Draft Order laid before the Scottish Parliament under section 28(4) and (5) of the Transport and Works (Scotland) Act 2007, for approval by resolution of the Scottish Parliament.

D R A F T S C O T T I S H S T A T U T O R Y I N S T R U M E N T S

2008 No.

TRANSPORT AND WORKS

TRANSPORT

CANALS AND INLAND WATERWAYS

The Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008

Made - - - -	*2008*
Coming into force - -	*2008*

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SCHEDULE — FORMS OF NOTICE

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 18(1)(a) and (2)(a) and (c) and 28(6) of the Transport and Works (Scotland) Act 2007(**a**) and all other powers enabling them to do so.

In accordance with section 28(4) and (5) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. This Order may be cited as the Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008 and comes into force on the day after the day on which it is made.

Interpretation

2. In this Order (unless the context otherwise requires)–

"the Act" means the Transport and Works (Scotland) Act 2007;

"application" means an application under article 5 and "applicant" means a person making, or proposing to make, an application;

"authorisation" means an authorisation under article 9(1)(a);

"authorised land" means the relevant land, or such part of the relevant land, which an applicant may enter by virtue of an authorisation;

"expiry date for representations" means the date, being a date not less than 28 days after the date of the notice to be served under article 6(1), which the applicant specifies in that notice as the final date for making representations;

"in writing" includes electronic transmission;

"owner", in relation to any land, means any person who under the Lands Clauses Acts would be enabled to sell and convey the land to the promoters of an undertaking; and

"relevant land" means the land which the applicant wishes to enter by virtue of an authorisation.

Access to land

3.—(1) On–

(a) the grant of an authorisation; and

(b) having obtained any other consent, permission or licence required under any other enactment,

an applicant may enter authorised land for such of the purposes set out in paragraph (2) as are permitted by that authorisation.

(2) Those purposes are–

(a) in connection with construction, operation or works to which an order under section 1 of the Act (orders as to transport systems and inland waterways) would relate–

(i) inspecting and surveying authorised land or any other land;

(ii) searching or boring on and in the authorised land to ascertain for the purposes of the survey the nature of the subsoil; and

(iii) carrying out archaeological and environmental investigations and assessments on and in the authorised land; and

(b) obtaining passage over authorised land to enable the activities in sub-paragraph (a) to be undertaken on and in other land.

(**a**) 2007 asp 8.

(3) Entry to authorised land under paragraph (1) shall include the entry of such persons, vehicles, plant, materials and apparatus as may be required for the purposes which are permitted by the authorisation.

(4) Entry to authorised land pursuant to this article is subject to–

(a) the provisions of this Order;

(b) the terms of the authorisation and any conditions or limitations attached to it; and

(c) the terms of any agreement between the applicant and any person with an interest in the authorised land regarding the applicant's entry to the authorised land.

Pre-application conditions

4. No application may be made by an applicant unless the applicant–

(a) is considering making an application for an order to be made under section 1 of the Act; and

(b) has attempted to obtain entry to the relevant land with the agreement of the owner and (where their agreement is also required) of every tenant and occupier of that relevant land.

Application

5.—(1) An application for authorisation to enter relevant land shall be made in writing, dated and shall be addressed to the Scottish Ministers.

(2) A separate application shall be made by the applicant for each area of relevant land in separate ownership or which would likely be in separate ownership if an owner could be traced.

(3) In the application the applicant shall give the name and the address to which any request for further information, notice or other document to be given to the applicant are to be sent.

(4) Where an application is made by an agent on behalf of the applicant details of the agent's authorisation must be appended to the application.

