



**RECENT CHANGES TO THE REGULATIONS TRANSPOSING THE HABITATS
DIRECTIVE: IMPLICATIONS FOR JNCC**

This paper was provided to the Joint Committee for decision/discussion or information. Please refer to the minutes of the meeting for Committee's position on the paper.

To view other Joint Committee papers and minutes visit <http://www.jncc.gov.uk/page-2671>

To find out more about JNCC visit <http://www.jncc.gov.uk/page-1729>

JOINT NATURE CONSERVATION COMMITTEE

RECENT CHANGES TO THE REGULATIONS TRANSPOSING THE HABITATS DIRECTIVE: IMPLICATIONS FOR JNCC

Paper by Wyn Jones, Lawrence Way, Sonia Mendes and Jane Hawkrigde

1. Introduction

- 1.1 Further to paper JNCC 08 N09 on the Habitats Directive infraction proceedings against the UK, presented in confidence at December 2008 Joint Committee meeting, amendments were made to the three Regulations¹ which transpose into law in the UK the Habitats Directive. The amendments to one Regulation, the Offshore Marine Conservation Regulations, give JNCC specific duties. These came into force on the 30 January 2009.
- 1.2 This paper sets out the changes to the Offshore Marine Conservation Regulations 2007 and their implications for the Joint Committee and Support Company.
- 1.3 The paper also looks at the need for guidance and advice arising from the amended surveillance and monitoring duties in each country.
- 1.4 Annex 1 sets out the new duties set out in the amended Offshore Marine Conservation Regulations, attached at Appendix 1 (noting specifically 4c, 6b & 8b).

2. Changes to the offshore legislation

- 2.1 The provisions relating to the disturbance of wild animals listed in Annex IV(a) of the Habitats Directive have been changed to ensure consistency with the Habitats Directive. References to disturbance 'likely to significantly affect' and 'significant groups' of animals have been removed
- 2.2 The Secretary of State or the Joint Committee may publish guidance on the application of offences relating to the deliberate disturbance of wild animals and the damaging, destruction or deterioration of breeding sites or resting places of wild animals. The courts must take into account any guidance.
- 2.3 The defences to offences against wild animals have also been changed to ensure consistency with the Habitats Directive. For certain defences to be used they are conditional on there being no satisfactory alternatives and the action

¹ [The Habitats Directive is transposed into UK law](#) by three Regulations, 'The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended); the Conservation (Natural Habitats, & c.) Regulations Northern Ireland 1995 (as amended), and the [Offshore](#) Marine Conservation (Natural Habitats, &c) Regulations 2007 (as amended).

not being detrimental to the maintenance of the species population concerned at favourable conservation status.

- 2.4 Changes in the provisions for surveillance now requires the Joint Committee to determine how and to what extent the surveillance of the conservation status of each relevant habitat and species needs to be carried out, having regard to whether they are a priority natural habitat type or priority species and their conservation status. This advice must be provided to the Secretary of State who in turn must ensure that the necessary surveillance is carried out on an ongoing basis. The surveillance may be carried out by the Joint Committee or any other person.
- 2.5 Changes in provisions for incidental capture and killing of the relevant species listed in Annex IV(a) Habitats Directive found in the offshore marine area, requires the Joint Committee to identify the risks of incidental capture and killing of the species (and the activities giving rise to those risks), maintain records of incidental capture and killing, and make an assessment of the extent to which monitoring of incidental capture and killing is needed. Assessments must take into account the risks and recorded instances of incidental capture and killing, whether the species are priority species, and the conservation status of the species. This advice must be provided to the Secretary of State who in turn must ensure that the necessary monitoring is carried out. The monitoring may be carried out by the Joint Committee, or any other competent authority, or any other person.

