

# **HABITATS AND BIRDS DIRECTIVES**

**Nature Conservation: Implementation in Scotland of  
EC Directives on the Conservation of Natural Habitats  
and of Wild Flora and Fauna and the Conservation of  
Wild Birds ('The Habitats and Birds Directives')**

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SCOTTISH EXECUTIVE

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SCOTTISH EXECUTIVE  
Rural Affairs Department

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EC Directives on the Conservation of Natural Habitats  
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**Revised Guidance Updating Scottish Office Circular No. 6/1995**

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# **NATURE CONSERVATION: IMPLEMENTATION IN SCOTLAND OF EC DIRECTIVES ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FLORA AND FAUNA AND THE CONSERVATION OF WILD BIRDS ("THE HABITATS AND BIRDS DIRECTIVES").**

## **INTRODUCTION**

1. This Circular replaces Scottish Office Circular 6/95 which provided guidance on the implementation of Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna (the Habitats Directive) and Directive 79/409/EEC on the Conservation of Wild Birds (the Birds Directive), in Scotland.

Revision of the guidance in Circular 6/95 is necessary because of certain changes in policy. In particular:

- it is no longer policy that all European sites selected under the Habitats and Birds Directives must also be notified as Sites of Special Scientific Interest;
- the "conservation objectives" of European sites are broader than was thought in 1995; the European Commission has taken the clear view that all habitats and species which occur at a significant level on any Special Area of Conservation should be taken into account when the effects of plans and projects on that site are assessed;
- Devolution and other institutional changes have made revision of the 1995 circular desirable.

This circular should be read in the context of NPPG 14 on the Natural Heritage, which sets out for planning authorities overall policy on protection of the natural heritage, including European sites selected under the Birds and Habitats Directives.

## **Devolution**

2. The Scottish Parliament took up its full legislative powers on 1 July 1999, following on the full commencement of the Scotland Act 1998. In terms of that Act, the Scottish Parliament has legislative competence, and the Scottish Ministers have ministerial competence, in relation to environmental matters such as natural heritage. Power to implement these directives now, therefore, lies with the Scottish Ministers.

3. The Conservation (Natural Habitats, &c.) Regulations 1994 (the "Habitats Regulations"), which implement the Habitats Directive in Scotland, England and Wales, remain in force.

## **BACKGROUND TO THE DIRECTIVES**

4. Sites selected by the European Commission for designation as Special Areas of Conservation (SACs) under the Habitats Directive or classified as Special Protection Areas (SPAs) under the Wild Birds Directive are referred to collectively in the Regulations as European sites. The network of sites across the European Community is known as Natura 2000.

## **The Habitats Directive**

5. The Habitats Directive aims to contribute to the conservation of biodiversity by requiring Member States to take measures designed to maintain or restore certain natural habitats and wild species at a favourable conservation status in the Community, giving effect to both site and species protection objectives. The Directive transposes the Bern Convention on European Wildlife and Natural Habitats into Community law. Article 7 modifies the Birds Directive in relation to the protection of SPAs. The Habitats Directive is reproduced as **Annex A**.

## **The Wild Birds Directive**

6. The Birds Directive applies to birds, their eggs, nests and habitats. It provides for the protection, management and control of all species of naturally occurring wild birds in the European territory of Member States (Article 1); requires Member States to take sufficient measures to preserve a sufficient diversity of habitats for all species of wild birds naturally occurring within their territories (Articles 2 and 3) in order to maintain populations at ecologically and scientifically sound levels; and requires Member States to take special measures to conserve the habitat of certain species of conservation concern and of migratory species (Article 4). The Birds Directive is reproduced as **Annex B**.

## **Key General Duties and Obligations**

7. The Habitats Regulations set out some key general duties and obligations:-

- duties are placed on the Scottish Ministers and Scottish Natural Heritage (SNH) to exercise their nature conservation functions to secure compliance with the requirements of the Habitats Directive (Regulation 3(2));
- the Scottish Ministers and all relevant public authorities are required to exercise their functions relevant to **marine conservation** so as to secure compliance with the requirements of the Habitats Directive (Regulation 3(3));
- the Scottish Ministers and all competent public authorities are required in the exercise of any of their functions to have regard to the requirements of the Habitats Directive (Regulation 3(4));
- public authorities are obliged not to permit developments or operations damaging to an interest to be protected within a European site, unless there are imperative reasons of overriding public interest;
- public authorities such as local authorities and the Scottish Environment Protection Agency (SEPA) are obliged to review existing planning permissions which have not yet been implemented and analogous consents, and to modify or revoke them if their effect would be damaging to the conservation interests of European sites.

## **Site Selection and Designation**

8. SACs are selected in accordance with the scientific criteria set out in the Habitats Directive. In the absence of specific criteria in the Wild Birds Directive, however, selection guidelines for SPAs were produced by the UK Government and the statutory nature conservation agencies and published by the Joint Nature Conservation Committee (JNCC) in

June 1999. These guidelines are set out at **Annex C** and will be followed by explanatory notes giving the rationale for each SPA and the qualifying species.

9. Following the publication of the SPA selection guidelines, a fundamental review of what sites should be selected as SPAs was carried out at UK level. 139 Scottish sites were identified as meeting the selection criteria and recognised as being the most suitable sites for listed species. A list of classified and potential SPAs is attached at **Annex D I**, indicating the relevant local authority (or authorities).

10. The UK Government submitted a list of 340 candidate sites to the European Commission for consideration as SACs, including 131 Scottish sites plus 3 sites that straddled the border with England. Having considered the list at meetings in Kilkee, Ireland and in Paris in late 1999, in common with all the other Member States at the meeting, the Commission found the UK list insufficient for a number of habitats and species. In response to this finding, the UK and devolved administrations and the statutory nature conservation agencies are revisiting the UK list with a view to submitting further candidate SACs to the Commission. A list of sites which have been proposed to the European Commission as candidate SACs, and of sites on which Ministers have announced an intention to consult about possible proposal to the Commission as candidate SACs, is attached at **Annex D II**. After a further "moderation" process to establish the sufficiency of Member States' proposals, the Commission will publish a list of "Sites of Community Importance" which should be designated as SACs by 2004. These sites are protected by the Habitats Regulations as soon as they are published on the list of "Sites of Community Importance"

11. Case law in the European Court of Justice since the introduction of the Directives has indicated that the identification and designation of sites must be based only on scientific criteria.

### **Protection of SAC and SPA Interests**

12. The Habitats Regulations place a statutory duty on planning authorities and other competent authorities to meet the requirements of the Habitats Directive. The Regulations require that, where an authority concludes that a development proposal unconnected with the nature conservation management of a Natura 2000 site is likely to have a significant effect on that site, it must undertake an appropriate assessment of the implications for the conservation interests for which the area has been designated. Further guidance is set out in **Annex E Appendix A**. In cases where an assessment of the proposal is also required under the Environmental Impact Assessment (Scotland) Regulations 1999, authorities should ensure that the environmental statement meets the requirements of both sets of regulations.

13. As the Directive requires the protection of the interests for which the area has been designated, the need for appropriate assessment extends to proposed developments outwith the boundary of the designated area. Authorities should consult SNH if they are in any doubt about whether a development outside the boundaries of a Natura 2000 site could have a significant effect on the site.

14. A development that would have an adverse effect on the conservation interests for which a Natura 2000 site has been designated should only be permitted where:

- there is no alternative solution; and

- there are imperative reasons of over-riding public interest, including those of a social or economic nature.