(5) The applicant shall submit with the application 2 copies of each of the following documents–

(a) a certificate of liability insurance specifying the level, and period, of cover, the matters for which cover is given and details of the person who is underwriting that cover or an explanation why such a certificate is not available;

(b) a report describing the construction, operation or works in respect of which the applicant will be proposing to make an application for an order under section 1 of the Act and the state of development of that proposal;

(c) a report of the attempt to seek entry by agreement with the owner and (where their agreement is also required) any tenant or occupier of the relevant land to which the application relates together with any reasons given if entry is refused;

(d) a plan of that relevant land and a schedule listing the names and addresses of the owner and every tenant and occupier of that relevant land and identifying with which of those persons the applicant has obtained an agreement regarding entry to that relevant land;

(e) a report of the reasons as to why entry to that relevant land is required and why that cannot be achieved without such entry;

(f) a report of each activity the applicant wishes to undertake in and on that relevant land including the type of activity, the impact on that relevant land, the duration required for entry, the preferred times and dates of entry and the number of persons, and details of any vehicles, plant, materials and apparatus, that will be required;

(g) a list of other consents, permissions or licences required under other enactments in connection with the proposed entry to that relevant land, which at the date of the application are being sought or which have been obtained or refused, specifying for each such consent, permission or licence–

(i) from whom the consent, permission or licence is or was required;

(ii) the date of the application for, or of the grant or refusal of, the consent, permission or licence (as the case may be); and

(iii) the reference number (if any) of the application; and

(h) a memorandum providing details of proposed arrangements or processes for reinstatement of that relevant land.

(6) The applicant may combine the reports, schedule, list and memorandum referred to in paragraph (5)(b) to (h) into a single document.

(7) The Scottish Ministers may dispense with the requirement for the applicant to provide the document in paragraph (5)(a) in any case where they consider it appropriate to do so.

(8) The applicant may provide the Scottish Ministers with any other material the applicant considers relevant in support of an application.

(9) The Scottish Ministers may direct the applicant to provide any other information that the Scottish Ministers may require in connection with an application.

Notice of application

6.—(1) The applicant shall as soon as possible after making an application serve a notice in (or as nearly as may be in) the form of Form 1 in the Schedule upon–

(a) the owner and every tenant and occupier of the relevant land to which the application relates; and

(b) any other person that the Scottish Ministers direct.

(2) The applicant shall also, as soon as possible after making an application, publish in at least one newspaper circulating in the locality, or each of the localities, in which the relevant land to which the application relates is situated, a notice in (or as nearly as may be in) the form of Form 2 in the Schedule.

(3) The notice to be published for the purposes of paragraph (2) may be combined with the newspaper notice of any other application by the applicant relating to other relevant land.

(4) If any person makes a request for further details as to the relevant land to which an application relates which is received by the applicant on or before the expiry date for representations, the applicant shall provide to that person, free of charge, further details sufficient to identify that relevant land.

(5) The applicant may comply with the applicant's obligation under paragraph (4) by providing the person making the request with a plan showing the relevant land.

(6) As soon as practicable after making the application the applicant shall submit to the Scottish Ministers copies of–

(a) the notices served under paragraph (1) and confirmation of the date on which they were served; and

(b) each notice placed in a newspaper for the purposes of paragraph (2).

Representations

7.—(1) Any representations made in relation to an application shall only be representations for the purposes of this Order if–

(a) subject to paragraph (2), received by the Scottish Ministers on or before the expiry date for representations;

(b) made in writing;

(c) they state the grounds of the representations;

(d) they indicate who is making the representations; and

(e) they provide an address to which any correspondence relating to the representations may be sent.

(2) The Scottish Ministers may in any particular case where they consider it appropriate to do so allow further time for making any representations beyond the expiry date for representations.

(3) The Scottish Ministers–

(a) shall, as soon as practicable after they have received representations, provide the applicant with a copy of the representations; and

(b) may send a copy of any representations they have received to any other person,

and may invite comments, in writing, from the applicant or such person within such period as the Scottish Ministers may specify.

(4) The Scottish Ministers may, upon request, provide any person with a copy of any representations made by others.

(5) The Scottish Ministers may send a copy of any comments they have received pursuant to this article to any person and may invite any further comments, in writing, from that person within such period as the Scottish Ministers may specify.

Hearing

8.—(1) The Scottish Ministers may give to a person who has made representations an opportunity of appearing before and being heard by a person appointed by the Scottish Ministers for the purpose.

(2) The persons entitled to appear at a hearing are–

(a) the applicant; and

(b) any person whose representations are to be dealt with at the hearing.

