

EXPLANATORY MEMORANDUM TO
THE CONSERVATION (NATURAL HABITATS, &C.) (AMENDMENT) (No. 2)
REGULATIONS 2009

2009 No. 2438

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.

1.1 This memorandum contains information for the Joint Committee on Statutory Instruments.

1.2 The relevant parts of this Memorandum provide the same information as is contained in the Explanatory Memorandum accompanying the Infrastructure Planning (Applications and Procedure) Regulations (and other related instruments) prepared by the Department of Communities and Local Government.

2. Purpose of the instrument

2.1 The Conservation (Natural Habitats, &c.) (Amendment No.2) Regulations 2009 (the “Amendment Regulations”) amend the Conservation (Natural Habitats, &c.) Regulations 1994¹, as amended (the “Habitats Regulations”).

2.2 The Habitats Regulations transpose Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”).

2.3 The Amendment Regulations comprise three distinct sets of amendments which are designed to :

- cater for the changes made to the procedures for considering nationally significant infrastructure planning applications in England, Wales and to a limited extent Scotland, introduced under the Planning Act 2008 (Part 2 of the Amendment Regulations);
- directly apply relevant provisions of the Habitats Regulations to certain marine works (Part 3 of the Amendment Regulations); and
- widen the scope of existing powers to make special nature conservation orders in order to bolster the transposition of Articles 6(2) and (3) of the Habitats Directive (Part 4 of the Amendment Regulations).

2.4 Annex 1 contains a transposition note setting out the changes contained in the Amendment Regulations and the provisions of the Habitats Directive which they transpose.

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

3.1 In the Explanatory Memorandum published in January 2009 in relation to the Conservation (Natural Habitats, &c.) (England and Wales) (Amendment) Regulations 2009²

¹ SI 1994/2716

the Department set out its plans to undertake a wider review and consolidation of the Habitats Regulations.

3.2. This review and consolidation remains under consideration. However the complexity of the exercise, and the resources needed to undertake it, meant that it has not been possible to include any element of consolidation in the Amended Regulations, which were required to come into effect on 1 October 2009 to tie in with the timetable for implementation of the Planning Act 2008.

4. Legislative Context

4.1 The Habitats Regulations, which are made under section 2(2) of the European Communities Act 1972, are the principal means by which the Habitats Directive is transposed for Great Britain and its 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.

4.2 Agreement to make the Amendment Regulations was given by the Ministerial Committee on Economic Development (Sub-Committee on Environment and Energy (ED(EE))) on 7 September.

Part 2 of the Regulations : Amendments relating to the grant of development consent

4.3 The Habitats Regulations apply the provisions of the Habitats Directive specifically to a number of consenting regimes, including the grant of planning permission under the Town and Country Planning Act 1990.

4.4 The amendments in Part 2 of the Amendment Regulations arise from new legislation contained in the Planning Act 2008, which makes provision for:

- the Government to produce National Policy Statements (NPSs) for nationally significant infrastructure. These will integrate environmental, social and economic objectives, including climate change commitments, for the delivery of sustainable development. They will set out the national need for infrastructure development and set the policy framework for IPC decisions. They aim to speed up the process of delivering large-scale infrastructure projects;
- a new duty on promoters to ensure that proposals are properly prepared and consulted on before they submit an application for development consent for nationally significant infrastructure projects; and
- a new independent body, the Infrastructure Planning Commission (IPC), to take over responsibility for considering and deciding such applications. Decisions will be based primarily on the National Policy Statements. The examination process will be streamlined. Questioning at hearings will be led by commissioners rather than being adversarial.