3. Implications for the JNCC

- 3.1 When providing advice to other government departments, regulators and industry, JNCC will need to take into consideration the new provisions for species protection in offshore marine waters and the respective defences.
- 3.2 Working in conjunction with colleagues from the Countryside Council for Wales and Natural England, the JNCC has already drafted guidance on the application of offences relating to the deliberate disturbance of marine European Protected Species, entitled 'The protection of European protected species from injury or disturbance'. This should be approved by Defra and the Welsh Assembly Government by the end of March and will be available on the JNCC website.
- 3.3 JNCC is undertaking, together with Natural England, a Defra funded project to prepare an integrated marine biodiversity surveillance and monitoring plan that encompasses the UK's statutory and policy requirements in UK offshore and England inshore waters. JNCC will, as part of the partnership project, carry out the assessments of surveillance and monitoring need required by the Offshore Regulations, whilst Natural England will be doing the same for the within-12-nautical-miles marine environment. The project will propose a high-level surveillance and monitoring strategy later this year and will investigate the various drivers for surveillance, including the Marine Strategy Framework Directive and Habitats Directives. A pilot to test options for the

implementation of the plan is due to start later in 2010/11 or early in 2011/2012.

4. Changes to the country-specific regulations

- 4.1 All the amended Habitats Regulations place additional duties on the Countryside Council for Wales, Natural England, Scottish Natural Heritage, and the Northern Ireland Environment Agency, to assess the Habitats Directive surveillance and monitoring need within their respective countries. All Regulations, including those for the Offshore, have identical text on how this should be done.
- 4.2 Scottish Natural Heritage has an additional duty to implement surveillance and monitoring once the assessments are done. The Northern Ireland Environment Agency will meet the Department of Environment Northern Ireland implementation responsibility. Natural England and the Countryside Council for Wales provide advice to their relevant Ministers and the decision on implementation rests with the Minister.
- 4.3 JNCC used its Terrestrial Biodiversity Surveillance Strategy to undertake a quick UK-level assessment of the surveillance and monitoring need in order to provide an estimate of the likely cost and operational implications in meeting the Habitats Directive requirements. This was provided to Defra and the countries during the response to the possible infraction and to inform the revision of the Regulations.
- 4.4 The review estimated an annual increase in costs over existing UK terrestrial and freshwater surveillance between £300-400k for habitats and £70k for species. It was not possible to estimate the marine implications: these will be addressed for English and offshore waters by the Defra funded surveillance monitoring project.
- 4.5 The tools used to undertake the review, including risk-based criteria for using conservation status to assess surveillance need, have been provided to each country agency to help with the delivery of their new surveillance and monitoring assessment duties.

5. Implications for JNCC of the assessment of surveillance and monitoring need within each country.

- 5.1 The initial approaches of each agency and JNCC to the new surveillance and monitoring duties were considered at an interagency meeting and by the Chief Scientists Group. As a consequence there is support to advise Defra on the need for a level of co-ordination of the separate assessment activities in order to minimise the risk of further infraction.
- 5.2 JNCC has advised Defra on the need for a timetable for this work. It also advised that the assessments and implementation plans in the 4 countries and offshore be compared to ensure that the systematic coverage required by the Directive is in place.

Annex 1

STATUTORY INSTRUMENTS

2009 No.7

WILDLIFE

The Offshore Marine Conservation (Natural Habitats, &c.)
(Amendment) Regulations 2009

<i>Made - - - -</i>	<i>5th January 2009</i>
<i>Laid before Parliament</i>	<i>8th January 2009</i>
<i>Coming into force - -</i>	<i>30th January 2009</i>

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

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

Title and commencement

1. These Regulations may be cited as the Offshore Marine Conservation (Natural Habitats, &c.) (Amendment) Regulations 2009 and come into force on 30th January 2009.

