

**2009 No. 2438**

**WILDLIFE**

**COUNTRYSIDE**

**The Conservation (Natural Habitats, &c.) (Amendment) (No. 2)  
Regulations 2009**

<i>Made</i> - - - -	<i>7th September 2009</i>
<i>Laid before Parliament</i>	<i>9th September 2009</i>
<i>Coming into force</i> - -	<i>1st October 2009</i>

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The Secretary of State is designated<sup>(a)</sup> for the purposes of making Regulations under section 2(2) of the European Communities Act 1972<sup>(b)</sup> in relation to the environment.

The Secretary of State makes these Regulations in exercise of the powers conferred by that section.

## PART 1

### Introductory provisions

#### **Title, commencement and extent**

1.—(1) These Regulations may be cited as the Conservation (Natural Habitats, &c.) (Amendment) (No. 2) Regulations 2009 and come into force on 1st October 2009.

(2) This Part extends to Great Britain.

(3) In Part 2—

- (a) regulations 4, 5 and 6 extend to Great Britain;
- (b) regulation 7 extends to England and Wales only; and
- (c) regulation 8 extends to Scotland only.

(4) Parts 3 and 4 extend to England and Wales only.

#### **Interpretation**

2. In these Regulations, “the 1994 Regulations” means the Conservation (Natural Habitats, &c.) Regulations 1994<sup>(c)</sup>.

#### **Amendments to the 1994 Regulations**

3. The 1994 Regulations are amended in accordance with Parts 2, 3 and 4.

## PART 2

### Amendments relating to the grant of development consents

#### **Amendments to Part 1 of the 1994 Regulations**

4. In regulation 3 (implementation of Directive), in paragraph (3), after “the Land Drainage Act 1991,” insert—

“the Planning Act 2008<sup>(d)</sup>,”.

#### **Amendments to Part 2 of the 1994 Regulations**

5. In regulation 37 (nature conservation policy in planning contexts), after paragraph (2) insert—

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(a) S.I. 2008/301.

(b) 1972 c. 68.

(c) S.I. 1994/2716 (the “1994 Regulations”). Relevant amendments have been made by S.I. 1997/3055, 2007/1843, S.S.I. 2004/475, 2007/80 and 2007/349.

(d) 2008 c. 29.

“(3) Where the Secretary of State considers it necessary, the Secretary of State shall include in a national policy statement under Part 2 of the Planning Act 2008 policy that encourages the management of such features of the landscape (as mentioned in the second paragraph of paragraph (1)) which are of major importance for wild fauna and flora.”.

#### **Amendments to Part 4 of the 1994 Regulations**

6.—(1) After regulation 67 insert—

##### **“Grant of development consent**

**67A.**—(1) Regulation 48 (assessment of implications for European site) and, with the exception of paragraph (1A)(a), regulation 49 (considerations of overriding public interest) apply in relation to the making of an order granting development consent under the Planning Act 2008.

(2) Where those provisions apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site or European offshore marine site would be avoided if the order granting development consent includes requirements under section 120 of the Planning Act 2008, make an order subject to those requirements.

##### **Development consent: review**

**67B.**—(1) Regulations 50 (review of existing decisions and consents, &c) and 51 (consideration on review) apply, with the modification specified in paragraph (2), to any order granting development consent under the Planning Act 2008 unless—

- (a) the development to which it related has been completed before the site becomes a European site or a European offshore marine site,
- (b) it included a requirement as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun, or
- (c) the development consent was granted for a limited period and that period has expired.

(2) Regulation 50(2) applies as if the words “and regulation 48A” were omitted.

(3) For the purpose of this regulation, in a case where the Panel or the Council made the order granting development consent, the Commission shall carry out any review.

(4) The Commission shall consult the Secretary of State for the purpose of any review under regulations 50 and 51.

(5) In reviewing any order granting development consent in pursuance of regulations 50 and 51, the competent authority shall—

- (a) consider whether any adverse effects could be overcome by imposing requirements under paragraph 5(4)(c), (d) or (e) of Schedule 6 to the Planning Act 2008, and
- (b) if they consider that those effects could be so overcome, impose those requirements by making such an order under paragraph 3(1) of Schedule 6 (changes to, and revocation of, orders granting development consent) to the Planning Act 2008 as may be required.

