EXECUTIVE NOTE

THE TRANSPORT AND WORKS (SCOTLAND) ACT 2007
(ACCESS TO LAND BY THE SCOTTISH MINISTERS) ORDER 2008

1. The above instrument would be made in exercise of the powers confered by sections 18(1)(b) and (2)(b) and (c) and 28(6) of the Transport and Works (Scotland) Act 2007 (asp 8). The instrument is subject to draft affirmative resolution procedure.

Policy

2. By virtue of section 6 of the Transport and Works (Scotland) Act 2007 ("the Act") the Scottish Ministers may make an order under section 1 of the Act to allow them to take whatever steps they believe are necessary or expedient to address circumstances where a promoter or operator has abandoned or neglected works of the types in section 1 of the Act subsequent to their authorisation. Section 6 also allows the Scottish Minsiters to get rid of spent provisions and to bring forward themselves an order to authorise the construction and operation of works under section 1.

3. The policy objective is to ensure that the Scottish Ministers should have all relevant information available to them prior to publishing under section 6 of the Act a notice of a proposal to make an order under section 1 of the Act and to that end it is considered that it would be beneficial for the Scottish Ministers to be able to inspect and survey land for purposes connected with construction, operation or works to which such an order would relate. In the case, for instance, where the Scottish Minsters were promoting a development at their own hands access might be required, for example, to ascertain the suitability of that land for the proposed transport scheme or inland waterway and to obtain information necessary for any environmental impact assessment.

4. The regime set out in this order makes provision as regards a proposal for entry to land by the Scottish Ministers where they are considering publishing a notice under section 6 of the Act.

5. The Scottish Ministers would hope to obtain access to land by agreement with the relevant owner or other person(s) with an interest in the land relevant to their proposal. If, however, agreement cannot be reached then recourse can be made to the regime set out within this order which allows the Scottish Ministers in the light of the evidence to make a determination that access should be granted (subject to such conditions or limitations as they consider appropriate) or not granted.

6. Aside from the benefits of the provision of more accurate information to assist with the design and development of the proposal access to land may also provide an opportunity, in certain circumstances, for example, where the Scottish Ministers are proposing a transport scheme, for greater specification so that the lines of deviation of a linear project (such as a railway line) may be more tightly drawn with consequential potential reduction in blight for property owners.

7. In short, the benefit of permitting the Scottish Ministers access to land is that it provides an opportunity for them to be better informed about their proposal and, particularly in respect of an environmental assessment, the impact of their proposal on the local area and its people.

Provisions

8. The provisions permit for the determination of whether to take access to land or for obtaining passage over land for the purposes of inspecting and surveying land or for carrying out archaeological and environmental investigations in connexion with the construction or operation of a proposal to which an order under section 1 of the Act would relate.

9. As mentioned previously, it is hoped that the Scottish Ministers would be able to obtain access to land by agreement with the owner, every tenant and occupier of the land in question. If, however, agreement cannot be reached the Scottish Ministers may make a determination on their proposal to enter land.

10. Prior to making that determination the Scottish Ministers must by notice inform the owner, every tenant and occupier of the land in question as to why entry to land is required and provide details of the activities that they intend to undertake once having gained access. That notice must also advise those parties of how they can make representations to the Scottish Ministers. Newspaper notice is also to be given.

11. Representations may be made concerning the proposal to enter with the Scottish Ministers within a 28 day period. Representations must be in writing (which includes email), state the grounds of the representations, indicate who is making the representations and provide an address to which any correspondence may be sent. Representations may, for example, object to the need for access on the grounds, for instance, that access is not necessary for the purposes that the Scottish Ministers wish or to particular aspects of the access, for example, the timing of access.

12. At the conclusion of the period for the receipt of representations the Scottish Ministers may determine how they wish to consider those representations, if any. The Scottish Ministers may provide an opportunity for a person who has made representations to have a hearing before a person appointed by the Scottish Ministers to conduct such a hearing.

