

**CONSERVATION (NATURAL HABITATS, &c.) (AMENDMENT)
REGULATIONS 2007**

HOW THE CHANGES WILL IMPACT ON FORESTRY

QUESTIONS AND ANSWERS

INDEX

	Page
Headline Messages	2
Key Messages	2
On-going activities	4
Further advice	8

Headline messages

The amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 (“Habitats Regulations”) address current gaps and inconsistencies and create greater legal certainty in a number of areas.

The amendments will:

- amend the species protection regime to better reflect the Habitats Directive;
- provide a clear legal basis for surveillance and monitoring of European protected species (“EPS”; which, for the purposes of our legislation, are species listed in Annex IV to the Habitats Directive whose natural range includes any area of Great Britain);
- toughen the regime on trading of all Annex IV and Annex II(b) species and not just those found in Great Britain;
- ensure that the requirement to carry out appropriate assessments on water abstraction consents and land use plans is explicit.

Key messages

Q1. Why are the provisions changing?

The 2005 European Court of Justice (ECJ) judgment in Case C-6/04, *Commission v United Kingdom*¹ ruled that the species protection provisions in the Habitats Regulations were not compatible with the strict species protection regime required by Articles 12 and 13 of the Habitats Directive. It also ruled that the UK’s transposition was deficient in not specifically requiring land use plans and water abstraction plans and projects to be subject to an appropriate assessment of their implications for Natura 2000 sites.

A separate judgment (Case C-131/05, *Commission v United Kingdom*)² ruled that trade of all species listed on Annex IV of the Directive should be prohibited and not just those whose natural range includes Great Britain.

Q2. What are the main changes?

The 2005 ECJ judgment in Case C-6/04 ruled that many of the defences to regulations 39 and 43 of the Habitats Regulations (protection of EPS), found in regulations 40 and 43, did not meet the strict derogations tests set out in Article 16 of the Habitats Directive. Therefore the majority of the defences have been removed from regulation 40 (in respect of animals) and regulation 43 (in respect of plants). This includes the commonly relied on “incidental result defence” which covers acts which are the incidental result of an otherwise lawful activity and which could not reasonably have been avoided.

¹ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELE09/07/2007X:62004J0006:EN:HTML>

² The judgment can be found on the ECJ’s website: <http://curia.europa.eu/>

The threshold above which a person will commit the offence of deliberately disturbing a wild animal of an EPS has been raised. Now, a person will commit an offence only if he deliberately disturbs wild animals of an EPS in such a way as to be likely significantly to affect (a) the ability of any significant group of animals of that species to survive, breed, or rear or nurture their young, or (b) the local distribution or abundance of that species.

Q3. What will be the benefits of these changes?

The changes will provide increased protection for EPS (and other Annex IV and Annex II(b) species). Those carrying out activities that may affect EPS will now have to consider, in a wider range of circumstances, the presence of EPS and their breeding sites or resting places. With this knowledge operators may choose to avoid EPS or, for specific purposes, obtain a licence to carry out an activity that would otherwise be unlawful. This will ensure that there will be no detrimental impact on the favourable conservation status of EPS and may result in the conservation status of the species involved being improved.

Q4. Surely there will be an increased burden on businesses and regulators?

There will be an increased burden, particularly on the forestry and agricultural sectors. Operators will need to consider the presence of EPS, or the risk of them being present on the site and follow good practice to minimise the possibility of committing an offence against an EPS. If they cannot avoid EPS then operators may need to apply for a licence to remain within the law. This will involve conducting surveys, reading guidance, filling in the licence application form and possibly obtaining professional advice. An increased regulatory burden will fall to the licensing authority as the number of licence applications is likely to increase.

Q5. What is being done to reduce this burden?

Defra is working with the Statutory Conservation Agencies (Countryside Council for Wales, Natural England), Welsh Assembly Government and the Forestry Commission to produce guidance to help operators undertake a risk assessment of the presence of EPS and their breeding sites and resting places and to advise on how to avoid committing an offence. We hope that this advice will reduce the burden on operators and minimise the need for a licence.

Q6. Will native EPS continue to be protected by Wildlife and Countryside Act 1981?

