



13 August 2009

Your Ref CON 1153

Policy Team
Historic Scotland
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sent by email to: hs.policy@scotland.gsi.gov.uk

Dear Sir/Madam

THE ANCIENT MONUMENTS AND LISTED BUILDINGS (AMENDMENT) (SCOTLAND) DRAFT BILL – CONSULTATION

Thank you for the opportunity to respond to the above consultation.

Background

British Waterways (BW) is a cross-border public corporation sponsored in Scotland by the Scottish Government, delivering a valuable contribution to its strategic objectives – smarter, wealthier & fairer, healthier, safer & stronger and greener – essential to enhancing the quality of life in Scotland.

We manage and care for over 3200 km of canals and navigable natural water bodies (rivers and lochs) in Britain as a whole, of which 220 km are in Scotland.

British Waterways Scotland (BWS) is responsible for five canals in Scotland: the Forth & Clyde, Union and Monkland Canals in the lowlands, the Crinan Canal in Argyll, and the Caledonian Canal in Highland.

BWS owns 48 scheduled monuments (42 of which make up four canals) and 85 listed buildings. For works outwith Class III consent relating to certain works of repair or maintenance, we made 22 applications for scheduled monument consent (SMC) in 2008/09. A smaller number of third party applications for works to scheduled monuments in our ownership were determined and BWS made one application for listed building consent in the same period. Our interests in the draft Bill are as a

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Scotland's Canals and The Falkirk Wheel



potential applicant for consent or grant assistance, as an owner in relation to third party applications for consent or grant assistance, and as a potential purchaser and vendor of designated structures.

General Comments

- BWS is generally content with the draft Bill and welcomes the broadening of grant criteria. However, clarification and/or amendment is sought in relation to the control of works affecting scheduled monuments, alternatives to prosecution, immunity from listing, and the liability of successive owners of listed buildings. We have provided more detail under 'Specific Comments'.
- BWS carries out works under Class III and Class V of the Ancient Monuments (Class Consents) (Scotland) Order 1996. The draft bill does not seek to modify the Order. In terms of Class III 'Works by the British Waterways Board', BWS would encourage Scottish Ministers to consider broadening the range of works which could be carried out under it. Specifically, defining what is meant by "material alteration" and "essential" works, or altering these terms, might enable works such as installing new drains, like-for-like repairs, replacing fenders, clay lining, and sampling for site investigation works, to be included in Class III.

This would reduce administrative effort for BWS and Historic Scotland to manage the SMC process by utilising in-house heritage expertise which has been supported by Historic Scotland since 2007. It would also mirror other recent initiatives such as 'The Joint Working Agreement between Historic Scotland and Planning Authorities in Relation to Statutory Casework and Consultations'. Changes to Class III could also help reflect BWS's wide-ranging role as set out in Scottish Government policy *Scotland's Canals: An Asset for the Future 2002* (www.scotland.gov.uk/Publications/2002/10/15571/11777). We would welcome debate on the possibility of modifying the Order.

Specific Comments

Section 2 – The Provisions

Part 2 – Modifications of the Ancient Monuments and Archaeological Areas Act 1979

Section 2 – Control of works affecting scheduled monuments

- Para 2.5, p. 17 of the consultation document states that "currently an offence is committed only if there are any unauthorised works 'resulting in the demolition or destruction of or any damage to a scheduled monument'." Section 2 (2) (a) of the 1979 Act is quoted. However, Section 2 (1) of the Act states that a person shall be guilty of an offence unless the works are authorised. 'Works' are defined under Section 2 (2):

“(a) any works resulting in the demolition or destruction of or any damage to a scheduled monument;

- (b) any works for the purpose of removing or repairing a scheduled monument or any part of it or of making any alterations or additions thereto; and
- (c) any flooding or tipping operations on land in, on or under which there is a scheduled monument.”

Section 2 (6) also states that “if a person executing or causing or permitting to be executed any works to which a scheduled monument consent relates fails to comply with any condition attached to the consent he shall be guilty of an offence, unless he proves that he took all reasonable precautions and exercised all due diligence to avoid contravening the condition.”

Clarification on how the Section 2 (2) (b), (c) and (6) should be considered would be helpful.

- The draft Bill seeks to add a fourth category of works under Section 2 (2) of the 1979 Act:

“(aa) any works resulting in the disturbance of a scheduled monument affecting its conservation, stability or national importance;”

Para 2.5, p. 17 of the consultation document states that this will give protection to scheduled monuments that have been ‘disturbed’ by unauthorised works, not just those that are ‘damaged’. The proposed provisions of the Marine (Scotland) Bill is also referred to. Section 84 (2) of the Marine (Scotland) Bill states that an offence has been committed if a person:

- “(a) carries out works or activities in the area which (or which are likely to)—
 - (i) damage or interfere with a marine historic asset,
 - (ii) have a significant impact on the protected area,
- (b) removes, alters or disturbs a marine historic asset.”

In a marine environment, activities such as disruption of sediments might dislodge an asset but would not ‘destroy’ it. The distinction between the existing provisions of Section (2) 2 (a) to (c) of the 1979 Act and the proposed addition is perhaps less clear in the case of land-based monuments.

The proposed wording Section 2 (2) (aa) is quite different from (a) to (c) in that it requires an understanding of what kind of works would affect the monument’s conservation, stability or national importance. The draft Bill could seek to clarify the intended differentiation between ‘damage’ and ‘disturb’, for example, by defining them in Section 61 ‘Interpretation’ of the 1979 Act. This comment also applies to Section 13 of the draft Bill. Section 61 of the 1979 Act currently provides a definition of “tipping operations” at (1) (b). Revised guidance in the Scottish Historic Environment Policy (SHEP) or elsewhere would also help applicants understand the instances in which SMC is required.