(6) Any order made by the Commission under paragraph 3(1) of Schedule 6 to the Planning Act 2008 shall, if not made on the application of the Secretary of State under paragraph 3(6) of that Schedule, be treated as so made.

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(a) Paragraph (1A) of regulation 49 only extends to Scotland. It was inserted in relation to Scotland by S.S.I. 2007/349, regulation 2(1) and (4)(b).

(7) Paragraph (6) shall only have effect where the Secretary of State has agreed to the making of such an order by the Commission.”.

(2) For regulation 68 substitute—

**“Interpretation**

**68.**—(1) Regulations 54 to 67 shall be construed—

- (a) in England and Wales, as one with the Town and Country Planning Act 1990; and
- (b) in Scotland, as one with the Town and Country Planning (Scotland) Act 1997<sup>(a)</sup>.

(2) In regulations 67A and 67B, the terms “the Commission”, “the Council”, “development”, “development consent” and “the Panel” shall have the meanings given by the Planning Act 2008.”.

**Amendments to Part 4A (England and Wales) of the 1994 Regulations**

7. After regulation 85E add—

**“National policy statements**

**85F.**—(1) This Part applies—

- (a) in relation to a national policy statement under Part 2 (national policy statements) of the Planning Act 2008<sup>(b)</sup> as it applies in relation to a land use plan; and
- (b) in relation to the Secretary of State when exercising powers under Part 2 of the Planning Act 2008 as it applies in relation to a plan-making authority,

with the modifications specified in paragraphs (2) to (4).

(2) Any reference in this Part to giving effect to a land use plan shall, in relation to a national policy statement, be taken to be a reference to the designation of a statement as a national policy statement or an amendment of a national policy statement under Part 2 of the Planning Act 2008.

(3) Regulations 85B(5), 85C(4) to (10) and 85D do not apply.

(4) Regulation 85E (compensatory measures) applies as if the words “(where the plan relates to England) and the Welsh Ministers (where the plan relates to Wales)” were omitted.”.

**Amendments to Part 4A (Scotland) of the 1994 Regulations**

8. After regulation 85E(c) add—

**“National Policy Statements**

**85F.**—(1) This Part applies—

- (a) in relation to a national policy statement under Part 2 (national policy statements) of the Planning Act 2008<sup>(d)</sup> as it applies in relation to a land use plan; and
- (b) in relation to the Secretary of State when exercising powers under Part 2 of the Planning Act 2008 as it applies in relation to a plan-making authority,

with the modifications specified in paragraphs (2) to (4).

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(a) 1997 c. 8.  
(b) 2008 c. 29.  
(c) Regulation 85E was inserted by S.S.I. 2007/80, regulation 4, 22 and Schedule 1.  
(d) 2008 c. 29.

(2) Any reference in this Part to giving effect to a land use plan shall, in relation to a national policy statement, be taken to be a reference to the designation of a statement as a national policy statement or an amendment of a national policy statement under Part 2 of the Planning Act 2008.

(3) Regulations 85B(5), 85C(3) to (7) and 85D do not apply.

(4) Regulation 85E applies as if, for the words “Scottish Ministers”, there were substituted “Secretary of State”.

## PART 3

### Marine works

#### Amendments to Part 4 of the 1994 Regulations

9. After regulation 84B(a) insert—

##### “Marine works

**84C.**—(1) Regulations 48 (assessment of implications for European site) and 49 (considerations of overriding public interest) apply in relation to the granting of a licence, consent or other approval for marine works.

(2) Where regulations 48 and 49 apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site or European offshore marine site would be avoided if the licence, consent or other approval were subject to conditions or requirements, grant the licence, consent or other approval subject to those conditions or requirements.

(3) Regulations 50 (review of existing decisions and consents, &c) and 51 (consideration on review) apply to any such licence, consent or other approval mentioned in paragraph (1).

(4) Where on the review of any such licence, consent or other approval the competent authority consider that any adverse effects on the integrity of a European site or European offshore marine site of the carrying out or, as the case may be, the continuation of activities authorised by it would be avoided by a variation of the licence, consent or other approval, they may vary it accordingly.