An “alternative solution” could be the identification of suitable and available sites that are reasonable alternatives for the development or finding different approaches that would have a lesser impact. Scottish Ministers expect there to be few cases where it is judged that imperative reasons of over-riding public interest will allow a development to proceed which will have an adverse effect on the integrity of the internationally important SPA or SAC designations. This applies equally to new proposals and to developments with valid existing permissions. The judgement will involve an assessment of the importance of the development and whether it is sufficient to override the nature conservation importance of that site. Developments must pass the most stringent tests. In many cases, it may be possible to negotiate a sustainable development solution that would remove or reduce apparent conflict. But where such possibilities have been explored and conflict remains, and where the local authority believes the development should proceed, the Habitats Regulations set out a procedure by which Scottish Ministers (and in certain cases affecting priority habitats or species as defined in Article 1 of the Habitats Directive), the European Commission may consider whether the over-riding public interest considerations should apply.

15. Where there is no alternative solution, each case will be judged on its merits but the following guiding principles will be relevant in deciding whether imperative reasons of overriding public interest are demonstrated:

- a need to address a serious risk to human health and public safety;
- the interests of national security and defence;
- the provision of a clear and demonstrable direct environmental benefit on a national or international scale;
- a vital contribution to strategic economic development or regeneration;
- where failure to proceed would have unacceptable social and/or economic consequences.

When considering cases against these principles, in general, projects of national importance are most likely to be judged as giving rise to imperative reasons of overriding public interest. Important regional projects might also be so judged. While projects of more local significance are not ruled out, it is less likely that their potential benefits will be considered to override the nature conservation value of the sites.

16. The relative importance of the SPA or SAC within the European network will also weigh in the balance of considerations. Some sites are designated for habitat types and species that are listed as “priority” under the Habitats Directive. These must be subject to particularly stringent scrutiny. In these cases the Directive requires considerations other than human health and public safety or overriding environmental reasons to be subject to an opinion from the European Commission.

17. Where the importance of the development is judged to outweigh the nature conservation importance of the site, compensatory habitat measures must be taken to maintain the coherence of the Natura 2000 network. If the habitat types or species affected are relatively abundant and only part of the national resource has been designated or proposed for designation, it may be possible for an area of similar quality and character to be identified for designation which could, at least in part, replace the loss to the network. This will become



increasingly difficult with rarer habitat types and species; in the cases of the most rare especially, all suitable sites are likely to already be designated or proposed for designation. In these cases the possibilities for restoration of damaged habitat or creation of replacement habitat will need to be considered. This may be costly and often technically difficult or ecologically untried. In certain cases the habitat affected may be irreplaceable. Wherever possible, Scottish Ministers would expect the developer, under 'polluter pays' principles, to bear the cost of compensatory measures. If re-creation or restoration is specified as compensatory measures, Scottish Ministers would expect the area concerned to become, within a clear timescale, of sufficient quality to ensure that the coherence of the Natura 2000 network is protected.

18. It is important to recognise that the Habitats Directive does not impose a general prohibition on development in or adjacent to Natura 2000 sites. Many wildlife species and habitats readily co-exist with human activity, and they may well rely upon it. Thus, for the most part, uses that have continued sustainably over many years, and may have contributed to the high conservation value for which the area is recognised, will accord with the aims of the Directive and may continue unchanged. Moreover, proposals for new development need to be assessed for their impact on the protected interests. Assessment may indicate that there would be no adverse effects on these interests.

19. The majority of land-based candidate SACs and classified SPAs are also notified as Sites of Special Scientific Interest (SSSI) under the nature conservation legislation contained in the Wildlife and Countryside Act 1981, and related provisions in the Countryside Act 1968. However, in line with evolving policy on the development of the SSSI system in Scotland some European sites may instead be protected by positive management schemes (the contractual measures provided for in Article 6.1 of the Habitats Directive) or may be afforded European protection in advance of SSSI notification.

### **Potential SPAs and SACs**

20. Some sites have been identified as potentially qualifying for SPA classification but are currently subject to further survey or consultation work before decisions can be taken about their classification. Similarly, Ministers have identified further sites that they will consult about before deciding whether they should be proposed to the European Commission as candidate SACs. For the purpose of considering development proposals or other consent regimes affecting them, potential SPAs and potential SACs should be treated in the same way as classified SPAs. Sites which the Commission, the UK Government and the Scottish Ministers have agreed as Sites of Community Importance (within the meaning of Article 4(2) of the Habitats Directive) and which are to be designated as SACs, attract the same legal protection as designated sites.

21. When consultations take place about possible SPA or SAC designations, planning authorities will be asked to consider all extant planning permissions and analogous consents that may affect the proposed area (i.e. those permissions that have not been implemented at all, and those that have not been completely implemented). They should consider for each whether that consent or the implementation of that permission would have a significant effect on the ecological value of the site. If so, they should say so in their response to the consultation.

## **THE EFFECTS OF THE HABITATS REGULATIONS**

22. Detailed advice and guidance on the provisions of the Habitats Regulations is attached as **Annex E**.

### **The Effects of Nature Conservation Provisions**

23. All European sites, including those that are not SSSIs, are protected by the duties placed on competent authorities not to consent to plans or projects that would damage the conservation interest of the site. They may be protected by contractual measures (including management agreements with the proprietors or tenants). In addition:

- Ministers may introduce on any European site a Special Nature Conservation Order prohibiting any operation which would be likely to damage the conservation interest of the site, and
- SNH may make byelaws to protect European sites from damage by parties other than the owner/occupier, and these byelaws may also apply to adjacent land.

24. European sites underpinned by SSSI notifications are subject to the following provisions which strengthen the SSSI protection regime:

- SNH are given the power to amend the lists of Potential Damaging Operations (PDO) which form part of an SSSI notification when this is necessary to bring them into line with the ecological objectives of a European site;
- this may lead to SNH on occasion having to modify or revoke PDO consents granted on an SSSI before it had become a European site;
- the existing time limit under the Wildlife and Countryside Act 1981 after which a PDO notified to SNH may be carried out without SNH's consent does not apply to a Special Nature Conservation Order protecting a European site. In many such cases SNH will in practice already have offered a management agreement, and affected owners/occupiers may seek arbitration if they disagree with the financial terms of the management agreement offered;
- if no management agreement can be concluded, or if an agreement has been breached so that the satisfactory management of the site has been prevented or impaired, SNH will in extreme circumstances be obliged to initiate compulsory purchase procedures. If this should become necessary, the area or interest to be purchased would be as limited as possible. The Scottish Executive expects SNH to make every effort to address the neglect or inappropriate management of land by offering voluntary management agreements;

### **Species Protection**

25. The Habitats Directive gives effect to the aspects of the Bern Convention that do not relate to birds. The species protection provisions of the Wildlife and Countryside Act 1981 - which are described in detail in Annex 2 to Circular Env 13/1991 - were in most respects consistent with the requirements of the Directive though some changes were necessary. The Habitats Regulations implement the requirements of the Directive for those species which are covered by the Directive through provisions which broadly parallel certain sections of the

1981 Act. In particular, Regulations 38-46 and Schedules 2-4 make provision to the following effect:

- addition of "disturbance" to the list of offences affecting protected animal species (for species not covered by the Directive still found in Section 9 of the 1981 Act) and the replacement of "intentionally" by "deliberately";
- the deletion of "intentionally" from the offence of damage or destruction of places of shelter or protection (breeding sites or resting places);
- the addition of "cutting" and "collecting" to the list of offences concerning protected plant species (otherwise found in Section 13 of the 1981 Act);
- the addition of all stages of the biological cycle to plant protection provision;
- the addition of a new proviso for the issue of licences under the present Section 16(3) to ensure that they cannot be issued unless there is no satisfactory alternative and the action authorised will not be detrimental to the maintenance of the species population at a favourable conservation status;
- to provide that, subject to the above proviso, licences can be issued for imperative reasons of overriding public interest;
- the addition of certain species to the Regulations' equivalent of Schedule 6 of the 1981 Act to ensure that all British native Annex IV and V mammals and fish are subject to Article 15 of the Directive (which prohibits particular means of taking or killing wild animals, and any form of taking or killing a wild animal from an aircraft or moving motor vehicle).

