

Special nature conservation orders made under regulations 25 – 29 of, and schedule 1 to, the conservation of habitats and species regulations 2010

Procedure guide

This guidance is intended for anyone who may be affected by a Special Nature Conservation Order (required to protect the interest features of a European site¹). This could include businesses whose operations may be constrained by such an order or regulators who may need to be aware of such orders when making decisions about granting licences or other permissions. It is also intended for those with a general interest in biodiversity protection such as voluntary conservation organisations. This guidance applies in England and Wales only.

Introduction

1. This document provides guidance on the procedures for;
 - a) the preparation and making of special nature conservation orders (SNCO); and
 - b) the serving of stop notices,under regulations 25 - 29 of, and Schedule 1 to, the Conservation of Habitats and Species Regulations 2010 (the Habitats Regulations). These were originally contained in regulations 22 – 27 of, and Schedule 1 to, the Conservation (Natural Habitats &c.) Regulations 1994.
2. The Habitats Regulations transpose the obligations of the EU Habitats Directive² (the “Directive”) in England and Wales³. The powers to make SNCOs provide one means of meeting the obligations contained in Articles 6(2) and 6(3) of the Directive. Article 6(2) requires Member States to take appropriate steps to avoid the deterioration of European sites or the disturbance of species for which sites have been designated⁴. Article 6(3) requires that any plan or project which is likely⁵ to have a significant effect on such a site, either individually or in combination with other plans or projects, is subject to an appropriate assessment of the environmental effects of the plan or project on the European site.
3. An appropriate assessment is the process by which competent authorities determine whether or not a plan or project, which is likely to have a significant effect on a site, may have an adverse effect on the site’s integrity. The assessment must be undertaken prior to deciding whether to grant consent for such plan or project⁶.
4. SNCOs are made by the Secretary of State (SoS) in relation to England or Welsh Ministers (WM) in relation to Wales, after consultation with the appropriate statutory nature conservation

¹ European sites in this context are defined in regulation 8 of the Conservation of Habitats and Species Regulations 2010. They include candidate Special Areas of Conservation (cSACs), Sites of Community Importance (SCIs) and Special Areas of Conservation (SACs) designated under the Habitats Directive, and Special Protection Areas (SPAs) classified under the Birds Directive.

² Council Directive 92/43/EEC http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

³ They also extend to Scotland to a limited extent.

⁴ If such disturbance could be significant in relation to the objectives of the Directive.

⁵ ‘Likely to have a significant effect’ is a term used in both the Habitats Directive and the Habitats Regulations. However, case law (Waddenzee C-127/02) has interpreted this as meaning that there may be (as opposed to is likely to be) a significant effect, thus reinforcing the need to take a precautionary approach when effects are not certain.

⁶ These restrictions are outlined in the Government Circular: Biodiversity and Geological Conservation – statutory obligations and their impact within the planning system (August 2005).

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/147570.pdf>

Competent authorities must take a precautionary approach and shall agree to a plan or project only having ascertained that there is no adverse effect on the integrity of the site, or if there are no feasible alternatives and the plan or project must proceed for imperative reasons of overriding public interest and compensatory measures provided.

body (SNCB). Reference in this guidance to SoS include a reference to WM. The SNCB in England is Natural England. The SNCB in Wales is the Countryside Council for Wales.