Due to the removal of defences in regulation 40 and 43(2) of the Habitats Regulations, consequential amendments have been made to the Wildlife and Countryside Act 1981 (WCA) to remove the protection afforded to EPS by certain offences. However the offences under the WCA covering obstruction of places used for shelter or protection, disturbance and sale still apply to

EPS. This is because the offences in the two sets of legislation do not match.

To ensure that enforcement provisions under the Regulations are consistent with the WCA the new enforcement powers that were added to the WCA by the Natural Environment Rural Communities Act 2006 (NERC) have been added to the Habitat Regulations. Penalties for all offences have also been raised to level 5 and/or a six month custodial sentence.

Q7. Will there be changes to the licensing of EPS?

Licences will be issued under the Habitats Regulations by licensing authorities as at present; Natural England in England, Countryside Council for Wales and Welsh Ministers in Wales. In order to reduce the burden on licence applicants we have sought to simplify the regime as far as possible whilst ensuring the strict species protection regime is adhered to. To more closely transpose Article 16 of the Habitats Directive, which sets out the derogation purposes permitted by the Directive, a new licensing purpose has been added to the Regulations which permits the taking or the possession of Annex IV and Annex II(b) species on a strictly limited basis, to a limited extent and in limited numbers. Licence applications for this purpose will be assessed on their merits in the light of the individual circumstances, but elsewhere in Europe this derogation has been used to manage populations of protected species.

On-going activities (e.g. forestry and agricultural practices)

Q8. What will the impact be on forestry and agriculture operators?

There will be an increased burden on forestry and agriculture operators as they will now need to consider, in a wider range of circumstances, the presence of EPS and their breeding sites and resting places when undertaking their activities, since the incidental result of a lawful operation defence has been removed.

Q9. Surely every forestry and agricultural activity will now need to be licensed?

An activity will only need to be licensed if it will result in an offence being committed against an EPS i.e. it will

- deliberately capture, injure, or kill an EPS animal, or
- deliberately pick, cut or destroy an EPS plant, or
- deliberately take or destroy the eggs of an EPS animal ; or
- deliberately disturb animals of an EPS significantly to effect the ability of a significant group of animals of that species to survive, breed, or rear or nurture their young, or the local distribution or abundance of that species; or
- damage or destroy in a breeding site or resting place of an EPS.

If it is thought likely that such an offence will be committed by an activity, it is recommended that you contact your licensing authority for advice as to whether a licence will be required.

Q10. How do I avoid committing offences and therefore a need for a licence?

It is recommended that operators follow good practice guidance issued by Natural England and the Forestry Commission. This gives advice on assessing the presence of EPS, assessing the possible impact of operations and practical strategies for avoiding committing offences. Following this guidance does not totally remove the risk of committing an offence. However, when considering whether to take forward a prosecution, the CPS may take this into account when assessing whether a prosecution would be in the public interest. Further guidance may be found on:

www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm

Q11. Will some activities be restricted or no longer carried out?

Most activities will be able to continue without restrictions but in some cases they may need to be modified in order to avoid committing an offence or may require a licence if the offence cannot be avoided. A licence will require strict tests to be met to ensure that there is no satisfactory alternative to the proposed activities and to ensure that the conservation status of the EPS will not be detrimentally affected. Activities under licence will need to meet conditions such as following good practice and mitigation to ensure the favourable conservation status is maintained.

Q12. I need to carry out an operation that may affect a European protected species but cannot obtain a licence because I cannot show that there is no satisfactory alternative and/or the operation does not fall within one of the derogation purposes? If I go ahead with the operation will I be prosecuted?

It is the responsibility of the Police to enforce these regulations. Where evidence of a criminal offence comes to their attention they will investigate and where appropriate submit papers to the Crown Prosecution Service for consideration of offenders being prosecuted. Investigations are likely to take into account best practice guidance and any relevant policies that should have been applied. The Crown Prosecution Service will apply the Code for Crown Prosecutors, a copy of which may be found at www.cps.gov.uk <file://www.cps.gov.uk/>. This requires consideration not only of evidence but also of public interest.

Q13. Will I be prosecuted if I accidentally damage or destroy a breeding site or resting place?