(3) Nothing in paragraph (2) shall prevent the person appointed by the Scottish Ministers to hold a hearing from permitting any other person to appear at a hearing.

(4) Any person entitled or permitted to appear may do so on that person's own behalf or be represented by counsel, a solicitor or any other person.

(5) The Scottish Ministers shall notify–

(a) the applicant; and

(b) any person whose representations are to be dealt with at a hearing,

of the arrangements for the hearing not less than 28 days before the date on which the hearing is to take place.

(6) The Scottish Ministers may vary the arrangements for a hearing and shall give such notice of any such variation as appears to them to be reasonable.

(7) The applicant shall, not later than 14 days before the date on which the hearing is to take place (or by such later day as the Scottish Ministers may allow), publish a notice of the hearing in at least one newspaper circulating in the locality, or each of the localities, in which the relevant land to which the application relates is situated.

(8) The person appointed by the Scottish Ministers to hold a hearing shall determine the procedure at a hearing and shall state at the commencement of a hearing the procedure that person proposes to adopt subject to consideration of any submission by any of the persons specified in paragraph (2).

(9) Subsections (6), (7) and (8) of section 210 of the Local Government (Scotland) Act 1973 (expenses of inquiries)(**a**) apply to a hearing held under this article as they apply to a local inquiry under that Act.

(**a**) 1973 c.65; section 210 was relevantly amended by the Housing and Planning Act 1986 (c.63), Schedule 11, paragraph 39.

Consideration of the application

9.—(1) The Scottish Ministers shall, after consideration of the application, any representations, any comments pursuant to article 7 and paragraph (5) and the report of any person appointed under article 8(1), determine–

(a) to grant authorisation to the applicant to take entry to the relevant land to which an application relates and, if so, the purposes in article 3(2) for which entry is permitted; or

(b) to refuse to authorise entry to that relevant land.

(2) A determination under paragraph (1) may authorise entry to part of the relevant land to which an application relates and refuse it to the remainder.

(3) The Scottish Ministers may attach such conditions and limitations to an authorisation as they consider appropriate.

(4) Without prejudice to the generality of paragraph (3) the conditions and limitations which the Scottish Ministers may attach to an authorisation include–

(a) requiring prior notice before entry is taken;

(b) the duration of the authorisation to take entry and restrictions as to the timing of entry including as to the days on which it may be taken;

(c) restrictions as to the timing of undertaking any activity including as to the days on which it may be undertaken;

(d) restrictions on entry to particular parts of the authorised land or for particular purposes;

(e) requirements applying before, during or after entry is taken;

(f) enabling the attendance of the owner or any tenant or occupier or their representative, if the owner or any tenant or occupier should wish it, at all times or at certain times or when performing a particular activity;

(g) requiring notice to, and the agreement of, specified persons before undertaking a particular activity;

(h) provision as regards the persons, vehicles, plant, materials and apparatus to which article 3(3) applies;

(i) requiring a survey or audit of the condition of the authorised land to be completed and recorded prior to entry for the purposes permitted by the authorisation, or to entry for any specified purpose, commencing; and

(j) requiring the making good of any damage done in entering or in consequence of entering the authorised land.

(5) Where the Scottish Ministers propose to attach conditions or limitations to an authorisation in the event of it being granted, they may, where they consider it appropriate to do so–

(a) serve a copy of those conditions or limitations on the applicant and other persons likely to be concerned; and

(b) invite comments, in writing, from the applicant and those other persons within such period as the Scottish Ministers may specify.

(6) As soon as practicable after making a determination under paragraph (1), the Scottish Ministers shall give notice of the determination, together with the reasons for it, to–

(a) the applicant; and

(b) the owner and every tenant and occupier of the land to which the authorisation relates or would have related in the case of a refusal to authorise entry to land.