Part 3 of the Regulations : marine works

4.5 Part 3 of the Amendment Regulations:

² SI 2009/6

- implement Articles 6(3) and 6(4) of the Habitats Directive in relation to marine works, including licences under Part 2 of the Food and Environment Protection Act 1985, consents under section 34 of the Coast Protection Act 1949 and approvals for works involving construction or making modifications in a harbour. In essence, Article 6(3) of the Directive requires that any plan or project likely to have a significant effect on a protected site must be subject to an assessment to identify the impact on that site before it is consented to by a competent authority. A plan or project may only be approved either if it has no negative impact on the integrity of the site, or where it does have such an impact, certain conditions set out in Article 6(4) are fulfilled; and
- transfer to the Welsh Ministers the functions of the Secretary of State under regulations 49-53 of the Habitats Regulations. These include, for example, the function of seeking an opinion from the Commission as to whether reasons may be considered to be “imperative reasons of overriding public interest”, and the function of securing compensatory measures.
- Part 3 of the Amendment Regulations only transfers these functions in relation to:
 - i) marine works carried out in relation to fishery harbours in Wales, which are authorised under an order made under s.14 or s.16 of the Harbours Act 1964,
 - ii) marine works for which the Welsh Ministers are the regulator; and
 - iii) marine works in relation to which the Welsh Ministers exercise any power of direction or call-in or where refusal of consent gives rise to a right of appeal to Welsh Ministers.

Part 4 of the Regulations : special nature conservation orders

4.6 Existing provisions in regulations 22-27 of, and Schedule 1 to, the Habitats Regulations contain powers to make a special nature conservation order (“SNCO”) in respect of any land within a European site. The purpose of the SNCO is to prohibit or control any operations which appear to the Secretary of State likely to destroy or damage the flora, fauna, or geological or physiological features by reason of which the land is a European site.

4.7 The current provisions are restricted to controlling operations carried out on any land within a European site. The Amendment Regulations :

- extend the scope of the powers to allow the control of operations taking place either within or outside the European site, and on either land or water;
- make provision to make it unlawful for a person who has been served a notice by the Secretary of State to carry out the operation specified on the SNCO, unless certain conditions are met. (Prior to these amendments, it was unlawful for a person to carry out any operation specified in an SNCO. No notice was required to be served). Where it is not possible to serve a notice on such person(s), the regulations provide for the notice to be displayed in an appropriate place(s); and
- make other minor consequential amendments to reflect the above changes.

5. Territorial Extent and Application

The Habitats Regulations extend to Great Britain. The Amendment Regulations have the following territorial extent:

Part 2 of the Regulations : Amendments relating to the grant of development consent

5.1 These amendments apply to England, Wales and Scotland in accordance with the scope of the Planning Act 2008, apart from regulation 7, which extends to England and Wales only, and regulation 8 which extends to Scotland only.

Part 3 of the Regulations : marine works

5.2. These amendments apply to England and Wales only. Similar amendments are under consideration for Scotland.

Part 4 of the Regulations : special nature conservation orders

5.3. These amendments apply to England and Wales only. In Scotland, similar powers are in place in relation to land, and consideration is being given to their extension into the marine environment.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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 habitats and species.

Part 2 of the Regulations : Amendments relating to the grant of development consent

7.2 The Planning Act 2008 does not directly apply any European Community law such as the EC Habitats Directive 92/43/EEC (the “Habitats Directive”) to the new bodies and procedures established under the Planning Act 2008. Instead, the Amendment Regulations apply the relevant provisions of the Habitats Directive via amendments to the Habitats Regulations.

7.3 In particular, the Amendment Regulations :

- ensure that where the Secretary of State considers it necessary, National Policy Statements will include text which encourages the management of the features of the landscape which are of major importance for wild fauna and flora. This transposes Article 10 of the Habitats Directive which provides that Member States shall endeavour to encourage the management of landscape features whenever they consider it necessary in land-use planning and development policies (see regulation 5);
- ensure that the IPC is a competent authority and has the same duties and powers as other competent authorities when deciding applications. Similarly the Secretary of State, the Panel of Commissioners or the Council can also be the competent authority in circumstances where they are granting development consent;
- ensure that where an application for development consent is likely to have a significant effect on a site protected under the Habitats Directive, the proposal is

subject to an appropriate assessment as required by Article 6(3) of that Directive (regulation 67A);

- require the decision-maker under the Planning Act 2008 to review any development consent orders which come within the scope of regulation 50 of the Habitats Regulations and ensure they are undertaken in accordance with the procedures set out in Schedule 6 to the Act (where the decision maker is the Panel or the Council, the IPC will carry out the review – see new regulation 67B). Regulation 50 of the Habitats Regulations provides that an existing consent must be reviewed where the consent is likely to have a significant effect on a protected site, where that site has been designated as a protected site after the consent has been granted;
- ensure that where a National Policy Statement is likely to have a significant effect on a protected site, the NPS is subject to appropriate assessment as required by Article 6(3) of the Directive (regulations 7 and 8).