13. After careful consideration of any representations and the report of any person appointed to hear representations the Scottish Ministers may make a determination to take entry to all the land in question, to take entry to part of the land in question or not to take entry. The Scottish Ministers may attach to their determination to take entry such conditions and limitations to the authorisation as they consider appropriate.

14. A notice of the determination of the Scottish Ministers including, in respect of a determination to enter land, any conditions or limitations attaching to that entry and providing information regarding the right of appeal to the sheriff, will be provided to the owner, any tenant and any occupier of the land.

15. Entry to land subsequent to a determination shall in any event have no effect until 28 days from the date of the notice have elapsed. That period is to allow any person aggrieved by the determination to make an appeal to the sheriff. After having heard the appeal the sheriff may dismiss the appeal, declare the determination to have no effect in respect of all or part of the land, modify the determination or remove or attach a condition or limitation to the determination or modify a condition or limitation. The sheriff's decision is final.

16. If access to land is refused or refusal is anticipated then the Scottish Ministers can approach the sheriff for the granting of a warrant. If a warrant is granted and the Scottish

Ministers are prevented from entering the land or part of it then the person causing the obstruction will be guilty of an offence and shall be liable on summary conviction to a fine.

17. Those with an interest in the property may recover compensation from the Scottish Ministers for any damage or loss of enjoyment of the property. If there is any dispute on compensation then it will be referred to the Lands Tribunal for Scotland for determination.

Consultation

18. A formal written consultation on the draft secondary legislation for the Act was conducted between 2 July and 31 August 2007. There were nineteen respondents. A summary of all responses was published on 27 September 2007 on the Scottish Government website.[1]

19. The order has been revised in the light of comments to make clear that the Scottish Ministers must also obtain any other statutory consents, permissions or licences necessary to conduct the survey or other activities in advance of taking entry. The notice to be given to owners, tenants and occupiers has also been modified so that a plan showing the land which the Scottish Ministers propose to enter can be attached and a provision has been included that enables the Scottish Ministers to issue the notice to any other person who is not directly affected by the application (this might, for instance, be to the planning authority for information).

20. The Scottish Ministers have advised consultants in response to queries raised that the list of conditions and limitations which the Scottish Ministers may attach to a determination (see article 8(4)) is non-exhaustive and may cover other matters. In order to put it beyond doubt, a provision has been included at article 9(4) that the sheriff's decision on an appeal is final.

Financial Effects

21. It is not envisaged that there will be any significant financial effects arising from the provisions for the Scottish Ministers or for the owners, tenants or occupiers of land. The process is discretionary and it may only be used if agreement for access cannot be obtained between parties.

22. Any matters relating to compensation for the owner or occupier of the land caused by damage or loss of enjoyment will be referred, should agreement not be obtained, to the Lands Tribunal for determination.

23. A regulatory impact assessment has been produced and a copy accompanies this note.

Transport Directorate
March 2008

[1] http://www.scotland.gov.uk/Publications/2007/09/Transport

Transport and Works (Scotland) Act 2007

Composite regulatory impact in respect of:

(i) Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008
(ii) Transport and Works (Scotland) Act 2007 (Access to Land by the Scottish Ministers) Order 2008

1. Title of proposals

1.1 This is a composite regulatory impact assessment of orders made under section 18 of the Transport and Works (Scotland) Act 2007 (the "TAWS"): those orders providing regimes for authorising access to land on application by prospective applicants for orders under section 1 of the TAWS and by the Scottish Ministers where they are considering promoting an order under section 1 of the TAWS.

2. Purpose and intended effect

Objectives

2.1 Orders made under section 1 of the TAWS are the means of authorising the construction and operation of railways, tramways, other guided transport systems, trolley vehicle systems and inland waterways (for example canals). Applications are made by promoters of schemes to the Scottish Ministers. The Scottish Ministers may also at their own volition promote such schemes.