26. The requirements of the Birds Directive to protect, manage and control all species of naturally occurring wild birds are met by the relevant sections of the Wildlife and Countryside Act 1981.

### **The Effects of Provisions Relating to Planning Permissions, Permitted Development Rights and Analogous Consents**

27. The Habitats Regulations set out measures to ensure that the Habitats Directive is implemented in the domain of planning law and other consent regimes operated by competent authorities (e.g. discharge consents, waste management licensing, integrated pollution control, construction of roads and pipelines, construction of electricity lines, and extraction of minerals by marine dredging). Competent authorities are obliged not to consent to operations or developments damaging to European sites. In outline:

- Authorities are obliged not to permit developments or operations damaging to the integrity of European sites unless there are imperative reasons of overriding public interest for the development to be undertaken;
- Authorities are obliged to review existing permissions which have not yet been implemented, and to modify or revoke them if their implementation would be damaging to the conservation interests of European sites (further guidance on this is given below);
- Provision already exists under the Town and Country Planning (Scotland) Act 1997 for developers to be compensated when a planning permission is modified or revoked;

- The Scottish Ministers must be notified if an authority proposes to permit a damaging development or operation to go ahead for the reasons of overriding public interest set out in the Directive;
- The General Permitted Development Order (GPDO) does not have effect to grant permission for developments damaging to the integrity of European sites. If a development permitted under that Order is likely to have a significant effect on the site and is not directly connected with or necessary to its management, specific approval for the development must be sought from the planning authority. Similar provision is made with regard to development in Simplified Planning Zones and Enterprise Zones. If a developer is in doubt about whether a proposed development permitted under the GPDO may affect a European site, he may consult SNH.

### **Review of extant permissions**

28. The obligation to review existing permissions arises once SPAs have been classified and when candidate SACs are adopted by the European Commission as Sites of Community Importance (SCIs). It may be appropriate, however, to commence an initial review once the site becomes a candidate SAC, i.e. when it is sent to the Commission.

29. Under the Regulations, where such a review takes place, the relevant planning authority must consult Scottish Natural Heritage (SNH). The following possibilities arise:

- i) The conclusion may be reached on the advice of SNH that permission is not likely to have a significant effect on the site or, following an assessment, that the permission will not have an adverse effect on site integrity. In such cases the permission may be implemented as planned.
- ii) Alternative approaches through agreed conditions or adaptation to the means of working might be adopted so that the risk of an adverse effect on site integrity is removed.
- iii) An alternative to the existing permission might be agreed by identifying a different area for which planning permission could be given (subject to the normal planning processes and considerations) which would not be damaging to that or any other nature conservation site.
- iv) Permissions might lapse through time expiry or, for minerals permissions, under Schedule 9 of the Town and Country Planning (Scotland) Act 1997. Planning authorities are encouraged to exercise their powers under Schedule 8 part 1 of the Town and Country Planning (Scotland) Act 1997 to make orders prohibiting the resumption of mineral working in appropriate cases.
- v) The developer might voluntarily relinquish all or part of the planning consent in recognition of the value of the site for nature conservation.
- vi) If there are no alternatives and if the threat of damage to the site cannot be removed by any of the above means, in accordance with the Habitats Regulations the permission may still be implemented if there are imperative reasons of overriding public interest. (This may in certain cases require an opinion from the European

Commission.) All compensatory measures must be taken which are necessary to ensure that the coherence of the Natura 2000 network of SACs and SPAs is protected.

vii) If there are no imperative reasons of overriding public interest, the planning authority is obliged, under the Habitats Regulations, to revoke or modify the permission to remove the risk. In such cases, the planning authority would be liable to pay any compensation due to the developer. Scottish Ministers would consider sympathetically any requests from local authorities for the reimbursement of the costs of compensation necessarily incurred by them in modifying or revoking planning permissions under the Habitats Regulations, provided they were satisfied that discussion and negotiation had explored all the possibilities set out in i) –v) above.

## **Effects in the Marine Environment**

30. In summary the Regulations provide that:

- all relevant authorities (such as harbour authorities, local authorities, and SEPA) having functions relevant to marine conservation are obliged to exercise those functions to protect the integrity of European marine sites. This means, for instance, that authorities will be obliged not to authorise discharges where this would damage the conservation interests of such sites (unless there are imperative reasons of overriding public interest);
- Ministers are also obliged to use their powers to protect the conservation interest of European marine sites (with the particular implication in Scotland that Ministers will use their powers under the Inshore Fishing (Scotland) Act 1984 to regulate fishing activities where this is necessary to protect European marine sites);
- SNH will inform relevant authorities of the conservation objectives of marine sites. It will be for the relevant authorities to decide how to use their powers to protect the integrity of European marine sites;
- where there is a complex interaction of different management issues, the relevant authorities may co-operate in developing a management scheme for the site, which will be sent to SNH (although SNH has no authority over these other authorities). Co-operation with the users of the marine environment, such as fishermen, is essential;
- Scottish Ministers have reserve powers to direct that a management scheme should be established under a lead agency, to require prior Ministerial approval of the scheme, or to direct what should be in the scheme;
- byelaws may be made by SNH to protect marine sites but, as with the existing provisions for marine nature reserves, the byelaws must not interfere with private rights. However, SNH may enter into voluntary management agreements with the holders of private salmon fishing rights in the marine environment if it is desirable to restrict the exercise of those rights to protect the integrity of a European marine site.

None of the provisions affect international rights of innocent passage.

31 There has been considerable progress made towards developing draft marine management schemes, ahead of formal designation of marine SACs. The successful

collaboration of relevant organisations and bodies with an interest in individual candidate marine SACs has already provided useful experience for extension to other areas.

32. Following a recent decision of the English High Court, it has been established that the Habitats Directive should be applied beyond the 12 mile limit of the territorial sea. Implementation beyond the 12 mile limit is a reserved matter for the UK Government.

### **Marine SPAs**

33. Having completed the guidelines for terrestrial sites, the JNCC has been asked to co-ordinate and produce advice in relation to Special Protection Areas below the low water mark.

### **European Sites: Development Plans**

34. Development plans must clearly refer to European sites and structure plans must indicate their broad locations and local plans will identify the sites in detail. The accompanying texts should emphasise the very strict protection that must be afforded to the interests for which European sites are designated and the implications this has for development proposals which would adversely affect those interests. This will be particularly useful in local plans, which are a key reference source for the public and developers in making an early assessment of development proposals.

### **Conservation Outside European Sites**

35. Article 10 of the Habitats Directive requires Member States to endeavour, where they consider it necessary, in their land use planning and development policies to encourage the management of features of the landscape which are of major importance for wild flora and fauna. These features are those which, because of their linear and continuous structure or their function as "stepping stones" are essential for migration, dispersal and genetic exchange. Examples given in the Directive are rivers with their banks, traditional field boundary systems, ponds and small woods. The requirements of Article 10 are transposed by Regulation 37 of the Habitats Regulations.

36. Structure plans, local plans and Indicative Forestry Strategies prepared in accordance with the advice contained in SODD Circular 9/1999 should include policies that respect the need to conserve and enhance our natural heritage, in accordance with current national policy and the UK's international obligations. In particular, these policies should seek to improve the ecological coherence of the Natura 2000 network in accordance with the requirements of Article 10. Regulation 37 requires that such policies shall include policies encouraging the management of features of the landscape which are of major importance for wild flora and fauna. Suitable planning conditions and obligations may serve to promote such management.

37. NPPG 14 sets out for planning authorities overall policy for the protection of the natural heritage in designated areas and the wider countryside.

38. The protection of SSSIs that do not qualify as European sites will also have an important contribution to make in meeting the requirements of Article 10 of the Directive and Regulation 37 of the Habitats Regulations. Scottish Ministers are considering what improvements may be made to the SSSI system.

## **FURTHER LEGISLATION**

39. Consideration is also being given to the Habitats Regulations and the amendments necessary both to reflect the effects of devolution and to clarify some aspects in the light of experience since 1994.

## **RAMSAR SITES**

40. The UK is a contracting party to the Ramsar Convention on Wetlands of International Importance, especially as waterfowl habitat. The full text of the Convention is set out in Cmnd 6465 (May 1976). The Convention requires contracting parties to designate suitable wetlands ("Ramsar sites") for inclusion in a list of wetlands of international importance and to formulate and implement their planning so as to promote the conservation of the wetlands included in the list, and as far as possible the wise use of wetlands in their territory. The Convention also requires that where a contracting party in its urgent national interest deletes or restricts the boundaries of a wetland included in the list it shall as far as possible compensate for this by designating and protecting alternative wetland areas of similar habitat.

41. Ramsar sites, like SPAs and SACs, are approved by Scottish Ministers and are normally underpinned by SSSI notification. The procedure for listing Ramsar sites is the same as that for the classification of SPAs, and where, as in the great majority of cases so far, such sites are also considered for classification as SPAs, joint consultation and consideration is undertaken. Further criteria are under consideration to extend the Ramsar site designation to some wetland habitats listed in the Habitats Directive, potentially resulting in future joint SAC/Ramsar site designation for some areas.

42. For those sites which qualify for designation only under the Ramsar Convention (and not as SAC or SPA) the Scottish Executive has chosen as a matter of policy to apply the same considerations to their protection as if they were classified as SPAs. SNH will be able to advise planning authorities on the conservation of Ramsar sites.

## **ENQUIRIES**

43. Any enquiries about this circular should be addressed to Kathryn Farrell (0131 244 6549)

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## DETAILS OF THE HABITATS REGULATIONS

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## THE CONSERVATION (NATURAL HABITATS &C) REGULATIONS 1994

**NOTE:** This Annex provides advice and guidance on the content of the Conservation (Natural Habitats &c) Regulations 1994 and on related matters with particular reference to the implications for local authorities, SEPA and other public bodies. It is not however a definitive statement as to the law, which is a matter for interpretation by the courts.

### PART I (GENERAL)

1. Part I (Regulations 1-6) contains introductory provisions. Regulation 3(2) places a duty on Scottish Ministers and Scottish Natural Heritage (SNH) to exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive. These enactments include relevant provisions of the Wildlife and Countryside Act 1981, the Natural Heritage (Scotland) Act 1991 and the Habitats Regulations themselves.

2. Regulation 3(3) places a duty on any competent authority having functions relevant to marine conservation to exercise these functions, in relation to marine areas, so as to secure compliance with the requirements of the Habitats Directive. This key duty is the basis for securing the protection of European marine sites. The duty applies in particular to functions under certain enactments specified in Regulation 3(3).

3. Without prejudice to the duties specified above, Regulation 3(4) places a duty on every competent authority in the exercise of any of their functions to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of these functions. "Competent authority" is defined in Regulation 6 as including any Minister, Scottish Executive Department, public or statutory undertaker, public body of any description or person holding a public office.

4. Regulation 5 specifies which are relevant authorities in relation to a marine area or a European marine site. These are, if they have functions in relation to land or waters within or adjacent to that area or site:-

SNH: local authorities; harbour authorities; lighthouse authorities; SEPA; district salmon fishery boards.

### PART II (CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES)

#### European Sites

5. Regulations 7-15 make provision for the selection, registration and notification of sites to be protected under the Directive ("European sites").

6. Regulations 7-9 reflect the requirements of Articles 4 and 5 of the Directive in relation to site selection.

7. Regulation 10 defines the meaning of "European sites" as used in the Regulations. It is not confined only to SPAs which have been classified and SACs which have been designated. It includes also:-

7.1 sites of Community Importance which have been adopted by the Commission pending designation as SAC (Article 4 refers); and

7.2 sites hosting a priority habitat or species during the period of consultation between the Commission and the UK if the Commission, in exceptional cases, considers that the UK's list ought to have included these sites (Article 5 refers)

8. Regulations 11-15 (which are in part modelled on the arrangements under the Wildlife and Countryside Act 1981 for maintaining a register of SSSIs) provide for the compilation and maintenance of a register of European sites in Great Britain.

9. SNH is required under Regulation 13(1) to give notice to all owners and occupiers of land within a European site, to the planning authorities concerned and to such other persons or bodies as the Scottish Ministers may direct, as soon as practicable after it receives notice of inclusion of a site in the register or of an amendment.

10. Planning authorities are required to keep available at their principal office for free public inspection a register of all the European sites of which they have been given notice by SNH (Regulation 15(1)). They may also keep available for free public inspection at any other of their offices such part of the register as appears to them to relate to that part of their area in which such office is situated. Planning authorities are also required to supply on request, on payment of such reasonable fee as they may determine, certified true copies of any entry in the register kept by them.

### **Management Agreements**

11. Regulation 16 is based on SNH's existing power under Section 16 of the National Parks and Access to the Countryside Act 1949 in relation to nature reserves. It empowers SNH to enter into management agreements with any owner, lessee or occupier of land forming part of a European site, or land adjacent to such a site, for the management, conservation, restoration or protection of the site or any part of it.

12. Regulation 17 provides that any management agreements in force on or after the commencement of the Regulations which relate to land within or adjacent to a European site shall have effect as if entered into under Regulation 16. If SNH considers that an existing agreement requires amendment or replacement to secure compliance with the Directive in relation to a European site, it will seek to enter negotiations with the owner or occupier on a new or revised agreement. The agreements referred to in this Regulation are not only those entered into under Section 16 of the 1949 Act but also includes those under Section 15 of the Countryside Act 1968 and Section 49a of the Countryside (Scotland) Act 1967.

### **Control of Potentially Damaging Operations**

13. Regulations 18-21 build on the existing provisions of Section 28 of the Wildlife and Countryside Act 1981 to ensure the protection of European sites in accordance with the

requirements of the Habitats Directive. Notifications of SSSIs by SNH or its predecessors, including the list of potentially damaging operations (PDOs) which may not be carried out without consultation with SNH, remain in force (Regulation 21). Owners and occupiers are required to notify SNH of their intention to undertake a PDO and are then precluded for a period of 4 months (or longer by agreement) from carrying out the operation unless the proposal is in accordance with the terms of a management agreement between the owner/occupier and SNH or has the consent of SNH (Regulation 19). SNH is obliged not to consent to PDOs which are likely to have an adverse effect on the integrity of the site (Regulation 20(2)).

