

Explanatory Memorandum to The Conservation of Habitats and Species Regulations 2017

This Explanatory Memorandum has been prepared by the Economy, Skills and Natural Resources Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Conservation of Habitats and Species Regulations 2017

Lesley Griffiths

Cabinet Secretary for Environment and Rural Affairs

31 October 2017

1. Description

These Regulations consolidate and update the Conservation of Habitats and Species Regulations 2010 (the “Habitats Regulations 2010”). The Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations 2017”) transpose Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive) and elements of Directive 2009/147/EC on the conservation of wild birds (“the Birds Directive”) in England, Wales and, to a limited extent, Scotland and Northern Ireland.

The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. The Directive lays down rules for the protection, management and exploitation of such habitats and species.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The Habitats Regulations 2010 extend to England and Wales. These Regulations have been amended several times and in 2011 and 2012 on a composite basis by the Welsh Ministers and the Parliamentary Under Secretary of State for the Environment.

A single instrument, made compositely by the Welsh Ministers and Parliamentary Under Secretary of State, offers an effective and efficient mechanism for updating the Habitats Regulations 2010, maintains consistency, provides reassurance and understanding for stakeholders, and offers a single legislative framework for implementing the Habitats Directive across the two countries. This is particularly important in the context of cross-border sites such as the River Severn Special Area of Conservation. A single set of regulations recognises wildlife knows no borders.

A single set of regulations also provides coherence and clarity for meeting the UK’s international biodiversity commitments, avoids unnecessary potential costs associated with the risk of operating two separate systems in England and Wales; and aligns with the current approach for wild birds (the Wildlife and Countryside Act 1981 provides common protection for wild birds across England, Wales and Scotland)

Legislation which will apply simultaneously throughout England and Wales should also assist with enforcement issues and the accessibility and understanding for members of the public and others.

This instrument is therefore being made on a composite basis with the Parliamentary under Secretary of State for Defra.

The Committee will wish to note that the Habitats Regulations 2017 consolidate all the various amendments made to the Habitats Regulations 2010, in respect of England and Wales. The Habitats Regulations 2017 also introduce a small number of minor amendments designed to rectify obsolete references, such as (as regards England) amending references to “regional strategy”, and including references to the

River Tweed Commission as a relevant authority; and generally improving the clarity of drafting. Further detail is at section 4 below.

A 2012 review of the implementation of the Habitats Regulations 2010, covering England only, concluded that “in the large majority of cases the implementation of the Directives is working well, allowing both development of key infrastructure and ensuring that a high level of environmental protection is maintained” The Habitats and Birds Directives have been comprehensively reviewed under the EU REFIT process. The review concluded in 2016 the Directives are fit for purpose but fully achieving their objectives and realising their full potential will depend on substantial improvement in their implementation.

These composite Regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament. Accordingly, it is not considered reasonably practicable for this Instrument to be laid or made bilingually. Where the instrument makes consequential amendments to bilingual legislation, both Welsh and English text has been provided.

This statutory instrument is being made under section 2(2) of the European Communities Act 1972 Para 2(2) of Schedule 2 to the European Communities Act 1972 gives discretion as to which procedure the instrument be subject to. Given that this is consolidation and there is no substantive change in policy nor legal effect, it is considered appropriate for the Regulations to be subject to the negative procedure.

3. Legislative background

The Habitats Regulations 2010, which are made under section 2(2) of the European Communities Act 1972, are the principal means by which the Habitats Directive is transposed for England and Wales and territorial seas.

Corresponding Regulations transpose the Habitats Directive in relation to Northern Ireland and Scotland.

The Habitats Regulations 2017 will continue to implement the Habitats Directive and certain elements of the Birds Directives in England and Wales.

The Habitats Regulations 2010 have been amended ten¹ times since they were last consolidated (in 2010). They are likely to remain in place for some time after the UK exits the EU. It would therefore be good practice to aid usability and clarity to consolidate the Habitats Regulations 2010.

