

EXPLANATORY MEMORANDUM TO
THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

2010 No. 490

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty. It contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The Conservation of Habitats and Species Regulations 2010 (the “Habitats Regulations”) consolidate and update the Conservation (Natural Habitats, &c.) Regulations 1994¹ (“the 1994 Regulations”).

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Joint Committee will wish to note that these Regulations consolidate all the various amendments made to the 1994 Regulations, in respect of England and Wales. This honours a commitment given to the JCSI in the past. The drafting of the 1994 Regulations has also been updated. More details are set out in section 7 below.

3.2 However, it should be noted that no detailed review of the 1994 Regulations has taken place, and the Habitats Regulations make no substantive changes to existing policies or procedures. It remains our intention to carry out such a review but, as mentioned in previous Memoranda, this will be a complex and time-consuming exercise which can only be undertaken when resources are available. In the meantime, we believe the consolidated Habitats Regulations are a significant improvement.

4. **Legislative Context**

4.1 The Habitats Regulations, which are made under section 2(2) of the European Communities Act 1972², are the principal means by which Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”) is transposed for England and Wales and territorial seas. Corresponding Regulations, the Conservation (Natural Habitats, &c.) Regulations (Northern Ireland) 1995 (SR(NI) 1995/380), transpose the Habitats Directive in relation to Northern Ireland. In Scotland, the Habitats Directive is transposed through a combination of the Habitats Regulations (in relation to reserved matters) and the 1994 Regulations.

4.2 The Habitats Regulations also contain new provisions designed to implement aspects of the Marine and Coastal Access Act 2009 (the “Marine Act”). These provisions provide for:

- the transfer of certain licensing functions from Natural England (NE) to the Marine Management Organisation (MMO);
- Marine Enforcement Officers to use powers under the Marine Act to enforce certain offences under the Habitats Regulations.

¹ SI 1994/2716

² And paragraph 1A of Schedule 2 of the European Communities Act 1972 and section 307(3) and (5) of the Criminal Justice Act 2003

4.3 A Transposition Note has not been prepared because the consolidation of the 1994 Regulations and the implementation of the Marine Act do not transpose any new EU legal requirements.

4.4 A statutory instrument is also being made to amend The Offshore Marine (Conservation Natural Habitats &c.) Regulations 2007, which transpose the Wild Birds and Habitats Directives beyond 12 nautical miles. A separate explanatory memorandum has been prepared for that instrument.

5. Territorial Extent and Application

5.1 This instrument extends to England, and Wales, including the adjacent territorial sea. It also extends to Scotland (including the adjacent territorial sea) to a limited degree, as regards reserved matters.

5.2 As a result of this instrument the 1994 Regulations will no longer extend to England and Wales though they will continue to extend to Scotland.

5.3 The Habitats Directive continues to be implemented in Northern Ireland by the Conservation (Natural Habitats &c) Regulations (Northern Ireland) 1995.

6. European Convention on Human Rights

6.1 The Secretary of State for Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of The Conservation of Habitats and Species Regulations 2010 are compatible with the Convention rights.

7. Policy background

7.1 The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. The Directive lays down rules for the protection, management and exploitation of such habitats and species.

7.2 The Habitats Regulations transpose the Habitats Directive in England, Wales and to a limited extent Scotland by ensuring that activities are carried out in accordance with the requirements of the Directive.

Consolidation of the Conservation (Natural Habitats &c) Regulations 1994 (as amended)

7.3 It has for some time been recognised that the 30 sets of amendments that have been made to the 1994 Regulations made the Regulations very difficult to follow. A commitment has been given to the JCSI that the Regulations would be subject to a comprehensive review and consolidation.

7.4 A comprehensive review of the Regulations would represent a very significant piece of work. As a first step, therefore, it was decided to undertake a consolidation and updating exercise, bringing the many amendments made to the regulations over the years together in one set of regulations and making certain other improvements (see below). The need for a more detailed review remains under consideration.

