



# **Technical Amendments to the Conservation (Natural Habitats &c.) Regulations 1994**

**A Consultation Paper on Amendments to the  
Habitats Regulations**

March 2003  
Paper 2003/10

Scottish Executive Environment Group

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CONSERVATION (NATURAL HABITATS &c.)  
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## **INTRODUCTION**

### **Background**

1. The Habitats (92/43/EEC) and Wild Birds (79/409/EEC) Directives introduced obligations on EU Member States to identify a network of sites of European nature conservation importance (“European sites”), known as Natura 2000, and to ensure that measures are taken for the protection of threatened species and habitats. These requirements were transposed into UK law through the Conservation (Natural Habitats &c.) Regulations 1994 (“the Regulations”).

### **Purpose**

2. The purpose of the legislative proposals outlined in this paper is to provide more explicit transposition of the Directives by amending the Regulations to provide greater clarity and legal certainty and better ensure that the objectives of the Directives are met. As part of this aim, the improved site protection and management measures proposed in Chapter 3 of the draft Nature Conservation (Scotland) Bill will be formally extended to European sites to provide a more streamlined and easily understood system that ensures adequate protection.

### **Geographical extent**

3. The Regulations apply in Great Britain but this consultation relates to amendments that will have effect only in Scotland and Scottish territorial waters out to 12 nautical miles. Comparable measures in England have been or will be the subject of consultation by the Department for Environment, Food and Rural Affairs, and in Wales by the Welsh Assembly Government.

### **Summary of proposals:**

4. The following is a summary of the main legislative amendments that the Scottish Executive intends to introduce (the numbers in brackets refer to the relevant paragraphs in this paper):

#### **Clarification of the definition of a “European” site**

- Amendment of Regulation 10 to clarify the meaning of a “European” site relating to the Habitats Regulations (10)

#### **Clarification of powers and duties of Scottish Natural Heritage (SNH) in relation to European sites and protected species**

- Power for SNH to seek the Scottish Executive’s approval to enter into enforceable management schemes as a last resort, and where necessary to require owners/occupiers to carry out works to restore or conserve a European site (11,12)
- Specific duties to carry out surveillance of conservation status and to establish a system of monitoring the incidental capture or killing of protected species (14,23)
- A new duty to review the list of prohibited means of capture or killing of European Protected Species (21)

#### **Powers to prevent, discourage and rectify damage to protected habitats and species**

- New offences of knowingly causing intentional or reckless damage to a European site and of causing deterioration to breeding sites or resting places (20,27,28)
- Legislation to prevent the sale of European Protected Species with natural ranges elsewhere in the EU (24,25)
- Extension of powers to apply Special Nature Conservation Orders (13)
- Conservation of Seals Act 1970 licensing procedures amendment to ensure compliance with the requirements of the Habitats Directive (22)
- New powers for Local Planning Authorities to authorise derogations from Articles 12 and 13 in relation to European Protected Species (26)

#### **Duties on competent authorities**

- Duty to adapt water abstraction controls where necessary to secure the protection of European sites (16)
- A specific duty for the Forestry Commission to ensure appropriate consideration of consents for forestry operations and the requirement to protect European sites (17)
- A specific duty for the competent authorities responsible for fish farm development consents to ensure appropriate consideration of the requirement to protect European sites (18)

#### **Comments on these legislative proposals will help inform our recommendations to Scottish Ministers.**

##### **How to respond**

5. Responses to this consultation are requested by **6 May 2003**. To help our considerations please indicate in your response:

- Your name
- Your interest
- The organisation you represent (if applicable)
- Contact details

A consultation response template is available on the Scottish Executive website within the electronic consultation document.

