may be possible. The court would have to consider advice from SNH before making a restoration order. Section 39 would also provide that not complying with a restoration order was in itself an offence, which would attract the same penalties as the other offences created by the Bill.

PART 3: PROTECTION OF WILDLIFE

INTRODUCTION

Part 3 of the Nature Conservation (Scotland) Bill 2003 seeks to amend Part I (Wildlife) of the Wildlife and Countryside (1981) Act. In doing so, it builds upon a variety of existing amendments to the 1981 Act, including most recently changes implemented by the Criminal Justice (Scotland) Act 2003. Schedule 6 of the Bill sets out amendments and repeals covering, *inter alia*:

- offences involving recklessness
- new controls on possession of wildlife specimens obtained illegally outwith Britain
- protection for capercaillie during the breeding season
- revision of various statutory defences
- enhanced protection for cetaceans and basking sharks
- offences of "causing or permitting"
- extended controls on the use of snares
- offence of possession of pesticides without reasonable excuse
- new provisions setting out the powers of government Wildlife Inspectors
- revision of definitions and terminology in the 1981 Act
- various consistency and EU compliance changes to the 1981 Act

Criminal Justice (Scotland) Act 2003

The Criminal Justice (Scotland) Act 2003 brought in some of the amendments to the Wildlife and Countryside (1981) Act that were originally intended to be implemented by this Bill. Schedule 3 of the Criminal Justice (Scotland) Act 2003, which came into force on 26 March 2003, sets out amendments concerning wildlife offences.

In particular, the 2003 Act introduced:

- custodial sentences
- increased financial penalties
- a specific power of arrest
- wider availability of search warrants, and
- reform of the existing time limit on bringing prosecutions more than six months after the offence has been committed

The Scottish Executive decided to implement the changes through the Criminal Justice Act 2003, rather than in this Bill following a number of high profile incidents in Spring 2002, which included the theft of osprey eggs, and the poisoning of white-tailed eagles. Evidence was taken on these issues by the Justice 2 Committee in December 2002 (Scottish Parliament 2002).

Key policy components

Recklessness[13] and "Causing or Permitting"

The principle of "recklessness" is intended to be inserted into relevant sections[14] of Part 1 of the 1981 Act. This would widen the existing offences of "intentionally" killing, taking, destroying or

[13] The meaning of recklessness is discussed on page 19 "Offences"

disturbing protected wildlife. For example, it is proposed that Section 1 (protection of wild birds etc), subsection (1) of the 1981 Act is to be amended to:

Subject to the provisions of this Part, if any person intentionally or recklessly—

(a) kills, injures or takes any wild bird

(b) takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or

(c) takes, or destroys an egg of any wild bird

he shall be guilty of an offence

The Scottish Landowners Federation (SLF) (Scottish Executive 2003a) welcomes the intention of this component. However, they have concerns that actions which are seen to be "reckless" for the moderately knowledgeable may not be for a larger (less knowledgeable) cross-section of the population. Similarly, concerns have been raised[15] that those taking recreational access to the countryside may be accused of wildlife crime as a result of unintentional actions close to protected species or sites. Additionally, it may be possible for land managers to use the introduction of this clause to restrict access and threaten visitors with prosecution.

The British Association for Shooting and Conservation (Scottish Executive 2003a) accept that reckless behaviour is unacceptable, but have reservations about the implications of an individual being expected to be aware "of the presence of a protected species". In relation to "causing or permitting" the commission of an offence, they are sceptical about a Court's ability to establish culpability under the proposed legislation and believe that the addition of this proposal would not provide any practical protection against pressure from employers.

