

POLICY NOTE

The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 to the European Union (Withdrawal) Act 2018 (“the 2018 Act”). The instrument is subject to affirmative procedure.

Purpose of the instrument

To amend The Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”) to ensure that they continue to operate effectively following the United Kingdom’s (UK) withdrawal from the European Union (EU).

It also makes minor changes in salmon conservation legislation to reflect the changes made to the 1994 Regulations to ensure that the provisions continue to operate as intended following EU withdrawal.

Policy Objectives

Where practical and appropriate, European legislation is being retained in UK law on the UKs exit from the EU. In relation to the conservation of habitats and species, the UK Government, the Scottish Government and the other devolved administrations plan to retain the current protections and standards set out in EU legislation and EU-derived domestic legislation, to ensure that, following the UKs exit from the EU, these continue to operate in the same or an equivalent way. This will ensure that the UK will continue to meet its international commitments, particularly under the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention).

Upon exit day, a number of technical amendments are required to ensure that the Conservation (Natural Habitats, &c.) Regulations 1994 remain operable. The continued functioning of legislation relating to the conservation of habitats and species has been identified as a high risk area in the event that the UK exits the EU without a deal, and these amendments are part of readiness preparations for that scenario.

Part 2 of the instrument makes these technical amendments to the 1994 Regulations. Parts 3 and 4 make the minor changes to salmon conservation legislation to reflect the special conservation area procedures after exit day.

Explanation of the law being amended by the regulations

The 1994 Regulations are the principal statutory instrument transposing the requirements of the EU Habitats Directive (Council Directive 92/43/EEC) into domestic law for Scotland on land and out to 12 nautical miles. They also transpose certain elements of the EU Wild Birds Directive (Directive 2009/147/EC). The EU Habitats and Wild Birds Directives lay down rules for the protection and management of habitats and the protection and exploitation of species.

The 1994 Regulations previously also applied in England and Wales, but separate consolidating regulations were made in 2010 and again in 2017 by the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012). In UK offshore waters, the Directives are transposed by the Conservation of Offshore Marine Habitats and Species Regulations 2017 (S.I. 2017/1013). A UK Statutory Instrument amending the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (S.I. 2017/1013) is being taken forward by the UK Government, with the agreement of the Scottish Government.

General requirements

The 1994 Regulations establish a general duty on the Scottish Ministers, the appropriate nature conservation body, and, in relation to the Scottish marine area out to 12 nautical miles, any competent authority, to exercise their functions so as to secure compliance with the requirements of the EU Habitats and Wild Birds Directives.

European sites

The 1994 Regulations place a duty on the Scottish Ministers to propose sites which are important for natural habitat types listed in Annex I or species listed in Annex II to the EU Habitats Directive. Currently, such sites are proposed to the European Commission, and once adopted as sites of Community importance, must be designated as special areas of conservation (SACs) within six years. The Regulations also give powers to the Scottish Ministers to classify special protection areas (SPAs) for the conservation of species listed in Annex I to the Wild Birds Directive or for regularly occurring migratory species of birds not listed in Annex I which naturally occur in that territory. These sites are collectively defined in the Regulations as “European sites”, and form an EU-wide network known as Natura 2000.

The 1994 Regulations set out rules for the management of European sites, including provisions relating to the establishment of management agreements and management schemes for European sites and European marine sites respectively, offences in relation to European sites, powers to make byelaws for the protection of European sites, and requirements in relation to surveillance of the conservation status of natural habitats and species of Community interest.

The Regulations set out procedural requirements in relation to the assessment of implications of plans or projects for European sites. If a plan or project is likely to have a significant effect on a European site, the competent authority can only give consent if they can ascertain, by means of an appropriate assessment, that the plan or project will not adversely affect the integrity of the European site in view of its conservation objectives. Further provisions adapt planning and other controls for the protection of European sites.

A derogation is provided in relation to considerations of overriding public interest, whereby the competent authority can agree to a plan or project which may adversely affect the integrity of a European site if there are no alternative solutions and there are imperative reasons of overriding public interest. Currently, if these reasons do not relate to human health, public safety or beneficial consequences of primary importance, the competent authority must have regard to the opinion of the European Commission. The regulations also require Scottish Ministers to secure any necessary compensatory measures to ensure that the overall coherence of Natura 2000 is protected.