5. It is Defra and Welsh Assembly Government policy to regard SNCOs as “**last-resort**” powers to be used in exceptional circumstances, where voluntary measures or the other regulatory controls to protect European sites are either not appropriate or have been tried but are considered insufficient to protect the site⁷.
6. SNCOs are an enforcement tool that enable the SoS to control operations which appear likely to damage or destroy the interest features of a European site. The provisions enable the SoS, after consultation with the SNCB, to make a special nature conservation order (SNCO) covering land within a European site specifying operations which appear to be likely to destroy or damage the interest features of that site. In this context the SoS, after consulting with the SNCB, is likely to take a precautionary approach, where an operation is capable of causing damage to a site.
7. Under the Habitats Regulations, SNCOs and stop notices can be made to control or prohibit operations that take place on land or water (including the marine or inland waterways environment), both within and outside the site, that may impact on a European site.
8. SNCOs (original orders) are made under regulation 25 of the Habitats Regulations and set out the operations which appear to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to damage or destroy the interest features of a European site. They take effect immediately they are made, but do not at this stage prohibit any activity. (Prohibition of activity is described in *Stage 2: Serving a Stop Notice*). They are subject to objection and representation procedures (see Annex B – *Right to make representation*). The SNCO ceases to have effect after 9 months unless the SNCO has previously been revoked, or the SoS has provided notice that it is not proposed to amend or revoke the SNCO.
9. SNCOs may be amended by:
 - (a) **Amending Orders (Non-Restrictive)** – This is an order which amends an existing order but does not extend the area to which the previous order applies.
 - (b) **Restrictive Amending Orders** – This is an order which amends an existing order extending the area to which the previous order applied.
 - (c) **Revoking Orders** – This is an order which revokes a SNCO.
10. This guidance focuses on the provisions and procedures for making SNCOs (original orders). For further guidance on Amending and Revoking Orders, and the procedures to be followed in making them, please contact the address given at the end of this guidance.

Procedures

Before making an Order

11. Generally, the decision to make a SNCO will only be taken following discussions between the SNCB and the person(s) carrying out, or proposing to carry out, an operation that appears to be of a kind which, if carried out in certain circumstances or in a particular manner, would be

⁷ Other regulatory controls are contained within part 2 (Conservation of Natural Habitats and Habitats of Species) and part 6 (Assessment of plans and projects) of the Habitats Regulations. Where sites have SSSI underpinning, provisions within the Wildlife and Countryside Act 1981 (as amended) also provide mechanisms to protect European sites. The Marine and Coastal Access Act provides further provisions to control operations that may affect European marine sites.

likely to damage or destroy the interest features of a European site. However, the need to take urgent and immediate action to prevent damage cannot be ruled out.

12. Assuming that it is possible to do so, the SNCB will, as part of the above discussions, explore with the person(s) carrying out or proposing to carry out the operation whether there is a means by which the operation can be undertaken without any risk of damage occurring to the European site, or whether it would be appropriate for the operation to be controlled in some other way – for example by a voluntary management agreement.
13. Where appropriate, the SNCB should also consult any other relevant regulatory bodies and trade or other association representing the interests of the person(s) carrying out or proposing to carry out the operation. This is particularly important where the identity of the person(s) carrying out or proposing to carry out the operation cannot reasonably be ascertained and thus the consultation process outlined in paragraphs 11 and 12 cannot be undertaken.
14. In general, a SNCO is only likely to be considered where such attempts stall or fail and there are **no other** voluntary or regulatory controls that the SoS considers appropriate to protect the European site(s).
15. After any such discussions the decision will be made about whether or not it is appropriate to recommend to the SoS that a SNCO should be made. The final decision on whether a SNCO should be made rests with the SoS.
16. Once the SoS has taken a decision to make a SNCO, the Habitats Regulations provide for a two-stage process.

Stage 1: Making an Original Order.

17. The SoS may make an original Order which specifies operations which appear to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy or damage the interest features of a European site. This is effectively a warning stage to those carrying out or proposing to carry out the specified operations likely to affect the European site, as the operations are not prohibited by the Order (see *Stage 2: Serving a Stop Notice*). The Order takes immediate effect, but is subject to objection and representation (see below).
18. The subsequent process is as follows:
 - I. SoS gives notice of the Order inviting representation or objection. (See Annex **B** for further details).
 - II. SoS receives and considers any representations or objections.
 - III. If objections or representations are made and, following any informal discussion, are not withdrawn, the SoS holds a local inquiry or hearing.
 - IV. A report on the outcome of the local inquiry or hearing is considered by the SoS. On considering the report, the SoS may either:
 - a) take no action; or
 - b) amend the order; or
 - c) revoke the order.