In their responses (Scottish Executive 2003b) many other consultees agreed with, or strongly supported the provisions[16], particularly where offences are "commissioned or encouraged" by employers. For example, in 1995 a Perthshire gamekeeper was fined £2500 after admitting laying hen's eggs spiked with the poison alphachloralose. Additionally, the landowner was also charged with supplying, and allowing the use of the poison. The case against the landowner eventually collapsed, because under current legislation a time bar comes into effect six months after the last date an alleged offence has occurred (Scotland on Sunday 1995). This is now to be amended. The Explanatory Notes state:

> *In the case of environmental and wildlife offences, it can be some time before the offence is in fact discovered and this provision ensures that an offender cannot readily escape prosecution simply by covering up his actions for 6 months. A time limit of 3 years is applied instead.*

Controls on the use of snares

Snaring is already regulated under section 11 of the 1981 Act. The Bill would introduce further controls in the use of snares, whilst retaining snaring as a legitimate method of taking animals such as foxes or rabbits, which are causing problems for land managers. Proposed

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[14] Section 1 (protection of wild birds etc), subsection (5), Section 3 (areas in which wild birds are given special protection), subsection (1)(a), Section 9 (protection of certain wild animals), subsections (1) and (4), and Section 13 (protection of wild plants), subsections (1)(a) and (b)

[15] Mountaineering Council of Scotland (MCofS), Ramblers Association Scotland (RAS)

[16] Scottish Society for the Protection of Animals (SSPCA), Association of Chief Police Officers (ACPO), Association of Chief Police Officers in Scotland (ACPOS), International Fund for Animal Welfare (IFAW), and the Capercaillie Biodiversity Action Plan Steering Group (CBAPSG).

amendments would regulate certain methods of killing or taking wild animals, including the operation of some types of snare.

It is proposed to amend Section 11 of the 1981 Act (prohibition of certain methods of killing or taking wild animals) by:

- extending it so as to create a new offence of setting in position or otherwise using any self-locking snare
- prohibiting the calculated placement or setting of lawful snares so as to deliberately cause unnecessary suffering (for example by intentionally injuring, maiming or killing) to any animal (whether or not living wild)
- Creating an offence of setting a snare which is likely to cause injury to any animal which enjoys special protection by virtue of being listed in schedule 6 of the 1981 Act.
- Inserting a duty to inspect, or instruct the inspection of a snare at least once a day at intervals of no more than 24 hours
- Obliging a person checking a snare to release or remove an animal caught by the snare (and to make it an offence to leave an animal – whether alive or dead – in the snare)
- Prohibiting the possession or sale of a self-locking snare
- Prohibiting the possession and operation of any snare on land where its use is not authorised by an owner or occupier
- Allowing Scottish Ministers to specify a range of technical matters in relation to the design and construction or the setting and operation of devices. This will allow the Executive, for example, to define a self-locking snare and, potentially, to set technical specifications for the design and construction of snares

These changes are designed to limit the accidental catch of protected, rare or endangered species. In the Policy Memorandum (2003. p8), the Executive said that, "where they are used properly, snares should continue to provide a legitimate and practical method of pest control."

There is broad support[17] (Scottish Executive 2003a) for these measures, although some[18] believe that they do not go far enough and in certain cases may be difficult to enforce. The RSPB recommend that it should be an offence to use snares in woodland that capercaillie[19] are known to frequent, and that SNH should be obliged to notify owners and occupiers where capercaillie are found regularly. They also recommend that proposals suggested under this section should apply not just to snares but to all forms of traps permitted under the 1981 Act.

Others[20] (Scottish Executive 2003a) do not agree with the proposal to create a new offence of possessing a self-locking snare. If, for example, a keeper retrieves a broken snare, which has become self-locking through rusting or damage, he is then (technically) breaking the law by being in possession of it. The potential for malicious prosecutions where non-targets have been accidentally captured is also a concern for gamekeeping interests[21].

Two bodies[22] advocated the licensing of snares. The SSPCA further commented that there was a need for snares to be checked twice within every 24 hour period (as opposed to once).

[17] RSPB, Game Conservancy Trust (GCT), Scottish Gamekeepers Association (SGA), Royal Society of Edinburgh (RSE), UKELA, CBAPSG
[18] IFAW
[19] a large woodland grouse, thought to be at risk of local extinction in Scotland
[20] SGA
[21] GCT
[22] SSPCA, SAC

Additionally, they proposed that the use of low velocity air rifles as a method of killing or taking should be licensed.

