

**The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2009
(England and Wales)**

and

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

Changes to the Habitats and Offshore Marine Conservation Regulations

QUESTIONS AND ANSWERS

Q1. What are the main changes to these regulations?

More detailed provisions for the surveillance of natural habitats and species of Community interest, and the monitoring of incidental capture and killing of European protected species have been added. Those provisions are amended to include specific requirements for nature conservation bodies to assess the needs for such surveillance and monitoring and advise the Secretary of State and Welsh Ministers, and for the Secretary of State and Welsh Ministers to ensure that the necessary surveillance and monitoring is carried out. They also indicate who may carry out such surveillance and monitoring.

The wording of the offence for disturbing European protected species of animals such as great crested newts and bats has been modified to provide further clarification on the scope of the offence. It is not expected to change in practice the kinds of actions, or the level of impact of those actions on a protected species, which will constitute an offence.

Ministers may publish or approve the publication of guidance about the application of the disturbance offence or the offence of damaging or destroying a breeding site or resting place. The courts will be required to take account of any such guidance in proceedings for those offences.

Defences to species protection offences i.e. for tending, mercy killing, and collecting evidence for prosecution will continue to apply. However, in the future, in any prosecution proceedings, the defences will not apply if the prosecution shows that either of the two conditions set out in Article 16(1) of the Directive were not satisfied, i.e. that the defendant was wrong to conclude that there was no satisfactory alternative and that the action was not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. This better ensures that the defences are compliant with the Directive and helps to ensure that the defences are not relied upon inappropriately.

Special provisions about the application of species protection offences in relation to sea fishing activities are revoked in the Habitats Regulations.

Q2. Why are the provisions changing?

The changes to the Habitats Regulations are in response to the judgment from the European Court of Justice (ECJ). The 2005 ECJ judgment in Case C-6/04, *Commission v United Kingdom*¹ ruled (amongst other things) that the species protection provisions in the Habitat Regulations were not compatible with the strict species protection regime required by Articles 12 and 13 of the 1992 Directive on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive). In light of discussions with the European Commission following the making of the Offshore Marine Regulations and the amendment of the Habitats Regulations in 2007, it has been decided to amend those instruments further in order to ensure that the United Kingdom has fully complied with the ECJ's judgment in Case C-6/04 and to secure the closure of those infraction proceedings. For further information on the changes made in 2007: <http://www.defra.gov.uk/wildlife-pets/wildlife/protect/bird-habitat/amend.htm>

Surveillance and monitoring

Q3. How will these changes affect surveillance and monitoring?

The duty to survey European protected species and priority habitats has not changed. The amended legislation clarifies roles and responsibilities. It also explains how surveillance is prioritised based on the requirements of the Habitats Directive and the system that is in place to monitor the incidental capture and killing of European protected species.

Changes to the disturbance offence

Q4. The disturbance offence has been changed. Will trivial disturbance now be caught by the offence?

Due to the removal of many of the defences in regulation 40 in 2007 the offence of deliberately disturbing an European protected species in regulation 39(1)(b) was amended at that time so that activities that cause low level deliberate disturbance that may be considered unlikely to have the effects covered by the Directive can continue within the law.

The current changes retain the requirement that for the offence to be committed, the result of disturbance must affect important life cycle processes and so low level or inconsequential disturbance (i.e. trivial) that does not have these impacts is not captured by the offence in these Regulations.

Q.5 Doesn't the removal of a "significant group of animals" mean that deliberate disturbance of a single animal will now be caught by the offence?

Removal of reference to "significant group of animals" ensures that whether the number of animals affected by an action is sufficient for that action to be regarded as "disturbance" will be a matter for consideration on a case by case basis. This will depend on the impact on the species in question. In most cases it is not expected that an action which disturbed a single animal or a small number of animals would have sufficient impact to be caught by the offence, although if any of our European

¹ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004J0006:EN:HTML>

protected species become particularly rare, disturbing very few animals could potentially have serious effects. (See also Q7 below about guidance).

Q6. Why have references to hibernation and migration been added?

The offence is now more consistent with the Article 12(1)(b) of the Habitats Directive by including reference to disturbance that affects species that hibernate and/or migrate.

Q7. Why have you introduced ministerial approved guidance to be taken into account in the courts?

Certain elements of these offences involve expert judgment or knowledge. This new provision will enable the development of guidance that will help parties to understand the scope of the offences and to consider whether their operations are likely to breach the regulations and could require licensing. It will also assist the courts if enforcement proceedings are brought in determining the seriousness of the offence and to what extent the operator had sought to heed the guidance. Any guidance regarding the disturbance offence and the offence of damaging or destroying a breeding site or resting place will be approved by ministers. This will provide reassurance that it is proper for the courts to be required to take its content into account.

Q8. Who will write the guidance to be published by ministers?

