

INFORMATION NOTE

Amendments to the Conservation (Natural Habitats &c.) Regulations 1994

Number: IN 04/07

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<p>Who Should Read this: All DE Offices, CESOs, CEstOs and RPC/PPP/PFI Managers</p>	
<p>When it takes effect: Immediate</p>	<p>When it is due to expire: 21 May 08</p>

Document Aim: To provide guidance on the changes effected by the amendments to the UK Conservation (Habitats &c.) Regulations 1994 (Habitats Regulations) and species protection measures

The amendment regulations for Scotland are now in force (February 2007). The amendment regulations for England, Wales and Northern Ireland will be in force from 21 August 2007.

Introduction

1. The Habitats Regulations transpose the European Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992).
2. The European Commission took the UK to the European Court of Justice (ECJ) over the transposition of the Directive into UK law. The ECJ ruled in 2005 that the species protection provisions in the UK Habitats Regulations were not compatible with the transposition of the strict species protection regime as set out in Article 12 of the Habitats Directive. A separate, related judgement ruled that trade of all species listed on Annex IV of the Directive should be prohibited and not just those found in Great Britain.
3. Changes were also required for the application of the Directive in Gibraltar, legislation to apply the Directive in the offshore environment, and various changes to other pieces of legislation including the Conservation of Seals Act 1970.

What are the main changes?

4. Changes apply to the following:

Habitats Regulations

Regulation 40	Exceptions from regulation 39 (Regulation 39 Protection of wild animals of European protected species).
Regulation 43	Protection of wild plants of European protected species

5. The ECJ judgment ruled that the defences or exceptions (derogations) in regulation 40 to the offences in regulation 39, did not meet the strict derogations tests set out in Article 16 of the Habitats Directive, and in particular, the 'incidental result of a lawful operation' defence.
6. Therefore, the majority of the defences have been removed from regulation 40 for animals and also regulation 43 for plants. The offence of deliberate disturbance to European Protected Species (EPS) has been more greatly defined.
7. The changes will provide greater protection for EPS. Those carrying out activities that may affect EPS will now have to consider the presence of EPS and their breeding sites or resting places. With this knowledge, operators may choose to avoid affecting EPS or obtain a licence to carry out an activity that would otherwise be unlawful. The licence process will ensure that there will be at least no detrimental effect to the favourable conservation status of EPS.
8. It will now also be an offence to possess, transport, sell or exchange or offer for sale or exchange any species listed on Annex IV of the Directive without a licence.

Which protected species are affected by the change?

9. The changes apply to European Protected Species of animal and plant that are listed in the schedule 2 and 4 of the Habitats Regulations. It does not apply to birds, which continue to be protected under the Wildlife and Countryside Act 1981(as amended).

What are the implications for MOD?

10. There is no Defence or Crown Exemption to the Habitats Directive or Regulations, and these amendments will apply to the MOD estate, and MOD activities. As the MOD Estate supports a high level of biodiversity, there is a high risk of EPS being encountered.

Protection of EPS

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

11. EPS are currently also protected under the Wildlife and Countryside Act 1981 (WCA) through their listing in Schedules 5 and 8. The protection of EPS has been removed from the WCA so that the defences which are being removed from regulations 39 and 43 of WCA do not apply.
12. To ensure that enforcement provisions of EPS are consistent with the WCA the same enforcement powers now apply to the WCA 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.

Will there be changes to the licensing of EPS?

13. Licences will be issued under the Habitats Regulations by licensing authorities; Natural England in England, Countryside Council for Wales and National Assembly for Wales in Wales, Scottish Executive in Scotland or Environment and Heritage Service in Northern Ireland.
14. In order to reduce the burden on licence applicants, Defra and the devolved administrations 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, a new purpose has been added which permits the taking or the possession of Annex IV species on a strictly limited basis, to a limited extent and in limited numbers. The application of this purpose will be assessed on its merits and will be strictly applied.

Ongoing activities (military)

Will I need a licence for military training activities that might disturb EPS?

15. Unless evidence shows a significant impact on an EPS, existing military activities will not require a licence, as long as existing operating procedures and policy are applied.
16. 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 affects the ability of a species to survive, breed, or rear or nurture its young or the local distribution or abundance of that species. If existing mitigation and avoidance methods are used to minimise impacts, then even if a group of individuals are affected, an offence will not be committed.