Email to: [HabitatsRegulationConsultation@scotland.gsi.gov.uk](mailto:HabitatsRegulationConsultation@scotland.gsi.gov.uk)

Post to: Lynn Dickson  
 Scottish Executive Environment & Rural Affairs Department  
 Wildlife & Habitats Unit  
 Protected Areas Team  
 1-H (South)  
 Victoria Quay  
 Edinburgh  
 EH6 6QQ

6. If you require further copies of this paper, please contact us at the above addresses. This paper and the Nature Conservation Bill consultation document are also available on the Scottish Executive web site:  
<http://www.scotland.gov.uk/views/views.asp>

7. An electronic copy of the Scottish Executive guidance on the EC Habitats and Birds Directives can be viewed at:  
<http://www.scotland.gov.uk/library3/nature/habd-00.asp>

An electronic copy of the Scottish Executive interim guidance on European Protected Species and licensing arrangements can be viewed at:  
<http://www.scotland.gov.uk/library3/environment/epsg-00.asp>

An electronic copy of the EC Habitats Directive can be viewed at:  
<http://www.ecnc.nl/doc/europe/legislat/habidire.html>

8. Copies of responses received will, as is normal practice, be made available to others on request, unless respondents indicate that all or part of their response is confidential. In the latter case, confidentiality will be strictly respected. Confidential responses will, nevertheless, be included in any statistical summary of numbers of comments received and views expressed.

## **DETAIL OF LEGISLATIVE PROPOSALS**

### **SITE MANAGEMENT AND PROTECTION**

#### **Background**

9. Article 6 of the Habitats Directive requires that conservation measures, including appropriate management plans are established for European sites, and that steps are taken to avoid the deterioration of habitats, the habitats of protected species,

and the disturbance of those species. Regulations 16 to 32 currently give effect to these provisions by placing restrictions on activities which could damage the site and giving Scottish Natural Heritage (SNH) powers to enter into legally binding management agreements with land managers, make bylaws for the protection of sites and compulsorily acquire land on sites under threat. In addition, the Scottish Executive can make Special Nature Conservation Orders (SNCOs) after consultation with SNH. Proposed changes to these provisions are outlined in the remainder of this section.

### **Definition of a “European” site**

10. In order to clarify the definition of a “European” site, and in order to bring Scottish legislation into line with the rest of the UK, **it is proposed that regulation 10 be amended to include all Habitats Directive sites that have been submitted to the EC as candidate Special Areas of Conservation.**

### **Prevention of site deterioration and damage**

11. It is Scottish Executive policy that European sites should in most cases also be underpinned by notification as Sites of Special Scientific Interest (SSSIs) under the Wildlife and Countryside Act 1981 (“the 1981 Act”). The draft Nature Conservation (Scotland) Bill proposes to introduce amendments to the 1981 Act which substantially enhance the system of site protection and management for SSSIs in Scotland. **It is proposed that the improved measures contained in Chapter 3 and Schedule 3 of the draft Nature Conservation (Scotland) Bill should apply to European sites** in order to afford the same levels of protection from damage and deterioration as SSSIs (<http://www.scotland.gov.uk/views/consult.asp>). This proposal would also avoid possible confusion by clarifying the legislative regime that should be followed in respect of land that is designated under the Natura 2000 network and/or as a SSSI.
12. Regulation 16 enables SNH to enter into management agreements with the owners and occupiers of European sites. To complement such management agreements, **it is proposed that the system of Land Management Orders set out in Chapter 3 and Schedule 3 of the draft Nature Conservation (Scotland) Bill be extended to European sites** and specifically referred to in the amended Regulations. This would give Scottish Ministers, in response to an application from SNH, the power to serve a notice on land managers requiring that works necessary for the restoration or conservation of the site be carried out where the land manager has refused or failed to enter into a management agreement. Owners/occupiers would have a right of appeal to the Scottish Land Court against such a notice. These powers will enhance the ability to take positive steps to prevent deterioration of sites. It is, however, envisaged that these provisions will only be used as a last resort in situations where negotiations with land managers have not proved successful.
13. Part II of the existing Regulations (regulations 22-27) provide for the protection of European sites by allowing Scottish Ministers to serve Special Nature Conservation Orders (SNCO’s) which prevent specified operations which are likely to damage or destroy Natura interests. **The Scottish Executive proposes**

**that SNCO powers should be extended to allow for their application in Scottish territorial waters and to allow for the prevention of operations which take place outside of European sites but are still likely to have an adverse effect within.** This is seen as very much a measure of last resort when the Regulations are being deliberately flouted.

