

**EXPLANATORY MEMORANDUM TO**  
**THE CONSERVATION OF HABITATS AND SPECIES (AMENDMENT)**  
**REGULATIONS 2012**

**2012 No. 1927**

**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.

**2. Purpose of the instrument**

2.1 These Regulations amend the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) (the “Habitats Regulations”). They place new duties on public bodies to take measures to preserve, maintain and re-establish habitat for wild birds.

2.2 The Regulations also make a number of further amendments to the Habitats Regulations to ensure certain provisions of Directive 92/43/EEC (“the Habitats Directive”) and Directive 2009/147/EC (“the Wild Birds Directive”) are transposed clearly.

2.3 The Regulations also amend section 15 of the National Parks and Access to the Countryside Act 1949 to make clear Local Nature Reserves may be designated for the purposes of re-establishing bird habitat.

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

3.1 None.

**4. Legislative Context**

4.1 The objective of the Wild Birds Directive is to conserve wild bird populations. The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. Both lay down rules for the protection, management and exploitation of such species.

4.2 The Habitats Regulations transpose the Habitats Directive and certain elements of the Wild Birds Directive in England and Wales and adjacent territorial seas (out to 12 nautical miles). Those Regulations also extend to Scotland to a limited extent in relation to reserved matters only.

4.3 The amendments in this instrument to the Habitats Regulations transpose Articles 2, 3, 4(4) (second sentence) and 10 of the Wild Birds Directive. The amendments also transpose, in particular, Article 18 of the Habitats Directive.

4.4 A Transposition Note is attached at the Annex A.

4.5 The Scottish Ministers and the Department of the Environment for Northern Ireland are making regulations, similar to this instrument, for Scotland and Northern Ireland respectively.

4.6 Similar amendments are being made to the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 (S.I. 2007/1842), which transpose the Habitats Directive and the Wild Birds Directive in relation to the United Kingdom's offshore marine area (broadly, beyond 12 nautical miles).

## **5. Territorial Extent and Application**

5.1 This instrument extends to England and Wales, including the adjacent territorial sea. It also extends to Scotland and Northern Ireland (including the adjacent territorial sea) to a limited degree.

## **6. European Convention on Human Rights**

6.1 Richard Benyon, the Minister for Natural Environment and Fisheries, has made the following statement regarding Human Rights:

“In my view the provisions of the Conservation of Habitats and Species (Amendment) Regulations 2012 are compatible with the Convention rights.”

## **7. Policy background**

7.1 The Wild Birds Directive 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 Directive recognises that habitat loss and degradation are serious threats to the conservation of wild birds. It sets broad objectives designed to protect wild birds.

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

7.2 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) (second sentence) of the Directive are designed to ensure Member States preserve, maintain or re-establish a sufficient diversity and area of habitats for wild 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.

7.3 Following correspondence with the European Commission, Defra has concluded that more needs to be done to transpose the provisions of Articles 2, 3 and Article 4(4) - second sentence. These Regulations are intended to ensure clearer transposition of these provisions by giving additional and specific duties to relevant bodies.

7.4 In particular, the Regulations:

- place new duties on the Secretary of State, Welsh Ministers, Natural England and the Countryside Council for Wales 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, local authorities, national park authorities and the Broads Authority 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 Natural England and the Countryside Council for Wales 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;
- make clear management schemes may 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 Nature Reserves to be designated for the purposes of re-establishing bird habitat.

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

#### Revocation of regulations 20 and 22 of the Habitats Regulations

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

7.6 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 removes some overlap between the two regimes. It also addresses 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.

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

7.8 Revoking regulation 22 removes a provision for the appropriate nature conservation body to notify the Secretary of State 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

7.9 This instrument revokes regulation 38(5) to ensure that the Marine Management Organisation 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 Marine Management Organisation and Welsh Ministers' powers to make byelaws/orders in respect of Marine Conservation Zones (sections 129-137 of that Act). Byelaw/order making powers provide for a full consultation process to be followed (except in the case of emergency).

#### Amendment of regulation 58 of the Habitats Regulations

7.10 This instrument amends regulation 58 to make it clear that this offence applies to anyone authorised to carry out activities under the licence.

#### Amendment of regulations 60 and 61 of the Habitats Regulations

7.11 This instrument amends regulation 60 to 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.

7.12 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.

## Amendments to extend certain provisions in the Habitats Regulations to Northern Ireland

7.13 The instrument makes some technical amendments to regulations 2, 5 and 8 to extend certain provisions in the Habitats Regulations to Northern Ireland. These include:

- amending regulation 8(2)(a) to refer to the United Kingdom instead of Great Britain, so that an appropriate assessment must include consideration of the effects on protected sites in Northern Ireland;
- ensuring Part 6 of the Regulations covers plans or projects relating to reserved matters in Northern Ireland, including marine licensing decisions.

### New regulation 129A of the Habitats Regulations – research

7.14 New regulation 129A places 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 would 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.

7.15 The UK's transposition of the Wild Birds and Habitats Directive was recently consolidated through the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490). Consideration will be given to whether a further consolidation exercise is necessary at this stage.

