

Statutory Instrument 1999 No. 1746

The Scotland Act 1998 (Border Rivers) Order 1999

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STATUTORY INSTRUMENTS

1999 No. 1746

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

River, Scotland

River, England and Wales

Salmon and Freshwater Fisheries

The Scotland Act 1998 (Border Rivers) Order 1999

Made

22nd June 1999

*Coming into force in accordance
with article 1(1)*

At the Court at Windsor Castle, the 22nd day of June 1999

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before and approved by a resolution of each

House of Parliament and of the Scottish Parliament;

Now therefore, Her Majesty, in exercise of the powers conferred upon Her by sections 111 and 113 of the Scotland Act 1998[1] is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

PART I

GENERAL

Citation, commencement and interpretation

1. - (1) This Order may be cited as the Scotland Act 1998 (Border Rivers) Order 1999 and shall come into force immediately before the principal appointed day[2]

(2) In this Order-

"the 1951 Act" means the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951[3]

"the 1975 Act" means the Salmon and Freshwater Fisheries Act 1975[4]

"the 1976 Act" means Freshwater and Salmon Fisheries (Scotland) Act 1976[5]

"the 1986 Act" means the Salmon Act 1986[6]

"the 1991 Act" means the Water Resources Act 1991[7]

"the 1995 Act" means the Environment Act 1995[8]

"the 1998 Act" means the Scotland Act 1998;

"the Minister" means the Minister of Agriculture, Fisheries and Food;

"the Environment Agency" means the body corporate established under section 1 of the 1995 Act;

"the River Tweed Council" means the council established by section 6 of the Tweed Fisheries Act 1969[9]

"sea trout" means migratory fish of the species *Salmo trutta* commonly known as sea trout and any part of such a fish; and

"Upper Esk" means that part of the River Esk lying upstream of a line drawn from a point at Ordnance Survey Grid Reference NY 3245 6632 on the western bank of the River Sark in a southerly direction to a point at Ordnance Survey Grid Reference NY 3245 6503 on the coast of Cumbria and "Lower Esk" means any part of that River downstream of that line.

Saving

2. - (1) This Order shall not affect the validity of anything done under any Border rivers function relating to the conservation, management or exploitation of salmon, trout, eels and freshwater fish prior to the coming into force of this Order.

(2) Anything (including legal proceedings) which, at the time when this Order comes into force, is in the process of being done may, so far as it relates to any Border rivers function relating to the conservation, management or exploitation of salmon, trout,

eels, and freshwater fish, be continued.

PART II
RIVER ESK

Disapplication of section 53 of the Scotland Act

3. Section 53 of the 1998 Act shall not apply to any Border rivers function of any Minister of the Crown under the 1975 Act, the 1991 Act and the 1995 Act relating solely to the conservation, management or exploitation of salmon, trout, eels and freshwater fish exercisable in relation to the River Esk (other than a function relating to any disease of fish).

Modifications of the Water Resources Act 1991

4. - (1) Sections 115 (fisheries orders), 116 (power to give effect to international obligations), 142 (fisheries contributions) and 211(3) (so far as relating to byelaws made by virtue of paragraph 6 of Schedule 25) and (6) (enforcement of byelaws) of, and paragraph 6 (byelaws for the purposes of fisheries functions) of Schedule 25 to the 1991 Act shall cease to have effect in relation to the Upper Esk.

(2) The Environment Agency shall have power, in relation to the Upper Esk to make byelaws generally for, or in connection with, the conservation, management or exploitation of salmon, trout, eels and freshwater fish.

(3) Schedule 26 to the 1991 Act shall apply to the making of any byelaw by the Environment Agency under this article as it would apply to the making of any byelaw under paragraph 6 of Schedule 25 to the 1991 Act subject to the following modifications-

- (i) subject to the following provisions of this sub-paragraph, any reference to "the relevant Minister" wherever occurring shall mean "the Minister and the Scottish Ministers acting jointly";**
- (ii) in paragraph 1(2)(a), for "the London Gazette" there is substituted "the Edinburgh and London Gazettes";**
- (iii) in paragraph 2(1), for "him" there is substituted "them";**
- (iv) in paragraph 5, for "he" there is substituted "they"; and**
- (v) paragraph 7 shall cease to have effect.**

Modifications of the Environment Act 1995

5. - (1) In its application to any Border rivers function relating to the conservation, management or exploitation of salmon, trout, eels and freshwater fish exercisable in relation to the Upper Esk, section 38 of the 1995 Act shall be modified-

- (a) in subsection (1), to provide that any agreement under that section only be entered into with the agreement of the Scottish Ministers; and**
- (b) in subsection (2), to provide that a function of the Scottish Ministers be capable of being the subject of such an agreement but only with the agreement of the Minister.**

(2) In its application to any Border rivers function relating to the conservation, management or exploitation of salmon, trout, eels and freshwater fish exercisable in relation to the Upper Esk, section 40 of the 1995 Act shall be modified-

(a) by substituting for the references to "appropriate Minister" references to "Scottish Ministers and the Minister acting jointly"; and

(b) by substituting for section 40(3)(b)-

" (b) notices shall be given in the Edinburgh and London Gazettes of the giving of the direction and of where a copy of that direction may be obtained".

