

EXPLANATORY MEMORANDUM TO

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2017

2017 No. 1012

1. Introduction

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

2. Purpose of the instrument

- 2.1 The Conservation of Habitats and Species Regulations 2017 (the “Habitats Regulations 2017”) consolidate and update the Conservation of Habitats and Species Regulations 2010 (the “Habitats Regulations 2010”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Joint Committee will wish to note that the Habitats Regulations 2017 consolidate all the various amendments made to the Habitats Regulations 2010.
- 3.2 The Regulations also introduce a small number of minor amendments designed to take account of changes to other related legislation, such as amendments to Town and Country Planning legislation, rectify previous omissions, such as including River Tweed Commission as a Relevant Authority, or improve the clarity of drafting. Further detail is at paragraph 7.4
- 3.3 It should be noted that there have been two reviews of the implementation of the Habitats Regulations 2010 which have concluded that they remain fit for purpose. This included a fitness check of the Nature Directives conducted by the EU and in June 2017 the EU launched an Action Plan to address the shortcomings in implementation.¹ A further review of the Regulations would be a complex and time consuming exercise which could only be undertaken when resources are available and would be best considered following our exit from the European Union.

Other matters of interest to the House of Commons

- 3.4 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

¹ <https://www.gov.uk/government/publications/report-of-the-habitats-and-wild-birds-directives-implementation-review>
<https://www.gov.uk/government/publications/progress-of-the-habitats-directive-implementation-review>
http://ec.europa.eu/environment/nature/legislation/fitness_check/action_plan/communication_en.pdf

4. Legislative Context

- 4.1 The Habitats Regulations 2010 are the principal means by which Council Directive 92/43/EEC on the conservation of natural habitats of wild fauna and flora (the “Habitats Directive”) is transposed in England and Wales and the adjacent territorial seas. They also transpose elements of the EU Wild Birds Directive in England and Wales.
- 4.2 Corresponding regulations, the Conservation (Natural Habitats, &c.) Regulations (Northern Ireland) 1995 (SR (NI) 1995/380), transpose the Habitats Directive in relation to Northern Ireland. In Scotland, the Habitats Directive is transposed through a combination of the Habitats Regulations 2010 (in relation to reserved matters) and the Conservation (Natural Habitats &c.) Regulations 1994.
- 4.3 There is an expectation, based on long standing Parliamentary convention, that we will consolidate legislation on the fourth substantive amendment. The Habitats Regulations 2010, themselves a consolidation of the Conservation (Natural Habitats &c.) Regulations 1994, have now been amended ten² times since enactment. They are likely to remain in place for some time after the UK exits the EU, and the power to consolidate them will no longer be available once we exit. In the light of this, we think it’s the right time to consolidate the Regulations, aiding usability and clarity.
- 4.4 A statutory instrument is also being made to consolidate the Offshore Marine (Conservation Natural Habitats &c.) Regulations 2007, which transpose the Wild Birds and Habitats Directives in the UK beyond 12 nautical miles. The 2007 Regulations have been amended twelve times since being introduced. A separate Explanatory Memorandum has been prepared for that instrument known as the Conservation of Offshore Marine Habitats and Species Regulations 2017.

5. Extent and Territorial Application

- 5.1 The instrument extends and applies to England and Wales, including the adjacent territorial sea. It also extends and applies to Scotland and Northern Ireland (including the adjacent territorial sea to a limited degree), as regards reserved and excepted matters respectively.
- 5.2 The Habitats Directive continues to also be implemented, as regards devolved matters, in Scotland by the Conservation and (Natural Habitats & c.) Regulations 1994 and in Northern Ireland by the Conservation (Natural Habitats & c.) (Northern Ireland) 1995.

6. European Convention on Human Rights

- 6.1 The Parliamentary Under Secretary of State for the Environment made the following statement regarding Human Rights:

In my view the provisions of the Conservation of Habitats and Species Regulations 2017 are compatible with the Convention rights.

² SI 2011/603, 2011/625, 2012/630, 2012/635, 2012/637, 2012/1927, 2013/755, 2015/377, 2015/2020, 2016/1154.

7. Policy background

What is being done and why

- 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 such habitats and species.
- 7.2 The Habitats Regulations 2017 transpose the Habitats Directive and elements of the Birds Directive in England, Wales and, to a limited extent, Scotland and Northern Ireland.