17. Most activities will be able to continue without restrictions. However, in some cases, particularly for example, new or intensified activities 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 the activity is not detrimental to the favourable conservation status of the EPS. Activities under licence will need to meet conditions such as following good practice and mitigation to ensure there is no detrimental effect of FCS of the EPS concerned.
18. New or intensified activities on areas will need to be assessed for their potential impacts on EPS to identify any modification that should be applied to avoid an offence being committed, or whether a species licence will be required. A licence will require strict tests to be met to show the activity is not detrimental to the favourable conservation status of the EPS.

On-going activities (forestry and agricultural practices)

What will the impact be on forestry and agriculture operators?

19. There will be an increased burden for forestry and agriculture operations as they will now need to consider the presence of EPS and their breeding sites and resting places as the incidental result of a lawful operation defence has been removed.
20. This does not mean that every forestry and agricultural operation will need to be licensed. An activity will only need to be licensed if it is likely to commit an offence against an EPS i.e. it deliberately captures, injures, or kills, deliberately disturbs or deliberately takes or destroys eggs; or damages or destroys a breeding site or resting place of an EPS.

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

21. 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 the activity is not detrimental to the favourable conservation status of the EPS. Activities under licence will need to meet conditions such as following good practice and mitigation to ensure there is no detrimental effect on FCS of EPS.

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

22. Any 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.

Do I need to consider EPS when meeting my cross-compliance commitments for the Single Farm Payment?

23. Meeting the requirements of the Habitats Regulations is part of the cross-compliance commitments for the Single Farm Payments. Those carrying out agricultural or forestry operations will need to consider whether they are committing an offence against EPS and act accordingly.

Ongoing activities (Both military and estate management)

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

24. As the incidental result of a lawful operation defence has been removed operators are now open to this strict liability offence, whether 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 or newts, it is not always possible to identify all breeding sites and resting places and there is a risk of committing an offence accidentally. However, the Crown Prosecution Service, in deciding whether to take forward a prosecution, will assess whether it would be in the public interest to do so.

How will I know if I am committing an offence of deliberately disturbing an EPS?

25. 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 be committed if the deliberate disturbance affects the ability of a species to survive, breed, or rear or nurture its young or the local distribution or abundance of that species.

What will happen if I do not follow licence conditions?

26. It will now be an offence to not follow conditions set out in an EPS licence. However, there is a defence if you took all reasonable precautions and exercised all due diligence to avoid committing the offence or the offence was committed due to matters beyond your control.

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

27. Guidance will be provided by Natural England, Countryside Council for Wales and Forestry Commission on how to identify the presence of EPS and their breeding sites or resting places.
28. DE Operations Environmental Support Team (Natural Environment) (DE Ops EST) maintain records of where known EPS can be found, and can provide guidance on minimising and avoiding impacts on EPS. Specific MOD Guidance is also being developed to inform activity planning and estate management to avoid offences being committed under the amended regulations.

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

29. 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. 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. This is often highly influenced by seasonal constraints.
30. DE Ops EST (Natural Environment) can provide advice on information requirements and apply for licences, particularly for urgent operational activities.

How will the changes affect EPS in dwelling houses?

31. The defences for EPS in dwelling houses have been removed. It will now be an offence to deliberately disturb or damage or destroy a breeding site or resting place of an EPS within a dwelling house. Where previously householders had to write to the relevant statutory body prior to the disturbing activity, it is now an offence to deliberately disturb or damage or destroy a breeding site or resting place of a bat in a dwelling house without a licence. This was always the case, the defence for householders was to contact the SB first.

Prohibition of the use of indiscriminate means of capture and killing

What will be the impact of the changes?

32. A general prohibition on the use of indiscriminate means of capture and killing has been added to the regulations. This covers any methods that are not already listed in Regulation 41.

Will there be restrictions on the types of legal methods used to capture Annex V species (species that can be taken)?

33. There will be no restrictions on the legal methods used to capture or kill Annex V species such as the use of traps and snares.

Will there be guidance available on how to avoid committing the offence?

34. Guidance will be made available that will provide an outline of how preventative action may be taken to avoid committing the offence by Defra and the statutory conservation bodies. DE ES&P will also be developing further guidance in due course on EPS and compliance for MOD.
35. Further advice on managing your activity to ensure compliance can be sought from the above contact point, or from DE Operations Environmental Support Team (naturalenvironmentmailbox@de.mod.uk)
36. Further advice about the legislation and policy changes, contact DE ES&P Sustainable Development on 9355 84142 (espsustainability@de.mod.uk)
37. Details of Annex V species can be found at:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML>