

# JNCC advice to DETR on species legislation

The following paper is the advice given to the Department of the Environment, Transport and the Regions (DETR) in December 1999, on behalf of the statutory conservation agencies, concerning the effectiveness of species protection legislation in Britain. This paper contains background briefing, advice on species protection issues and includes six main recommendations. The advice is supported by additional recommendations, which are intended to improve the operation of wildlife legislation by clarifying wording and by reconciling differences between the Habitats Regulations 1994 and the Wildlife and Countryside Act 1981.

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## THE EFFECTIVENESS OF SPECIES PROTECTION LEGISLATION - ADVICE TO GOVERNMENT

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## List of main recommendations

**Recommendation 1:** In relation to specially-protected species listed on Schedules 1, 5 and 8 of the Wildlife and Countryside Act, the word 'intentionally' where it occurs be replaced by the words 'intentionally, knowingly or negligently'.

**Recommendation 2:** The country agencies be given an enabling power to enter into Management Agreements outside SSSIs where this is necessary for the purposes of nature conservation.

**Recommendation 3:** The Secretary of State, and the National Assembly for Wales, be given the power to make an Order which prevents any person from carrying out an activity on land specified in the Order which is likely to cause harm to a species listed on Schedules 1, 5 or 8 of the 1981 Act, or to their habitats, without consent. This legal provision could exempt actions undertaken with the benefit of planning consent, or which were undertaken in an emergency. Land damaged in contravention of such an Order could be made subject to a restoration provision.

**Recommendation 4:** The next Quinquennial Review should take into account the number of species to be included on Schedules 5 and 8 in relation to the other mechanisms now available for conserving species (including Action Plans prepared in order to implement the Convention on Biological Diversity in the United Kingdom) and in relation to the desirability of maintaining awareness of which species are protected. At the same time the benefits of legal protection should be retained for those species liable to persecution.

**Recommendation 5:** Section 14 of the Wildlife and Countryside Act, 1981 should be amended to make it an offence to release, allow to escape, or cause to grow in the wild, any plant or micro-organism which is not ordinarily resident in, or a regular visitor to, Great Britain in a wild state. Provided such action was not undertaken recklessly, we would exempt from this provision plants grown for agriculture, horticulture, forestry or in gardens and micro-organisms used for specified purposes (for example, medicine, veterinary medicine, brewing and food processing).

**Recommendation 6:** We would propose that Schedule 9 Part II be made available for listing of specified micro-organisms (as well as plants), where such listing is necessary for protecting the environment, and that the sale of plants and micro-organisms listed on Schedule 9 Part II be prohibited except under licence.

# **JOINT NATURE CONSERVATION COMMITTEE**

## **THE EFFECTIVENESS OF SPECIES PROTECTION LEGISLATION - ADVICE TO GOVERNMENT**

### **1. Background**

- 1.1 DETR and Scottish Office consultations over proposed changes to Part II of the Wildlife and Countryside Act, 1981 (concerning SSSIs) were conducted in Autumn 1998. Concurrently, JNCC was asked by DETR to review the effectiveness of the species protection Schedules (5 and 8) prior to any new wildlife legislation being drafted for England and Wales.
- 1.2 This paper summarises JNCC views on the effectiveness of the species protection Schedules (5 and 8) since the Wildlife and Countryside Act, 1981 became law, taking into account the experience of conducting three Quinquennial Reviews of the species included on these Schedules. It is based upon the knowledge of staff in JNCC and the three country agencies, supplemented by a commissioned review carried out by King, Hepburn and Gubbay (1999). This review was funded jointly by JNCC, the three country agencies and Wildlife & Countryside Link and it was based on the views of 88 individuals and organisations consulted during November and December 1988. This report was distributed to those consulted, but was not disseminated much more widely.
- 1.3 This paper gives advice in relation to wildlife legislation for England and Wales that is included within the legislative programme announced in the Queen's Speech on 17 November 1999. Separate discussions are underway between the Scottish Executive and SNH for proposed new wildlife legislation in Scotland.