(3) Section 6(8) of the 1995 Act shall be modified by inserting before the definition of "the River Tweed" the following-

" "the River Esk" means that River as defined by section 111(4) of the Scotland Act 1998 or as such definition as may be modified by an order under section 111(1) of that Act;"

Fishing without right or licence in the Lower Esk

6. - (1) No person shall fish for or take salmon or sea trout in the Lower Esk unless either-

(a) he does so under the authority of, and in accordance with, a licence granted by the Environment Agency under section 25 of the 1975 Act; or

(b) he has a legal right to fish for salmon or he has written permission from a person having such a right.

(2) Any person who has in his possession, for the purpose of fishing for salmon or sea trout in the Lower Esk, an instrument other than one which he is authorised, by any rule of law or, in the case of fishing under the authority of a licence, by that licence, to use for that purpose, shall be guilty of an offence.

(3) Section 1 of the 1951 Act and section 27 of the 1975 Act shall cease to have effect in relation to the Lower Esk.

(4) Subject to paragraph (6) below a licence granted by the Environment Agency may only authorise fishing in any part of the Lower Esk lying on or towards the south of a line representing the *medium filum*, at low water, of the main channel of the River Esk and of the main channel of the River Eden downstream of its confluence at low water with the main channel of the River Esk, wherever that line may be from time to time.

(5) A legal right to fish for salmon, or a written permission given by a person having such a right, shall authorise fishing-

(a) in any part of the Lower Esk lying on or towards the north of the line described in paragraph (4) above; and

(b) to the extent that right or permission so authorises, in any other part of the Lower Esk.

(6) A licence granted by the Environment Agency shall not apply to any part of the Lower Esk which is the subject of a grant of fishings granted by King James V of Scotland to the Burghers of Annan by Royal Charter dated 1st March 1538 and re-stated on 10th July 1612.

(7) It shall be for any person claiming to have a legal right to fish for salmon, or to have written permission from such a person, to prove that he has that right or permission.

(8) In this article-

"legal right to fish for salmon" means-

(a) a right of ownership of salmon fishings contained in a title recorded in the Register of Sasines or entered in the Land Register of Scotland;

(b) the right of a tenant under a lease of salmon fishings granted by a person having a right under (a) above or (d) below;

(c) the right of any person vest by operation of law in the heritable property of a person having a right under (a) above or (d) below; or

(d) a right of salmon fishings under Royal Warrant or Royal Charter.

Offences

7. - (1) Any person who contravenes any byelaw made under article 4, or who contravenes article 6, shall be guilty of an offence.

(2) Any person guilty of an offence under this article shall be liable-

(a) on summary conviction to a fine not exceeding level 4 on the standard scale or to imprisonment for a term not exceeding three months; and

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

(3) In addition to any penalty imposed by paragraph (2), the court before which a person is convicted of an offence under article 6 may order the forfeiture of-

(a) any licence issued to that person under section 25 of the 1975 Act;

(b) any fish in respect of which the offence was committed; and

(c) any net or other fishing instrument, vessel or vehicle used in the commission of the offence,

and may order that that person be disqualified from holding a licence under section 25 of the 1975 Act for such period as may be specified.

(4) Proceedings for an offence under this article may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the Sheriffdom of Dumfries and Galloway or within the Commission of the Peace for Cumbria.

Enforcement

8. - (1) The powers of water bailiffs, of any person appointed by the Minister and of a constable under sections 31(1), 32 to 34, and 36 of the 1975 Act shall apply to any offence under article 7 above as they apply to an offence under that Act.

(2) The powers of water bailiffs and constables under sections 10 to 12 of the 1951 Act shall apply to any offence under article 7 above as they apply to an offence under that Act.

(3) Any person referred to in paragraphs (1) and (2) above may exercise his powers in any part of the River Esk.

(4) A water bailiff who reasonably suspects that a person is, intends to, or has been, fishing in the River Esk may require that person-

(a) to produce his licence or other authority to fish; and

(b) to state his name and address.

(5) Any person who fails to comply with such a requirement or provides false information in response to it shall be guilty of an offence; but any person who complies with paragraph (4)(a) above within 7 days of being so required shall not be convicted of an offence under this paragraph.

(6) Any person who resists or otherwise obstructs a water bailiff in the exercise of any power referred to in paragraphs (1) or (2) above shall be guilty of an offence.

(7) Any person guilty of an offence under paragraph (5) and (6) above shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(8) Article 7(4) above applies to an offence under this article as it does to an offence under article 7.

(9) Section 10(6) of the 1951 Act and sections 31(2) and 35 of the 1975 Act shall cease to have effect in relation to the River Esk.

Waters landward of River Esk estuary limits

9. The waters on the landward side of the estuary limits of the River Esk which require to be determined in accordance with paragraph (b) of the definition of "the River Esk" in section 111(4) of the 1998 Act are as set out in the Schedule to this Order.