4. Purpose & intended effect of the legislation

The objective of the Habitats Directive is to protect biodiversity through the conservation of natural habitats and species of wild fauna and flora. The Directive lays down rules for the protection, management and exploitation of such habitats and species.

The Habitats Regulations 2017 transpose the Habitats Directive and elements of the Birds Directive in England, Wales and, to a limited extent, Scotland and Northern Ireland.

¹ 2011/603, 2011/625, 2012/630, 2012/635, 2012/637, 2012/1927, 2013/755, 2015/377, 2015/2020, 2016/1154.

In the period since the Habitats Regulations 2010 came into force, they have been amended by ten different Statutory Instruments. It would therefore make sense to consolidate these changes.

Consolidation would make the Habitats Regulations 2017 easier to follow and make any operability changes which may follow the UK's exit from the EU easier to understand.

In addition to consolidating the Habitats Regulations 2010, the Habitats Regulations 2017 make a number of minor amendments. These amendments do not involve new changes in policy, but reflect amendments to, and made by, other related legislation which have occurred since the Habitats Regulations 2010 were made. The amendments are set out below:-

- adds the River Tweed Commission as a Relevant Authority European sites and European marine sites.
- amends regulations 7 and 68² to include references to section 57(2A) of the Town and Country Planning (Scotland) Act 1997, which do not affect Wales
- removes references to 'regional strategies' and 'responsible regional authorities' to ensure consistency with planning laws in England following changes made by the Localism Act 2011.
- updates the provisions setting penalties for offences under the Regulations, taking into account the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012;
- corrects a previous omission by including a reference to regulation 61(8)³ in regulation 63(2)⁴.
- updates regulations 68 and 69⁵ (and related regulations), which deal with the review of planning permission, to take account of changes to Town and Country planning legislation made by the Growth and Infrastructure Act 2013;
- improves the drafting of regulation 69(2)(a)⁶ to make it clearer that it refers to both local development orders and neighbourhood development orders, although the latter do not apply in Wales;
- corrects a previous error, amending regulation 71⁷ by substituting references to regulation 69⁸ for references to regulation 70(2)⁹;
- removes the now defunct reference to unitary development plans in the definition of "land use plan" in regulation 107¹⁰;
- with regard to England, updates the review provision.

² Regulation 71 of the 2017 Regulations.

³ Regulation 63(8) in the 2017 Regulations.

⁴ Regulation 65(2) in the 2017 Regulations.

⁵ Regulations 70 and 71 in the 2017 Regulations.

⁶ Regulation 71(2)(a) in the 2017 Regulations.

⁷ Regulation 73 in the 2017 Regulations..

⁸ Regulation 71 in the 2017 Regulations.

⁹ Regulation 72(2) in the 2017 Regulations.

¹⁰ Regulation 111 in the 2017 Regulations.

In addition to the amendments listed above, all necessary consequential amendments arising as a result of the consolidation have been included, obsolete legislation revoked and references to obsolete legislation removed.

5. Consultation

No formal public consultation was undertaken as these Regulations do not introduce new policy changes or additional regulatory burden. These Regulations consolidate changes to the Habitats Regulations 2010 and introduce a small number of minor amendments designed to rectify obsolete references or include previous omissions as set out at section 4 above.

6. Regulatory Impact Assessment (RIA)

Having considered the Welsh Ministers' code of practice, a Regulatory Impact Assessment has not been prepared for these Regulations.

The Habitats Regulations 2017 contain no substantive changes to existing policies and procedures.

There is no impact on business, charities or voluntary bodies over and above that which arises from the Habitats Regulations 2010 (as amended).

There is no substantive impact on the public sector. There may be some minor impact on Government Departments and Agencies which provide guidance on the Habitats Regulations, in relation to the need to provide an update to the numbering of the Regulations within the guidance. There are no policy or other substantive changes in the Habitats Regulations 2017 and so no need for substantive new guidance.