### **2. Effectiveness of Schedules 5 and 8 in deterring persecution**

- 2.1 With some exceptions, JNCC considers that Schedules 5 and 8 have been generally effective in deterring persecution of the species listed. Persecution is here defined as deliberate collection or killing of animals or plants for whatever purpose(s). Given the wording of the Act (see particularly Sections 9, 11 and 13), which is directed towards preventing killing and removal of wild animals and plants, this shows that the original intentions of the legislation have been achieved to a great extent. Legal protection of threatened wild animals and plants is hard to achieve in practice because most of these species tend to occur in remote places (where surveillance to prevent persecution is difficult) and persecution crimes may not be obvious to most people. There is general acceptance that those species particularly liable to be persecuted (such as bats, butterflies and orchids) for whatever motives, have benefited from being included on Schedules 5 and 8.
- 2.2 However, it should be borne in mind that the level of persecution for legally protected animals and plants is hard to assess. This is due to the problems of detection cited above and to the levels of enforcement and lack of reporting of wildlife crime. Nevertheless, the limited number of prosecutions for offences committed against species since 1981 appear to have deterred persecution of protected species, and have changed attitudes towards animals as diverse as bats and butterflies for the better. For these and other species, there is increased understanding and support for their protection and conservation among the public, and the Act has made an important contribution towards achieving this.
- 2.3 Bearing in mind experience with the operation of Part I of the Wildlife and Countryside Act, 1981 we conclude that Schedules 5 and 8 should be retained to give legal protection to appropriate animals and plants.
- 2.4 The operation of the law, as it relates to specially-protected species, requires offences to be intentional i.e. undertaken with the intention of harming the species. There is uncertainty about whether 'intentionally' is also to be construed as including activities where the person concerned could reasonably be expected to know that his/her action would have caused harm to the specially-protected species. The recent judicial interpretation of Article 12 of the Habitats Directive as limiting the meaning of 'deliberate' to activity intended to cause harm, suggests strongly that it

might not. The recommendation would have the effect of ensuring that specially-protected species are protected against any activity where it is known that this would harm the species. The rights of the individual are adequately safeguarded by the defence that harm which is caused as the incidental result of an otherwise lawful activity is not an offence in the circumstance that it could not, reasonably, have been avoided.

**Recommendation 1: In relation to specially-protected species listed on Schedules 1, 5 and 8 of the Wildlife and Countryside Act, the word 'intentionally' where it occurs be replaced by the words 'intentionally, knowingly or negligently'.**

### **3. Effectiveness of Schedules 5 and 8 in protecting habitats of listed species**

- 3.1 Part I of the Wildlife and Countryside Act, 1981 is concerned with protecting individual species. Species are threatened by many factors, with the ranking of these factors differing according to the appearance, economic significance and ecology of the species being considered. For the majority of species that are threatened in Britain (that is those listed in Red Data Books endorsed by the statutory conservation agencies) habitat change and loss are the primary reasons for their declines.
- 3.2 At present, protection of the habitats of protected species is via the provisions of Part I (Section 9(4) for structures or places used by protected animals for shelter or protection) or via Part II (through designation of SSSIs).
- 3.3 The Wildlife and Countryside Act, 1981 affords only limited protection to habitats and species outside SSSIs. The following recommendation would enable English Nature and the Countryside Council for Wales to enter into management agreements outside SSSIs where, in their opinion, it is necessary for the purposes of nature conservation, for example, to achieve the conservation of a specially-protected species or the implementation of an action plan for a priority habitat or species published under the UK Biodiversity Action Plan. The level of any financial offer made under such a proposed agreement would be for the country agency to determine in accordance with any financial guidance agreed with government. The recommendation is framed as a general enabling power which will allow the country agencies to respond to changing nature conservation priorities. Scottish Natural Heritage already has such a power in relation to Scotland (by virtue of Paragraph 4 of Schedule 10 of the Natural Heritage (Scotland) Act 1991).

**Recommendation 2: The country agencies be given an enabling power to enter into Management Agreements outside SSSIs where this is necessary for the purposes of nature conservation.**

- 3.4 The protection afforded to threatened species under the Wildlife and Countryside Act, 1981, and to the places used by these species for shelter and protection (i.e. their habitats) does not apply where damage to the species or their habitat is an incidental result of an otherwise lawful operation. This is probably the greatest weakness of existing species protection legislation. The following recommendation would enable the Secretary of State, or the National Assembly for Wales, to prevent or halt any activity which would be likely to harm the population of a specially-protected species outside SSSIs. Existing statutory regulatory control procedures, e.g. planning consent, or necessary emergency procedures, could be provided for within the legal provisions.

**Recommendation 3: The Secretary of State, and the National Assembly for Wales, be given the power to make an Order which prevents any person from carrying out an activity on land specified in the Order which is likely to cause harm to a species listed on Schedules 1, 5 or 8 of the 1981 Act, or to their habitats, without consent. This legal provision could exempt actions undertaken with the benefit of planning consent, or which were undertaken in an emergency. Land damaged in contravention of such an Order could be made subject to a restoration provision.**

#### **4. Effectiveness of Schedules 5 and 8 in terrestrial, freshwater and marine situations**

- 4.1 There are terrestrial, freshwater and marine species included on Schedules 5 and 8. Each of these three situations has particular circumstances and conditions, which affect the operation of species protection legislation.
- 4.2 Further work, discussions and consultations would be required to develop proposals to improve the operation of Part I of the Act in terrestrial, freshwater and marine situations. Until such further work is carried out, we conclude that the present coverage of Schedules 5 and 8 over terrestrial, freshwater and marine situations. Until such further work is carried out, we conclude that the present coverage of Schedules 5 and 8 over terrestrial, freshwater and marine conditions should be retained.