2.2 The policy objective is to ensure that at the time of application for an order, under section 1 of the TAWS, an applicant should have all relevant information available in order to ensure that the consideration of the proposed scheme by the Scottish Ministers can take place efficiently and effectively.

2.3 In order to assist the applicant in the development of their proposals and the putting together of their application it was considered by the Scottish Ministers that it would be beneficial for the prospective applicant to be able to inspect and survey land in order to ascertain the suitability of that land for the proposed transport scheme and to obtain information necessary for any environmental impact assessment.

2.4 The Scottish Ministers hope that a prospective applicant for an order under section 1 of the TAWS will be able to obtain access to land by agreement with the relevant owner or occupier of land relevant to their proposed scheme. If however agreement cannot be reached then recourse can be made to the regime set out within these orders which allow the Scottish Ministers, in the light of evidence presented to determine whether access should be granted, granted subject to such conditions or limitations as they consider appropriate, or not granted.

2.5 Aside from the benefits of the provision of more accurate information to assist with the design and development of the proposal, access to land by an applicant may also provide an opportunity for greater scheme specification so that the lines of deviation of a linear project, such as a railway line, may be more tightly drawn with consequential reduction in blight for property owners.

2.6 In short, the purpose of these orders made under section 18 of the TAWS is to provide, subject to safeguards, a regime by orders to authorise prospective applicants or the Scottish Ministers (for example, where Transport Scotland are promoting a development proposal) to access land, for the purposes of putting together their application or proposal for an order under section 1, in the absence of an agreement between the applicant or the Scottish Ministers and the owner or occupier of the land in question. By accessing land the prospective applicant or the Scottish Ministers may inspect and survey land in order to determine its suitability for the proposed transport project and to carry out environmental investigation to assess the impact of the proposed development on the local area and its population.

Rationale for government intervention

2.7 The Scottish Ministers acknowledge that a great deal of information about land is currently available and can be obtained by desktop studies, analysing database and historic record information. Furthermore where information is not currently known, remote sensing and other non-intrusive investigation techniques can provide the necessary information. It is accepted that there may be occasions where being on site would prove extremely advantageous particularly to determine the suitability of the relevant land for the proposed development or assessing the environmental impacts of that proposed development.

2.8 The policy thrust of the TAWS process is to have an efficient process that allows decisions to be made swiftly in the knowledge of all available information. It is considered that anything that might assist that objective provided that it pays due regard to the rights of any affected parties must be beneficial.

3. Consultation

(i) Within government

3.1 Internal consultation within the Scottish Government has been extensive throughout the Administration's various directorates, including transport, planning, environment and justice. Consultation has also been undertaken with Scottish Government agencies, namely, Historic Scotland and Transport Scotland.

(ii)Public consultation

3.2 A consultation paper[1] was published on the Scottish Government's website on 4 July 2007 and invited views by 31 August 2007. A wide range of organisations were notified of the consultation exercise. These included all Local Authorities, both National Park Authorities, every regional transport partnership, all relevant Government bodies including SNH and SEPA, the Council on Tribunals, business and environment interests as well as legal firms and representative bodies that expressed an interest during the passage of the TAWS.

3.3 Nineteen responses were received to the consultation. A summary of all responses was published on 27 September 2007 on the Scottish Government website[2].

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[1] http://www.scotland.gov.uk/Publications/2007/07/consultation
[2] http://www.scotland.gov.uk/Publications/2007/09/Transport

3.4 The legislation will be supported by extensive guidance and it is within that guidance that the Scottish Government will provide, as a direct response to concerns raised by consultants, an explanation of the expected type of liability insurance required to be provided by the applicant at the time of the application.

3.5 The Scottish Government is grateful to all those who have provided comments and observations in response to the consultation exercise.

4. Options

4.1 Two options have been identified:

Option 1 - Do nothing, by which is meant that any access to land, in advance of an application being made under section 1 of the TAWS, could be made only by means of voluntary agreement or by any existing statutory means open to the prospective applicant (or the Scottish Ministers where they are the promoter) for an order under section 1 of the TAWS.