(5) This regulation shall not apply in relation to any application for a licence mentioned in paragraph (6)(a), or a consent mentioned in paragraph (6)(b), in respect of dredging where—

- (a) the Secretary of State has determined that the dredging would constitute a habitats project under the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007(b); or
- (b) the Welsh Ministers have determined that the dredging would constitute a habitats project under the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Wales) Regulations 2007(c).

(6) In this regulation, “marine works” means any activity or proposed activity requiring—

- (a) a licence under Part 2 of the Food and Environment Protection Act 1985(d);
- (b) a consent under section 34 of the Coast Protection Act 1949(e);

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(a) Regulation 84B was inserted by S.I. 2007/1843, regulation 5(1) and (48).  
(b) S.I. 2007/1067.  
(c) S.I. 2007/2610.  
(d) 1985 c. 48.  
(e) 1949 c. 74.

- (c) an approval or consent for works involved in the construction of a harbour or involving the making of modifications to an existing harbour under—
  - (i) a local Act;
  - (ii) such an Act read together with a notice given and published under section 9 of the Harbours Transfer Act 1862(a); or
  - (iii) an order made under section 14 or 16 of the Harbours Act 1964(b).

(7) For the purposes of any provision in regulations 49 to 53 which is applied by this regulation and which confers a function on the Secretary of State, any reference to the Secretary of State in that provision is to be taken to be a reference to the Welsh Ministers, if the function is exercisable in relation to—

- (a) any application to the Welsh Ministers for an authorisation in respect of marine works;
  - (b) any application to any other authority for—
    - (i) an authorisation in respect of marine works, the refusal of which gives rise to a right of appeal to the Welsh Ministers;
    - (ii) an authorisation in respect of marine works in relation to which the Welsh Ministers exercise any power of direction or call-in;
    - (iii) an authorisation of a kind mentioned in paragraph (6)(c)(iii) in respect of works which are to be carried out in relation to a fishery harbour in Wales; or
  - (c) the grant of any application of a kind mentioned in sub-paragraph (a) or (b).
- (8) In paragraph (7), “authorisation” means any licence, consent or other approval.”.

## PART 4

### Special nature conservation orders

#### Amendments to Part 2 of the 1994 Regulations

10.—(1) In regulation 22 (power to make special nature conservation order)—

- (a) for paragraph (1) substitute—

“(1) The Secretary of State may, after consultation with the appropriate nature conservation body, make in respect of any land within a European site an order (a “special nature conservation order”) specifying operations (whether on land specified in that order or elsewhere and whether or not within the European site) which appear to the Secretary of State 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 flora, fauna, or geological or physiographical features by reason of which the land is a European site.”;

- (b) in paragraph (4), for “in relation to land” substitute “specifying operations on land”; and

- (c) after paragraph (6), insert—

“(7) If an order under paragraph (1) specifies any operation of a kind not carried out, or proposed to be carried out, on land within a European site, the order shall specify the operation by reference to the place where it is being, or is proposed to be, carried out.”.

(2) In regulation 23 (restriction on carrying out operations specified in order)—

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(a) 1862 c. 69.  
 (b) 1964 c. 40.

- (a) for paragraph (1) substitute—

“(1) No person to whom notice is given in accordance with this regulation shall carry out on any land within a European site in respect of which a special nature conservation order is in force, or in the place by reference to which the operation is specified, any operation specified in the order, unless the notice condition specified in paragraph (1A) and the consent condition specified in paragraph (2) are fulfilled.

(1A) The notice condition is—

- (a) where the operation is carried out on land, that—
- (i) the operation is carried out, or caused or permitted to be carried out, by the owner or occupier of the land; and
  - (ii) after notice is given, one of them has given the appropriate nature conservation body written notice of a proposal to carry out the operation, specifying its nature and where it is proposed to carry it out; and
- (b) in any other case, that, after notice is given, the person proposing to carry out the operation has given the appropriate nature conservation body written notice of a proposal to carry out the operation, specifying its nature and where it is proposed to carry it out.”.

- (b) in paragraph (2)—

- (i) for “Those conditions are” substitute “The consent condition is”; and
- (ii) after “body;” insert “or”; and

- (c) after paragraph (2), insert—

“(2A) A consent under paragraph (2)(a) may be given—

- (a) subject to conditions, and
- (b) for a limited period,

specified in the consent.