As the incidental result of a lawful operation defence has been removed operators are now open to this strict liability offence, whether the damage occurs by accident or not. The risk of committing this offence may be reduced by following guidance and avoiding breeding sites and resting places where

known. Due to the nature of some EPS such as bats it is not always possible to identify all breeding sites and resting places and there is a risk of committing an offence accidentally. However, in deciding whether to take forward a prosecution, the CPS will assess whether it would be in the public interest to do so (see question 39).

Q14. How will I know that I am committing an offence of deliberately and significantly disturbing an EPS?

The offence of deliberately disturbing an EPS has been amended to allow activities that cause trivial disturbance to continue lawfully and without a licence. An offence will only be committed if the deliberate disturbance is likely to significantly affect a significant group of animals of that species' ability to survive, breed, or rear or nurture its young or is likely to significantly affect the local distribution or abundance of that species. Further guidance on the disturbance offence may be found on:

www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm

Deliberate disturbance (trivial or not) of a protected animal (species on Schedule 5 which includes EPS) in its place of shelter or protection will continue to be an offence under the Wildlife and Countryside Act 1981. However, the incidental result of a lawful operation defence will be available for that offence where the disturbance could not have been reasonably avoided.

Q15. What do you mean by “deliberately”?

The offences covering capturing, injuring or killing, disturbing or, taking or destroying eggs under regulation 39(1) continue to require a deliberate action. “Deliberately” has a broad meaning. In the context of capture and killing, the European Court of Justice has interpreted it to include “accepting the possibility” of such capture or killing (see paragraph 71 of ECJ case C-221/04³). In other words, an offence may be committed by a person who might not intend to capture or kill an EPS specimen but nevertheless performs the relevant action, being sufficiently informed and aware of the consequences his action will most likely have. Whether this wide interpretation applies more generally (i.e. to other provisions of the Habitats Directive which use the word “deliberate”) is unclear from the judgment. However, it would appear likely that this broad meaning will also be taken to apply to the other offences in regulation 39 (and regulation 43) where the term is used.

Q16. How do I know that EPS and their breeding sites or resting places are present and will be affected by operations?

³ Commission v the Kingdom of Spain. The judgment can be found on the ECJ's website: <http://curia.europa.eu/>

Individuals and organisations will need to assess the risk of committing an offence against EPS and act accordingly. This may involve carrying out surveys to ascertain whether EPS are present and, if they are present, deciding whether to go ahead or modify practices to avoid committing an offence. If committing an offence is unavoidable, a licence may be required. Guidance will be provided by Natural England, the Countryside Council for Wales and the Forestry Commission on how to assess these risks, particularly in identifying the presence of EPS and their breeding sites or resting places.

Q17. Will I need a licence if I am part of a government funded scheme such as woodland grant scheme and environmental stewardship?

A licence may be required if the activities carried out under these schemes are likely to commit an offence against EPS and cannot be avoided. Guidance will be provided by Natural England, the Countryside Council for Wales and the Forestry Commission.

Q18. Will I need a licence for EPS when applying for a felling licence?

Those involved in the felling of woodland will now need to consider whether an offence against an EPS will be committed and particularly the impact on their breeding sites and resting places. If this cannot be avoided then a licence will be required.

Q19. Will the changes apply to Government owned land?

The amendments will apply to all land owned and managed by the Government including land owned by the MOD, Forestry Commission and the Highways Agency.

Q20. Will I need to obtain professional advice to help me apply for a licence?

This will depend on the nature of the activity and the existing information available on the presence of EPS where the activity is taking place. Some species are more easily detected than others, and certain times of year are better than others for surveying. Each site will have different requirements; where information is already available a quick 'walk through' may suffice to confirm EPS presence; where information is absent a more detailed survey may be required that may need expert assistance.

Q21. What will happen if I do not follow licence conditions?

It will now be an offence to contravene or to fail to comply with conditions set out in an EPS licence. However, there is a defence available where you can show that you took all reasonable precautions and exercised all due diligence to avoid committing the offence or the commission of the offence was otherwise due to matters beyond your control.

Further advice

Q22. Where can I obtain further advice on the amendments to the Regulations?

For further advice on the changes to the regulations and licensing please see www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm