

Explanatory Memorandum to the Conservation of Habitats and Species (Amendment) Regulations 2012

This Explanatory Memorandum has been prepared by the Environment and Sustainable Development Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Conservation of Habitats and Species (Amendment) Regulations 2012.

I am satisfied that the benefits outweigh any costs.

John Griffiths

Minister for Environment and Sustainable Development, one of the Welsh Ministers

10 July 2012

1. Description

These regulations amend the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) (the “Habitats Regulations”). They place new duties on the Secretary of State and Welsh Ministers, Natural England, Countryside Council for Wales, the Environment Agency, Forestry Commission, Local Authorities and, in relation to the marine area, other competent authorities to take measures to preserve, maintain and re-establish habitat for wild birds. The regulations place a duty on competent authorities to use all reasonable endeavours to avoid any pollution or deterioration of these habitats. The regulations also place a duty on any competent authority, in exercising any of their functions, to have regard to the requirements of Directive 2009/147/EC (the “Wild Birds Directive”) and of Directive 92/43/EEC (the “Habitats Directive”).

The regulations also make a number of further amendments to the Conservation of Habitats and Species Regulations 2010 to ensure certain provisions of the Wild Birds and Habitats Directives are transposed clearly.

The regulations also amend section 15 of the National Parks and Access to the Countryside Act 1949 to make clear local authorities are able to designate Local Nature Reserves for the purposes of re-establishing bird habitat.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

These amendments are being introduced in response to correspondence received from the European Commission regarding gaps in the UK transposition of the Wild Birds Directive.

The legislation is being made on a composite basis as the regulations are required to implement Community law on an urgent basis, late introduction of the legislation could result in substantial infraction fines, and, because it is desirable to have a common England-Wales regulatory regime covering transposition of a European Directive. The regulations also introduce new duties for relevant authorities working in both England and Wales such as the Environment Agency.

This statutory instrument is subject to annulment of the Assembly (negative procedure). The regulations do not amend any provision of an Assembly Act or Measure, but they do make minor amendments to a piece of UK primary legislation (National Parks and Access to the Countryside Act 1949 – see above). They do not impose obligations of special importance. Rather, they serve to further clarify the UK's transposition of the Wild Birds and Habitats Directive. Accordingly, there is no factor indicating the use of the affirmative procedure.

3. Legislative background

The Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to the conservation of natural

habitats and of wild fauna and flora in relation to Wales. They would rely on that designation in order to make the amendment to the Habitats Regulations in relation to Wales. The amendments to the Habitats Regulations transpose Articles 2, 3 and 4(4) and 10 of the Wild Birds Directive.

These amendments will be complimented by amendments to the Offshore Marine Conservation Regulations 2007. These UK wide regulations will be made by the Secretary of State.

4. Purpose & intended effect of the legislation

The Wild Birds Directive (Council Directive 79/409/EEC now codified in Directive 2009/147/EC) provides a mechanism for protecting all wild bird species naturally occurring in the European Union. It was adopted as a response to increasing concern about the decline in Europe's wild bird populations resulting from pollution, loss of habitats as well as their unsustainable exploitation. The Wild Birds Directive recognises that habitat loss and degradation are serious threats to the conservation of wild birds. It sets broad objectives for a wide range of activities designed to protect wild birds.

The Habitats Directive (Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) protects 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.

The Habitats Regulations transpose the Habitats Directive and certain elements of the Wild Birds Directive in England and Wales. The Regulations also extend to Scotland and Northern Ireland to a limited extent.

Articles 2, 3 and 4(4) of the Wild Birds Directive

Article 2 of the Wild Birds Directive requires Member States to take requisite measures to maintain wild bird populations at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level. Articles 3 and 4(4) of the Wild Birds Directive are designed to ensure Member States preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of naturally occurring birds and to ensure that outside those areas which are specifically designated as important bird habitats, efforts are taken to avoid pollution or deterioration of habitats. The purpose of these obligations is to help to ensure that populations of wild bird species are maintained at a level which corresponds in particular to ecological scientific and cultural requirements, while taking account of economic and recreational requirements.

Following correspondence with the European Commission, the UK and devolved administrations have concluded that more needs to be done to transpose the provisions of Articles 2, 3 and 4(4) of the Wild Birds Directive. These regulations are intended to ensure clearer transposition of these provisions by giving additional and specific duties to relevant bodies.