7.5 The Habitats Regulations do not introduce any substantive policy changes. Consolidation has, however, involved substantial amendments for the following reasons:

Extent

7.6 The vast majority of the provisions in the Habitats Regulations now apply specifically only to England and Wales. The reason for this change is that Scottish Ministers have amended the 1994 Regulations on a number of occasions, so that the Regulations as they apply to Scotland are different in a significant number of places compared to the Regulations as they apply to England and Wales. The consolidated Habitats Regulations do however extend to Scotland in respect of certain reserved matters.

7.7 The relevant authorities in Scotland are aware of the extent of the Habitats Regulations, and are considering whether to undertake a consolidation of their own. In the meantime, the 1994 Regulations continue to apply to Scotland.

Devolution, as regards Wales

7.8 A number of amendments are designed to more closely reflect devolved powers and duties. It is now clear, on the face of the Habitats Regulations, where a power can be exercised by Welsh Ministers and where it cannot. We have also made two corrections to the Habitats Regulations, because it became apparent that Welsh Ministers should have been given powers but had not, in relation to environmental permitting and abstraction licensing.

Restructuring

7.9 Another objective of consolidation is to put the Habitats Regulations into a more logical structure and order. This has resulted in the Regulations more closely following the model established in the Offshore Marine (Conservation Natural Habitats &c.) Regulations 2007, which transpose the Habitats Directive in the sea beyond 12 nautical miles from the coast.

Updating drafting style and legislative references

7.10 These changes are intended to modernise the language to remove archaic terms and phrases and improve the terminology used throughout the Habitats Regulations.

The Marine and Coastal Access Act 2009

7.11 The Marine Act received Royal Assent on 12 November 2009. The Act, amongst other things, establishes the Marine Management Organisation (MMO) to regulate and manage the marine area around England, and to undertake certain nature conservation licensing functions (under the Conservation of Seals Act 1970 and the Wildlife and Countryside Act 1981). The Act also provides enforcement powers for Marine Enforcement Officers (MEOs) to investigate certain nature conservation offences in the marine area, including some offences under the 1994 Regulations.

7.12 This instrument includes the following provisions in relation to the MMO and MEOs, which will complement, and ensure consistency with, related provisions in the Marine Act:

Exercise of functions in accordance with the Habitats Directive

7.13 Regulation 9(4) includes a reference to the Marine Act in the list of enactments to which the duty (in regulation 9(3)) on competent authorities, to exercise their functions in accordance with the Habitats Directive, applies.

Species Licensing

7.14 Regulation 56 gives the MMO responsibility for granting licenses for the purposes listed in regulation 53(2)(a) to (d), in England seaward of mean low water mark. In respect of those licences, Natural England will be the licensing body landward of mean low water mark in England, and the Countryside Council for Wales will be the licensing body in Wales. Licences are issued to permit certain activities to proceed (e.g. those relating to scientific, conservation or educational purposes) without an offence being committed.

7.15 The Secretary of State, in England, and the Welsh Ministers in Wales, will be the licensing body in respect of licences issued for the purposes set out in regulations 53(2)(e) to (g), 53(4) and 54. It is intended to authorise the MMO (by agreement under section 14 of the Marine Act) to exercise the Secretary of State's licensing functions seaward of mean low water mark. This will ensure that the MMO becomes responsible for issuing most nature conservation related licenses in English territorial waters.

Enforcement

7.16 Regulation 132 and Schedule 6 make amendments to legislation. This includes an amendment to section 237(2) (enforcement of nature conservation legislation) of the Marine Act. The amendment extends the powers of MEOs to offences under regulations 57, 58 and 116 of the Habitats Regulations. This will ensure that MEOs are able to make use of the Marine Act's common enforcement powers for the purposes of enforcing the full range of relevant offences under the Habitats Regulations, including the offences of giving false statements for obtaining a licence, breach of a licensing condition, attempting to commit an offence and possessing anything capable of being used for committing an offence. This corrects a minor omission which arose during the course of the drafting of the Marine and Coastal Access Bill. Without this amendment, MEOs will not be able to take enforcement action in relation to these particular offences (although constables and wildlife inspectors would be able to take such action using their powers under the Habitats Regulations).