Option 2 - To provide a means in the absence of any existing statutory rights of access for a prospective applicant (or the Scottish Ministers where they are the promoter) for an order under section 1 of the TAWS, ensuring that any access regime seeks to safeguard the interests of the land owners and provides a mechanism for appeal against a decision to permit access as well as making provision for the consideration and award of compensation for any damage to or loss of enjoyment of the land owners' property.

4.2 Option 2 is the preferred option. It is consistent with the policy objective of having an efficient and effective process, and provides a degree of uniformity for any promoter who does not currently have a statutory right of access to request access to the land that is subject to possible development under a TAWS order. Option 2 also sets out a comprehensive regime that ensures a consistent procedure will apply.

5. Costs and benefits

5.1 The bodies and individuals likely to be affected are those that may make applications (which might include, for example, local authorities or Network Rail); those whose interests are affected by access to land (such as owners and occupiers of land); the sheriff court service in determining any appeals; the Lands Tribunal for Scotland in determining any unresolved compensation issues; and the Scottish Ministers who will take an active role in administering the process.

5.2 As the regime is discretionary it will be open to those making applications to decide whether they wish to pursue the process. There will be a cost to bodies and individuals in producing the information necessary to make an application. However, the Scottish Ministers consider that any costs will be outweighed by the benefits that will accrue once information has been obtained and used to inform an application for an order under section 1 of the TAWS. There will be no charge for the making of an application for an access to land order.

5.3 Those whose interests are affected by the granting of access to another party may suffer some inconvenience in terms of physical disturbance to the land and possible loss of enjoyment, and it will be for the Scottish Ministers, in the light of an application and any representations made on it, to set such limitations and conditions as they think appropriate to mitigate any inconvenience. A benefit of access to land (either by agreement or by means of an order) is that more and better information can be obtained which should ultimately permit swifter consideration of a subsequent application for an order under section 1 of the TAWS and swifter informed consideration is clearly to the benefit of all concerned.

5.4 It should also be noted that by obtaining access to land prospective promoters should be able to provide greater specification of the design and development of their proposal and in the case of linear developments, such as railways, may result in a reduction to the lines of deviation, with consequential reductions in the blighting effects of the proposed scheme on owners and occupiers of land.

5.5 It is not envisaged that there will be any appreciable impact on sheriffs' courts. The number of applications for access to land in any given year is likely to be small; whilst the number of decisions of the Scottish Ministers that will be challenged by those with an interest in land cannot be determined with any degree of confidence, it is considered, set against the current level of activity of sheriffs' courts, that any additional activity is likely to be minimal and therefore containable.

5.6 In respect of the Lands Tribunal for Scotland it is not considered that there will be any appreciable impact. No formal assessment of that impact has been undertaken since it is not known to what extent any party will wish to use this new regime however the instances of approaches are likely to be limited; it is conceivable that parties may wish to seek agreement through negotiation rather than be bound by an outcome determined by a third party.

5.7 The Scottish Ministers have established the TAWS Unit to undertake the management of processes falling under the TAWS. The Unit will therefore be responsible for the access to land. Any hearing initiated under these orders will be conducted by reporters from the Directorate for Planning & Environmental Appeals (DPEA). The Scottish Ministers have taken a decision not to seek to recover any costs they incur from an applicant for the holding of a hearing on the basis that applications for access to land will relate to transport infrastructure developments that are likely to be important to the economic, social or environmental well-being of the country. It is highly likely that by providing access to land developers will be able to obtain information relevant to their proposals which in turn should lead to swifter consideration of proposals and may potentially reduce the cost of implementing schemes (many of which are largely publicly funded). One party to a hearing may be ordered by the Scottish Ministers to meet another party's expenses at the hearing. Guidance will explain to parties the specific circumstances where this will arise but it is restricted to where there is unreasonable behaviour by a party at a hearing that causes another party to incur unnecessary expense.