### **Surveillance of Conservation Status**

14. Article 11 of the Habitats Directive requires that surveillance of the conservation status of European protected habitats and species is undertaken. SNH currently perform a number of surveillance activities under their general statutory functions, as outlined in Part I (4) of the Natural Heritage (Scotland) Act 1991, and the related Environmental Protection Act 1990 sections 132 and 133. However, to ensure that the obligations of the Directive are explicitly assigned, **a specific statutory duty to undertake surveillance of conservation status shall be added to the Regulations.**

### **Competent Authorities and Assessment Procedures**

15. Certain plans or projects may require multiple consents and therefore multiple appropriate assessments of the effect on European sites will need to be carried out. **It is intended to introduce new provisions clarifying the procedure to be followed for multiple appropriate assessments under the existing regulation 52, and requiring liaison between competent authorities in such situations.** Suggestions as to the most appropriate procedure would be welcomed.
16. In addition to the general duties imposed on competent authorities by Part IV of the Regulations, regulations 54 to 85 provide that consents given under specified statutory regimes must always be the subject of prior appropriate assessment due to the likelihood of their having significant implications for protected sites. **It is proposed that water abstraction controls be added to the regimes specified in Part IV.** Relevant water abstraction schemes will normally already be notified as potentially damaging operations and therefore subject to appropriate assessment under Regulation 20 so this amendment would merely codify the existing situation.
17. As with water abstraction it is **proposed that controls relating to forestry operations be added to the regimes specified in Part IV of the Regulations.**
18. In addition to water abstraction and forestry it is **proposed that controls relating to fish farm development be added to the regimes specified in Part IV of the Regulations.** This is in addition to the existing regulation 85 which specifies consideration of discharge consents under water pollution legislation.

## **SPECIES PROTECTION**

### **Background**

19. Under Articles 12 and 13 of the Habitats Directive, Member States are required to establish a system of strict protection for certain European Protected Species (EPS) of animals and plants. This system was established in the UK through Part III of the Regulations, which prohibits certain actions that would adversely affect these species. The amendments outlined below will improve this system of protection by introducing new offences, and by clarifying the situations that are exempt and the responsibilities of SNH in relation to EPS.

#### **Deterioration of breeding sites or resting places**

20. Regulation 39(1)(d) makes it a criminal offence to damage or destroy a breeding site or resting place of wild animals of EPS. Although the act does not have to be deliberate or intentional for an offence to be committed, the Scottish Executive proposes to strengthen this protection still further by **specifically making acts which would result in the deterioration of breeding sites or resting places of EPS a criminal offence.**

#### **Indiscriminate means of capture or killing**

21. Regulation 41 prohibits the use of specified means for the taking or killing of any wild animal of EPS (this transposes the requirements of Article 15 of the Habitats Directive). The means listed are indiscriminate and therefore capable of causing decline of, or serious disturbance to, the species' population. All currently known indiscriminate means of capture and killing are listed in Regulation 41, however the possibility remains that new means might be introduced in the future. To guard against this, and ensure the continued protection of EPS, the Scottish Executive intends to **introduce a statutory duty to periodically review the list of prohibited means of capture or killing** so that any as yet unknown means can be added.
22. Section 10 of the Conservation of Seals Act 1970 provides the facility for Scottish Ministers to issue licenses to kill or take seals within Scottish waters subject to the conditions specified in the licence. **It is proposed that the Regulations be amended to provide an explicit duty on Scottish Ministers to ensure that any licensing under this Act is compliant with the requirements of the Habitats Directive.**

#### **Monitoring incidental capture and killing**

23. Article 12(4) requires that a system to monitor the incidental capture and killing of animals of EPS be established. SNH currently operate a species monitoring programme under their general statutory functions. However, to ensure legal certainty, it is proposed that a **specific statutory duty to undertake monitoring of incidental capture and killing be added to the Regulations.**