Part 3 of the Regulations : marine works

7.4 The Habitats Regulations 1994 apply the provisions related to the protection of European sites contained in regulations 48 to 53 to planning and other regulatory control mechanisms set out in regulations 54 to 85. In essence regulations 48 to 53 provide for the proper assessment of plans and projects likely to have a significant effect on a protected site; set out the conditions, including the provision of compensatory measures, that must be met before consent can be granted for a plan or project which has an adverse impact on the integrity of such a site; provide for a review of any consents granted prior to a site becoming protected under the Habitats Regulations; and provide for co-ordination of action where more than one authority is involved in the consideration of a plan or project. For regulatory control mechanisms not listed in regulations 54 to 85, the general protection of European sites is provided via regulation 3(4).

7.5 The Amendment Regulations have the effect of :

- making general provisions for the protection of European sites contained in regulations 48 to 53 directly and explicitly applicable to marine works;
- transferring to the Welsh Ministers the functions of the Secretary of State under regulations 49 to 53. These include, for example, the function of seeking an opinion from the Commission in certain circumstances and the function of securing compensatory measures, in relation to marine works carried out in relation to fishery harbours in Wales which are authorised under an order made under s.14 or s.16 of the Harbours Act 1964, and marine works for which the Welsh Ministers are the regulator or in relation to which the Welsh Ministers exercise any power of direction or call-in or where refusal of consent gives rise to a right of appeal to Welsh Ministers.

Part 4 of the Regulations : special nature conservation orders

7.6 The Amendment Regulations allow the Secretary of State to make a SNCO to restrict any person from carrying out an operation which appears to the Secretary of State to be likely to destroy or damage the flora, fauna or geological or physiographical features by reason of which the land is a European site, not only where the operation is carried out on **land within**

a European site (as at present), but also where it is carried out elsewhere, eg **on water** or on land outside a European site³.

7.7 The amendments prescribe a two-stage process. First the Secretary of State can make a SNCO which would specify operations which appear to him to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy or damage the interest features of a European site (effectively this would be a warning stage to those operating within or near a European site). Secondly a new step so that when a SNCO has been made, it only applies to a particular operator where the Secretary of State has served a notice on that person. A notice will only be served where it appears that the operations are likely to damage the European site. This approach has the advantage of targeting the provision specifically at those persons that receive a notice. Where the notice cannot be served on an identifiable person(s), there is provision for it to be displayed in a suitable place.

7.8 Judicial Review proceedings, and a complaint to the European Commission, highlighted the need to take immediate steps to bolster the SNCO powers.

8. Consultation outcome

Part 2 of the Regulations : Amendments relating to the grant of development consent

8.1 The government consulted on draft Regulations (ie the provisions now included in Part 2 of the Amendment Regulations) between 30 March and 19 June 2009. The consultation document can be found at <http://www.communities.gov.uk/documents/planningandbuilding/pdf/consultationpreapplication.pdf>

8.2 The government received 28 responses to the questions on the draft amendments to the Habitats Regulations. The predominant view was that draft amendments were appropriate, and would successfully transpose the requirements of the Habitats Directive for the new regime under the Planning Act. It was strongly suggested that the IPC must have regard to the tests of the Habitats Directive regarding alternatives and the IROPI when it decides on an application which would impact on a European site.

8.3 Some respondents suggested that rather than amend the existing Habitats Regulations, the government should make a bespoke set of Habitats Regulations for the purposes of Nationally Significant Infrastructure Projects. This proposal was considered. However, our general policy since the Habitats Regulations were first made is, as far as possible, to keep all regulatory provisions that transpose the Habitats Directive in one place. Our conclusion therefore was that amendments to the Habitats Regulations would be more consistent with this general approach.