14. In some cases the current list of PDOs and consents given hitherto by SNH or its predecessors may not meet the Directive's requirements for the protection of a European site. Regulation 18 therefore enables SNH to amend SSSI notifications, including the PDO list: notice of any amendment must be given to every owner/occupier concerned and to the planning authority. The Scottish Ministers also expect SNH to notify them of any such amendments.

15. If SNH considers that there is a risk of the PDO going ahead without consent 4 months after notice of intent has been given to SNH, SNH must inform the Scottish Ministers at least one month before expiry of the consultation period (Regulation 20(4) and (5)). This is to enable the Scottish Ministers to consider whether other action (e.g. a special nature conservation order) should be taken to protect the site.

16. Regulation 21 requires SNH to review and, where necessary, modify or withdraw consents, including those given at the time of the original SSSI notification, unless they were given under a management agreement. Any changes must be notified to the owners/occupiers concerned. Owners/occupiers would, unless other action is taken, be able to carry out the PDO without consent 4 months after notice of withdrawal of consent. However in practice SNH is likely in such cases to offer a management agreement. If SNH considers that there is a risk of a PDO going ahead after 4 months, it is obliged to inform the Scottish Ministers at least one month before the expiry of the 4 month period.

### **Special Nature Conservation Orders**

17. Regulations 22-27 build on the existing provisions of Sections 29-31 of the Wildlife and Countryside Act 1981 which enable the Scottish Ministers to intervene to protect threatened sites of national importance.

18. Regulation 22(1) provides that the Scottish Ministers may, after consultation with SNH, make a Special Nature Conservation Order (SNCO) specifying PDOs(s) that may damage the features by reason of which the land is a European site. (In practice a SNCO is likely to be made only if there is a risk of a PDO going ahead without consent). Carrying out of the PDO(s) is then prohibited under Regulation 23(1) and (2) unless the owner/occupier has given written notice of intent and the operation is carried out either with SNH's written consent or in accordance with a management agreement. There is provision for objections or representations to be made to the making of a SNCO and in such circumstances the Scottish Ministers are required to hold a local inquiry or a hearing and to consider the objections or representations and the report of the inquiry before reaching a final decision on the Order. In any event they must reach a decision on what action (if any) to take in relation to the Order

within 9 months of its being made. The detailed procedure is set out in Schedule I to the Regulations.

19. Unlike land subject to Orders made under Section 29 of the 1981 Act, there is no time limit during which SNH may respond to a notice of intent to carry out a PDO on land subject to a SNCO. In practice therefore a SNCO, if confirmed, imposes an absolute obligation not to carry out without consent the operations specified in the Order. Regulation 24 provides that SNH can give consent to a PDO specified in a SNCO only if it has ascertained that the plan or project to which it relates would not adversely affect the integrity of the site. If consent is refused, SNH is obliged to give reasons for its decision; the owner or occupier of the land in question may then, within 2 months of refusal, require SNH to refer the matter to the Scottish Ministers. If the Scottish Ministers are satisfied that there being no alternative solutions, the plan or project concerned must be carried out for imperative reasons of overriding public interest, they may direct SNH to give consent to the operation. This Regulation does not apply to a site which is a European site by reason only of Regulation 10(1)(c).

20. Regulation 25 provides that where a SNCO is made SNH shall pay compensation to any person having an interest in an agricultural unit comprising land to which the Order relates only if the Scottish Ministers have given notice setting out both the Order and their decision either to take no action or to confirm or not to confirm the Order. This Regulation is based on the little used Section 30 of the 1981 Act. In practice SNH is likely to have offered a management agreement in response to a PDO to which it cannot give consent; and the offer of a management agreement (with recourse to arbitration if necessary) will remain on the table after a SNCO is made. The provisions relating to management agreements are not restricted to agricultural units so the Scottish Executive expects that Regulation 25 will seldom if ever be used.

21. Regulation 26 provides that an owner or occupier may be required to carry out restoration measures if convicted of carrying out a PDO without consent. Regulation 27 provides that where there is in place an order under Section 29 of the 1981 Act, this will in effect become a SNCO when the land becomes a European site. SNH is required by Regulation 27(3) to review any consent previously given under Section 29(5)(a) of the 1981 Act as regards its compatibility with the conservation objectives of the site, and it may modify or withdraw the consent. Under Regulation 27(4) SNH must give notice of any such modification or withdrawal of consent to every owner and occupier of land within the site who in SNH's opinion may be affected by it. SNH would be likely at that stage to indicate its willingness to enter into a management agreement with the owners and occupiers affected. Regulation 27(5) provides that the withdrawal or modification of a consent does not affect anything done in reliance on the consent before the modification or withdrawal takes effect.

## Byelaws

22. Regulation 28 empowers SNH to make byelaws for the protection of a European site; and these may apply to surrounding or adjoining land. Byelaws are subject to confirmation by the Scottish Ministers. Regulation 29 provides that byelaws cannot interfere with the rights of owners and occupiers of land to which the byelaws apply; the exercise of any public right of way or the exercise of any functions of statutory undertakers or district salmon fishery board; or the running of a telecommunications code system or the right of its operator.

23. Regulation 31 provides that byelaws already in force on a nature reserve will have effect as if made under Regulation 28 if that reserve becomes a European site.

### **Powers of Compulsory Acquisition**

24. Regulation 32 provides that SNH may initiate compulsory purchase procedures where:

24.1 no management agreement can be concluded between SNH and an owner or occupier on terms SNH considers reasonable; or

24.2 an agreement has been breached, so that satisfactory management of a European site has been prevented or impaired.

25. If this should become necessary, the area to be purchased will be as limited as possible. There is provision for arbitration to determine whether such a breach of a management agreement has occurred. An act or omission that can be and is remedied within reasonable time is not a breach. Where a site is threatened by a PDO the Scottish Executive expects that resort where necessary to a Special Nature Conservation Order will be sufficient to protect the site. The Scottish Executive also expects SNH to make every effort to address the neglect or inappropriate management of land by offering voluntary positive management agreements. Compulsory purchase is therefore a last resort measure which should only be necessary in extreme and exceptional circumstances.

### **European Marine Sites**

26. Regulations 33-36 make special provision as to the protection of European marine sites. They need to be read with the key duties set out in Regulation 3, in particular Regulation 3(3). The general framework for the protection of European marine sites is set out in Paragraph 22 of the main Circular. This approach is consistent with the Scottish Executive's policy towards coastal zone management generally and with the objectives and targets relating to marine conservation set out in the Biodiversity Action Plan published in January 1994. The Scottish Executive favours an approach which requires all relevant authorities to co-operate with each other and with other interests in developing management schemes for European marine sites. However it has no wish to see onerous or complex arrangements put in place if these are not necessary to achieve the appropriate management of a site. Moreover, the Scottish Executive hopes that management schemes will be developed from existing working arrangements where these cover European marine sites and that "re-inventing the wheel" will be avoided. The Scottish Executive considers that, as will be the case on land, existing uses of marine sites will usually be compatible with the requirements of the Directive. In particular the Directive encourages sustainable fishing and not the exclusion of all fishing activity.