#### **Specimens of protected species**

24. Under Regulations 39(2) and 43(2) it is an offence to keep, transport, sell or exchange, or offer for sale or exchange any live or dead specimens of EPS (whether animal or plant). However, the Regulations currently provide that such

an offence has not been committed if that specimen was taken or sold legally. **This defence shall be amended to more clearly state that its use is limited only to specimens that were legally taken or sold before the Habitats Directive was implemented.**

25. The Regulations make reference to species whose natural range includes any area of Great Britain. The Scottish Executive considers that this creates a loophole in the protection of species whose natural range is elsewhere in the EU. **It is proposed that the Regulations are amended to prevent the transport, sale or exchange of all EPS listed in Annex IV of the Habitats Directive regardless of natural range.**

### **Safeguard of European Protected Species**

26. The Scottish Executive considers that the present Scottish land-use planning procedure requires to be altered to take full and proper account of the need to safeguard European Protected Species and their habitats in Scotland. The Scottish Executive believes that the current general duty placed on planning authorities needs strengthened, and accordingly, the following alterations to current procedures are proposed:

- **Scottish planning authorities will be given a statutory status as appropriate authorities to authorise derogations in relation to Articles 12 and 13 of the Habitats Directive. SNH will be consulted as part of this process.**
- **Formal and specific obligations will be placed on planning authorities to ensure that planning permission will not be granted for developments which would result in a breach of Article 12 or 13 of the Habitats Directive**

In October 2001 the Scottish Executive published interim guidance for local authorities on licensing arrangements entitled *European Protected Species, Development Sites and the Planning System* (<http://www.scotland.gov.uk/library3/environment/eps-g-00.asp>). This was issued to clarify the interim licensing arrangements which apply in all cases where European Protected Species are present on sites subject to a development proposal. As part of this consultation exercise the Scottish Executive invites comments on the effectiveness of this guidance and on ways of further improving the process.

### **Derogations**

27. Article 16 of the Directive allows certain derogations, or exemptions, from the system of species protection and these are transposed through Regulation 40 which creates defences against the criminal offence of harming EPS. **It is proposed that the Regulation shall be amended to clarify that the defences are only applicable where there is no satisfactory alternative and that the action is not detrimental to the conservation status of the species concerned.**
28. The defence in Regulations 40(3)(c) and 43(4) provides that a person shall not be guilty of a criminal offence where there was no intent to cause, and all reasonable steps were taken to prevent, harm to EPS. The intention behind the Regulation was to avoid criminalising actions taken in good faith and genuine ignorance of

the effect on EPS. **It is proposed that the Regulation shall be amended to reflect more explicitly that it only applies in situations where a person was unaware of the presence of a EPS and could not reasonably have been expected to know that his or her action was in breach of the Regulations.**

29. Regulations 40(5) and (6) will be revoked because these derogation defences are not explicitly available under Article 16 of the Habitats Directive.

## **REGULATORY IMPACT ASSESSMENT**

### **Purpose**

The United Kingdom is subject to obligations under the EU Directives on Wild Birds (79/409/EEC) and Habitats (92/43/EEC) relating to the identification of nature conservation sites of European importance, and to ensuring that effective measures are taken for the protection of threatened species and habitats. These requirements were transposed through the UK Conservation (Natural Habitats &c.) Regulations 1994 (“the Regulations”).

The aim of the proposals is to enhance the transposition of these Directives through amendments to the Regulations to provide greater clarity and legal certainty and ensure the continued protection of European sites and species. As part of this, the proposals also aim to formally extend the improved site protection and management measures proposed in Chapter 3 and Schedule 3 of the draft Nature Conservation (Scotland) Bill to the Natura 2000 network of European sites.

This may have implications for owners/occupiers of affected land, including members of the public, individuals affected by the species protection proposals, Scottish Natural Heritage (SNH) as the statutory nature conservation agency, local authorities, statutory undertakers and public bodies.