8. Consultation outcome

8.1 No public consultation exercise was considered necessary for the Habitats Regulations. The reasons for this were that :

- a) the consolidation amendments are primarily technical ones and do not involve any substantive changes to existing policy or procedures; and
- b) the Government's intention to confer species licensing functions on the MMO, and to make the Marine Act's enforcement powers available for enforcement of all relevant nature conservation offences, was announced during consideration of the draft Bill and during the Bill's passage through Parliament. The establishment of the MMO as a marine regulator with nature conservation powers transferred to it from Natural England and the Secretary of State, as well

as a suite of up-to-date and improved enforcement powers, was widely supported by stakeholders during the Bill's passage through Parliament.

8.2 However, the Department undertook a targeted consultation on the Instrument with key external stakeholders and Agencies. It has also liaised with other Government Departments.

8.3 All consultees were supportive of the proposals. The main concern expressed was that the opportunity was not being taken to review certain aspects of the Regulations in more depth. This was never the intention and a more fundamental review would, among other things, have necessitated a much wider public consultation and could not therefore have been undertaken in the time available.

9. Guidance

9.1 Considerable guidance³ already exists on how to apply the requirements of the Habitats Regulations. No substantive changes to this will be required as there are no significant changes to any policies or procedures. Natural England and the MMO will issue guidance (e.g. to those applying for licences under Part 5).

10. Impact

Consolidation of the Conservation (Natural Habitats &c) Regulations 1994 (as amended)

10.1 The Habitats Regulations contain no substantive changes to existing policies and procedures. Thus there will be no impact on business, charities or voluntary bodies that does not already arise via the 1994 Regulations (as amended). There may be some minor impact on Government Departments and Agencies which provide guidance on the Habitats Regulations, and costs may arise from the need to update websites, forms and other documents. This will be well under the threshold needed to trigger an Impact Assessment.

The Marine and Coastal Access Act 2009

10.2 The transfer of licensing functions in the marine area around England from Natural England to the MMO, and the application of MEO's enforcement powers to certain offences under the regulations, will have no significant impact on business, charities or voluntary bodies. Nor will it increase costs for the public sector, although some minor costs that currently fall to Natural England will in future fall to the MMO. The Impact Assessment prepared during the passage of the Marine Act considered the impacts relating to MEO's enforcement powers and the transfer of licensing functions, and can be found on the Department for Environment, Food and Rural Affairs' website at www.defra.gov.uk.

10.3 As a consequence of the above, no Impact Assessment has been prepared for this instrument.

11. Regulating small business

³ For example ODPM Circular 06/2005 (Defra Circular 01/2005): Biodiversity and Geological conservation – Statutory obligations and their impact within the planning system and Managing Natura 2000 sites : The provisions of Article 6 of the Habitats Directive 92/43/EEC

Consolidation of the Conservation (Natural Habitats &c) Regulations 1994 (as amended)

11.1 The Regulations have no significant additional impact on Small Businesses over and above that which arises from the 1994 Regulations (as amended).

The Marine and Coastal Access Act 2009

11.2 The provisions in the Regulations relating to the Marine Act will have no significant impact on small businesses.

12. Monitoring & review

12.1 The Habitats Regulations are subject to regular review. A formal, detailed review is under consideration (see para 3.2 above).

13. Contacts

13.1 On consolidation aspects: Jo Withers at the Department for Environment, Food and Rural Affairs (Tel: 07771 808160 or email: Jo.withers@defra.gsi.gov.uk).

13.2 On the Marine Act aspects : Geoff Audcent at the Department for Environment, Food and Rural Affairs, (Tel 0117 372 8339 or email Geoff.Audcent@defra.gsi.gov.uk).