There are also requirements for competent authorities to review consents previously granted before a site became a European site, make an appropriate assessment of the implications for the site in view of its conservation objectives, and affirm, modify or revoke their previous decision.

Protection of species

The 1994 Regulations make it an offence to deliberately capture, injure, kill or trade European protected species of animal, being those animals listed in Annex IV(a) to the EU Habitats Directive whose natural range includes any area in Great Britain (as listed in Schedule 2 to the Regulations), and require Scottish Natural Heritage to monitor the incidental capture or killing of these animals. Similarly, the Regulations make it an offence to deliberately or recklessly to pick, collect, cut, uproot, destroy or trade in a wild plant of a European protected species, being those species listed in Annex IV(b) to the EU Habitats Directive whose natural range includes an area in Great Britain (as listed in Schedule 4 to the 1994 Regulations).

Provisions are also included laying out prohibited means of taking or killing animals listed in Annex IV(a) to the EU Habitats Directive (as listed in Schedule 3 to the 1994 Regulations). The Regulations do allow the appropriate authority (either the Scottish Ministers or Scottish Natural Heritage) to grant a licence for prohibited activities for specific purposes, if they are satisfied that there is no alternative, and the action will not be detrimental to the maintenance of favourable conservation status for the species concerned.

Reasons for and effect of the proposed change or changes on retained EU law

Part 2 of the instrument provides changes to those parts of 1994 Regulations which would no longer work when the UK leaves the EU, so that they continue to fulfil the objectives of the EU Habitats and Wild Birds Directives in Scotland and Scottish territorial waters out to 12 nautical miles.

Neither this instrument, nor the UK Statutory Instrument the UK Government is taking forward for the Conservation of Habitats and Species Regulations 2017 (S.I. 2017/1012) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (S.I. 2017/1013) reflect a change in policy. They have been brought forward in exercise of powers in the 2018 Act in order to address failures of retained EU law to operate effectively after the UK's exit from the EU.

Amendments to the 1994 Regulations include:

- Amendments to references to the Habitats and Birds Directives, including how these should now be read. For example, so that any reference to “Member State” or “Member States” also includes a reference to the UK, and any reference to “of Community interest” includes, in relation to the UK, a reference to “of national interest”.
- Reporting requirements as reporting under the Directives will no longer be to the European Commission. The Scottish Ministers will report publicly on the implementation of the measures taken for the purposes of giving effect to the provisions of the Habitats and Birds Directives and the achievement of the objectives set out in the Directives.

- The current two-stage process for designating SACs is amended to remove the Commission’s role in adopting a list of sites of Community Importance. This assessment function will be transferred to the Scottish Ministers, having regard to the advice of Scottish Natural Heritage and the Joint Nature Conservation Committee. Where a site is part way through the designation process at the time of exit, provisions are added requiring the Scottish Ministers to, within six years of exit day, either designate the site as an SAC, or give notice of their intention not to do so and publish reasons why.
- A new definition of “the UK site network” is defined, to include Natura 2000 sites designated prior to EU exit, and those SACs and SPAs designated post-EU Exit under the retained transposing regulations (the 1994 Regulations and the other UK transposing regulations). This retains the concept of a network of sites at the UK level. References to “European site”, “European Marine site”, “Special Area of Conservation” and “Special Protection Area” are retained, as there is no operability reason for these to change, and these terms are familiar to stakeholders.
- Provisions are added in relation to guidance on the application of these Regulations issued before exit day, to ensure that references to “Natura 2000” are now read as references to the UK site network. There is also provision for the Scottish Ministers to issue new guidance as to the interpretation of the requirements of the Directives.
- Management objectives are established for the UK site network. The Scottish Ministers, in co-operation with any other authority with a corresponding responsibility, must manage and where necessary adapt the UK site network to meet its management objectives. The management objectives are to maintain or restore habitats and species to favourable conservation status, and to contribute to ensuring the survival and reproduction of birds in their area of distribution.
- Amendments are made to the provisions relating to establishing whether imperative reasons of overriding importance (IROPI) apply in relation to plans or projects adversely affecting priority habitats or species. The amendments remove the role of the European Commission in giving an opinion on whether IROPI apply in cases not relating to human health, public safety or beneficial consequences of primary importance. This role is transferred to Scottish Ministers, who must have regard to the national interest, and consult the Joint Nature Conservation Committee, the Secretary of State, the Department of Agriculture, Environment and Rural Affairs in Northern Ireland, Welsh Ministers, and any other person the Scottish Ministers consider appropriate.
- Currently, annexes to the EU Habitats and Birds Directives list those habitats, plants and animals to which the Directives apply and to which the European Commission can propose amendments. They also list other conditions such as the criteria for selecting SACs, and prohibited methods of capture and killing and modes of transport. Article 19 of the Habitats Directive sets out a procedure for amending Annexes to the Directives, as necessary to adapt them to technical and scientific progress. A new regulation-making power is included in this instrument to make amendments to Annexes in the Directives and Schedules to the 1994 Regulations for the purposes of adapting them to technical and scientific progress. Prohibited methods of capturing and killing of wild animals, which are currently listed in the body of the 1994 Regulations, are transferred into new Schedules to allow for future amendments using this new regulation-making power. This will allow for amendments to this list of methods in future, to ensure that new