(2B) In respect of any land within a European site in respect of which a special nature conservation order is made, the Secretary of State may serve a notice on any person carrying out, or proposing to carry out, any operation of a kind specified in that order which appears to the Secretary of State to be likely to destroy or damage the flora, fauna, or geological or physiological features by reason of which the land is a European site.

(2C) The notice served under paragraph (2B) shall specify—

- (a) details of the operation;
- (b) details of the European site to which the notice relates; and
- (c) the date on which the notice takes effect.

(2D) Where the identity of a person carrying out, or proposing to carry out, the operation is not reasonably ascertainable, the Secretary of State may, instead of serving a notice under paragraph (2B), publish a notice in one local newspaper circulating in the area in which the land to which the notice relates is situated, and affix a copy or copies of the notice to some conspicuous object or objects on the land to which the notice relates.”.

(3) In regulation 24(4) (supplementary provisions as to consents), for “The owner or occupier of the land in question” substitute “A person to whom notice is given”.

(4) For regulation 25 (compensation for effect of order) substitute—

### **“Compensation for effect of notice**

**25.**—(1) Where the Secretary of State has given notice to any person under regulation 23, the appropriate nature conservation body shall pay compensation to any person having at the time at which notice is given an interest in land comprised in an agricultural unit comprising land to which the notice relates who, on a claim made to the appropriate nature conservation body within the time and in the manner required prescribed by regulations(a), shows that the value of that person’s interest is less than it would have been if notice had not been given.

(2) For this purpose an “agricultural unit” means land which is occupied as a unit for agricultural purposes, including any dwelling-house or other building occupied by the same person for the purpose of farming the land.

(3) No claim for compensation shall be made under this regulation in respect of an order unless the Secretary of State has given notice under paragraph 6(1) or (2) of Schedule 1 of the giving of notice under regulation 23.”.

(5) After regulation 27 (continuation in force of existing orders, &c) insert—

### **“Interpretation**

**27A.**—(1) In regulations 23 to 25 and 91, references to the giving of notice by the Secretary of State to a person under regulation 23 are to the service of a notice on a person under regulation 23(2B) or the publication and affixing of a notice under regulation 23(2D), and where a notice is published and affixed under regulation 23(2D) any person carrying out an operation specified in the notice shall be taken to be a person to whom notice is given under regulation 23(1).

(2) In regulations 22 to 25, 89 and Schedule 1, references to the Secretary of State shall be taken to be, in relation to Wales, references to the Welsh Ministers.”.

### **Amendments to Part 5 of the 1994 Regulations**

**11.**—(1) In regulation 89(1)(a) (payments under certain agreements offered by authorities), for “23(1)(a)” substitute “23(1A)(a)(ii) or (b)”.

(2) In regulation 90 (powers of entry)—

- (a) in paragraph (1)(a) omit “in relation to that land” and the final “or”;
- (b) in paragraph (1)(b), for the full stop substitute “; or”; and
- (c) after paragraph (1)(b) insert—

“(c) to affix a notice in accordance with regulation 23(2D) or paragraph 2(4) of Schedule 1.”.

(3) In regulation 91 (compensation: amount and assessment)—

- (a) in paragraph (1), for “regulation 25(1) (effect of special nature conservation order: decrease in value of agricultural unit)” substitute “regulation 25 (compensation for effect of notice)”;
- (b) in paragraph (2), for “the order not been made”, substitute “notice not been given”;
- (c) in paragraph (3)(a), for “the order is made”, substitute “notice is given”; and

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(a) Regulation 93(2) provides that the reference to matters being “prescribed by regulations” is to their being prescribed in exercise of the power to make regulations under section 30 of the Wildlife and Countryside Act 1981 (c.69) (“the 1981 Act”). That section is applied by regulation 93(1) so as to enable provision to be made for the purposes of these Regulations corresponding to those for which provision may be made under section 30. Section 30 of the 1981 Act was repealed in England and Wales by paragraph 2 of Schedule 9 to the Countryside and Rights of Way Act 2000 (c.37) (“the 2000 Act”), but by virtue of paragraph 19(1) of Schedule 11 to the 2000 Act continues to apply in connection with an order made under section 29 of the 1981 Act before the coming into force of paragraph 2 of Schedule 9 to the 2000 Act. As a consequence the operation of regulation 93(2) is not affected by the repeal in England and Wales of section 30 of the 1981 Act.