## **8. Consultation outcome**

8.1 These proposals have not been subject to public consultation as the measures to ensure clearer transposition of the Wild Birds Directive are an urgent response to correspondence instigated by the European Commission. Both these measures and the additional measures not related directly to this formal correspondence will not have any significant impact on any person or body and will impose no significant additional burdens on business or any other stakeholder.

8.2 However, in preparing these Regulations, Defra has consulted other Government Departments, the devolved administrations in Wales, Scotland and Northern Ireland, and delivery bodies such as the Joint Nature Conservation Committee, Natural England, the Countryside Council for Wales and the Forestry Commission.

## **9. Guidance**

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

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is negligible, related to work associated with the provision of guidance to relevant bodies.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **11. Regulating small business**

11.1 The Habitats Regulations do not apply to small business directly, as duties are placed on competent authorities (public bodies). However, the carrying out of those duties may affect the approval of activities which any organisation, including a small business, proposes to carry out.

## **12. Monitoring & review**

12.1 The appropriate nature conservation body must review, from time to time, whether the relevant bodies are meeting the objective of preserving, maintaining or re-establishing sufficient diversity and area of habitat for wild birds.

12.2 The Secretary of State must carry out a review of the Habitats Regulations (in relation to England) and publish a report setting out the conclusions of the review after five years, with subsequent reports to be published at no more than five yearly intervals.

## **13. Contacts**

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## Transposition Note relating to Directive 2009/147/EC on the Conservation of Wild Birds (“the Wild Birds Directive”)

### The Conservation of Habitats and Species (Amendment) Regulations 2012

This instrument extends to England and Wales (including the adjacent territorial sea). It also extends to Scotland and Northern Ireland (including the adjacent territorial sea) to a limited degree.

The Regulations do not go beyond what is necessary to implement the Wild Birds Directive.

<b>Directive 2009/147/EC on the Conservation of Wild Birds</b>			
Articles	Objectives	Implementation	Responsibility
2	Requires Member States to take the 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.	Regulation 8 amends Regulation 9(1) of the Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) (the “Habitats Regulations”) to place a duty on the appropriate authority, nature conservation bodies and, in relation to the marine area, a competent authority to exercise their nature conservation functions, including marine conservation, to secure compliance with the requirements of the Wild Birds Directive. Regulation 9(3) of the Habitats Regulations imposes a duty on other competent authorities to have regard to the Wild Birds Directives, when exercising their functions.	Secretary of State, Welsh Ministers, Natural England, Countryside Council for Wales, competent authorities.
3(1)	Requires Member States to take measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all wild birds.	Regulation 8 inserts new regulation 9A into the Habitats Regulations which :  - places new duties on the Secretary of State, Welsh Ministers, Natural England, Countryside Council for Wales and, in relation to a marine area, any relevant competent authority to ensure steps are taken to protect and create bird habitat (reg 9A(1));	Secretary of State, Welsh Ministers, Natural England, Countryside Council for Wales, Environment Agency, Forestry Commission, local authorities, National Park Authorities, the Broads Authority and any other relevant competent authority.
3(2)	The preservation, maintenance and re-establishment of wild bird habitat must include measures to: create protected areas; upkeep and manage habitats inside and outside the protected zones; re-establish destroyed biotopes; create biotopes.	- places new duties on the Environment Agency, the Forestry Commission, local authorities, National Park Authorities and the Broads Authority to take steps to contribute to the protection and creation of bird habitat (reg 9A(2));	

		<p>- makes clear that the Secretary of State and Welsh Ministers have an obligation to consider designating Marine Conservation Zones to protect and create bird habitat (reg 9A(6));</p> <p>- places 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 (reg 9A(9));</p> <p>- places 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 (reg 9A(10)).</p> <p>Regulation 8 inserts new regulation 9B into the Habitats Regulations which places a duty on Natural England and the Countryside Council for Wales to review and report on the implementation of the duties described above to the Secretary of State and Welsh Ministers.</p> <p>Regulation 16 amends regulation 36 of the Habitats Regulations to enable management schemes to be established for European Marine sites to secure compliance with the Birds Directive.</p> <p>Regulation 26 amends section 15 of the National Parks and Access to the Countryside Act 1949 to make clear that local nature reserves may be designated to re-establish bird habitat.</p>	
4(4) second sentence	Outside special protection areas for habitats, Member States must strive to avoid pollution or deterioration of habitats.	Regulation 8 inserts new regulation 9A(8) into the Habitats Regulations which places a duty on a competent authority to use all reasonable endeavours to avoid any pollution or deterioration of wild bird habitat.	Competent Authorities



10	Member States are required to encourage research and any work required as a basis for the protection, management and exploitation of wild birds. Member States must send relevant information to the Commission.	Regulation 22 inserts new regulation 129A into the Habitats Regulations which places a duty on the Secretary of State and Welsh Ministers to take steps to encourage research and scientific work as they consider necessary for the purposes of the protection, management and use of any population of wild birds; and to supply such information as they consider appropriate to the European Commission to further the proper co-ordination of research.	Secretary of State, Welsh Ministers
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