### **Assessment of Risk**

Failure to enhance the current arrangements for the protection of habitats and species could have effects on the quality of the natural environment in Scotland. There is a risk that some of the country’s most important wildlife sites and species could suffer a decline in condition leading to a loss of biodiversity.

### **Options**

There are no other practicable non-regulatory options for the better transposition of the Habitats Directive obligations in domestic legislation.

To do nothing to improve implementation of the Habitats Directive in Scotland would leave legislation short of the Directive’s requirements.

### **Costs**

As most of the legislative proposals are already being followed under general obligations and administrative practices, they are unlikely to significantly add to current burdens or create additional financial implications. SNH will need to extend some of its existing monitoring programmes, in particular to improve its coverage of the incidental capture and killing of European Protected Species, but this aspect apart, it is not expected that the proposals will have significant implications.

The Scottish Executive’s policy is that the Natura 2000 network of protected sites should also normally have protection as sites of special scientific interest (SSSIs) under the Wildlife and Countryside Act 1981. As such, they are already subject to the

provisions of this Act, and those proposed in the draft Nature Conservation (Scotland) Bill would also normally apply to Natura sites. The proposals seek to clarify this situation and therefore land managers of protected sites should not incur any additional costs as a consequence of these proposals beyond those contained within the prevention of deterioration and damage provisions of the draft Nature Conservation (Scotland) Bill.

It is envisaged that the proposed provision for Land Management Orders contained within the draft Nature Conservation (Scotland) Bill will only be used as a last resort in situations where negotiation over changes to existing land management have not proved successful. The Scottish Executive expect that referral of appeals and disputes to the Scottish Land Court will be relatively infrequent, with SNH and land managers encouraged to reach resolution through mediation. Only those disputes which cannot be settled through these routes would be referred to the Land Court, and it is not thought that any financial implications would be significant.

The licensing arrangements which currently apply in cases where European Protected Species are present on any site which is proposed for development have been the subject of interim Scottish Executive guidance which was issued to local authorities in October 2001. This guidance sought to make planning authorities more aware of their responsibilities under the Habitats Regulations and to alert them of proposed changes to the licensing system. We anticipate that there will be additional costs for local authorities and businesses, however it is not possible at this stage to identify these costs. Based on experience drawn from the interim guidance the Scottish Executive now invites comments on the likely impact that these proposed amendments may have.

### **Benefits**

These legislative proposals are important to the effective achievement of the Scottish Executive's nature conservation policy aims in Scotland. They will provide enhanced means for securing a significant improvement in the conservation status of sites and species.

In addition by placing current general obligations and administrative practice on a clear legislative footing, they will provide greater clarity, certainty and consistency about the rights and responsibilities of all relevant parties concerning European protected sites and species.

### **Consultation**

There will be public consultation on the proposals for amended regulations and the draft regulatory appraisal. The prevention of site deterioration and damage provisions within the draft Nature Conservation (Scotland) Bill are proposed to extend to European sites, and as such this aspect of that particular consultation will apply equally to these proposals.

### **Enforcement, Sanctions and Monitoring**

SNH will continue to seek appropriate protection for designated nature conservation sites, as well as playing a key role in monitoring and reporting on their condition. As part of these efforts, SNH have introduced a more rigorous condition monitoring regime to help identify damage affecting SSSIs and Natura sites and opportunities where altered management in partnership with local interests may be necessary.

### **Review**

The operation of these Regulations will be monitored by SNH and the Scottish Executive. Advice will be sought from SNH on the extent to which they secure the desired benefits for wildlife, and the need for further reviews in future.

**Scottish Executive  
Wildlife & Habitats Unit  
March 2003**



Small changes in the way we perform everyday tasks can have huge impacts on Scotland's environment.

Walking short distances rather than using the car, or being careful not to overfill the kettle are just two positive steps we can all take.

This butterfly represents the beauty and fragility of Scotland's environment. The motif will be utilised extensively by the Scottish Executive and its partners in their efforts to persuade people they can do a little to change a lot.

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