- V. If no representations or objections are made, then the SoS may either take no further action, amend or revoke the order.
19. In each case under points IV and V, the SoS is required to give notice of the decision. As outlined in Annex C (publication of Orders and Stop Notices), where an Order is made in the marine or inland waterways environment, appropriate arrangements will be made to ensure that, to the extent possible, all relevant persons are made aware of the Order. This may require the assistance of those authorities who have jurisdiction in the marine or inland waterways environment.
20. Following the process outlined above, any amending or revoking order would take effect immediately and would not require confirmation and would not be open to the objection or representation procedure.
21. If at a later date the SoS wishes to extend the time in which the Order is in force, or to amend or revoke the Order, notice to this effect must be served in the same way that notice of the original Order was served. A flowchart outlining the above process is provided at Annex A.

Procedure for questioning the validity of orders

22. Paragraph 7 of Schedule 1 to the Regulations gives a right for an applicant to question the validity of a SNCO. This right only applies following any notice of a decision to either amend a SNCO or to take no action following an inquiry or hearing into a SNCO. In such circumstances a person has 6 weeks in which to make an appeal from the date of the relevant decision. Any such appeal must be lodged with the High Court and can only be made on grounds that an Order has not been made in accordance with the powers contained in regulation 25, or that the procedures set out in Schedule 1 have not been complied with.

Stage 2: Serving a Stop Notice

23. The second stage of the process is that at the same time the Order is made, or at any subsequent time provided the Order is still in force, the SoS can serve a stop notice on an operator carrying out the operation specified in the SNCO. **Note, it is the stop notice which triggers the prohibition of the activity – not the Order.**
24. A stop notice may be served where it appears to the SoS on the advice of the SNCB that the operations being carried out, or proposed to be carried, by the operator appear to be likely to damage the European site. The stop notice allows the SoS to target the restrictions to specific operators.
25. A likely effect in this context should be taken to include an effect that could happen if its occurrence cannot be ruled out, based on the best available impartial information (ie utilising the precautionary principle).
26. It is envisaged that the stop notice will be served by the relevant SNCB on behalf of the SoS. The notice sets out the detail of:
- a) the operation;
 - b) the European site to which the notice relates;
 - c) the date on which the stop notice takes effect.

27. In normal circumstances the stop notice will be served directly on those persons or bodies carrying out, or proposing to carry out, the operation(s) specified on the original Order, where that operation is likely to damage the European site.
28. Where the identity of the person carrying out or proposing to carry out the operation cannot reasonably be ascertained, the SoS may instead publish a notice in the local newspaper and display copies of the notice on the land to which the notice applies. Where a notice has been served by this method, any person carrying out operations specified in the notice in the area subject to the SNCO is deemed to have been served with that notice.
29. A person who has been served a stop notice must not carry out any operation specified in the notice unless:
- a) where the operation is carried out on land, the operation is carried out or caused or permitted to be carried out by the owner or occupier of the land and, after the service of a stop notice, the owner or occupier has given the SNCB written notice of the proposal to carry out the operation; or
 - b) in any other case, after the service of the stop notice, the person proposing to carry out the operation provides the relevant SNCB with written notice of a proposal to carry out the operation, specifying its nature and where it is proposed to carry it out; **and**
 - c) in either case, the written consent of the relevant SNCB is obtained to carry out the operation (which may or may not be subject to conditions including time limiting conditions) or the operation is carried out in accordance with the terms of a management agreement⁸.
30. A person who, without reasonable excuse, contravenes the provisions in the above paragraph commits a criminal offence.
31. In considering an application for consent, the appropriate SNCB will need to consider whether the operation(s) is or forms part of a plan or project which:
- a) is likely to have a significant effect on a European site (either alone or in combination with other plans or projects); and
 - b) is not directly connected with or necessary to the management of that site.
32. Where the SNCB concludes that the operation is a plan or project which is likely to have a significant effect on the European site, and is not directly connected with or necessary to the management of that site, it must carry out an appropriate assessment of the implications for that site in view of the site's conservation objectives. In light of the conclusion of the assessment, the SNCB may consent to that plan or project only after ascertaining that it will not adversely affect the integrity of the site.
33. Where the assessment concludes that the operation may have an adverse effect on the interest features of the site, consent will be refused. In these cases, the applicant will be notified by the SNCB of the decision and the reasons for it. The applicant may, by notice in writing within two months of receiving notice of the refusal of consent or three months following an application for consent where no notice of a decision is received, require the SNCB to refer the matter to the SoS. The SoS may then direct the SNCB to give consent to the operation if, being satisfied that in the absence of feasible alternative solutions, the SoS considers that the plan or project must be carried out for imperative reasons of overriding public interest. In such