27. European marine sites may include inter-tidal areas (the foreshore) or sub-tidal areas (permanently covered by the sea). The SSSI system extends to inter-tidal areas but not to the sub-tidal, and there is no equivalent marine designation; hence the need for the measures in the Regulations.

28. Regulation 33 empowers SNH to install markers indicating the existence and extent of European marine sites. It also requires SNH, as soon as possible after a site becomes a European marine site, to advise other relevant authorities as to:-

28.1 the conservation objectives of the site; and

28.2 any operations which may cause deterioration of natural habitats or the habitats for species, or disturbance of species, for which the site has been designated.

29. Regulation 34 provides that the relevant authorities, or any of them, may establish for a European marine site a management scheme under which their functions shall be exercised so as to secure compliance with the requirements of the Directive in relation to that site. As soon as a scheme has been established, or is amended, the relevant authority or authorities must send a copy to SNH.

30. Regulation 35 gives Scottish Ministers reserve powers to direct that a management scheme should be established under a lead agency; to require prior Ministerial approval of the scheme, or to direct what should be in the scheme.

31. Regulation 36 extends to European marine sites SNH's existing power under the Wildlife and Countryside Act 1981 to make byelaws for the protection of marine nature reserves. Such byelaws, which are subject to confirmation by the Scottish Ministers, cannot interfere with any functions of a relevant authority, functions conferred under an enactment or any private rights.

### **Nature Conservation Policy in Planning Contexts**

32. Paragraphs 26-37 of the main Circular provide advice on the Directives' implications for development plans both in relation to European sites and to the wider countryside and marine environment outside these designated areas. These paragraphs include advice on Regulation 37, which transposes Article 10 of the Habitats Directive.

33. NPPG 14 on Natural Heritage, referred to in paragraph 36 of the main Circular, and the Circular on Indicative Forestry Strategies offer detailed advice on planning issues relating to the natural heritage in a consolidated form.

### **PART III (PROTECTION OF SPECIES)**

34. Regulations 38-46 make provision for protection of species and habitats - see paragraph 24 of main Circular.

### **PART IV (ADAPTATION OF PLANNING AND OTHER CONTROLS)**

#### **Introduction/General Provisions for Production of European Sites**

35. Regulations 47-51 are core provisions that are of fundamental importance in understanding the other provisions of this Part of the Regulations. In particular, Regulation 47 provides that the requirements of:-

(a) Regulations 48 and 49, which specify the requirement on competent authorities to undertake appropriate assessments to consider the effect of plans or projects on European sites; and

(b) Regulations 50 and 51, which specify the requirement on competent authorities to review certain existing decisions and consents in relation to their effect on European sites

apply to the matters specified in Regulations 54-85. Thus the detailed provisions in those Regulations should be read with the general requirements of Regulations 48-51.

NB: By virtue of Regulation 48(7), this Part of the Regulations, does not apply to sites that are European sites only by reason of Regulation 10(1)(c). For general ease of understanding, however, the guidance below refers generally to European sites or to SPAs and SACs.

36. Regulations 52 and 53 make provision which is supplementary to the general purpose and effect of this Part. Regulation 52 applies in situations where more than one competent authority is involved in a plan or project. Regulation 53 transposes Article 6(4) of the Habitats Directive. Where a plan or project is agreed to, notwithstanding an assessment which indicates that it would be likely to have an adverse effect on the integrity of a European site, the Scottish Ministers must secure that any necessary compensatory measures are taken to protect the overall coherence of the Natura 2000 network. Such measures could include the designation of another area as a European site.

### **Duty to Review Extant Permissions**

37. Regulations 50, 51, 55 and 56 of the Regulations require the planning authority to review extant planning permissions<sup>1</sup> which are likely to have a significant effect on a site, either individually or in combination with other development, and to take any appropriate action. This requirement applies to:

existing SPAs when the Regulations came into force and those classified since then, (listed in Annex C to the main Circular);

future SPAs when they are classified; and

candidate SACs when they are listed as Sites of Community Importance by the European Commission. (Planning authorities will be notified when sites are listed).

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<sup>1</sup> Excluding planning permissions deemed to be granted by virtue of Section 57 of the Town and Country Planning (Scotland) Act 1997 in respect of developments authorised under the Pipelines Act 1962 or for which consent has been given under the Electricity Act 1989. Such reviews will be carried out by Scottish Ministers (see Regulation 55(3)). The planning authority must identify any other permissions deemed to have been granted under Section 57 which they consider fall to be reviewed and refer the matter to the Scottish Executive. If the Executive agrees with the planning authority on this, it must review the permission accordingly (see Regulation 55(4)). See also paragraph 41 below regarding permissions granted by Development Orders and Simplified Planning Zone and Enterprise Zone schemes, which are also excluded from review (Regulation 55(2)) refers

38. Planning authorities are required by Regulation 50(1) to review permissions as soon as is reasonably practicable. They should have identified any relevant permissions during the consultations referred to in paragraph 18 of the main Circular. The review will need to ascertain whether implementation of any permission which is likely to have a significant effect on the site, and is not directly connected with or necessary to its management, would adversely affect its integrity (see Appendix A). The planning authority must consult SNH and have regard to any representations made by it within such reasonable time as the authority may specify (Regulations 48(3) and 50(2)). If the integrity of the site would be adversely affected, and if the permission does not fulfil the conditions under which a new development proposal affecting the site would be approved, then the authority must take appropriate action to remove the potential for harm, unless there is no likelihood of the development being carried out or continued (see Regulation 56(3)).

39. If planning authorities consider that agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997 would safeguard the integrity of the site Regulation 56(2) requires them to invite those concerned to enter into them. Otherwise they must modify or revoke the permission, or make a discontinuance order. They should also take such action if a developer proceeds with damaging development while they are endeavouring to secure a Section 75 agreement. Regulation 58 provides that modification, revocation or discontinuance orders take effect when served. The Scottish Ministers must however, confirm them in order to have continuing effect. Where compensation is payable in the event of the order not being confirmed, the authority must refer the amount to the Lands Tribunal for Scotland unless the Scottish Ministers indicates otherwise (see Regulation 59).

40. The Scottish Executive advise that planning authorities should not seek to duplicate controls which are the statutory responsibility of other bodies (including planning authorities in their non-planning functions). Regulations 83, 84 and 85 require the review of authorisations under the Environmental Protection Act 1990 granted by SEPA for integrated pollution control and by local authorities for air pollution control; of waste management licences under the 1990 Act granted by local authorities (district or islands councils until April 1995); and of effluent discharge consents under the Control of Pollution Act 1974 granted by the river purification authority. As a matter of policy, if in reviewing a planning permission planning authorities consider that action calls to be taken under Regulations 83, 84 and 85 they should inform the relevant authority. Further they should exercise planning powers under Regulation 56 only if powers under the other regimes are not available or if they exercise could not achieve what is required. In carrying out reviews and in exercising their own powers planning authorities must have regard to the provision in Regulation 51 that the action to be taken to secure that the integrity of the site is not adversely affected should be the least onerous to those affected.

41. Advice on amendments to the General Permitted Development Order (GPDO) and General Development Procedure Order (GDPO) is at paragraphs 47-55 below. Regulations 64, 65 and 66 provide that existing Special Development Orders, Simplified Planning Zone schemes and Enterprise Zone schemes cease to have effect to grant planning permission for development which is likely to have a significant effect on a classified SPA or a site agreed by the Commission and the Scottish Executive as a Site of Community Importance to be designed as an SAC. The Regulations also prevent the SPZ and EZ schemes from granting planning permission for development which is likely significantly to affect a site classified as SPA or agreed as SAC.