Reports

10. - (1) The Environment Agency shall, at the same time as it sends a copy of a report to the appropriate Minister in accordance with section 52(1) of the 1995 Act, send a copy of that report to the Scottish Ministers.

(2) The Scottish Ministers shall cause a copy of that report to be laid before the Scottish Parliament.

PART III
RIVER TWEED

11. - (1) The Scottish Ministers may, with the agreement of the Minister, make regulations or orders, as the case may be, under the provisions set out in paragraph (2) below, which apply to so much of the River Tweed as is situated outside Scotland.

(2) The provisions are-

section 2(2A) of the 1951 Act (definition of net and coble etc.)

section 3 of the 1986 Act (observance of weekly close times etc.)

section 6 of the 1986 Act (annual close time)

section 8 of the 1986 Act (definition of "rod and line").

(3) In their application to so much of the River Tweed as is situated outside Scotland, any application for an order under sections 6 or 8 of the 1986 Act shall be made to the Scottish Ministers.

(4) In their application to so much of the River Tweed as is situated outside Scotland, sections 27 and 28 of the 1986 Act shall be modified by substituting for references to "Secretary of State" references to "Scottish Ministers".

(5) Before exempting under section 27 or giving any permission under section 28 of the 1986 Act in relation to any act or omission taking place in so much of the River Tweed as is situated outside Scotland, the Scottish Ministers shall consult the Minister.

12. - (1) In their application to so much of the River Tweed as is situated outside Scotland-

section 6 (taking of dead salmon or trout),

section 10(5) (powers of water bailiffs),

section 11(1) and (5) (powers of search),

section 12(2) (apprehension of offenders), and

section 15(1) (power to conduct inquiries and to obtain information),

of the 1951 Act shall be modified by substituting for the references to "Secretary of State" references to "Scottish Ministers".

(2) In its application to so much of the River Tweed as is situated outside Scotland, section 7(2) of the 1976 Act (consent to contraventions of section 4(b) or (c) of the 1951 Act) shall be modified by substituting for the reference to "Secretary of State", a reference to "Scottish Ministers".

(3) Before giving consent under section 7(2) of the 1976 Act, the Scottish Ministers shall consult the Minister.

A. K. Galloway
Clerk to the Privy Council

SCHEDULE

Article 9

Waters on the Landward side of the Estuary Limits of the River Esk

Those waters, at any stage of the tide, in the River Esk to the landward of a line drawn between Ordnance Survey Grid Reference NY 1245 5605 and Ordnance Survey Grid Reference NX 9930 5730 but excluding therefrom any waters lying upstream from lines drawn between (a) Ordnance Survey Grid Reference NY 3365 6155 and Ordnance Survey Grid Reference NY 3365 6182 (b) Ordnance Survey Grid Reference NX 9920 6605 to Ordnance Survey Grid Reference NX 0015 6605 (c) Ordnance Survey Grid Reference NY 1920 6430 to Ordnance Survey Grid Reference NY 1920 6455 and any part of any other river or stream which flows into the River Esk downstream from a line drawn from a point at Ordnance Survey Grid Reference NY 3245 6632 to a point at Ordnance Survey Grid Reference NY 3245 6503.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision in relation to the River Esk by-

- (a) preserving functions of Ministers of the Crown in relation to that River in Scotland but making their exercise subject to the agreement of Scottish Ministers;**
- (b) giving new power to make byelaws for, or in connection with, the conservation, management or exploitation of salmon, trout, eels and freshwater fish in the Upper Esk (as defined in article 1(2)), to the Environment Agency;**
- (c) creating a new offence of unauthorised fishing in the Lower Esk (as defined in article 1(2));**
- (d) giving powers to water bailiffs to enforce these new provisions and extending existing powers of water bailiffs and other authorised persons to the whole of the River Esk;**
- (e) creating new offences applicable to those powers;**
- (f) defining the extent of waters to the landward of the estuary limits of the River Esk; and**
- (g) requiring the Environment Agency to send a copy of their annual report to the Scottish Ministers and the Scottish Ministers to lay it before the Scottish Parliament.**

This Order makes provision in relation to the River Tweed by allowing the Scottish Ministers to exercise functions under Scottish salmon and freshwater fisheries legislation in relation to so much of that River as is situated outside Scotland, with the

agreement of, or after consultation with, the Minister of Agriculture, Fisheries and Food.

The Order makes consequential modifications and makes savings for existing provisions.

Notes:

[1] 1998 c.46.[back](#)

[2] The principal appointed day is 1st July 1999 by virtue of article 3 of the Scotland Act (Commencement) Order 1998 (S.I. 1998/3178).[back](#)

[3] 1951 c.26.[back](#)

[4] 1975 c.51.[back](#)

[5] 1976 c.22.[back](#)

[6] 1986 c.22[back](#)

[7] 1991 c.57.[back](#)

[8] 1995 c.25.[back](#)

[9] 1969 c.xxiv.[back](#)

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