#### **5. Enforcement issues**

- 5.1 Many of the issues concerning enforcement of Part I of the Wildlife and Countryside Act, 1981 have been summarised by King *et al* (1999). The PAW group has considered and reported on enforcement issues, making 11 recommendations (PAW, 1999), see Annex 1.
- 5.2 The PAW recommendations are known to the statutory conservation agencies, and will contribute to improving enforcement with respect to Part I of the Act.
- 5.3 JNCC has been advised that Government is minded to accept the 11 PAW recommendations. JNCC believes that implementation of these recommendations as part of revisions of Part I of the Wildlife and Countryside Act, 1981 will make a significant contribution to enforcement of the Act and to wildlife conservation.

#### **6. The future of the Quinquennial Review**

- 6.1 The NCC, and latterly JNCC, have been responsible for carrying out reviews every five years of the species included on Schedules 5 and 8. The result of the three reviews completed so far has been an increase in the number of protected species. Animals on Schedule 5 have increased from 51 to 142 and plants on Schedule 8 from 62 to 184 species.
- 6.2 These increases have obviously given legal protection to a wider range of plants and animals, although the general understanding of which species are protected has declined as less obvious and less well-known species have been listed. There are diminishing returns from adding significant numbers of additional species at future Quinquennial Reviews. JNCC concludes that future Quinquennial Reviews should be carried using a more streamlined process, which will also reduce the costs involved.

**Recommendation 4: The next Quinquennial Review should take into account the number of species to be included on Schedules 5 and 8 in relation to the other mechanisms now available for conserving species (including Action Plans prepared in order to implement the Convention on Biological Diversity in the United Kingdom) and in relation to the desirability of maintaining awareness of which species are protected. At the same time the benefits of legal protection should be retained for those species liable to persecution.**

#### **7. The need for clarifying wording of the Wildlife and Countryside Act, 1981**

- 7.1 There are a number of instances where experience since 1981 has revealed difficulties with the existing wording of the Act. These are summarised here, with recommendations as to how they should be addressed.
- 7.2 The wording of the Wildlife and Countryside Act should be made consistent with The Conservation (Natural Habitats, &c.) Regulations 1994, see Annex 2.
- 7.3 To avoid possible persecution of captive bred stock released into the wild as part of conservation programmes, progeny of protected animals or plants should be given protection in Sections 9 and 13 respectively.

- 7.4 To avoid unregulated release of these species, all Schedule 1, 5 and 8 species could be included on Schedule 9 Parts I and II.
- 7.5 Definitions of organisms (animals and plants) to include corals, algae, fungi, lichens and micro-organisms: list the animals at Section 27.
- 7.6 Licensing issues are the subject of separate discussions between DETR and the Country Agencies.

## **8. Issues concerning invasive species**

- 8.1 Invasive species, typically non-native in origin, are a major problem for native characteristic biodiversity in many British biotopes.
- 8.2 At present, while the release to the wild of non-native types of animal is strictly controlled, the control of non-native plants is limited to the small number listed on Schedule 9 Part II. It is usually only possible to list a plant on this schedule where it is already causing problems, and in this situation it may already be too late to control the spread of the plant concerned. The control of micro-organisms is controlled (under non-wildlife legislation) only insofar as they may be pathogens or pesticides, or where there are human safety implications. The following recommendation is a twin-track approach to this issue. Firstly, the following recommendation would have the effect of controlling delineate introductions or releases of plants and micro-organisms into the wild, while safeguarding the legitimate interests of agricultural, forestry, horticultural etc interests. This would provide a significant measure of safeguard against the spread of non-native plants and micro-organisms which could not have been anticipated.
- 8.3 Secondly, plants and micro-organisms known to be invasive in character, or which are likely to be invasive in the British environment, could be listed on Part II of Schedule 9 of the Wildlife and Countryside Act. Control over the sale of plants or micro-organisms so listed would provide an additional, and potentially very effective, control mechanism.

**Recommendation 5: Section 14 of the Wildlife and Countryside Act, 1981 should be amended to make it an offence to release, allow to escape, or cause to grow in the wild, any plant or micro-organism which is not ordinarily resident in, or a regular visitor to, Great Britain in a wild state. Provided such action was not undertaken recklessly, we would exempt from this provision plants grown for agriculture, horticulture, forestry or in gardens and micro-organisms used for specified purposes (for example, medicine, veterinary medicine, brewing and food processing).**

**Recommendation 6: We would propose that Schedule 9 Part II be made available for listing of specified micro-organisms (as well as plants), where such listing is necessary for protecting the environment, and that the sale of plants and micro-organisms listed on Schedule 9 Part II be prohibited except under licence.**

## **9. References**

- King, M., Hepburn, I. and Gubbay, S. (1999) *A review of the operation of species legislation in Great Britain*. Joint Nature Conservation Committee and Wildlife & Countryside Link, unpublished contract report.
- PAW (1999) *Proposals for legislative changes*. Partnership for Action against Wildlife Crime, unpublished report.
- Statutory Instrument 2716 (1994) *The Conservation (Natural Habitats, &c.) Regulations 1994*. HMSO, London.
- Wildlife and Countryside Act 1981. HMSO, London.

# ANNEX 1

## PAW report proposals (February 1999)

These follow the numbering and sequence of the PAW (1999) report (PAW recommendations quoted verbatim in Italics).

### **Sentencing provisions**

*Recommendation 1: We recommend that the Wildlife and Countryside Act 1981 is amended to give Courts discretion to impose custodial sentences for Part I offences, to bring it in line with other wildlife legislation. Magistrates Courts should be able to impose sentences of up to six months, and Crown Courts - up to two years (for section 14 cases).*

*Recommendation 2: We also recommend that an assessment is made of whether penalties for offences should be increased.*

### **Power of arrest**

*Recommendation 3: We recommend that the power of arrest formerly available in section 19 of the Wildlife and Countryside Act 1981 should be re-instated, and subject to the additional provision that a police officer may arrest a person where he has reasonable grounds to believe that failure to do so would result in the removal, destruction or other disposal of evidence.*

### **Search warrants**

*Recommendation 4: We recommend that the 1981 Act search warrant provisions should be made available for all Part I offences.*

### **Taking samples for DNA analysis**

*Recommendation 5: We recommend that an express power for police officers and Department of the Environment wildlife inspectors to require tissue samples to be taken for DNA analysis is introduced.*

### **Time limits for bringing prosecutions**

*Recommendation 6: We recommend that the time limits for bringing prosecutions for all offences under Part I of the 1981 Act are rationalised so that in all cases, proceedings must begin within six months of the date sufficient information is available to the prosecutor, but not after two years of the commission of the offence has expired.*

*Recommendation 7: We also recommend that consideration is given to whether provision should be made for charges to be brought after two years.*

### **Recording offences**

*Recommendation 8: We recommend that the scope for collecting statistics of reported crimes by administrative means should be considered.*

*Recommendation 9: We also recommend that ACPO should be invited to consider submitting a recommendation to the Home Office that some wildlife cases should be made notifiable.*

### **Proving 'intent to disturb'**

*Recommendation 10: We recommend that the 1981 Act is amended to make it an offence to recklessly disturb, by a person's actions or consequences of them, a nest site or shelter.*

### **Wildlife Inspectors' powers of entry**

*Recommendation 11: We recommend that Wildlife Inspectors are given the power to enter premises to confirm details of any application for a sales licence, or to enter where there are reasonable grounds to suspect that a sale is or has taken place.*

## ANNEX 2

### **Points of difference between the Conservation (Natural Habitats, &c.) Regulations 1994 and the Wildlife and Countryside Act 1981, which should be reconciled to improve protection for species listed on Schedules of the 1981 Act.**

1. Regulation 39(1)(b) makes it an offence to "deliberately disturb any such animal" which is stronger than W&C Act section 9(4)(b) "disturbs any such animal while it is occupying a structure or place which it uses for that purpose". Adopting the Regulations wording for all scheduled animals would result in enhanced protection against disturbance.
2. Regulation 39(1)(d) does not include the word "intentionally" before "to damage or destroy a breeding site or resting place of such an animal", compared with W&C Act section 9(4) "Subject to the provisions of this Part, if any person intentionally-". Adopting the Regulations wording for all scheduled animals would result in enhanced protection against damage to any structure or place used by an animal. This would also be more effective than the wording recommended by the PAW report (see their Recommendation 10 in Annex 1, above).
3. Regulation 41 includes more extensive prohibitions for methods of taking or killing wild animals than W&C Act section 11. Prohibiting these additional methods would be beneficial.
4. Regulation 43(1) makes it an offence to "pick, collect, cut, uproot or destroy a wild plant of a European protected species", which is stronger than W&C Act section 13(1)(a) "picks, uproots or destroys any wild plant included in Schedule 8". This additional protection for plants on Schedule 8 would be beneficial.
5. Regulation 43(3) gives protection to all stages of wild plants, which is not explicitly stated in W&C Act section 13. This additional protection for plants on Schedule 8 would be beneficial.
6. Regulation 44(3) states with respect to licensing "The appropriate authority shall not grant a licence under this regulation unless they are satisfied:
  - i. that there is no satisfactory alternative
  - ii. that the action authorised will not be detrimental to the maintenance of the population of the species concerned at favourable conservation status in their natural range."

This restriction of conditions for issuing a licence would be beneficial if applied to all licensing authorities.