A complete ban on the use of snares was advocated[23], and many others[24] stated that they would prefer live trapping, or the shooting of larger animals. The Policy Memorandum (2003. p8) states that:

> *This is not a straight forward issue and a range of bodies are likely to press for an outright ban on snaring. The case they present is one which cannot be dismissed out of hand. Nonetheless, the Executive believes – after full consideration of the arguments – that the policy being pursued in the Bill is the correct one and strikes the right balance.*

Better Implementation of European Obligations

To maintain effective compliance with the Birds and Habitats Directives (Council Directives 79/409/EEC and 92/43/EEC) (EU 1992a), it is proposed to extend the definition of wild birds in the 1981 Act to include the killing, taking or selling of specimens both within and outwith EU member states. This would allow the prosecution of those who steal or buy specimens abroad for private collections in Scotland.

Additionally, the Bill proposes to repeal Section 5(5) of the 1981 Act. This would remove the right to net or trap wild birds (such as duck or pheasant). In cases where it is appropriate and justifiable to continue using nets and traps, it will be allowed under licence. The authorisation of such methods under Section 5(5) amounts to a standing derogation from Article 9 of the EU Birds Directive (79/409/EEC).

There is general support[25] for the need to extend the current definition of wild birds and to ensure compliance with EU law. In support of this, SSPCA highlighted evidence of UK egg thieves often travelling to other European countries to pursue their activities. On trapping, the RSPB recommend that an individual convicted of misusing a licensed trap, or breaching the conditions of the licence, should be prohibited from applying for a further licence for five years.

BASC feel strongly that Section 5(5) should be retained as it translates many of the provisions and derogations contained in the EU Birds Directive (79/409/EEC) (EU 1992) into national legislation. They also note that the practice of "catching-up" game birds (almost exclusively pheasants), as breeding stock for further stocking is threatened and strongly oppose any measures that will put an end to this game management practice. BASC has argued that it is not in fact clear that licensing under section 16(1) of the 1981 Act would be a realistic alternative option if section 5(5)(c) is repealed.

Lek sites

Breeding season displays by capercaillie are known as "lekking". Lekking involves courtship and sexual display in which male birds congregate, usually on a traditionally used site, for the purpose of attracting female birds for mating. Disturbance of lek sites when birds are displaying can therefore have a damaging impact on breeding and ultimately the numbers of this endangered species. Additional protection for capercaillie whilst lekking is to be inserted into Section 1 (protection of wild birds etc) of the 1981 Act as follows (the Bill. p44):

[23] League Against Cruel Sports
[24] Advocates for Animals, National Federation of Badger Groups, WTS, Perth & Kinross Council
[25] RSPB, UKELA, Professor Reid, SAC, SSPCA

Subject to the provisions of this Part, any person who intentionally or recklessly disturbs a capercaillie (tetrao urogallus) while it is leking shall be guilty of an offence

This also applies to any person who knowingly causes or permits the disturbance of a lek.

In their consultation response, LINK (Scottish Executive 2003a) ask whether the concept of lek could be included in a broader definition of a communal gathering site for protected birds. This might apply to communal winter roosting sites of birds of prey, such as Hen harrier, Red Kite and White-tailed Eagle. ACPOS (Scottish Executive 2003a) stress that defining a lek may be difficult.

Following representations from a number of interested bodies, including the FTA and members of the CBAPSG, the Executive revised its original proposal, which in the consultation draft of the Bill had accorded protection to lek sites as sites, rather than to active lekking displays. The Bill now focuses more directly on prohibiting disturbance of birds whilst lekking is in progress.

In addition to protection for lek sites, three bodies[26] called for a strengthening of legislation to protect nest sites (especially those of raptors used each year). This is required by the EU Birds Directive (79/409/EEC) (EU 1992) and recognised by a proposal from the DETR Raptor Working Group (2000). The RSPB called for an amendment to the 1981 Act to make the damage or destruction of a regularly used nest site an offence (irrespective of whether the nest is in use at the time of that damage or destruction).