## Development Affecting SPAs and SACs

42. Regulations 48, 49 and 54 restrict the granting of planning permission for development which is likely significantly to affect an SPA or SAC, and which is not directly connected with or necessary to the management of the site. They apply to planning decisions taken on or after the date the Regulations came into force, regardless of when the application was submitted. They apply to sites of one of the types listed in paragraph 37 above. They do not apply to candidate SACs before they have been published on the European Commission's list of Sites of Community Importance or to potential SPAs, but as a matter of policy the Scottish Executive wishes development proposals affecting them to be considered in the same way as if they had already been classified. The Scottish Executive has chosen to apply the same considerations to listed Ramsar sites. (See also paragraphs 19 and 41 of main Circular).

43. SPAs and in future terrestrial SACs will usually have been notified to authorities as SSSIs. An authority is required under the GDPO to consult SNH before granting planning permission for development affecting an SSSI; Regulation 48 incorporates a similar requirement for development affecting a SPA or SAC. Planning authorities should ensure that SNH is consulted about development affecting **all** SPAs and SACs (regardless of whether they are also notified as SSSI). In responding, SNH will advise on issues of particular significance in terms of the Birds or Habitats Directives. It will also advise whether in its opinion the proposed development would significantly affect the ecological value for which the site is identified, and if appropriate will suggest what measures might be taken in advance of permission being granted to avoid such effects.

44. Before issuing a decision on the planning application Regulation 49(5) requires an authority proposing to allow a development which would adversely affect a SPA or SAC, to notify the Scottish Ministers and to delay agreeing to the development for a period of 21 days following receipt of the notification by the Scottish Ministers unless permitted in writing by the Scottish Ministers. Planning authorities should explain the reasons for their decision particularly if they do not decide the case in accordance with the recommendations of SNH. The Scottish Ministers will normally call-in for their own decision planning applications which are likely to have a significant effect on sites of international importance; they will have regard to the advice of SNH on applications which are likely to have such effects. If a planning application for development likely to affect such a site is not called-in, the Scottish Executive expects the planning authority to demonstrate in the decision-making process that the relevant factors have been fully addressed; this requirement applies whether or not the authority is minded to approve the application.

45. The approach to be taken in considering a development proposal that would affect a SPA or SAC is set out in Appendix A, whether the decision-taker is the Scottish Ministers or the planning authority.

## Planning Authority and Crown Development Affecting SPAs and SACs

46. Applications made by planning authorities for the development of their land are subject to the planning procedures set out in the Town and Country Planning (Development by Planning Authorities)(Scotland) Regulation 1981. The Scottish Executive has announced its intention to end Crown exemption from planning laws, with certain exceptions including trunk road and motorway development which is subject to separate procedures designed to

produce the same effect as planning legislation. Regulation 69 achieves the same result as regards road construction or improvement projects carried out by the Scottish Ministers under the Roads (Scotland) Act 1984 as the Regulations do for development requiring planning permission. Pending legislation altering Crown exemption, planning authorities will continue to be consulted about proposals for Crown development under the procedures in SDD Circular No 21/1984. Where such proposals are likely to affect a site or a type listed in paragraph 37 above, authorities should apply the same tests in framing their advice as under the Habitats Regulations. The Scottish Ministers will do likewise in deciding whether planning clearance should be given for proposals which are the subject of unresolved objections from a planning authority.

### **Permitted Development Rights: SPAs and SACs**

47. Article 3 of the Town and Country Planning (General Permitted Development)(Scotland) Order 1992 (GPDO) grants a general planning permission (subject to specified conditions and limitations) for the types of development set out in Schedule 1 to the GPDO. These permitted development rights largely apply to developments which are uncontentious, and which, if they required individual consideration, would place an unnecessary burden on householders or other developers and on planning authorities. Other permitted development rights relate to developments that are controlled through other approval procedures, and to developments by statutory undertakers and local authorities in the performance of their statutory duties.

48. Regulations 60-63 ensure that any permission grant under the GPDO is not in breach of the terms of the Habitats Directive. They prevent any development which is likely significantly to affect a European site from benefiting from permitted development rights unless the planning authority have decided, after consulting SNH, that it would not adversely affect the integrity of the site.

49. Appendix C explains the process developers should follow to find out whether the particular development they propose would benefit from a permitted development right. It identifies the role of the planning authority and SNH.

### **Permitted Development Rights and the Developer**

50. Developers should bear in mind that if they proceed with a development in or near a European site on the assumption that it benefits from a permitted development right, without first checking whether it is likely to have a significant effect on the site, they run the risk of undertaking the project without the benefit of planning permission and being liable to enforcement proceedings.

51. If developers are uncertain whether their proposal is likely to have a significant effect on the site, they may seek an opinion from SNH (Regulation 61(1)). There is no charge for this. An application for SNH's opinion must give details of the proposed development and, in the Department's view, this should include the following information:-

51.1 A short description of the proposed development or works showing:

- Their broad purpose;

- Their physical extent, including the area of land or water likely to be covered;
- Any residues likely to be produced and proposals for disposal, and any emissions to air, water, soil, and by noise, vibration, heat, light or radiation;
- The timetable for the proposed development.

51.2 A map (or maps) showing the location of the proposed development in relation to the SPA/SAC boundary and the position of all proposed buildings, service access routes and works (whether permanent or temporary).

51.3 A description of possible direct or indirect effects (including disturbance) on the wildlife, water quality, hydrology, geological or landform features of the site.

51.4 Information about any measures the developer proposes to incorporate into the project to prevent, reduce, ameliorate or offset any landtake, residues or emissions.

52. To inform their initial consideration about whether to consult SNH, developers may obtain a copy of the citation giving the reasons for classification of the site from the appropriate local office of SNH. A copy of the citation is provided to relevant planning authorities and to owners and occupiers of a site during the pre-classification process.

53. The planning authority would enter the process at the point where either the developer or SNH decided that the proposal would be likely to have a significant effect on the site. If the developer wished to pursue the proposal further, the planning authority would undertake an assessment of the implications of the proposal for the site's conservation objectives. After consulting SNH, the planning authority would decide whether or not the proposal would adversely affect the integrity of the site. If the authority concluded that it would have such an effect and the developer wished to proceed an application for the authority's approval would be required. Regulation 63(2) provides for a fee to be paid to the planning authority in connection with the application for approval. Advice on significant effect, appropriate assessment and site integrity is contained in **Appendix A**.

54. If the authority decides, after consulting SNH, that there would be no adverse effect on the integrity of the site, the developer can go ahead. If the authority decides that there would be, the developer will have to make a full planning application. As with any other change in the law which has the effect of withdrawing PDRs, compensation may be payable. The possible right to compensation arises only where a planning application is:-

54.1 Submitted within 12 months of the date when the removal of PDRs come into effect (in this case 30 October 1994);

54.2 Refused or granted subject to conditions other than those attached to the PDRs; and

54.3 For a development which would have benefited from those PDRs if they had not been revoked.

55. SNH will endeavour to respond within 21 days from the receipt of all information necessary to enable it to form an opinion, both to:

55.1 Requests from a developer for his opinion as to whether a development is likely to have a significant effect on a site (Regulation 61(1)); and

55.2 Applications from a planning authority under Regulation 62(4) on the issue of whether a development will adversely affect the integrity of a site.