Amendments

2. The Offshore Marine Conservation (Natural Habitats &c.) Regulations 2007 **(c)** are amended as follows.
3. In regulation 32, in paragraphs (4)(b)(i) and (5)(b)(i), for “the ability of any significant group of animals of that species” substitute “their ability”.
4. In regulation 39:
 - (a) in paragraph (1)(b), omit the words from “in such a way” to the end;
 - (b) after paragraph (1) insert:

‘(1A) For the purposes of paragraph (1)(b), disturbance of animals includes in particular any disturbance which is likely:

 - (a) to impair their ability:
 - (i) to survive, to breed or reproduce, or to rear or nurture their young; or

(a) S.I. 2008/301.

(b) 1972 c. 68.

(c) S.I. 2007/1842. The 2007 Regulations make provision for implementing, in relation to marine areas where the United Kingdom has jurisdiction beyond its territorial sea, Council Directive 79/409/EEC on the conservation of wild birds (O.J. No. L103, 25.4.79, p.1.) and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (O.J. No. L206, 22.7.92, p.7) as last amended (in both cases) by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 79/409/EEC, 92/43/EEC, 97/68/EC, 2001/80/EC and 2001/81/EC in the field of environment, by reason of the accession of Bulgaria and Romania (O.J. No. L363, 20.12.06, p.368).

- (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
- (b) to affect significantly the local distribution or abundance of the species to which they belong.' and
- (c) for paragraphs (7) and (8) substitute:

'(7) The Secretary of State, or the Joint Nature Conservation Committee with the approval of the Secretary of State, may publish guidance as to the application of the offences in paragraph (1)(b) or (d) in relation to particular species of animals or particular activities.

(8) In proceedings for an offence under paragraph (1)(b) or (d), a court must take into account any relevant guidance published under paragraph (7).'

5. In regulation 40, after paragraph (6) insert:

'(6A) The defences in paragraphs (1) to (3) and (6) do not apply where it is shown by the prosecution that the defendant's action did not satisfy the conditions in paragraph (6B).

(6B) Those conditions are that:

- (a) there was no satisfactory alternative; and
- (b) the action was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.'

6. In regulation 44:

(a) in paragraph (1), after "arrangements", insert "in accordance with paragraphs (3) to (5)";

(b) after paragraph (2) insert:

'(3) The joint committee must:

- (a) assess how and to what extent surveillance of the conservation status of each relevant habitat and species needs to be carried out, having regard to:
 - (i) whether a habitat or species is a priority natural habitat type or priority species; and
 - (ii) the conservation status of the habitat or species; and
- (b) advise the Secretary of State as to the need for such surveillance.

(4) The Secretary of State must ensure that the necessary surveillance is carried out on an ongoing basis.

(5) Surveillance for the purposes of this regulation may be carried out by:

- (a) the joint committee; or
- (b) any other person acting pursuant to, and in accordance with, an agreement with the Secretary of State or the joint committee.

(6) In paragraphs (3) and (5):

- (a) 'the joint committee' means the Joint Nature Conservation Committee; and
- (b) a 'relevant' habitat or species means a habitat or species in the offshore marine area of a type referred to in paragraph (1).

7. In regulation 45:

(a) for paragraph (1) substitute:

'(1) The Secretary of State must, as required in the light of information derived from surveillance carried out under regulation 44 or otherwise arranged for the purposes of Article 11 of the Habitats Directive, ensure that measures are taken for the purpose in paragraph (2).'

(b) in paragraph (3), for 'Where the Secretary of State considers that measures are necessary under paragraph (1), he must' substitute 'Where measures are required under paragraph (1), the Secretary of State must'.

8. In regulation 46:

(a) in paragraph (1), after "arrangements" insert "in accordance with paragraphs (3) to (5); and

(b) after paragraph (2) insert:

'(3) The joint committee must, in relation to the species of animals listed in Annex IV(a) to the Habitats Directive which are found in the offshore marine area:

- (a) identify the risks of incidental capture and killing to which those species are subject, and the activities which give rise to such risks;
- (b) maintain a record of instances of incidental capture or killing of animals of those species of which the joint committee is aware as a result of the surveillance carried out under regulation 44, the monitoring carried out under this regulation, or otherwise;
- (c) assess to what extent monitoring of incidental capture and killing is needed, having regard to:
 - (i) the risks identified under sub-paragraph (a);
 - (ii) the instances of incidental capture or killing recorded under sub-paragraph (b);
 - (iii) whether the species is a priority species; and
 - (iv) the conservation status of the species; and
- (d) advise the Secretary of State as to the need for such monitoring.