⁸ As defined in the Habitats Regulations.

circumstances, compensatory measures must be undertaken to ensure that the overall coherence of the network of European sites known as Natura 2000 is protected.

34. In circumstances where the original Order on which the stop notice is based expires or is revoked, any stop notice issued will cease to have effect. In these circumstances the SoS may write to operators and, if appropriate, advertise the fact that the stop notice no longer has effect.

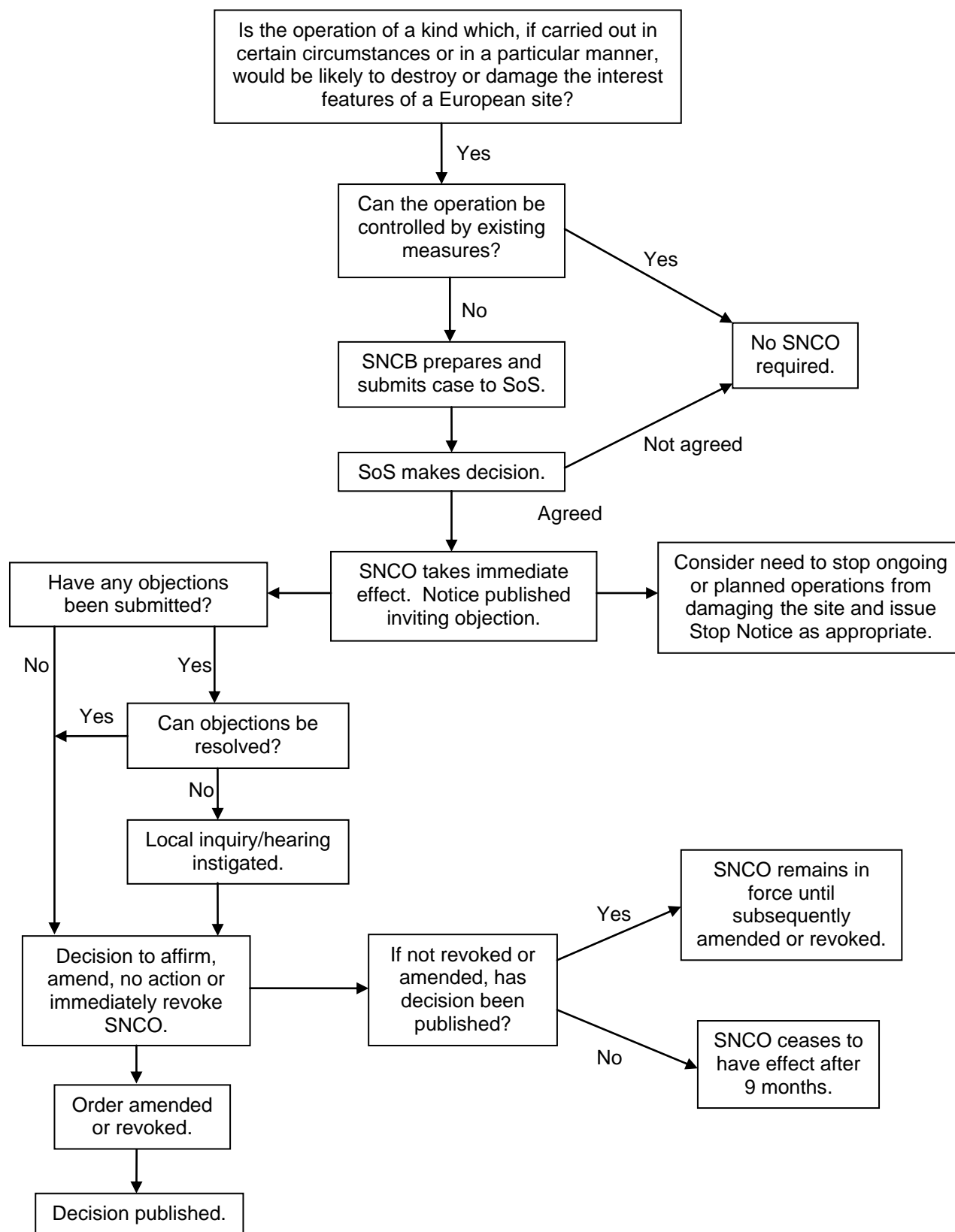
Enquiries on this guidance should be submitted in writing to:

Defra
International Protected Areas Team
Zone 1/16
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Email Habitats@defra.gsi.gov.uk

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SNCO FLOW CHART FOR MAKING AN ORIGINAL ORDER



RIGHT TO MAKE REPRESENTATION

1. Schedule 1 of the Habitats Regulations provides rights to make representations and objections in relation to the SNCO.

Rights to make representation at the order making stage

2. When the SoS gives notice of an order, they must invite any person to make representations or objections in accordance with the procedures prescribed in the notice.
3. Where, following any informal discussions (see paragraph 18.III), any representations or objections to an Order are not withdrawn, the SoS will either hold a local inquiry or afford any person making such representations the opportunity of putting their views to an independent inspector.
4. It will be for the SoS to decide, where representations or objections to an Order are made and not withdrawn and a stop notice has not yet been served, whether to proceed with serving a stop notice or to wait for a decision to be made on the Order after consideration of the representations and objections. Where, on the advice of the relevant SNCB, there is a need to take urgent or immediate action, it is possible for a stop notice to be served before the receipt or consideration of any representations or objections. The stop notice continues to have effect until such time as the Order is revoked. In the event that the Order is amended, following a hearing or inquiry, the SoS will modify any stop notice accordingly.

Right to refer matter to SoS following a negative decision for a consent where an appropriate assessment is required (see *Stage 2: Serving a Stop Notice*)

5. The applicant may, within two months of receiving a consent refusal, or three months of seeking a consent without a response, ask the relevant SNCB to refer the matter to the SoS. The SoS may, in the absence of feasible alternatives, consider that the operation must be carried out for imperative reasons of overriding public interest and this could include socio-economic considerations.
6. If the stop notice relates to a European site with priority natural habitat types or priority species, then such reasons must relate to human health, public safety or beneficial consequences of primary importance to the environment, or other reasons of overriding public interest, following consultation with the European Commission.

PUBLICATION OF ORDERS AND STOP NOTICES

Orders

1. Once an Order is made, it takes immediate effect. The notice accompanying the Order will invite representations or objections (28 days is the minimum time period for any response to the notice).
2. All notices will be publicised in the London Gazette and at least one local newspaper circulating in the area in which the land to which the Order relates is situated. The notice will also specify venues where the Order may be inspected free of charge. Such venues will be local to the area to which the Order relates.
3. The notice will also be served on every owner and occupier of the land to which the Order relates and on the local planning authority within whose area the site is situated.
4. On some occasions, instead of serving a notice on every owner and occupier of the land, the SoS may direct that a copy or copies of the notice be affixed to a conspicuous object or objects on the land to which the Order relates. In this instance, the notice will detail the operations contained within the Order and describe the area to which the Order relates. Such notices will be addressed to the owners and any occupiers of the land. Where an Order is made in the marine or inland waterways environment, appropriate arrangements will be made to ensure that relevant persons are made aware of the Order.
5. A SNCO specifying operations on land is a local land charge.