In particular, the Regulations:

- place new duties on the Secretary of State, Welsh Ministers, the appropriate nature conservation bodies and, in relation to a marine area, any relevant competent authority to ensure steps are taken to protect and create bird habitat;
- place new duties on the Environment Agency, the Forestry Commission and local authorities to take steps to contribute to the protection and creation of bird habitat;
- place an obligation on the Secretary of State and Welsh Ministers to consider designating Marine Conservation Zones for the purpose of protecting and creating bird habitat;
- place new duties on competent authorities to avoid pollution or deterioration of bird habitat;
- place a duty on the nature conservation bodies to review and report on the implementation of the duties described above to the Secretary of State and Welsh Ministers;
- place a duty on the Secretary of State and Welsh Ministers to provide guidance to local authorities, the Environment Agency, the Forestry Commission and any other relevant body to assist them in meeting these new duties;
- place a duty on the Secretary of State and Welsh Ministers to take steps to facilitate and co-ordinate actions to ensure other bodies meet these new duties;
- place a duty on the Secretary of State, Welsh Ministers, appropriate nature conservation bodies and, in the marine area, relevant competent authorities, to secure compliance with the Wild Birds Directive;
- place a duty on competent authorities to have regard to the Wild Birds Directive in exercising any of their functions;
- allow management schemes to be established for European marine sites for the purposes of securing compliance with the requirements of the Wild Birds Directive;
- amend section 15 of the National Parks and Access to the Countryside Act 1949 to enable local authorities to designate Local Nature Reserves for the purposes of re-establishing bird habitat.

The Regulations also make the following amendments to transpose more clearly certain elements of the Habitat Directive.

Revocation of Regulations 20 and 22 of the Habitats Regulations

The instrument revokes regulations 20 and 22 of the Habitats Regulations and makes consequential amendments to related regulations 18, 19, 21 and 23.

Currently, there is an overlap in the controls imposed by the Site of Special Scientific Interest (SSSI) regime under Part 2 of the Wildlife and Countryside Act 1981 (the “1981 Act”) and the regime imposed by regulations 19-23 of the Habitats Regulations where land is designated both as a SSSI and a European site. Revoking regulation 20 will remove some overlap between the two regimes. It would also address one specific inconsistency that currently provides that, in circumstances where an owner or occupier has given the appropriate nature conservation body notice of a proposal to carry out an operation on land notified as a European site, and where the appropriate nature conservation body has not responded to that notification, after four months the owner or occupier may carry out the operation. Revoking this regulation removes the inconsistency with section 28F(2) of the 1981 Act, which provides that where the appropriate nature conservation body does not respond to a notification from the owner or occupier within four months, consent to the operation is deemed to be refused. This change will not make any difference in practice to the controls that are applied because, mindful of this inconsistency, the appropriate nature conservation body currently use the powers available under section 28F(2) of the 1981 Act to control operations.

Additionally, revoking regulation 20 will also remove a superfluous criminal offence, given a similar offence under the 1981 Act, though the latter carries possibility of higher penalties.

Revoking regulation 22 will remove a provision for the appropriate nature conservation body to notify the Secretary of State or Welsh Ministers where it considers that there is a risk that an operation that it has not given consent to may be carried out. We consider that this provision serves no practical purpose.

Amendment of Regulation 38 of the Habitats Regulations

Removal of regulation 38(5) will ensure that the Welsh Ministers powers to make orders in relation to European protected sites are consistent with their powers in respect of Marine Conservation Zones (section 134 of the Marine & Coastal Access Act 2009).

Amendment of Regulation 58 of the Habitats Regulations

Amendment to regulation 58 will make it clear that this offence applies to anyone authorised to carry out activities under the licence.

Amendment of Regulation 60 and 61 of the Habitats Regulations

Amendment to regulation 60 will make it clear that the appropriate assessment provisions apply to any plan or project which a competent authority proposes to undertake or give consent to (unless this requirement is already specifically

applied in legislation). At present, the Regulations provide that the appropriate assessment provisions are applied to all those consenting regimes listed in Chapters 2 to 9 of the Regulations. For other plans or projects, at present the need to undertake appropriate assessments is covered by the general duty to comply with or have regard to the Directive, as set out in regulation 9.

The instrument makes a consequential amendment to regulation 61 to disapply regulation 61 where there would otherwise be an overlap with certain other regulations, which are already in place to govern the assessment of plans or projects which may have an effect on European sites and European offshore marine sites.

New Regulation 129A of the Habitats Regulations – Research

This new regulation will place a duty on the Secretary of State and Welsh Ministers to take appropriate steps to encourage research and scientific work for the maintenance or restoration of habitats and species at favourable conservation status, and for the protection, management and use of any population of wild bird. The Secretary of State and Welsh Ministers will also be required to share appropriate information with the European Commission, and, in the case of the Habitats Directive, other Member States to assist in the effective co-ordination of research.

5. Consultation

These Regulations proposals have not been subject to public consultation as they seek to ensure clearer transposition of the EC Wild Birds Directive and are an urgent response to formal correspondence instigated by the European Commission. The measures and the additional measures proposed (not related directly to the formal correspondence) will not have a significant impact on any person or body and will impose no significant additional burdens on business or any other stakeholder.

However, in preparing these Regulations, the Welsh Government has liaised with other Welsh Government Departments, DEFRA and the devolved administrations in Scotland and Northern Ireland, and delivery bodies such as the Countryside Council for Wales, the Environment Agency Wales and the Forestry Commission Wales.

The regulations place a duty on the Secretary of State and Welsh Ministers, after consultation with the nature conservation bodies, to issue guidance to local authorities, the Environment Agency, the Forestry Commission and any other relevant body considered appropriate to assist these bodies in meeting their new duty to take steps to contribute to the protection and creation of bird habitat.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option 0

Do nothing. Rely on existing measures to deliver the obligations.

Option 1

Introduce a duty on specified authorities to take steps to secure the purposes of Article 3(2). Introduce a duty on all public bodies to strive to avoid pollution and deterioration of bird habitats outside protected areas to secure the purpose of Article 4(4) and take steps to encourage research and scientific work which necessary to deliver Article 10.

Option 2

Introduce duties as Option 1 and an additional power for the relevant agency to impose management schemes for the purposes of meeting 3(2)(b)-(d) obligations.

Costs and Benefits

Option 0:

Costs:

No additional costs for businesses or individuals over and above current commitments.

Benefits:

This does not clarify the transposition of the Wild Birds Directive, nor provide the legal underpinning for the measures being taken to deliver the obligations and therefore creates a risk of infraction.

Option 1:

Costs:

This option involves relevant authorities (Welsh Ministers, Environment Agency, Countryside Council for Wales, Forestry Commission and local authorities) having a duty to ensure (as far as lies within their powers) the preservation and maintenance of the requisite habitat for birds. It provides a basis of statutory duties on the relevant authorities' activities which already take place when they carry out their existing biodiversity functions and, as a result, no additional costs are anticipated. Clearly the existence of a legislative obligation carries more weight than where the obligation is undertaken as a matter of policy. The introduction of the statutory duties will underpin a range of measures already used in practise.

The Countryside Council for Wales, along with the other UK statutory nature conservation bodies will incur costs in producing guidance for other authorities on how to meet their obligations, and in carrying out monitoring to measure how far the appropriate authorities are complying with the duty placed on them and

then reporting their conclusions. This duty has been included in the remit for CCW for 2012-2013.

For the marine area this option clarifies and specifies the role the Marine and Coastal Access Act 2009 will have in meeting Article 3(2) obligations. If further Marine Conservation Zones (MCZs) are required to meet any shortfall in our Article 3(2) obligations this could fall within the scope of our current work under the 2009 Act to identify and designate MCZs that will contribute to a network of ecologically coherent marine protected areas. This could incur additional costs for Wales. We expect that the review mechanism for Article 3(2) will fall within scope of the current marine monitoring and surveillance programme that JNCC carry out so will not incur any additional cost for Wales.

Benefits:

This option involves the Welsh Ministers, Environment Agency, Natural England, Forestry Commission and local authorities having new duties to ensure (so far as lies within their powers) the preservation and maintenance of the requisite habitat for birds. It involves introducing a statutory duty to underpin the activities already undertaken by the relevant bodies when they are carrying out their existing biodiversity functions. Delivery of the obligations will be achieved using powers the relevant bodies already have at their disposal and which, for the most part, are already used to deliver outcomes relating to birds, their habitats and other biodiversity outcomes. As a result of this, it is not anticipated that any significant additional costs will result from the introduction of the new legislative obligations.

It is intended that the statutory guidance will

- i. set out what the priorities are and which species (or groups) need particular attention;
- ii. inform the relevant authorities about how much habitat they might need to create/manage to achieve a certain result;
- iii. show the relevant authorities what sort of actions they can take to meet their obligations in respect of the priority species; and
- iv. guide them as to the types of habitats or specific locations where action could best be taken.

This will have the benefit of giving the relevant authorities clear information when looking at the existing functions they carry out to see how they can be tailored to meet the obligations under the Birds Directive.