Part 3 of the Regulations : marine works

8.4 The proposed amendments to the Habitats Regulations were subject to public consultation between 27 November 2008 and 19 February 2009. There were 29 responses. The consultation document can be found at : <http://www.defra.gov.uk/corporate/consult/marine-works/>

³ In regulation 2 of the Habitats Regulations “land” includes land covered by water.

8.5 Just under half the respondents commented on whether they agreed that it was correct to ensure articles 6(3) and 6(4) of the Habitats Directive are implemented in relation to marine works. Almost all agreed with the proposal to amend the Habitats Regulations, with one respondent doubting the need for the change.

Part 4 of the Regulations : special nature conservation orders

8.6 Draft regulations relating to the amendments to the procedures for making special nature conservation orders were the subject of an 8 week public consultation exercise between 8 June and 3 August. This shorter than usual consultation period was agreed by the Minister for Marine and Natural Environment in view of the need to introduce new powers by 1 October 2009. There were 70 responses. The consultation document can be found at : <http://www.defra.gov.uk/corporate/consult/conservation-habitats/index.htm>

8.7 Thirty respondents, principally local authorities or conservation groups, supported the proposals and accepted that they are necessary to improve our transposition of the Directive. Twenty-six respondents, principally the marine industries, opposed the proposals. The main concern expressed by objectors was the potential impact the new powers might have on both commercial and recreational activities. Fourteen other respondents commented without expressing either strong support or an objection.

8.8. We are very mindful of the potential impact of these extended powers as they provide new controls to make a SNCO in relation to operations taking place on water, and operations taking place outside a protected site but which nevertheless have an adverse impact on the features which gave rise to its protected status. However, SNCO powers are last resort powers, to be used when all other mechanisms have been tried and failed. Existing SNCO powers have been used infrequently and we have no evidence to suggest that situation will change. Provided other provisions in the Regulations are complied with the need to make a SNCO to control operations already subject to a consent regime should only arise in the most exceptional circumstances.

8.9 Our conclusion was that the Amendment Regulations should be pursued in view of the immediate need to bolster transposition of the Habitats Directive to ensure that powers are available to prevent the deterioration of protected sites.

9. Accompanying guidance documents

Part 2 of the Regulations : Amendments relating to the grant of development consent

9.1 These Regulations are being made at the same time as guidance documents are published by the Secretary of State on:

- How applicants should complete the prescribed application forms
- How applicants should conduct pre-application consultation to the standards required by the Planning Act 2008 and the Habitats Regulations
- What types of development could be included in development consent orders, as development “associated” to development mentioned in Part 3 of the Planning Act 2008.

Part 3 of the Regulations : marine works

9.2 No specific guidance is being issued on the proposals in Part 3 of the Regulations. Guidance already exists on how to apply the requirements of the Habitats Regulations to the planning regime⁴ and this guidance is generally applicable to other consenting regimes.

Part 4 of the Regulations : special nature conservation orders

9.3 These amendments make provisions for new procedures to be followed by the Secretary of State and the statutory nature conservation bodies. We propose to draw up guidance on how the powers will be used, and the process, in due course.

10. Impact

Part 1 of the Regulations : Amendments relating to the grant of development consent

10.1 An Impact Assessment has not been prepared for this consultation as the policy options do not have an additional impact on business, charities or the public sector beyond that examined in the Impact Assessment that accompanied the Planning Act 2008, which can be found at

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/impacttowncountry.pdf>

Part 2 of the Regulations : marine works

10.2 An Impact Assessment has been undertaken and is available at

<http://www.defra.gov.uk/corporate/consult/marine-works/impact-assessment-habitats.pdf>

Part 3 of the Regulations : special nature conservation orders

10.3 An Impact Assessment has been undertaken and will be available shortly on the Defra website.

11. Regulating small business

Part 2 of the Regulations : Amendments relating to the grant of development consent

11.1 The legislation applies to small business, but the government believes it is unlikely that a small business will apply for a development consent order under the Planning Act 2008.