(4) The Secretary of State must ensure that the necessary monitoring of incidental capture and killing is carried out.

(5) Monitoring for the purposes of this regulation may be carried out by:

- (a) the joint committee;
- (b) any other competent authority;
- (c) any other person acting pursuant to, and in accordance with:
 - (i) an agreement with the Secretary of State or the joint committee; or

- (ii) a condition of a licence or other authorisation granted by a competent authority.

(6) In paragraphs (3) and (5), 'the joint committee' means the Joint Nature Conservation Committee.'

9. For regulation 47(1) substitute:

'(1) The Secretary of State must, as required in the light of information derived from monitoring carried out under regulation 46 or otherwise arranged for the purposes of Article 12(4) of the Habitats Directive, make arrangements for further research, or ensure that conservation measures are taken, for the purpose specified in paragraph (2).'

5th January 2009

Hilary Benn
Secretary of State
Department for Environment, Food and Rural Affairs

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 (“the 2007 Regulations”), which make provision for implementing Council Directive 79/409/EEC on the conservation of wild birds (O.J. No. L103, 25.4.79, p.1) (“the Wild Birds Directive”) and Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna (“the Habitats Directive”) (O.J. No. L206, 22.07.92, p.7) in relation to marine areas where the United Kingdom has jurisdiction beyond its territorial sea.

The amendments made to the 2007 Regulations by this instrument alter the transposition of the Habitats Directive, but do not affect the transposition of the Wild Birds Directive.

Regulations 3 and 4 amend the terms of offences of disturbing protected species in regulations 32(4) and (5) and 39(1)(b) of the 2007 Regulations. The offences in regulation 32(4) and (5) apply to the disturbance of animals of a species for which a site has been designated as a special area of conservation or listed by the European Commission as a site of Community importance, while the animals are within that site. The offence in regulation 39(1)(b) applies to the deliberate disturbance of animals of a European protected species whether or not they are in a protected site. Regulation 4 also makes provision for the publication of guidance as to the application of the offences in regulation 39(1)(b) and (d) in relation to particular species of animals or particular activities, and requires the court to take account of any such guidance in proceedings for an offence under those provisions.

Regulation 5 amends regulation 40 of the 2007 Regulations, which contains defences to the offences relating to European protected species in regulation 39, by providing that the defences in paragraphs (1), (2), (3) and (6) of regulation 39 do not apply if the prosecution shows that there was a satisfactory alternative to the defendant’s action, or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

Regulations 6 and 7 amend regulations 44 and 45 of the 2007 Regulations to specify in greater detail the arrangements to be made for surveillance of the conservation status of natural habitat types of Community interest and species of Community interest, and to clarify the duty to take action in the light of that surveillance. Similarly, regulations 8 and 9 amend regulations 46 and 47 of the 2007 Regulations to specify in greater details the arrangements to be made for monitoring the incidental capture and killing of animals of the species listed in Annex IV(a) to the Habitats Directive, and to clarify the duty to take conservation measures in the light of that monitoring.

A transposition note setting out how the 2007 Regulations, as amended by this instrument, transpose the provisions of the Habitats Directive 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 alongside this instrument on the OPSI website. A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

£4.00
E3579 1/2009 193579T 19585

Crown copyright 2009
Printed and published in the UK by The Stationery Office Limited under the authority and
superintendence of Carol Tullo, Controller
of Her Majesty’s Stationery Office and Queen’s Printer of Acts of Parliament.