This should lead to improved outcomes for birds which are expected to be increases in the amount of habitat for wild birds where these obligations are seen as a priority. This will encourage growth of bird populations given time. Existence of the guidance is a significant contributory factor in underpinning the achievement of our obligations under several articles of the Birds Directive.

As an example local authorities already have powers to designate Local Nature Reserves (LNRs) using Section 21 of the National Parks and Access to the Countryside Act 1949. The considerations to be worked through when declaring a LNR include looking at the habitats and species of interest and considering

the value of the site as a place where people can enjoy contact with wildlife. By introducing this new duty, we will make it mandatory to take account of the specific considerations for birds outlined in Article 3(2) to upkeep and manage habitats outside of protected areas, to re-establish destroyed biotopes and to create biotopes, but guidance will be adjusted and this will simply be part of the consideration processes which already exist. In addition local authorities will be able to use the statutory guidance (described above) to determine for what species they should take action and the extent and type of habitat they should be aiming to create, manage or re-establish.

In considering the correspondence with the Commission it was decided to review the clarity of the UK's transposition more broadly and it was concluded that we should take this opportunity to make certain other amendments to the Regulations that either supplement the other Option 1 proposals or which amend the Regulations in other ways to make legislative provisions comprehensive, clearer or more consistent, thus making the Regulations easier to understand (and thus aiding compliance).

These are:

(a) powers to be used by local authorities to deliver the obligations in Article 3(2) contained in sections 17, 18, 20 and 21 of the National Parks and Access to the Countryside Act 1949, relating to the establishment of nature reserves. To ensure that these powers are sufficiently wide to meet all the obligations contained in Article 3(2)(b)-(d) of the Directive, we propose to make a minor amendment to section 15(2)(b) of the 1949 Act to provide that "Land is managed for a conservation purpose if it is managed for the purpose of "preserving flora, fauna or geological or physiographical features of special interest in the area", including enabling the increase or recovery of that flora or fauna.

This will make clear that local authorities may establish nature reserves not just to protect those bird habitats that already exist on the site, but also to take action to re-establish such habitat where possible.

(b) the regulations also bring some consistency to the legislative provisions covering the powers available to the Countryside Council for Wales to control operations likely to damage the conservation interests in protected sites. Changes made to the powers available within Sites of Special Scientific Interest (SSSIs) by the Countryside and Rights of Way Act 2000 and Natural Environment and Rural Communities Act 2006 were not reflected in the Habitats Regulations and as a result different, and inconsistent, legislative provisions apply in the same set of circumstances.

Revocation of regulation 20 of the Habitats Regulations and further, minor consequential amendments to related regulations 18 – 23 will ensure consistency between the two regimes that impose controls on SSSIs and European protected sites. In particular, this will address one specific inconsistency that currently provides that, in circumstances where an owner or occupier has given the nature conservation body notice of a proposal to carry out an operation on land notified as an SSSI, and where the nature

conservation body has not responded to that notification, after 4 months the owner or occupier may carry out the operation. Revoking this regulation will make the approach consistent with section 28F(2) of the Wildlife and Countryside Act 1981 as amended, which provides that where the appropriate nature conservation body does not respond to a notification from the owner or occupier within 4 months, consent to the operation is deemed to be refused. This change will not make any difference in practice to the controls that are applied because, mindful of this inconsistency, the nature conservation body currently use the powers available under section 28F(2) of the 1981 Act to control operations.

Additionally, revoking regulation 20 will also remove a criminal offence that is duplicated within the Wildlife and Countryside Act 1981 but which carries inconsistent penalties.

These changes will not, therefore, result in any additional burdens, but will have the benefit of removing redundant and inconsistent provisions to provide clarity for owners and occupiers affected by these provisions.

(c) Amendments to regulation 60 will provide that the appropriate assessment provisions apply to any plan or project which a competent authority proposes to undertake or give consent to. At present, the Habitats Regulations provide that the appropriate assessment provisions are applied to all those consenting regimes listed in Chapters 2 to 8 of the Regulations. For other plans or projects the need to undertake appropriate assessments is covered by the general duty to comply with the Directive, as set out in regulation 9. This amendment is entirely consistent with the Directive.

(d) regulation 38 of the Habitats Regulations allows the Marine Management Organisation (MMO) and Welsh Ministers to make byelaws/orders for the protection of a European marine site under the Marine Act 2009. This helps us to meet our obligations to protect special areas of conservation (SAC) under Article 6 of the Habitats Directive and Special Protection Areas (SPA) under Article 4 of the Wild Birds Directive.