Consolidation

- 7.3 The Conservation of Habitats and Species Regulations 2010 have been amended 10 times and consolidation will improve clarity and accessibility. We will shortly look to ensure the Habitats Regulations 2017 are fully operational following the UK's exit from the EU. Consolidation now will make the Habitats Regulations 2017 easier to follow and make subsequent necessary operability changes in the light of our Exit from the EU easier to understand.
- 7.4 In addition to consolidating the 2010 Regulations, these Regulations make a number of minor amendments. These amendments do not reflect new changes in policy, but are intended to take account of amendments to other related legislation which have occurred since the 2010 Regulations were made, update the Regulations or otherwise improve the drafting.
- We rectify a previous omission and add the River Tweed Commission to the list of Relevant Authorities for European sites and European marine sites.
 - We rectify a previous omission by amending regulations 7 and 68³ to include references to section 57(2A) of the Town and Country Planning (Scotland) Act 1997.
 - We remove references to 'regional strategies' and 'responsible regional authorities' to ensure consistency with planning laws following changes made by the Localism Act 2011.
 - We update the provisions setting penalties for offences under the Regulations, taking into account the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012;
 - We correct what we think may have been a previous omission by including a reference to regulation 61(8)⁴ in regulation 63(2)⁵.
 - We update regulations 68 and 69⁶ (and related regulations), which deal with the review of planning permission, to take account of changes to Town and Country Planning legislation made by the Growth and Infrastructure Act 2013;
 - We improve the drafting of regulation 69(2)(a)⁷ to make it clearer that it refers to both local development orders and neighbourhood development orders;

³ Regulation 71 of the 2017 Regulations.

⁴ Regulation 63(8) of the 2017 Regulations.

⁵ Regulation 65(2) of the 2017 Regulations.

⁶ Regulations 70 and 71 of the 2017 Regulations.

⁷ Regulation 71(2)(a) of the 2017 Regulations.

- We correct what we think may have been a previous drafting error, amending regulation 71⁸ by substituting references to regulation 69⁹ for references to regulation 70(2)¹⁰;
- We improve the drafting of regulation 86¹¹ to clarify the circumstances in which the review provisions do not apply to consents to construct, extend or operate electricity generating power stations.
- We remove the now defunct reference to unitary development plans in the definition of “land use plan” in regulation 107¹²;

We have also made consequential amendments to a large number of instruments, including primary legislation, in order to replace references to the Habitats Regulations 2010 with references to the Habitats Regulations 2017.

8. Consultation outcome

- 8.1 No formal public consultation was undertaken as these Regulations do not introduce new policy or regulatory burden. These Regulations consolidate changes to the Habitats Regulations 2010 and introduce a small number of minor amendments as set out at paragraph 7.4.
- 8.2 Informal consultation took place with Her Majesty’s Treasury, the Department for Communities and Local Government, Ministry of Defence, Department for Transport, Department for Business, Energy & Industrial Strategy and Defra policy teams with an interest in the Regulations. No significant issues were raised.
- 8.3 We have discussed consolidation informally with the Scottish Government and Northern Ireland Executive. The Parliamentary Under Secretary of State for Defra has written to the Cabinet Secretary for environment, climate change and land reform, Scotland, setting out the changes. The Permanent Secretary for Defra has written in similar fashion to the Permanent Secretary at DAERA, Northern Ireland. Neither administration has raised any significant issues and are content with the proposed consolidation.
- 8.4 Stakeholders covering a range of commercial and conservation interests such as the Royal Society for the Protection of Birds, Wildlife Trusts, Wildlife and Countryside Link, the National Farmers Union, Country Land and Business Association, the Home Builders Federation, Energy UK, Mineral Products, Association of British Ports, Royal Institute of Town Planners, Association of Local Government Ecologists, Chartered Institute of Ecology and Environmental Managers, Forestry Commission, Environment Agency and Natural England have been advised of our intentions. Most organisations welcomed the intention to consolidate the 2010 Regulations. Some organisations intended to publicise the Regulations once laid, including through dissemination to their member organisations, and some offered to make supportive public statements. No substantive concerns or issues were raised.

⁸ Regulation 73 of the 2017 Regulations.

⁹ Regulation 71 of the 2017 Regulations.

¹⁰ Regulation 72(2) of the 2017 Regulations.

¹¹ Regulation 89 of the 2017 Regulations.

¹² Regulation 111 of the 2017 Regulations.

9. Guidance

- 9.1 Considerable guidance already exists on how to apply the requirements of the Habitats Regulations. No substantive changes to this will be required as there are no changes to policies and procedures, however references to the Regulations will need to be updated.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies over and above that which arises from the Habitats Regulations 2010 (as amended).
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument. The Habitats Regulations 2017 contain no substantive changes to existing policies and procedures. Thus there will be no impact on business, charities or voluntary bodies that does not already arise via the Habitats Regulations 2010 (as amended). There may be some minor impact on Government Departments and Agencies which provide guidance on the Habitats Regulations, and costs may arise from the need to update websites, forms and other documents. This will be well under the threshold needed to trigger an Impact Assessment.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses but has no significant impact over and above that which arises from the Habitats Regulations 2010 (as amended).

12. Monitoring & review

- 12.1 The Habitats Regulations are subject to regular review. These Regulations contain a review provision in regulation 142, which provides for the first review to be carried out and reported upon within 5 years of these Regulations coming into force and then at intervals not exceeding 5 years.

13. Contact

- 13.1 Clive Porro or Mark Baxter at the Department for Environment, Food and Rural Affairs. Telephone: 0208 026 2941/0208 026 6794 or email: Clive.Porro@defra.gsi.gov.uk/Mark.Baxter@defra.gsi.gov.uk can answer any queries regarding the instrument.