

Harper Macleod LLP Opinion

on

The interaction between conservation measures (protected area consents) and the right to roam as regards large events

Provided to NatureScot

March 2026

1. Introduction, Background and Instruction

- 1.1. NatureScot is Scotland's nature agency. It has responsibility for a number of statutory functions. In particular, NatureScot:-
 - 1.1.1. Has a duty under the Nature Conservation (Scotland) Act 2004 ("the 2004 Act") to give notification of sites of special scientific interest ("SSSI") (section 3), provide guidance on the conservation of protected features (s.4), review, regulate and enforce the operations requiring consent ("ORCs") (ss.6-20), and may propose land management agreements (s.29);
 - 1.1.2. Is a nature conservation body under Reg 2 of the Conservation (Natural Habitats, &c.) Regulations 1994 ("the Habitats Regulations"), may enter into management agreements in respect of "European sites" (Reg 16), and is empowered to create byelaws for the protection of a "European site" (Reg 28);
 - 1.1.3. Has licensing functions in respect of the Wildlife and Countryside Act 1981 ("the 1981 Act"); and
 - 1.1.4. Has a duty under the Land Reform (Scotland) Act 2003 ("the 2003 Act") to keep and maintain the Scottish Outdoor Access Code ("the Code") (s.10) and the power to put up and maintain notices for the protection of natural heritage.
- 1.2. NatureScot has become aware of the promotion and operation of large-scale running or orienteering events (offered commercially for profit) taking place on or crossing protected areas. NatureScot has determined that, due to the risk of damage to protected features, relevant landowners required to apply for consent. NatureScot has template wording for ORCs to be included in SSSI Notifications. NatureScot has caused the Code to include reference to what responsible access is in an organised event context.
- 1.3. Two event organisers have challenged NatureScot's position. The challenge is two-fold:-
 - 1.3.1. There is no basis in law for requiring consent to the exercise of access rights under s.1 of the 2003 Act; and
 - 1.3.2. The Code is guidance only with no legal basis.
- 1.4. You have instructed me to provide an opinion on how the legislative framework for nature conservation interacts with the right to roam. In particular, you have asked me to provide answers to the following questions:-
 - 1.4.1. Do the organisers of outdoor events, or the relevant landowners, have to apply to NatureScot for SSSI consent where these events could harm protected areas and where these sites have an ORC listed covering either recreation or damage to vegetation? Alternatively do the provisions of the Land Reform (Scotland) Act 2003 apply giving the organisers a public right to hold these events within protected areas without further statutory oversight?

- 1.4.2. To what extent do organisers have to comply with SOAC and associated guidance on outdoor events?
- 1.4.3. What offences are potentially committed if an organiser or landowner does not apply for consent, and who is liable? What is the situation if an organiser does not liaise with the relevant landowner(s) before an event takes place?
- 1.4.4. Aside from section 29 powers, what are the implications for access rights if we advise organisers and landowners in advance of potential harm to the environment from a particular event, but nevertheless they carry on with no regard to the requirements of the Nature Conservation (Scotland) Act 2004?

2. Operations Requiring Consent vs Access Rights

The Conservation Regime

- 2.1. The relevant legislation for this part is the 2004 Act, the Habitats Regulations, and the 1981 Act. For the purposes of this note, I do not propose to go into detail regarding the conservation regime except where necessary to answer the specific question posed.
- 2.2. For now, it is sufficient to say that NatureScot, under the 2004 Act, has the power to issue a notification that an area is to be a SSSI, to specify therein which operations require consent (s.3), and to add, modify or remove operations from that list through periodic review (ss.6-8). NatureScot can also propose a Land Management Order to the Scottish Ministers if necessary or expedient for the purpose of conserving, restoring or otherwise enhancing any protected natural feature (s.29), and make byelaws to protect the SSSI (s.20). Where the Scottish Ministers have determined that an area is to be a SAC, then NatureScot also has the power to enter Land Management Agreements with landowners/occupiers (Reg 16), and make byelaws to protect an SAC (Reg 28).
- 2.3. The prohibition against operations requiring consent applies to owners or occupiers of land (s.16, 2004 Act). For present purposes it appears to me that “occupiers” must require something more than transient occupation, such as a person exercising access rights. It seems to me that “occupier” must require some more permanent type of occupation, such as one acting under a lease or licence to occupy.
- 2.4. The result of that analysis is that failure to comply with an ORC is an offence committed by owners and occupiers; not access takers. I will consider the offences under separate heading below, but for the purposes of this part it is sufficient to say that it is an offence to carry out or permit the carrying out of an ORC without consent.
- 2.5. The Scottish Ministers may make a Nature Conservation Order (“NCO”) for the purpose of conservation of any natural feature by reason of which the site is a SSSI (s.23, 2004 Act) or Special Area of Conservation (“SAC”) (Reg 19(1)(a), the Habitats Regulations). A NCO can specify an operation which is to be wholly or partly prohibited and any circumstances relating to the prohibition. A NCO is not limited to landowners and occupiers and can be imposed on any person (s.23(1)(c)).