(d) in paragraph (3)(b), for “order”, substitute “restriction having effect by virtue of notice being given under regulation 23”.

(4) In regulation 92 (compensation: other supplementary provisions), in paragraph (1), for “special nature conservation order”, substitute “notice”.

(5) In Schedule 1 (procedure in connection with orders under regulation 22), for paragraph 2(4) substitute—

“(4) The Secretary of State may, in any particular case, direct that it shall not be necessary to comply with sub-paragraph (3)(b)(i); but if the Secretary of State so directs in the case of an order specifying any operation carried out, or proposed to be carried out, on any land, then in addition to publication the notice shall be addressed to “The owners and any occupiers” of the land (describing it), describing details of the operation and the details of the European site to which the order relates and a copy or copies of the notice shall be affixed to some conspicuous object or objects on the land.”.

### **Transitional provision**

**12.** Regulations 10 and 11 do not affect the validity or operation of any special nature conservation order made prior to the coming into force of these Regulations.

7th September 2009

*Huw Irranca-Davies*  
Parliamentary under Secretary of State,  
Department for Environment, Food and Rural Affairs

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend the Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”), which make provision implementing Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna (“the Habitats Directive”) (OJ No. L206, 22.07.92, p.7).

Part 2 makes provision for the adaptation of the planning regime introduced under the Planning Act 2008(a) for nationally significant infrastructure projects, for the protection of any site protected under the Habitats Directive (a “European site”). In particular, the amendments made by regulation 6 (which extends to Great Britain) will require the effect on a European site to be considered before the grant of development consent. Subject to certain exceptions, a development consent cannot be granted where the integrity of the European site would be adversely affected.

New regulation 67B (which extends to Great Britain) requires development consent granted before the date on which a site becomes a European site to be reviewed and in certain circumstances revoked where the integrity of the site would be adversely affected.

Regulations 7 and 8 (which respectively extend to England and Wales only and Scotland only) require the competent authority to consider the effect of a National Policy Statement on European sites, before the statement is designated.

Part 3 (which extends to England and Wales only) makes equivalent provision for the requirement to consider the effect on a European site and for review as respects marine works, including licences under Part 2 of the Food and Environment Protection Act 1985(b), consents under section 34 of the Coast Protection Act 1949(c) and approvals for works involved in the construction or modification of a harbour.

Part 4 (which extends to England and Wales only) amends the provisions concerning special nature conservation orders under the Habitats Regulations, to extend the power to control activities causing harm to a European site. Regulation 10 extends this power so that it is no longer limited to controlling land-based activities taking place within the European site and now extends to controlling any activities which are likely to harm a European site, whether those activities take place on the site or not and on land or not.

New regulation 23(1) prevents a person who has received a notice from the Secretary of State from carrying out any operation specified in the special nature conservation order unless certain conditions are met. The offence under regulation 23(3) can now only be committed by a person to whom a notice has been given under regulation 23(1) (as amended).

An impact assessment has not been prepared in relation to the amendments in Part 2 of these Regulations. An impact assessment relating to the Planning Bill (introduced in Parliament on 27th November 2007) can be found on the Department for Communities and Local Government website. Part 2 has no additional impact on business, charities or the public sector.

A transposition note setting out how the amendments transpose the provisions of the Habitats Directive and a full impact assessment of the effect that Parts 3 and 4 of this instrument will have on the costs of business and the voluntary sector is available from the Wildlife, Habitats and Biodiversity Division, Defra, Temple Quay, Bristol BS1 6EB and is annexed to the Explanatory Memorandum which is available along the instrument on the OPSI website.

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- (a) 2008 c. 29.
  - (b) 1985, c. 48.
  - (c) 1949 c. 74.



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STATUTORY INSTRUMENTS

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**2009 No. 2438**

**WILDLIFE**

**COUNTRYSIDE**

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

£5.50