5.8 In terms of the overall picture, when account is taken of the potential benefits of quicker decisions arising from the implementation of the rules and regulations under the TAWS it is considered that the access to land procedures could yield significant net cost benefits.

6. Small/Micro Firms Impact Test

6.1 Small businesses are likely to be involved in the process as objectors to the granting of an order for access because of concerns about the potential effect of access on the conduct of their business.

6.2 It is open to these businesses, as is the case with any other owner, tenant or occupier subject to an application to make representations on that application for access. The Scottish Ministers in the light of those representations may provide an opportunity for a hearing on the representations and should the Scottish Ministers decide to permit access to the land they may set such conditions or limitations as they deem appropriate. These conditions might seek to mitigate the impact of access on a business by controlling, for instance, times and dates of entry.

6.3 Small businesses are not treated differently to other owners, tenants or occupiers nor are they affected in a manner differently to that of other parties.

7. Legal Aid Impact Test

7.1 Assistance by Way of Representation and Civil Legal Aid are not generally available for the type of hearing that may be conducted under either of the Access to land regimes and therefore there will be no impact on the Legal Aid fund.

8. "Test Run" of business forms

8.1 A copy of the forms to be used to give owners, tenants and occupiers notice under the procedure was included within the consultation exercise and was approved subject to a minor modification to include reference to a plan of the land in question. That modification has been incorporated.

9. Competition assessment

9.1 It is not considered that the orders raise any competition issues as the rules apply equally to all applicants and any other persons engaged in the process.

10. Enforcement, sanctions and monitoring

10.1 Responsibility for ensuring compliance with statutory procedures rests with the sheriff.

10.2 If access to land is refused or that refusal is anticipated then the applicant can approach the sheriff for the granting of a warrant. If a warrant is granted and the applicant is prevented from entering the land or part of it then the person causing the obstruction will be guilty of an offence and shall be liable on summary conviction to a fine.

10.3 As with all the other rules and regulations made under the TAWS the new procedures will be closely monitored by the TAWS Unit and the rules, regulations and orders will be subject to ongoing monitoring and review.

11. Implementation and delivery plan

11.1 The intention is that the orders will come into force before the summer of 2008.

11.2 Full guidance will be given on the new procedure on its introduction by way of comprehensive material, which is to be published and also made available on the Scottish Government's web site.

12. Post-implementation review

12.1 Under section 21 of the TAWS the Scottish Ministers are obligated to prepare a report by 1 October each year reviewing the operation of the preceding year up to and including 31 July.

12.2 That report will be published and a copy will be laid before the Scottish Parliament. It is also expected that the relevant Scottish Parliamentary committee will review the report and, if appropriate, call on the Scottish Ministers to provide comment.

12.3 TAWS Unit administrators have included within their work programme the need to conduct a formal review, at least every 3 years, on the effectiveness and appropriateness of the rules, regulations and orders under the TAWS. However, any serious defect in the procedures or the guidance material would be addressed at the time issues were identified.

13. Summary

13.1 The regime provides for a statutory mechanism in the absence of agreement by parties. The mechanism does not necessarily mean that an applicant will always obtain access to land in the absence of any agreement with a land owner or occupier. An applicant will be required to establish a case. It is hoped that an applicant or the Scottish Ministers (where they are the promoter) will be able to obtain access to land by agreement with the relevant owner and occupier of land. If however agreement cannot be reached, applicants may seek, by application, authority from the Scottish Ministers to access land. Any application under this procedure is seen by the Scottish Ministers as the last resort; prospective applicants must demonstrate that they have made substantial efforts to achieve access by agreement. The regime enables land owners and occupiers to defend their position by means of a hearing if considered appropriate. Furthermore, there is an opportunity for a land owner or occupier to challenge the decision of the Scottish Ministers by seeking appeal to a sheriff.

14. Declaration and publication

'I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.'

Signed by the Responsible Minister ……

Minister for Transport, Infrastructure and Climate Change

Date ……

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