

EXPLANATORY MEMORANDUM TO
THE CONSERVATION OF HABITATS AND SPECIES AND PLANNING (VARIOUS
AMENDMENTS) (ENGLAND AND WALES) REGULATIONS 2018

2018 No. 1307

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These regulations make amendments to the Conservation of Habitats and Species Regulations 2017, the Neighbourhood Planning (General) Regulations 2012, the Town and Country Planning (Permission in Principle) Order 2017 and the Town and Country Planning (Brownfield Land Register) Regulations 2017 to ensure they reflect recent European case law in relation to the assessment of plans and projects on sites protected under Council Directive 92/43/EEC on the conservation of natural habitats of wild fauna and flora (“the Habitats Directive”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments, the Select Committee on Statutory Instruments or the Sifting Committees

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.
- 3.3 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Conservation of Habitats and Species Regulations 2017 (“the 2017 Regulations”) are the principal means by which the Habitats Directive is transposed in England and Wales and the adjacent territorial seas. These regulations also transpose elements of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds in England and Wales (“the Birds Directive”).
- 6.2 The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. The Habitats Directive lays down rules for the protection, management and exploitation of such habitats and species. These include rules for the assessment of the impact of plans and projects on protected habitats sites (“European sites”).
- 6.3 Article 6(3) of the Habitats Directive requires that plans or projects that affect European sites are scrutinised before consent is granted for them. In practice this process has two stages. The first non-statutory stage is a preliminary ‘screening’ to determine whether the plan or project is likely to have a significant effect on a protected site (called the ‘screening stage’). If a plan or project is ‘screened in’ (i.e. because significant effects cannot be ruled out) the second stage is for an assessment to be undertaken to determine the impact of development proposals on the site’s conservation objectives (called an ‘appropriate assessment’). Consent for the plan or project may only be given if the plan or project is ‘screened out’ in the first stage, or the appropriate assessment concludes development will not adversely affect the integrity of the protected site. In exceptional circumstances, where there are imperative reasons of overriding public interest (IROPI) consent can be granted in accordance with Article 6(4).
- 6.4 When the Habitats Directive was transposed into national law (primarily through the Conservation (Natural Habitats, &c.) Regulations 1994 which were subsequently consolidated with various amending instruments and modified in the Conservation of Habitats and Species Regulations 2010, and then again in the 2017 Regulations) a number of provisions were drafted on the basis that it would be permissible, when screening a plan or project, to take into account any measures built into the plan or project to avoid or remove likely significant effects (‘mitigation measures’). That approach was supported by a settled interpretation of the Habitats Directive in domestic law which allowed for mitigation measures to be taken account of at the screening stage (*see, R (on the Application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin)).
- 6.5 Part 6 of the 2017 Regulations set out the general rules for the assessment of relevant plans and projects. Within that part, provisions were made in Chapter 2 in relation to certain ‘planning tools’ (special development orders, local development orders, neighbourhood development orders, simplified planning zones, enterprise zones and cycle tracks) stating that planning permission may not be granted (or deemed to be granted) for development which is likely to have a significant effect on a European site. Similar provisions were made in other secondary legislation for neighbourhood development plans, applications for permission in principle and inclusion on Part 2 of the brownfield land register.

7. Policy background

What is being done and why?