(7) Where the determination is to grant an authorisation to the applicant to enter all or part of the relevant land to which their application relates–

(a) the notice under paragraph (6)(a) shall include the authorisation (including any conditions or limitations attaching to it); and

(b) the notice under paragraph (6)(b) shall–

(i) include a copy of the authorisation (including any conditions or limitations attaching to it);

(ii) give information regarding the right of appeal to the sheriff under article 10; and

(iii) state that an offence may be committed if entry is obstructed and the sheriff has by warrant authorised the applicant to enter the authorised land.

(8) An authorisation shall have no effect–

(a) before the expiry of the period within which an appeal to the sheriff under article 10(1) may be made; or

(b) where an appeal under that article has been made, before the appeal is withdrawn or otherwise disposed of.

Appeal to sheriff

10.—(1) Any person who is aggrieved by–

(a) an authorisation; or

(b) the terms of any condition or limitation attached, or the failure of the Scottish Ministers to attach a particular condition or limitation, to an authorisation,

may, by summary application, appeal to the sheriff within 28 days of the giving of the notice required by article 9(6).

(2) The sheriff in whose sheriffdom the authorised land or any part of it is situated has jurisdiction to hear an appeal under this article.

(3) The decision of the sheriff in an appeal under this article may–

(a) dismiss the appeal;

(b) declare the authorisation to be of no effect in respect of all or part of the authorised land; or

(c) modify an authorisation or modify or remove a condition or limitation attached to the authorisation or attach a condition or limitation to it.

(4) The sheriff's decision on such an appeal is final.

Compensation

11.—(1) Where in the exercise of the power of entry of an applicant–

(a) damage is caused to land or corporeal moveables; and

(b) that damage has not been made good by the applicant,

any person having an interest in the land or moveables may recover compensation in respect of that damage from that applicant.

(2) Where in consequence of the exercise of the power of entry of an applicant any person is disturbed in their enjoyment of land or corporeal moveables, that person may recover compensation from that applicant in respect of the disturbance.

(3) Any dispute as to the amount of any compensation payable by virtue of this article shall be referred to and determined by the Lands Tribunal for Scotland.

(4) Sections 9 and 11 of the Land Compensation (Scotland) Act 1963 (procedure on reference to the Lands Tribunal and expenses)(**a**) shall apply in relation to the determination of any such dispute as if–

(a) the reference in section 9(1) of that Act to section 8 of that Act was a reference to paragraph (3);

(b) in section 9(3) of that Act the words from "except that" to the end were omitted; and

(**a**) 1963 c.51; section 9 was amended by the Local Government, Planning and Land Act 1980 (c.65), Schedule 33, paragraph 7(2).

(c) references in section 11 of that Act to the acquiring authority were references to the applicant.

Warrant

12.—(1) If it is shown to the satisfaction of the sheriff, on evidence on oath, that entry to authorised land has been refused, or that refusal is apprehended, the sheriff may by warrant authorise the applicant to enter the authorised land in accordance with article 3.

(2) A warrant granted under paragraph (1) shall continue in force until the time when the purposes for which the warrant is granted are satisfied.

Offence

13. A person who wilfully obstructs the applicant, or any person falling within article 3(3), where the applicant has been authorised to enter authorised land by virtue of a warrant under article 12 is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Saving

14. The ability of a prospective applicant for an order under section 1 of the Act to obtain entry to land by virtue of the provision in this Order is in addition to any other power to obtain entry to land under any other enactment.

Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
2008

SCHEDULE

Article 6

FORMS OF NOTICE

Form 1

Article 6(1)

The Transport and Works (Scotland) Act 2007

The Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008

NOTICE OF APPLICATION FOR ENTRY TO LAND

To: [*owner/tenant/occupier/other person as the case may be*]

[*Name and address of applicant*] gives notice under article 6(1) of the Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008 that an application, dated [*date of application*] has been made to the Scottish Ministers for an authorisation pursuant to that Order for entry to [*details of the land to which entry is required and a plan may be attached where this would be helpful*] for the purposes of [*details of purposes*] in respect of a proposed project to [*the purpose of the project*].

