

EXECUTIVE NOTE
THE CONSERVATION (NATURAL HABITATS, &C.) AMENDMENT (NO.2)
(SCOTLAND)
REGULATIONS 2007
SSI/2007/349

Background

The above Instrument is made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972. The Instrument is subject to affirmative resolution procedure.

The overall effect of the instrument is to further transpose Council Directive 92/43/EEC (“the Habitats Directive”) by amending the Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”), which originally transposed the Habitats Directive.

This builds on the amendments made through the Conservation (Natural Habits, &c.) Amendments (Scotland) Regulations 2007 made on 14 February 2007 in the light of the judgement of the European Court of Justice in cases C-6/04 and C-131/05. The ruling in case C-6/04 found certain aspects of the 1994 Regulations to be inconsistent with a strict interpretation of the obligations arising under the Habitats Directive. In particular, consideration was given to whether it was competent to rely on regulation 3 of the 1994 Regulations to transpose the appropriate assessment requirements in Articles 6(3) and (4) of the Habitats Directive. The court held that while it was not always necessary to formally enact the requirements of a Directive in specific express legal provisions it is important to ensure that measures are sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations.

The amending Regulations made on 14 February 2007 rectified matters specifically identified in the ECJ rulings. However, it has become clear that, in certain cases, which are not currently covered by Part IV of the 1994 Regulations that further measures are necessary to ensure a clear transposition of the Habitats Directive.

Policy Objectives

The policy aim is to satisfy the requirement to transpose the Habitats Directive accurately and in full.

The relevant changes to the 1994 Regulations take the form of new provisions and amendments to existing provisions. In Part IV of the 1994 Regulations the Instrument will have the following effects:

- ⊕ It will extend Part IV to “all plans or projects”.
- ⊕ Provide new powers for Scottish Ministers to call in a plan or project which they consider may have a significant effect on a protected site so as to ensure compliance with the Habitats Directive.

- ⊕ Provides powers to issue directions in relation to the manner in which an appropriate assessment must be carried out and the matters to be covered.
- ⊕ Suspends proposals until the Scottish Ministers issue a direction signalling that they are satisfied that an appropriate assessment has been carried out in accordance with the Habitats Directive and the 1994 Regulations.
- ⊕ Strengthens Ministers' functions in relation to the overriding public interest test

Consultation

This draft Instrument has been developed as a result of public concerns that Scottish Ministers do not have sufficient powers to exert direct influence on competent authorities to ensure proper compliance of decisions with the Habitats Directive in relation to projects which have a potentially in relation to projects which have a potentially significant effect on protected sites. In response to concerns expressed by the public and in the Parliament, this Instrument is being made and brought into force quickly through an accelerated affirmative procedure. The Instrument will be debated in the chamber and affirmed by the whole of the Scottish Parliament.

Financial Effects

The principal purpose of the amendments is to clarify the law in relation to the obligations arising under the Habitats Directive and to provide Scottish Ministers with powers to ensure compliance. As a consequence, it is not expected that the amendments will give rise, overall, to significant new demands on the public, private or voluntary sectors or impose unreasonable new demands on individuals. Certain administrative processes however, will be required in exercising the functions of the Scottish Ministers. A Regulatory Impact Assessment (RIA) is attached below.

Scottish Executive

June 2007

Regulatory Impact Assessment

Introduction

1. The new Regulations will amend Part IV of the Conservation (Natural Habitats, & c.) (Scotland) Regulations 1994 (“the 1994 Regulations”). The amendments will make further provision for the implementation of Council Directive 92/43/EEC (“the Habitats Directive”) which is transposed in Scotland in a number of respects.

Background

2. The Habitats Directive was adopted in 1992 with the purpose of establishing common levels of conservation throughout the European Community for habitats and species perceived to be under threat. Central to the Directive's objectives is the establishment of an ecologically coherent network of sites known as Natura 2000. The principal instrument for transposing the Habitats Directive in Great Britain and adjacent territorial waters is the 1994 Regulations.
3. These Regulations make changes to the 1994 Regulations.
4. Previous technical amendments to the 1994 Regulations in Scotland were made in November 2004 and February 2007 respectively through SSI 2004 No. 475 and SSI 2007 No. 80
5. In summary the Conservation (Natural Habitats, &c.) Amendment (No.2) (Scotland) Regulations 2007 will:
 - i. Extend Part IV of the Habitats Regulations to ‘all plans or projects’
 - ii. Include a power of direction for Scottish Ministers to call in a plan or project which they consider may have a significant effect on a protected site
 - iii. Give Scottish Ministers a range of powers to instruct how appropriate assessments should be carried out and the matters they should cover

Rationale for government intervention

6. Scottish Ministers are required by Section 57(2) of the Scotland Act to comply with community law.

Costs and Benefits

i) Costs, Sectors and groups affected

7. Some business sectors may be affected by the proposed amendments to Part IV of the Habitats Regulations, this could include minor delays while the Scottish Government considers whether the plans or projects will go ahead. The new powers are proportionate and Scottish Ministers will be required to administer the process within a reasonable timeframe. The new regulations are a means to ensure the Habitats

Directive is complied with where competent authorities are carrying out functions in their area of responsibility.

(ii) Benefits

8. Although the 1994 Regulations already provide protection for habitats and species in the UK, amending the Regulations would improve the transposition of the Habitats Directive and in particular would better transpose Article 6(3) and (4) of the Directive into domestic legislation.
9. The new regulations should not have a significant impact on business as there has been a duty to comply with Article 6 since 1994.
10. If the Scottish government were to do nothing then the benefits outlined above would not be achieved and could risk delivery of environmental legal obligations.

Direct Costs to the Scottish Executive and its Agencies

11. It is not anticipated that the proposed changes would result in any significant additional cost to Government or its Agencies.

Competition Assessment

12. No economic sector will be affected by the proposals more than at present.

Scottish Executive
June 2007