- 2.6. Where NatureScot considers that it is necessary or expedient for the purpose of conserving, restoring or otherwise enhancing any natural feature in a SSSI or SAC, it may propose to the Scottish Ministers that they make a Land Management Order (s.29, 2004 Act; Reg 19(1)(b), the Habitats Regulations). This power applies only where attempts to use a Management Agreement have failed either by (i) the landowner/occupier refusing to enter into one, (ii) the landowner/occupier having breached the Agreement, or (iii) NatureScot is unable to offer a Management Agreement due to a lack of contact details. Again, this is tied to owners and occupiers.
- 2.7. Finally, where a public body exercises any function on, or so far as affecting, a SSSI, it must (i) consult with NatureScot, (ii) have regard to any advice given by NatureScot, and (iii) take reasonable steps so far as consistent with the proper exercise of its own functions, to further the conservation and enhancement of the protected natural feature (s.12, 2004 Act).

The Right to Roam

- 2.8. In terms of s.1 of the 2003 Act access rights apply to all land in Scotland which is not exempt under s.6. Access rights includes (i) the right to cross land, and (ii) the right to be on land for recreation, education, or a commercial purpose which could be undertaken as an exercise of access rights for non-commercial purposes. The exemptions generally relate to land required for privacy, security or safety, or land set out for a particular purpose. There is no express exemption relating to conservation areas, though there is an exemption where public access is prohibited, excluded or restricted by or under any enactment (s.6(1)(d)). There is also an exemption where the land is exempted by the local authority under s.11 or where access is restricted by byelaws made under s.12.
- 2.9. In terms of s.2 of the 2003 Act, access rights only exist if they are being exercised responsibly. In terms of s.3, landowners must use, manage and conduct their ownership of land responsibly, which generally means insofar as possible in a way which permits the exercise of access rights. When assessing whether any action is “responsible” for the purposes of the 2003 Act, regard is to be had to the Code (*Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority*, 2018 S.C. 406, at paragraph [3]).
- 2.10. Certain types of conduct are excluded from access rights (s.9). That includes being on or crossing land for the purpose of doing anything which is an offence (s.9(b)).
- 2.11. In terms of enforcement, local authorities have a duty to uphold access rights (s.13), and the power to serve an enforcement notice where a landowner does anything, or fails to take any action, for the purpose or main purpose of deterring access takers from exercising access rights (s.14). Any person may also raise proceedings for a judicial determination regarding the existence of access rights in any area or whether conduct by an access taker or landowner has been responsible.

The Interaction

2.12. It is my view that the Conservation Regime takes priority over the exercise of Access Rights. I reach that view because:-

2.12.1. the duty to uphold access rights rests with the local authority; and

2.12.2. in exercising its duty to uphold access rights over an area that is a SSSI, the local authority must consult with NatureScot, take its advice on board, and act insofar as possible to further the conservation and enhancement of the protected natural feature.

2.13. It follows that where a local authority intends to take enforcement action under s.14 of the 2003 Act in respect of an apparent breach of access rights by a landowner of a SSSI, the local authority ought to be taking a lead from NatureScot regarding whether the conduct constituting the breach is necessary for the protection of a natural feature.

2.14. However, that notwithstanding, it seems to me that the Conservation Regime and 2003 Act are capable of being read together in complementary fashion. In particular, if NatureScot prescribes ORCs that would require landowners to act contrary to access rights, the purpose or main purpose of their doing so would be comply with the statutory prohibition on undertaking ORCs without consent, and not for the purpose or main purpose of deterring the exercise of access rights. Accordingly, the local authority would be unable to proceed with enforcement action under s.14 of the 2003 Act, and the landowner could not reasonably be accused of acting irresponsibly under s.3.

2.15. Similarly, if NatureScot was inclined to make byelaws that prohibited access to protected sites by groups (or, indeed, altogether), or entered into a Land Management Agreement with a landowner requiring access to be restricted, any conduct by a landowner to comply with the byelaws or agreement would be for that purpose or main purpose. Again, a landowner could not reasonably be accused of acting irresponsibly under s.3.

2.16. If the Scottish Ministers were minded to make a NCO or Land Management Order in respect of a SSSI or SAC that restricted the exercise of access rights over it (whether completely or only to groups in excess of a particular number), then access in contravention of those would be a criminal offence. Given that access for criminal conduct is excluded from access rights, it would mean that access rights could not be exercised.

2.17. Insofar as the taking of access could of itself be a criminal offence (e.g. by recklessly causing damage to a protected feature), then such access is excluded conduct as well.

2.18. Separately, insofar as access is prohibited (in whole or in part and on such conditions as specified) under byelaws, a land management agreement, a land management order or NCO, that would amount to prohibition, exclusion or restriction under an enactment. It follows that the land would be exempt from access rights under s.6(1)(d).

- 2.19. If local authorities could be persuaded to exclude or restrict access rights under s.11, or issue byelaws that restricted access over SSSIs or SACs under s.12, then the land would also be exempt under s.6(1)(j).
- 2.20. Finally, and in any event, I would suggest that any exercise of access which puts protected sites at risk could not legitimately be said to be responsible for the purposes of s.2 of the 2003 Act. It follows that if the exercise is irresponsible then it is not an exercise of access rights at all.

The Question Posed

- 2.21. Turning to the questions posed, I would observe that organisers of external events do not require to apply for SSSI consent. The onus is on an owner or occupier of the SSSI to apply for consent if the access proposed is an ORC.
- 2.22. That means that responsibility to prevent access lies with the owner or occupier. The prevention of an exercise of access rights by an owner or occupier of land exposes them to enforcement action by the local authority or proceedings raised by the aggrieved organiser (or any proposed access taker). However, for the reasons set out above, I would consider there to be strong prospects of successfully defending such proceedings.
- 2.23. If the Scottish Ministers were minded to grant a NCO that prohibited access for the operation of events from protected sites, then that would prohibit the organiser from running the event unless any conditions specified were met.

3. Status of the Code

- 3.1. The Code has been created by NatureScot in compliance with its statutory duty. The Code is not subordinate legislation and does not impose any legal duties or obligations. In that sense, the organisers are correct. The Code is guidance.
- 3.2. However, the Code is a special type of guidance. Its existence is to help all parties, including the courts, assess whether conduct by an access taker or landowner has been “responsible”. In *Renyan Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority*, 2018 S.C. 406, at paragraph [3], when discussing the concept of responsibility for the purposes of ss.2 and 3, the Lord President Carloway said (twice) that “regard must be had to the Scottish Outdoor Access Code”.
- 3.3. It follows therefore that the Code merits special consideration in these matters. It is highly likely that a Court would determine that any conduct which fails to comply with the Code is irresponsible.

4. Offences

- 4.1. The Conservation Regime creates a number of offences which could be relevant to large group access takers:-

- 4.1.1. Any person who intentionally or recklessly damages any natural feature specified in a SSSI notification is guilty of an offence, unless (i) the act was incidental to a lawful operation, (ii) reasonable precautions to avoid the act were undertaken, or it was not and could not have been reasonably foreseen that the act would be incidental to the lawful operation, and (iii) reasonably practicable steps were taken to minimise the damage (s.19(1) and (2), 2004 Act);
 - 4.1.2. Any person who, without reasonable cause, contravenes s.16 (prohibition on operations by owners/occupiers which require consent) is guilty of an offence (s.19(3)(a), 2004 Act);
 - 4.1.3. Any person who carried out, or causes or permits to be carried out, an operation prohibited by a NCO is guilty of an offence (s.27, 2004 Act);
 - 4.1.4. Any person who, without reasonable excuse:-
 - 4.1.4.1. Fails to carry out an operation required by a land management order; or
 - 4.1.4.2. Carries out or causes or permits to be carried out an operation excluded by a land management order,

commits an offence (s.36, 2004 Act);
 - 4.1.5. Any person who intentionally or recklessly damages any natural feature by reason of which land is a SAC is guilty of an offence, unless (i) the act was incidental to a lawful operation, (ii) reasonable precautions to avoid the act were undertaken, or it was not and could not have been reasonably foreseen that the act would be incidental to the lawful operation, and (iii) reasonably practicable steps were taken to minimise the damage (Reg 18, the Habitats Regulations);
 - 4.1.6. Any person who intentionally or recklessly kills, injures or takes any wild bird, takes damages, destroys or interferes with a nest of a wild bird in use, being built, or habitually used, obstructs a wild bird from using its nest, or takes or destroys an egg of any wild bird shall be guilty of an offence (s.1(1), 1981 Act);
 - 4.1.7. Any person who intentionally or recklessly picks, uproots or destroys any wild plant, or seed or spore attached to such wild plant, listed in Schedule 8 of the 1981 Act, or without authorisation intentionally or recklessly uproots any wild plant not listed in the said schedule shall be guilty of an offence (s.13(1), 1981 Act).
- 4.2. As explained above, there is no requirement for the event organiser to apply for SSSI consent. It follows that any failure to do so before permitting the event to proceed can only be an offence by the owner/occupier responsible. The issue of course is whether the owner/occupier bears responsibility for stopping unlawful access taking across the SSSI. That may turn on whether the owner/occupier has granted "permission", or whether inaction is sufficient to amount to permission. That is not clear from the legislation, but I would expect that an owner/occupier who is charged with not permitting activity on the protected site is required to actively seek to stop it. If the owner/occupier

does so, then there likely can be no contravention of s.16 and therefore no offence under s.19(3)(a) of the 2004 Act.

- 4.3. Of greater consequence are the other offences listed above. These are all offences which attach to individuals based on conduct rather than status (i.e. not limited to owners or occupiers). It seems arguable to me that access to protected sites for larger group events, unless very carefully managed, could result in reckless damage. In that case, the individual access taker is likely responsible. It could reasonably be argued that the organiser is also responsible given that the operation of the event was reckless insofar as it failed to put adequate measures in place to protect the natural features.
- 4.4. The strongest option would, of course, be to seek a NCO from Scottish Ministers to prevent the operation of larger events on protected sites. Any contravention of the NCO by any person would be an offence regardless of whether damage was actually caused.

5. Alternative Options for Enforcement

- 5.1. There is no alternative option for NatureScot under the 2003 Act as regards access rights.
- 5.2. As set out above, the options available to NatureScot would be:-
- 5.2.1. To impose ORCs on owners/occupiers that would require them to take action to prevent group events taking place on protected sites;
 - 5.2.2. To assert that access rights do not apply because the access would recklessly cause damage to natural features and is therefore criminal conduct excluded by s.9 of the 2003 Act;
 - 5.2.3. To impose, or persuade the local authority to impose, byelaws that exclude specified types of access from the protected sites;
 - 5.2.4. To persuade the Scottish Ministers to impose NCOs that exclude specified types of access from the protected sites; and/or
 - 5.2.5. To update the Code to reflect what types of access over a protected site would be irresponsible (i.e. the organisation of and participation in a large event of the type envisaged) in respect of protected sites, and thereafter assert that the taking of such access would be irresponsible.
- 5.3. If it was felt necessary, NatureScot could look to raise a court action in the Sheriff Court under s.28 for a determination of the existence of access rights, whether taking access in a particular way is responsible and whether any restriction of access by a landowner is responsible having regard to the matters identified in this opinion. That action could operate as a “test case” to apply across all protected sites. However, I would like to think that NatureScot would be able to reach an understanding with both Scottish Ministers and Local Authorities that would render that unnecessary.

6. Conclusion

6.1. Accordingly, I would answer the questions posed as follows:-

6.1.1. There is no requirement for event organisers to seek SSSI consent.

Owners/occupiers require to seek consent to permit events on protected sites. However, whether and to what extent access rights apply to the land depends on (i) whether the conduct is sufficient to amount to a criminal offence and is therefore excluded, (ii) whether a basis exists to say that the land is exempt from access rights, and/or (iii) whether access of the type proposed would be "responsible".

6.1.2. The Code is guidance, but that guidance is to be used (and has been used by the Courts) to determine whether access or land management is "responsible" for the purposes of ss.2 and 3 of the 2003 Act;

6.1.3. The failure of an organiser to seek consent is not an offence. There are various offences that an organiser or participant may commit if they recklessly cause damage. An owner/occupier may commit an offence if the event is permitted to take place, but what amounts to permission in that context is untested. I would expect landowners to be required to take steps to stop irresponsible access.

6.1.4. The powers in s.29 are the only express powers that NatureScot has in respect of access rights. NatureScot's true power is in imposing conservation measures and influencing other public bodies to impose or assist with the imposition of conservation measures in a way which lawfully restricts access rights.

6.2. I hope that the above is sufficient for your purposes. If you require anything further then please do not hesitate to contact me.

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In respect whereof



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