In the event that the Scottish Ministers decide to authorise entry to the land, article 3(4)(c) of the Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008 provides that such entry is subject to the terms of any agreement between us regarding our entry to the land. [*Delete this paragraph if no such agreement has been entered into between the applicant and the recipient of the notice*]

Any representations about the application should be sent to the Scottish Ministers, c/o Transport and Works Unit [*postal and e-mail address*]. Representations MUST (i) be received by the Scottish Ministers on or before *[expiry date for representations being a date not less than 28 days after the date of the notice*], (ii) be made in writing (whether sent by post or e-mail), (iii) state the grounds of the representations, (iv) indicate who is making the representations, and (v) give an address to which any correspondence relating to the representations may be sent. (If you are sending your representations by e-mail, please also provide a postal address).

The Scottish Ministers may make complete copies of the representations public and will copy them to the applicant seeking the authorisation.

Signed _____

On behalf of: _____
[delete if appropriate]

Date: _____

Name and status of signatory: _____

Form 2 Article 6(2)

The Transport and Works (Scotland) Act 2007

The Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008

NOTICE OF APPLICATION FOR ENTRY TO LAND

[*Name and address of applicant*] gives notice under article 6(2) of the Transport and Works (Scotland) Act 2007 (Access to Land on Application) Order 2008 that an application, dated [*date of application*] has been made to the Scottish Ministers for an authorisation pursuant to that Order for entry to land situated at [*locality of the land to which entry is required*] for the purposes of [*details of purposes*] in respect of a proposed project to [*the purpose of the project*].

Further details as to the land to which the application relates may be requested from the applicant at *[contact address given pursuant to article 5(3) and any email address which may be used]* provided that request is received by the applicant on or before *[expiry date for representations being a date not less than 28 days after the date of the notice to be served under article 6(1)]*.

Any representations about the application should be sent to the Scottish Ministers, c/o Transport and Works Unit [*postal and e-mail address*]. Representations MUST (i) be received by the Scottish Ministers on or before *[expiry date for representations being a date not less than 28 days after the date of the notice to be served under article 6(1)*], (ii) be made in writing (whether sent by post or e-mail), (iii) state the grounds of the representations, (iv) indicate who is making the representations, and (v) give an address to which any correspondence relating to the representations may be sent. (If you are sending your representations by e-mail, please also provide a postal address).

The Scottish Ministers may make complete copies of the representations public and will copy them to the applicant seeking the authorisation.

Signed _____

On behalf of: _____
[delete if appropriate]

Date: _____

Name and status of signatory: _____

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision as regards authorising prospective applicants for orders under section 1 of the Transport and Works (Scotland) Act 2007 (which relate to the authorisation of transport systems and inland waterways), to enter land to undertake inspections and surveys for purposes connected with construction, operation or works to which such an order would relate. This Order prescribes the manner in which an application should be made, the procedure for the making and consideration of representations in relation to an application and the procedure for enforcing access, where subsequent to authorisation, access is prevented.

Article 3 provides that if an authorisation is granted an applicant may enter land for such purposes as may be specified in the authorisation.

Article 4 provides the conditions that an applicant has to fulfil in order to make application for an authorisation to enter land.

Article 5 sets out how an application is to be made and the documentation which must be submitted in support of it.

Article 6 (with the Schedule) provides for the service by the applicant of notice, on specific persons, of the application and for a newspaper notice.

Article 7 makes provision relating to representations including the validity of representations.

Article 8 makes provision in relation to any hearing held to consider representations on an application.

Article 9 sets out provision regarding the determination of an application for entry to land, the noticing arrangements and in the case of access being authorised provision as to the date on which that authorisation shall have effect.

Article 10 sets out the procedures for an appeal to the Sheriff by any person aggrieved by an authorisation.

Article 11 sets out the circumstances where compensation can be recovered from the applicant. It also prescribes that any dispute shall be referred to and determined by the Lands Tribunal for Scotland.

Article 12 provides the circumstances in which the sheriff may grant a warrant and article 13 sets out the offence that a person commits in wilfully obstructing entry which has been authorised by virtue of a warrant.

A Regulatory Impact Assessment has been prepared in respect of this Order. A copy can be obtained from the Scottish Government Transport Directorate, Victoria Quay, Edinburgh EH6 6QQ.