The Statutory Nature Conservation bodies in England and Wales and Joint Nature Conservation Committee (JNCC) will write ecological focused guidance and will be approved by the Secretary of State and Welsh Ministers. They will work with species experts and organisations. In England operational guidance, where necessary, will be written by Government Departments or their agencies where operations under their remit may have an impact on European protected species. This may include the Forestry Commission, Ministry of Defence (MoD) and Department for Energy and Climate Change (DECC). This operational guidance (approved by the Secretary of State) will be taken into account in the courts in England. For operational guidance in Wales please contact the Welsh Assembly Government. They will work with their key stakeholders and use the ecological guidance as reference. The guidance will also take account of the formal and generic article 12 and 16 guidance published by the European Commission in February 2007.

Q9. What about existing guidance published since the 2007 changes to the regulations?

Existing guidance may require some modification or enhancement but is expected to be reliable for the most part with the new guidance anticipated in the 2009 regulations likely to involve some expansion on existing advice. Government family bodies responsible for existing guidance will be expected to examine it and identify any need for changes as soon as possible. In case of doubt, you should consult the relevant organisation. Guidance may be found on:

<http://www.forestry.gov.uk/england-protectedspecies>

<http://www.naturalengland.org.uk/conservation/wildlife-management/licensing/habsregs.htm>

Q10. What impact will the changes have on forestry and agriculture operators?

No changes to forestry and agriculture operations will be necessary for operators to remain within the law. Operators should already be following best practice guidance to avoid committing offences and should in future take into account any ministerial approved guidance.

Q11. What impact will the changes have on marine industries?

No changes to marine operations will be necessary for operators to remain within the law. We are developing guidance regarding the deliberate disturbance offence in the marine area which will take in to account the current changes, and which operators should take account of.

Q12. When will the ministerial approved guidance be published?

The ecological guidance covering the disturbance offence in the terrestrial and marine areas is expected to be published by the end of March 2009. The ecological guidance covering the offence of damaging or destroying a breeding site or resting place is expected to be published during summer 2009. Further guidance regarding specific sectors and operations will follow where needed.

Defences to species protection offences

Q13. Will I now be committing an offence if I tend an injured bat (or any European protected species) for a short period of time without obtaining a licence?

You may rely on the defence of tending an injured animal provided that there is no satisfactory alternative course of action and your intended action would not be detrimental to maintaining the favourable conservation status of the species. You should give thought to those matters, but we expect that in cases where there is a genuine need to tend an injured animal those tests will normally be satisfied and no offence will be committed. The same would be true of the mercy killing and investigation of offences defences. The derogation tests have been inserted to ensure that those relying on the defences are fully aware of the tests that must be met and do not rely on them inappropriately, e.g. an European protected species animal is entangled in broken fence-wire and is taken home for 'tending' in captivity over a period of time. However, if its injuries were no more than superficial, all it required was to be freed from the wire and released which would have been the satisfactory alternative.

Fisheries

Q14. Why has the sea fisheries defence been removed from the Habitats regulations and what does this mean for fishermen?

This reflects the powers available to Member States to regulate the activities of their own vessels within 12 nautical miles of baselines under the Common Fisheries Policy. In practice the removal of this provision should mean little change for fishermen. We consider that as long as they are fishing in accordance with the Common Fisheries Policy they are unlikely to commit an offence under these Regulations. Clearly, however, if fishermen were found to be deliberately targeting / harming protected species then they would be liable for prosecution.

Unfortunately, in the process of sea fishing accidental by-catch of protected species such as dolphins and porpoise can occur. Fishermen should adopt appropriate measures to try to avoid the by-catch of protected species.

Further advice

Q15. Where can I obtain further advice on the amendments to the regulations?

For further advice on the changes to the regulations please see <http://www.defra.gov.uk/wildlife-pets/wildlife/protect/bird-habitat/amend.htm>

HEADLINE MESSAGES

The amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 (England and Wales) (Habitats Regulations) and the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 provide greater legal clarity in a number of areas.

The amendments will:

- Clarify the roles and responsibilities of nature conservation bodies and Secretary of State and Welsh Ministers in meeting requirements under the Habitats Directive for surveillance of habitats and species, and monitoring incidental capture and killing of European protected species.
- Ensure that the wording of the disturbance of species offence is more clearly aligned with the relevant Directive provisions without changing the overall scope of the offence.
- Provide powers for publishing guidance about the application of the disturbance offence and the offence of damaging or destroying breeding sites and resting places. This will provide valuable advice for all and will also be taken into account by the courts should enforcement proceedings be brought.
- Better ensure that the Directive's derogation tests are considered when relying on the tending and release, mercy killing and enforcement defences to the species offences in the regulations.
- Better reflect the powers available to Member States to regulate the activities of their own vessels within 12 nautical miles of baselines under the Common Fisheries Policy.

28th January 2009