Stop notices

6. Where there is a need to serve a stop notice and the identity of the person carrying out the operation or proposing the operation cannot reasonably be ascertained, the stop notice may instead be published in at least one local newspaper circulating in the area and a copy or copies of the notice affixed to some conspicuous object or objects on the land to which the stop notice relates. Where a stop notice is made in the marine or inland waterways environment, appropriate arrangements will be made to ensure that relevant persons are made aware of the stop notice.

INQUIRY PROCEDURE

1. Where a local inquiry is to be held, a notice will be issued indicating the date, time and place of the inquiry. The notice will be published in at least one local newspaper and arrangements made to post copies of the notice on or near the area to which the Order relates (this may be carried out by the relevant SNCB or other relevant authorities). Notices will be issued at least 28 days in advance of the inquiry date.

Appearances at inquiry

2. The SoS will appoint an independent inspector to hold the local inquiry. The inspector's role is to conduct the inquiry and then make a report and recommendation to the SoS. SNCBs represent themselves in the capacity of the Government's nature conservation advisor. Other parties required to attend may, depending on the nature of the Order, include owners/occupiers of the land to which the Order relates and those who have made written objection to the Order.

Site inspections

3. The inspector may make an inspection of the land before and during the inquiry. The inspector can be unaccompanied or accompanied by key parties at the discretion of the inspector.

Decision

4. After the inquiry, the inspector will write a report and recommendation(s) and submit this to the SoS. The final decision on the order will be made by the SoS. Objectors and those appearing at the inquiry will be sent a copy of the decision notice and the inspector's report. Other interested parties will be provided with a copy of these documents on request.

Frequently asked questions

Q1. A SNCO stop notice has prevented me from carrying out my business. Can I apply for compensation?

A1. Where an operator has been served a stop notice, provisions in the Regulations provide for compensation to be paid where the operator can demonstrate that they have an interest in the affected land and that the value of such interest is less than it would have been without the stop notice. **Note that these provisions apply to land which forms part of an agricultural unit only.** Compensation will not reflect any loss of profit from not being able to undertake the operation. Anyone wishing to make a claim for compensation must do so through the relevant SNCB.

Q2. What are the penalties for not complying with a SNCO stop notice?

A2. A person is liable to a fine on summary conviction (not exceeding the statutory maximum⁹) or an unlimited amount on conviction on indictment if they carry out an operation in contravention of a SNCO stop notice without reasonable excuse. There are certain defences to the offence, including if the operation was undertaken in an emergency and the SNCB was notified of the operation as soon as practicable after its commencement.

The Courts are also empowered to make an order requiring that person to take certain actions to restore the land to its former condition. Failure, without reasonable excuse, to comply with such a court order may be punishable by a fine (not exceeding level 5¹⁰ on the standard scale) or further fines until the order is complied with. SNCBs can also enter the land to carry out restorative work and claim the costs back from the person subject to the order, where work has not been carried out within the period specified in the order.

Q3. Can socio-economic factors be taken into consideration when deciding to make a SNCO?

A3. Where an operation is likely to damage a European site, socio-economic factors would be factored into discussions about management measures needed to avoid such damage. However, where these cannot be agreed and no other mechanisms exist to control the impacts of such damage, a SNCO may be necessary.

Where a SNCO or stop notice is in force, socio-economic factors may be taken into account in the following circumstances. Where an operator makes a request for a consent to carry out an operation and the SNCB concluded that the operation forms part of a plan or project, the SNCB must carry out an appropriate assessment. Where, following the assessment and in the absence of feasible alternatives, it is concluded that the operation may have an adverse effect on the interest features of the site, mechanisms exist to allow the plan or project to proceed where the SoS considers that the plan or project must be carried out for imperative reasons of overriding public interest (see paragraphs 29 -33) and these reasons can include socio-economic factors.

Q4. Who is responsible for enforcing the SNCO?

A4. Enforcement responsibilities will in most cases fall to the relevant SNCB. However, this may need to be reviewed if a SNCO were made in the marine or inland waterways environment. In such cases it may be necessary to explore enforcement options with those authorities that have jurisdiction in these environments.

⁹The current level (at 1st January 2011) is £5,000.

¹⁰ The current level (at 1st January 2011) is £5,000.