Part 3 of the Regulations : marine works

11.2 The legislation applies to small businesses but its impact will be minimal as the new provisions simply replace a general duty that already arises under regulation 3 of the Habitats Regulations.

Part 4 of the Regulations : special nature conservation orders

⁴ See, for example, Planning Policy Statement 9: Biodiversity and Geological Conservation and related ODPM Circular 06/2005 (Defra Circular 01/2005) on Biodiversity and Geological Conservation – Statutory Obligations and their impact within the planning system

11.3 The legislation applies to small businesses. Burdens might arise if a SNCO is served on a small business. But this will depend on the nature of the controls applied by the SNCO. Given their specific and targeted nature, the extended powers will not impose any general burdens on small businesses.

12. Monitoring & review

12.1 The Habitats Regulations are subject to regular review. A consolidation exercise is under consideration (see paragraph 3.2 above).

13. Contact

13.1 Simon Hopkinson at the Department for Environment, Food and Rural Affairs (Simon.Hopkinson@defra.gsi.gov.uk) is the first point of contact for queries on the Amended Regulations.

TRANSPOSITION NOTE relating to Council Directive (92/43/EEC) on the conservation of natural habitats and wild fauna and flora (“the Habitats Directive”)

The Conservation (Natural Habitats, &c.) (Amendment) (No. 2) Regulations 2009 (the “Amendment Regulations”)

Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (“the Habitats Directive”) provides a framework for the conservation and management of habitats listed in Annex I of the Directive and the species listed in Annexes II, IV and V.

In Great Britain, the Directive is principally implemented by the Conservation (Natural Habitats, &c.) Regulations 1994⁵ (as amended) (“the Habitats Regulations”). These Regulations do not go beyond what is necessary to implement the Directive.

Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora

Article	Objective	Implementation	Responsibility
6(3) and 6(4)	<p>Article 6(3) requires that any plan or project likely to have a significant effect on a protected site be subject to an assessment before consent is granted by a competent authority. The assessment must consider the effect of the plan or project on the European site.</p> <p>A plan or project may only be approved if it will not adversely affect the integrity of the protected site, unless certain conditions set out in article 6(4) are fulfilled.</p>	<p>Regulation 6 of the Amendment Regulations transposes article 6(3) and 6(4) by ensuring the requirements of those articles expressly apply in relation to the granting of an order for development consent under the Planning Act 2008.</p>	<p>Competent authorities (see definition in regulation 6 of the Habitats Regulations). Depending on who is considering the application for the development consent order, this could include the Infrastructure Planning Commission or the Secretary of State.</p>
6(3) and 6(4)	See above	Regulations 7 and 8 of the Amendment	The Secretary of State

⁵ SI 1994/2176

		Regulations transpose article 6(3) and 6(4) by ensuring that those articles expressly apply in relation to the designation of national policy statements under the Planning Act 2008.	
6(3) and 6(4)	See above	Part 3 of the Amendment Regulations transposes article 6(3) and 6(4) by ensuring that those articles expressly apply in relation to the granting of certain authorisations in England and Wales (relating to marine works) under the Food and Environment Protection Act 1985, Coast Protection Act 1949, Harbours Act 1964 and certain other harbours legislation.	Competent authorities (see definition in regulation 6 of the Habitats Regulations)
Article 6(2), 6(3) and 6(4)	Article 6(2) requires Member States to take appropriate steps to avoid deterioration of habitats and significant disturbance of species in protected sites. (See above for article 6(3) and 6(4))	Part 4 of the Amendment Regulations extends provisions to control activities which may harm sites protected by the Habitats Directive. The Amendment Regulations will allow the control of activities taking place on water and activities taking place outside a protected site.	Secretary of State
Article 10	Article 10 requires Member States to endeavour, where they consider it necessary, to encourage the management of certain landscape features in their land-use planning and development policies.	Regulation 5 transposes article 10 in relation to national policy statements under Part 2 of the Planning Act 2008.	Secretary of State