- 7.1 European case law has superseded domestic case law, with the effect of restricting use of these planning tools, even where suitable mitigation strategies are available to avoid adverse effects on European sites. In April 2018 the Court of Justice of the European Union clarified in case C-323/17 *People Over Wind & Sweetman v Coillte Teoranta* that it is not appropriate at the screening stage to take account of mitigation measures. The judgment reserves consideration of mitigation measures for the appropriate assessment stage. The judgment has led to uncertainty among stakeholders as to how the 2017 Regulations should be applied. It is therefore considered necessary to amend these Regulations and other affected secondary legislation to ensure that the planning tools are available in accordance with their original policy intent and consideration can be given to mitigation measures when considering whether to grant consent.
- 7.2 Regulation 2 amends the 2017 Regulations to extend the application of regulation 63 to special development orders, local development orders, neighbourhood development orders, simplified planning zones, enterprise zones and cycle tracks. Regulation 63 (Assessment of implications for European sites and European offshore marine sites) enables consent to be granted for development where, following appropriate assessment, adverse effects on the integrity of the protected habitats site are not found. Regulation 63 together with regulation 64 comprise the ‘assessment provisions’, the general provisions for the protection of protected sites under the 2017 Regulations. The provisions in regulation 64 (Considerations of overriding public interest) are disapplied for the amendments under these regulations because the application of this provision would exceed the policy intent prior to the “People over Wind” judgment by providing the possibility, in exceptional circumstances, for consent to be granted for plans and projects despite a negative assessment of the implications for a European site. The assessment provisions are applied alongside the ‘review provisions’ (regulation 65 and 66) to ensure that any new protected habitat sites due to be designated are considered in the same way as existing sites.
- 7.3 Regulation 2 also includes the granting of permission in principle under 59A of the Town and Country Planning Act 1990 in the list of planning permissions to which the assessment provisions apply. The provisions in regulation 64 are again disapplied.
- 7.4 Regulation 3 amends the Neighbourhood Planning (General) Regulations 2012 to revise one of the basic conditions for making a neighbourhood plan. The revised basic condition requires that neighbourhood plans can only be made if they have followed the requirements of the Directive transposed into Chapter 8 of Part 6 of the 2017 Regulations (which set out the habitat assessment process for other land use plans, such as Local Plans). This assessment process is already applicable to neighbourhood plans, as they are defined as a ‘land use plan’ in regulation 111 of the 2017 Regulations. This amendment connects the basic condition for making neighbourhood plans to this process.
- 7.5 Regulations 4 and 5 amend the Town and Country Planning (Permission in Principle) Order 2017 and the Town and Country Planning (Brownfield Land Register) Regulations 2017 respectively to ensure that permission in principle and inclusion on

part 2 of the brownfield land register is authorised in accordance with regulation 63 of the 2017 Regulations.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 A consolidation is not being undertaken.

10. Consultation outcome

10.1 No formal consultation has taken place. The Government has engaged with key stakeholders in the sector to ensure they understand how the changes may affect them. This includes the Welsh Government, Natural England, the Department for Environment, Food and Rural Affairs, the Department for Transport, the Royal Society for the Protection of Birds, the UK Environmental Law Association, the Local Government Association, the Town and Country Planning Association and the Neighbourhood Planning Independent Examiner Referral Service. The reason we did not consult formally is because the instrument introduces technical changes which restore the original policy intent and does not introduce a new regulatory regime i.e. stakeholders will not lose a benefit they currently have because of this mechanical change.

11. Guidance

11.1 We will update guidance to ensure that users of the planning system understand how the changes may affect them. This guidance will be published shortly on GOV.UK alongside other planning guidance published by the Government at:
<https://www.gov.uk/government/collections/planning-practice-guidance>

12. Impact

12.1 There is no significant impact on business, charities, voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the measure was assessed by the Department's internal Economist panel as falling under the +/- £5m pa threshold. There will generally be positive impacts on the development industry and civil society as the instrument will restore the ability to deliver new development and neighbourhood plans, where appropriate, in areas near protected habitats, which were available prior to the *People over Wind* judgment, but have subsequently stalled. There will be no negative impact on environmental protection.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses, in particular the changes that relate to the permission in principle process. No mitigating action has been taken because the regulatory impact has been identified as generally positive in that it will restore the position prior to the *People over Wind* judgment.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is for officials in the Department to engage with key stakeholders in the sector after six months to review the impact of the changes.
- 14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Kit Malthouse has made the following statement:

The regulation does not include a statutory review clause because the instrument does not introduce a new regulatory regime and the impact of the measure has been assessed by my Department's internal Economist panel as not significant because it falls under the +/- £5m pa threshold. In addition, there are no other factors that would necessitate the need for a review clause.

15. Contact

- 15.1 Tom Simpson at the Ministry of Housing, Communities and Local Government Telephone: 03034441704 or email: Tom.Simpson@communities.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Lucy Wilkins, Deputy Director for Development Plans, at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kit Malthouse at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.