Section 3 – Works affecting scheduled monuments: consent for works without authority

- BWS welcomes the provision of a mechanism which would allow retention of works which have not first been authorised under Section 2 of the 1979 Act. We also agree with the sentiment of para 2.6, p.1 of the consultation document that this should only be applied in “certain limited circumstances”. This proviso could be reflected in the wording of Section 3, however. Guidance on what kind of circumstances this power might be used should also be provided in subsequent amendments of the SHEP, etc., however.

Section 7 – Works affecting scheduled monuments: enforcement

Stop notices and temporary stop notices for unauthorised works on scheduled monuments

- These new provisions are welcomed by BWS. Formal mechanisms whereby the regulator can prevent further damage and pursue remedial works are desirable.
- It is proposed to introduce fixed penalty notices as an alternative to prosecution for non-compliance with a listed building enforcement notice in Section 23 of the draft Bill (as Section 39A of the 1997 Act). In order to harmonise legislation and reduce potential costs related to court proceedings, the same measure could be considered in relation to scheduled monument enforcement notices.

Section 11 – Financial support for preservation etc. of monuments

- There are instances where BWS would find the ability for third parties to qualify for grant aid for works to scheduled monuments in our ownership desirable and therefore we support this amendment.

Section 13 – Offence of disturbance of certain ancient monuments

- It is not clear what the existing and proposed provisions of Section 28 of the 1979 Act add to Section 2 in terms of the circumstances in which an offence has been committed. Either Section 28 is not necessary or the existing or intended relationship could be made clearer in Sections 2 and 13 of the draft Bill.
- Our comments relating to the differentiation between ‘damage’ and ‘disturb’ under Section 2 above also apply.

Section 14 – Development and understanding of matters of historic, etc. interest: grants and loans

- BWS welcomes the broadening of the types of projects which would qualify for grant assistance under Section 14 of the draft bill.

Part 3 – Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Section 18 – Certificate that building not intended to be listed

- There are circumstances for which certainty of an outcome for a period of five years would be welcome. For unlisted buildings these are:

- the decision that an unlisted building should remain unlisted,
- the decision to list an unlisted building, and
- what category it is listed as.

For listed buildings which are the subject of resurvey or reassessment:

- the category a listed building is re-graded as,
- the decision to de-list a listed building.

Refocusing Section 18 of the draft Bill would help to change some negative perceptions about owning or purchasing a listed building. This would benefit both owners of listed buildings and the buildings themselves.

Sections 21 and 22 – Enforcement notice: requirement to cease works and stop notices and temporary stop notices

- These new provisions are welcomed by BWS. Formal mechanisms whereby the regulator can prevent further damage and pursue remedial works are desirable.

Section 25 – Liability of owner and successors for expenses of urgent works

- The proposed Section 50A (2) would provide the regulator with an additional means to recover outlays related to urgent works from new owners of listed buildings. Although Section 50A (4) allows for the new owner to recover costs, this is likely to prove difficult as, by inference, the draft Bill seeks to introduce this measure as the current provision to recover costs is inadequate.

Listed buildings, where notice of liability for expenses have been registered, are likely to be those most 'at risk' and this measure might dissuade potential purchasers from investing in them. It also seems to be inconsistent as the draft Bill does not propose to introduce a similar liability in the 1979 Act.

The draft Bill could make a proviso that a new owner would be pursued for past expenses only in certain defined exceptional circumstances, with the first recourse being the previous owner.

Section 3 – Financial Assessment

- Para 3.1 of the consultation document states that the Bill places no new significant burdens or duties on owners of assets and the use of the new powers that the Bill will introduce will be discretionary. However, the draft Bill introduces the ability for authorities to pursue successive owners of listed buildings for expenses of past urgent works at Section 25; therefore, where these powers are used, there would be a new liability for potential purchasers.

- BWS does not fit within one of the four sectors included in the financial assessment. The section on the Private Sector could be extended to encompass the range of owners of designated assets or additional sectors added.

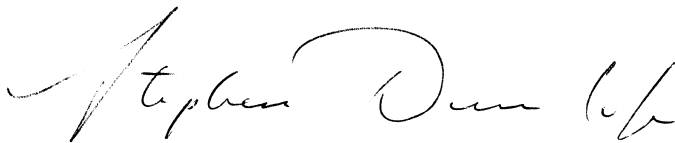
Section 4 – Partial Regulatory Impact Assessment

- Para 4.10 'do nothing option' of the Costs and Benefits analysis relates listing to “abortive plans” and hence unnecessary costs. It appears to suggest that proposals for unlisted buildings do not, or are less likely to, progress once they become listed. It is government policy that the use of buildings of heritage value is encouraged, and so the stigma the associated with listing could be diminished by broadening Section 18 'Certificate that building not intended to be listed' as suggested above.

Conclusion

If you have any queries regarding the above, please contact me or Dr Sabina Strachan (Senior Heritage Advisor) at the address provided on page 1 of this response.

Yours faithfully

A handwritten signature in black ink that reads "Steve Dunlop". The signature is written in a cursive style with a large initial 'S' and a stylized 'D'.

Steve Dunlop
Director – Scotland

cc. Margaret Horn, Freight and Inland Waterways Branch, Scottish Government