New protection measures for Wild Animals

The protection of cetaceans (whales, dolphins and porpoises), as well as basking shark (cetorhinus maximus) would be improved by the following insertion in Section 9 (protection of certain wild animals) (the Bill. P47):

subject to the provisions of this Part, any person who, intentionally or recklessly, disturbs or harasses any wild animal included in Schedule 5 as a –

(d) dolphin, whale or porpoise (cetacea); or
(e) basking shark (cetorhinus maximus)

shall be guilty of an offence

Many consultation responses[27] (Scottish Executive 2003a) strongly supported these proposals. However one[28] proposed a further definition of "wild animal" to include the offspring of any wild animal not legally in captivity.

Some concern[29] was voiced over the enforcement of these proposals. It was suggested that businesses involved with whale watching should be licensed by SNH, and that steps should be taken to stop the indiscriminate killing of cetaceans and basking sharks in fishing nets. Similarly, it was suggested that Fisheries Protection Officers and/or Coastguards should be designated as competent bodies and receive training which will allow them to recognise infractions and bring them to court.

[26] SNH, RSPB, LINK
[27] ACPO, SSPCA, NTS, IFAW, and Scottish Biodiversity Forum (SBF)
[28] Buglife
[29] Stonefield Farms, SAC, Hebridean Whale and Dolphin Trust,

Improved protection for Wild Plants

Section 13 (protection of wild plants) of the 1981 Act would be amended to improve the protection afforded both to specially protected plants (those on Schedule 8 of the 1981 Act) and to wild plants in general. The special case of seeds and spores is addressed. Any potential ambiguity in relation to the status of fungi (which are not, in strict biological terms, plants) is removed by the Bill.

Once again, most parties[30] strongly supported these proposals in their consultation responses; however it was anticipated[31] that success would depend on site inspections and improved enforcement.

Plantlife Scotland (2003) suggested that the Bill should include a mechanism to allow licensed collection of certain wild seeds for commercial sale (where it can be shown that this does not threaten populations of these species). This is to meet demand whilst preventing the collection of bulbs and other damage to wild populations. The use of seeds taken from verified native populations is important in terms of safeguarding biodiversity, since alternative sources of seed would involve introducing new genetic material or even entirely non-native species to sensitive locations.

The more general need for legislation to control the spread of invasive non-native plants was also highlighted[32]. To remain in accordance with the provision of the CBD (1992) on alien species, it was recommended that the policy solutions put forward in DEFRA's Review of Non-native Species Policy (2003) should be implemented as a matter of urgency. These include:

- designating, or creating a single lead organisation to ensure consistency of application in policy
- develop comprehensive, accepted risk assessment procedures to assess the risks posed by non-native species, and identifying and prioritising prevention action
- develop codes of conduct to help prevent introductions for all relevant sectors in a participative fashion involving all relevant stakeholders
- develop a targeted education and awareness strategy involving all relevant sectors
- revise and update existing legislation to improve handling of invasive non-native species issues
- establish adequate monitoring and surveillance arrangements for non-native species in Great Britain

The Executive undertook a mini-consultation (which concluded on 16 September) on the potential need for legislative change to tackle non-native species. The Minister subsequently wrote to the Convener of the Environment and Rural Development Committee to signal that the outcome of the consultation could, potentially, be reflected in Executive amendments to be brought forward at Stage 2 of the Bill's parliamentary progress.

Possession of pesticides

A new section on the possession of pesticides is proposed to be added to the 1981 Act. The Bill proposes that (the Bill. p50):

> *Any person who is in possession of any pesticide containing one or more prescribed active ingredient shall be guilty of an offence.*

[30] ACPO, UKELA, RSPB, SBF, SAC, Plantlife Scotland
[31] SAC
[32] Plantlife Scotland, LINK, Botanical Society of the British Isles

However, a person shall not be guilty of an offence if they have a reasonable excuse for possessing the pesticide. This means for the purposes of any agricultural or horticultural operation as prescribed by the Scottish Ministers, and the relevant UK and EU regulations.

This proposal is particularly strongly supported by RSPB Scotland (2003b) as a mechanism to deal with the threat presented by illegal poisoning of birds of prey.

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