If the information provided under Regulation 61(1) is inadequate or incomplete, SNH will advise what additional information they need Regulation 61(4). Planning authorities must, by virtue of Regulation 62(4), take account of any representations made by SNH

### **Unauthorised Developments Affecting SPAs and SACs**

56. Planning authorities will need to implement specific administrative procedures to prevent, or remedy quickly, any alleged breach of planning control that has, or is likely to have, a significant effect on a SPA or SAC. If a continuing breach of planning control is likely to result in serious long-term harm to a site, the authority should consider the simultaneous service of a stop notice with the related enforcement notice, to prohibit environmentally harmful activity which would otherwise continue for the duration of an enforcement appeal. Where the significant effect on a SPA or SAC appears to result from an alleged breach of a planning condition, it may be more effective to issue an enforcement notice, reinforced by a stop notice, rather than serve a breach of condition notice. This is because a minimum period of 28 days must be allowed for compliance with a breach of condition notice, during which period irremediable harm to the natural habitat may occur. Alternatively, or additionally, the authority may consider submitting an immediate application to the Court of Session or the Sheriff Court for interdict while they prepare to take other action to enforce against a breach of control which is having a significant effect on an SPA or SAC. Advice on enforcement is given in National Planning Policy Guideline 1 (NPPG1) (The Planning System, paragraphs 62 and 63) and in SODD Circular 4/1999 on Planning Enforcement.

### **OTHER CONTROLS**

57. Regulations 69-85 achieve broadly the same result as the preceding Regulations in this Part do for activities requiring permission or consent. Under Regulation 48, competent authorities must consider the effect on SPAs and SACs of any consents or permissions issued by them and this Part amplifies the requirements for some specified activities.

### **PART V (SUPPLEMENTARY PROVISIONS)**

58. Regulations 86-108 contain supplementary provisions that are not described in detail here. Regulation 87 is modelled on Sections 28(6A), (6B) and (6C) of the Wildlife and Countryside Act 1981 (as inserted by the Wildlife and Countryside (Amendment) Act 1985) Regulation 88 is modelled on Section 32 of the 1981 Act. This Regulation requires the Scottish Ministers, where an application for a farm capital grant relates to activities on land within a European site, to exercise their functions so far as is consistent with the purposes of the grant provisions to further the conservation of the features by reason of which the land is a European site. SNH may object to the making of a grant where this may damage or destroy these features: and the Scottish Ministers must consider any such objections. If grant is refused, SNH must offer to enter into a management agreement with the applicant within 3

months. Imposing restrictions on these activities and providing for payments to the applicant, Regulation 89 is modelled on Section 50 of the Act.

59. Powers of entry to land exist for:

59.1 Persons authorised by SNH to ascertain whether a special nature conservation order should be made in relation to that land, an offence has been committed on the land or the award of compensation payable under Regulation 25 (by virtue of Regulation 90(1));

59.2 Persons authorised by the Valuation Office to survey land or estimate its value in consideration of a claim for compensation under Regulation 30 (Regulation 95(1)); or

59.3 Persons authorised to survey land in the exercise of any power under the Regulations prior to the acquisition of an interest in the land by the prospective acquirer (Regulation 99(1)).

In the first case, 24 hours notice to the occupier is required prior to entry unless it is believed an offence is being or has been committed Regulation 90(2). Otherwise, 14 days notice is required (Regulations 95(3) and 99(3) respectively).

60. Regulations 100-104 contain provisions supplementary to Part III of the Regulations relating to the protection of species.

ANNEX E  
APPENDIX A**CONSIDERATION OF DEVELOPMENT PROPOSALS AFFECTING SPAs AND SACs<sup>1</sup>**

1. The planning authority must first establish: (1) whether the proposed development is directly connected with or necessary to site management for nature conservation; and (2) whether it is likely to have a significant effect on a European site either individually or in combination with other plans or projects. The authority should take account of advice from SNH. If initial consideration of these issues is inconclusive, an analysis in more depth will be needed to establish the effects of the proposed development of the site.

2. If the planning authority concludes that a proposed development unconnected with site management is likely to significantly affect a European site, it must then carry out an appropriate assessment of its implications in view of the site's conservation objectives (i.e. the reasons for which the site was classified), so as to ascertain whether or not it will adversely affect the integrity of the site. The advice of SNH (as required by Regulation 48(3)) and the citation issued by it saying why the site was classified will need to be carefully considered, since the implications for significant occurrences of **all** Natura interests on the site must be assessed. The integrity of a site is the coherence of its ecological structure and function, across its whole area, which enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified. The scope and content of what constitutes an appropriate assessment will depend on the location, size and significance of the proposed project. SNH will advise on a case-by-case basis.

3. According to the nature conservation value of the site, SNH will identify whether particular aspects such as hydrology, disturbance or landtake should be specifically addressed. In the simplest terms, a general statement from SNH of the impact of the development may suffice. The assessment required under the Habitats Regulations is that which is necessary to determine the likely impact of a development proposal on the conservation interest(s) for which a European site has been classified. An assessment made under the Habitats Regulations does not exempt prospective developers from their obligations under the Environmental Impact Assessment (Scotland) Regulations 1999 and related legislation to undertake an Environmental Impact Assessment (EIA) for certain types of project. However, in cases where EIA is required in order to comply with those Regulations, it will be appropriate to use the information assembled for the purposes of the EIA and also for the assessment required by the Habitats Regulations.

4. If the planning authority ascertains that the proposed development will adversely affect the integrity of the site, and this effect will not be removed by conditions attached to the planning permission, it must not grant planning permission except in the following closely defined circumstances. It must first be satisfied that there are no alternative solutions. It should consider whether there are or are likely to be suitable and available sites which are reasonable alternatives for the proposed development, or different practicable approaches, which would have a lesser impact. It should bear in mind the advice of SNH. In their own interests applicants should demonstrate that they have fully considered alternative solutions.

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<sup>1</sup> See also paragraphs 14 and 30 regarding potential SPAs and SACs, and Ramsar sites.

5. If there is no alternative solution, and the site does not host a priority natural habitat type or species defined in the Habitats Directive<sup>2</sup>, planning permission must not be granted unless the proposed development has to be carried out for imperative reasons of over-riding public interest, including those of a social or economic nature.
6. Such reasons would need to be sufficient to over-ride the ecological importance of the classification<sup>3</sup>.
7. If the site hosts a priority habitat or species, and there is no alternative solution, the only considerations which can justify the grant of planning permission are those which relate to human health, public safety, or beneficial consequences of primary importance to the environment (unless the European Commission is of the opinion that there are other imperative reasons of over-riding public interest - any such consultation with the Commission must be carried out by the Scottish Executive).
8. This process is represented in **Appendix B**.
9. If planning permission is granted for a development which would adversely affect the integrity of a SPA or SAC, Regulation 53 requires the Scottish Ministers to secure that any necessary compensatory measures are taken to ensure that the overall coherence of the Community-wide network of SPAs and SACs known as Natura 2000 is protected (see paragraphs 27-28 of the main circular).

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<sup>2</sup> Priority habitats and species are indicated by an asterisk in Annexes I and II of the Habitats Directive. The citation saying why the site was classified will show whether it hosts a priority habitat or species.

<sup>3</sup> Regulation 52(4) requires a "competent authority", other than the Scottish Ministers, in determining whether to agree to a development on grounds of overriding public interest, to seek and have regard to the views of any other competent authorities involved.

# CONSIDERATION OF DEVELOPMENT PROPOSALS AFFECTING SPAs AND SACs