technologies can be included. There is also a regulation-making power to add species to Schedules 2 or 4 of the 1994 Regulations.

- Requirements for Scottish Ministers to supply information to the European Commission to further the proper co-ordination of research carried out by member States or the European Commission for the purposes of the EU Habitats and Wild Birds Directives are removed.

Parts 3 and 4 of the instrument amend both the Conservation of Salmon (Scotland) Regulations 2016 (S.S.I. 2016/115) and the Tweed Regulation (Salmon Conservation) (No. 2) Order 2016 (2016/391). The amendments delete certain references in those instruments in relation to special areas of conservation, which are defined with reference to the EU Habitats and Birds Directive. The amendments delete those references, replacing the procedure before exit day with references to the procedure for designating special areas of conservation in the amended 1994 Regulations.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement “In my view The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 does no more than is appropriate. This is the case because the amendments are being made only to ensure, following a United Kingdom exit from the European Union, continued and effective functioning of the legislation being amended and do not introduce policy change.”.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These are to ensure following a United Kingdom exit from the European Union, the continued and effective operation of environmental legislation in order to protect Scotland’s environment.”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement “In my view The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement “In my view The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”.

Where the regulations create a criminal offence, an explanation of why there are good reasons for creating the offence and providing for a penalty in respect of it

This instrument adjusts provisions relating to criminal offences. Annex VI of the Habitats Directive lists Prohibited methods of capturing and killing of wild animals. This list is currently reproduced in the body of the 1994 Regulations, but this instrument transfers the list to new Schedules to the Regulation. Article 19 of the Habitats Directive sets out a procedure for amending Annexes to the Directives, as necessary to adapt them to technical and scientific progress. A new regulation-making power is included in this instrument to make amendments to Annexes to the Directives and Schedules to the 1994 Regulations as necessary to adapt them to technical and scientific progress. This instrument will therefore allow for the current system to operate in an equivalent way after the UKs withdrawal from the EU.

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, has made the following statement “In my view The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to the guiding principles on the environment and animal welfare as derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union.”.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable.

An indication of how the regulations should be categorised in relation to the significance of the change proposed

Low – the amendments are technical in nature to allow continuity of law and do not amount to a change in policy.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

This SSI is subject to mandatory affirmative procedure under paragraph 1(6) of Schedule 7 of the European Union (Withdrawal) Act 2018. Therefore, the sifting procedure in the SSI protocol is not relevant to this SSI.

Further information

Consultation

This instrument does not amount to a change in policy and is being made to avoid deficiencies arising as a result of the UK's withdrawal from the EU. There has been no formal public consultation regarding this instrument. We have engaged with DEFRA and other UK administrations on the content of equivalent UK Statutory Instruments, where similar technical amendments are being made. Changes are considered essential to ensure legislative operability on day one of the UK's exit from the EU.

Impact Assessments

Full impact assessments have not been prepared for this instrument because it is aimed at preserving the effect of the current regulatory regimes once the UK leaves the EU. The current amendments do not alter the Scottish Government's current environmental policies and priorities and, therefore, do not have a significant impact on the environment. The impact on business, charities or voluntary bodies is expected to be minimal.

Financial Effects

The Cabinet Secretary for Environment, Climate Change and Land Reform confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

*Scottish Government
Environment and Forestry Directorate*

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