Removal of regulation 38(5) of the Habitats Regulations will ensure that the MMO and Welsh Ministers have byelaw/order making powers which are consistent with those of the Inshore Fisheries Conservation Authorities (sections 155 to 162 of the Marine and Coastal Access Act 2009) and consistent with the MMO's and Welsh Minister's powers to make byelaws/orders in respect to Marine Conservation Zones. Achieving management of marine activities through a byelaw/order enables a proper consultation process to be followed (except in the cases of emergency).

We believe that the measures set out in (a) to (d) above will not have any significant impact on any person or body and will impose no significant additional burdens on business or any other stakeholder. (a) simply facilitates achievement of the Article 3(2) obligations. (b) eliminates an inconsistency in regulatory provisions which should be regarded as welcome clarification, particularly as it will not lead to any change in the way the controls operate. (c)

simply clarifies the existing regulatory position which will lead to greater certainty. In relation to (d), the MMO and Welsh Ministers currently have powers to control potentially damaging activities through amendments to marine and fisheries licences so the only additional activities that the byelaw/order power could affect are unregulated activities (such as recreational activities). However we expect that the effect of applying the new byelaw/order power to these unregulated activities is fairly minimal and, therefore, do not expect any significant cost associated with this amendment.

Option 2:

Costs

We have considered whether introducing additional powers of compulsion into the arrangements proposed in Option 1 would assist in delivering our obligations under Article 3(2)(b)-(d) of the Directive.

All the proposals set out in Option 1 would still be needed under Option 2. Under Option 2, however, CCW would be given extended powers to compel landowners and occupiers in certain cases to enter into management schemes which CCW considers would make an important contribution to meeting the Article 3(2) obligations – particularly those related to the creation or re-establishment of bird habitat.

There is considerable evidence that voluntary agreements with landowners and occupiers are effective in delivering these obligations. For example, a similar power has been available to CCW since the Countryside and Rights of Way Act (CROW) which allows them to impose management schemes for Sites of Special Scientific Interest (SSSIs).

To avoid the creation of an open-ended power, which could potentially apply to any area of land, we would identify transparent criteria for selecting individual pieces of land to establish where this power could be exercised. The criteria would need to identify habitats that are or could be particularly important for maintaining or increasing bird populations. Due to the diversity of bird habitats, and the wide range of types of land that might be relevant – rural, urban, terrestrial, water, marine, woodland etc. it would be challenging to prescribe criteria to define key habitats that might be important for birds. Consequently individual land owners might strongly challenge why their land had been chosen for this purpose, rather than some other, similar, piece of land. An imposed scheme could be perceived to place a disproportionate burden on those landowners involved and the criteria developed would need to be sufficiently robust. Imposition of schemes would be rare. However having the power to do this would be an additional lever to encourage voluntary participation.

Benefits

This should lead to improved outcomes for birds which are expected to be increases in the amount of habitat for wild birds but at an additional cost to Option 1.

Risks

Option 0: Risks

Taking no action could result in appropriate and competent authorities being unaware of their obligations under the Wild Birds Directive and failing to use their existing powers to meet these obligations and is unlikely to satisfy the concerns of the Commission about our transposition.

Option1: Risks

Additional marine conservation zones may be required, leading to restrictions on certain activities, although economic and recreational considerations can be taken into account (as allowed by Article 2 of the Directive).

Option 2: Risks

A proposal to introduce new powers to enable CCW to impose management schemes on any part of the country outside currently designated areas would be difficult to justify in circumstances where we are satisfied that the objective can be achieved by other (voluntary) means.

Preferred Option

Option 0 would not address the problem and is unlikely to satisfy the Commission's concerns about transposition. Option 1 is preferred as implementation is achievable with existing powers, but does not confer any power of compulsion to ensure that the statutory objective can be achieved. The new statutory guidance is expected to provide relevant authorities with clear information to meet obligations under the Birds Directive leading to improved outcomes for birds which are likely to more than offset the small additional costs of the statutory nature conservation bodies producing statutory guidance. Option 2 would also lead to improved outcomes for birds (which are expected to be increases in the amount of habitat for wild birds) but at an additional cost to Option 1. A proposal to introduce new powers to enable CCW to impose management schemes on any part of the country outside currently designated areas would be difficult to justify in circumstances where we are satisfied that the objective can be achieved by other (voluntary) means.

Post implementation review

The Countryside Council for Wales will carry out monitoring to measure how far the appropriate authorities are complying with the duty placed on them and then reporting their conclusions.

The review clause at paragraph 23 imposes obligations on the Secretary of State only.