

*These notes refer to the Natural Environment and Rural Communities Act 2006 (c.16) which received Royal Assent on 30 March 2006*

# NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3: Wildlife etc.**

#### **Biodiversity**

##### *Section 40: Duty to conserve biodiversity*

112. This section and sections 41 and 42 replace section 74 of the Countryside and Rights of Way Act 2000 (conservation of biological diversity). In these notes, that Act is referred to as “CRoW”.
113. *Section 40* extends to all public authorities the existing section 74 duty to have regard to biodiversity as far as is consistent with the proper exercise of their functions. However, only Ministers, government departments and the National Assembly for Wales (that is, roughly, those bound by the original section 74 CRoW duty) are obliged to have particular regard to the 1992 Convention; other public authorities are not. “Public authority” is defined in section 40. It includes, for example, local authorities, local planning authorities and statutory undertakers.

##### *Section 41: Biodiversity lists and action (England)*

114. This section replaces and reflects what is in existing subsections (2) to (5) of section 74 of CRoW. It places a duty on the Secretary of State to publish, review and revise lists of living organisms and types of habitat in England that are of principal importance for the purpose of conserving English biodiversity, and to consult Natural England before doing so. It also requires the Secretary of State to take, and promote the taking of, steps to further the conservation of the listed organisms and habitats. A list was published in 2002 under the existing duty placed on the Secretary of State by section 74(5) of CRoW.

##### *Section 42: Biodiversity lists and action (Wales)*

115. This section is equivalent to section 41, but relates to Wales rather than England. It requires the National Assembly for Wales to publish, review, revise and act on lists of organisms of principal importance in Wales. The Countryside Council for Wales is the body to be consulted.

#### **Pesticides harmful to wildlife**

##### *Section 43: Possession of pesticides harmful to wildlife*

116. The Secretary of State may, by negative resolution order, prescribe those ingredients of pesticides that she believes could cause harm to wild birds and/or animals. An order under section 43 could be made in relation to several pesticide ingredients that have

been linked with poisoned bait and that are known to be very dangerous to animals, in particular to birds of prey. It will be an offence to possess a pesticide containing a prescribed ingredient unless it can be shown that possession was for lawful use in accordance with relevant pesticide, biocide or poisons legislation.

117. Existing legislation in Part 1 of the Wildlife and Countryside Act 1981 already provides for an offence where it can be shown that a person has set or used a poisoned bait (sections 5(1)(a) and (b) and 11(2)(a) and (b)). However, in practice, it has been difficult to prove that the person set or used the bait, and so under the new section 43 offence it will not be necessary to show this.
118. A similar offence to that set out in section 43 has been introduced in Scotland by the Nature Conservation (Scotland) Act 2004.
119. The offence in section 43 is not inserted in the 1981 Act partly for reasons connected with enforcement powers. Section 43 needs to be read with section 44, which confers enforcement powers in connection with the new offence, including certain powers contained in Schedule 2 to the Food and Environment Protection Act 1985 (FEPA) that are available in connection with other provisions regulating pesticides.

#### ***Section 44: Enforcement powers in connection with pesticides***

120. The inspectors on whom the enforcement powers under this section are conferred will be authorised by the Secretary of State (in England) or the National Assembly for Wales (in Wales).
121. Under *subsection (1)* inspectors may enter premises to check if persons have a pesticide containing a prescribed ingredient in storage without any lawful use for it if they have reasonable grounds to suspect that they may find evidence of an offence. This power could be used where there have been reports of poisoning wild birds or animals in a neighbourhood and an inspector wishes to check for possession of such pesticides in that neighbourhood. The inspector can require the disclosure of information under (1) (b) about any substance that he finds.
122. *Subsection (4)* applies most of the enforcement provisions of Schedule 2 to FEPA to the enforcement of the offence in section 43. This is particularly significant in connection with the power of entry conferred by subsection (1)(a) of section 44. Under paragraph 7 of Schedule 2 to FEPA, an inspector may enter a dwelling only if a justice of the peace has issued a warrant authorising him to do so. Such warrant will only be issued in certain prescribed circumstances as listed in that Schedule (for instance, where it is not possible to communicate with any person entitled to grant entry to the dwelling).
123. Authorised inspectors using enforcement powers under paragraph 2 of Schedule 2 to FEPA may bring with them other persons and any equipment or materials to assist them in performing their functions. They must only operate at reasonable hours. Additionally they will be able to use reasonable force to perform their functions (for example in opening containers). They can photograph evidence. Related offences are provided for under paragraph 10 of the FEPA Schedule. These include supplying false information to an inspector and obstructing an inspector who is performing his duties.
124. By virtue of *subsection (1)(c)* an inspector can seize any substance that he has reasonable grounds to believe to be a pesticide containing a prescribed ingredient. This power could be used to take a sample for analysis, or to take the whole of the substance away.
125. *Subsections (5) to (8)* provide safeguards in connection with seizure and a procedure for recovery of the seized substance if proceedings are not brought or after the completion of any criminal proceedings.

### **Section 45 Codes of Practice**

126. The Secretary of State may issue a code that details how the authorised pesticide inspector will conduct himself before, during and after he has entered premises under the powers given by section 44. The inspector must have regard to such code and it will be admissible in evidence in any proceedings where it can be taken into account by a court.

### **Section 46: Interpretation**

127. *Subsection (2)* defines “pesticide”. The term can include substances, preparations or organisms prepared or used for destroying any pests.
128. *Subsection (3)* defines “wild bird” and “wild animal”. Under the Wildlife and Countryside Act 1981 “wild bird” means any bird of a species that is ordinarily resident in or is a visitor to the European territory of any member state in a wild state, but does not include poultry, or game birds (other than in a few specified circumstances). “Wild animal” under the 1981 Act means any animal (other than a bird) which is or (before it was taken) was living wild.
129. It is necessary to be able to inspect not only land and buildings but also vehicles, vessels and so on, and therefore in *subsection (4)* “premises” is given an extended meaning. It is not uncommon in legislation for the meaning of “premises” to be extended in this way.

## **Protection of birds**

### **Section 47: Protection of nests of certain birds which re-use their nests**

130. This section introduces a new paragraph into section 1(1) of the Wildlife and Countryside Act 1981. The new paragraph makes it an offence, at any time of the year, to take, damage or destroy the nest of a wild bird species included in a new Schedule ZA1 to the 1981 Act. Schedule ZA1 contains three bird species which traditionally re-use their nests: the golden eagle (*Aquila chrysaetos*), the white-tailed eagle (*Haliaeetus albicilla*), and the osprey (*Pandion haliaetus*). Section 22 of the 1981 Act is also amended so that the list of species in Schedule ZA1 may be changed by the Secretary of State by order.

### **Section 48: Birds released into the wild as part of a re-population programme**

131. This section substitutes a new section 1(6) in the 1981 Act and thus extends the protection afforded to wild birds under section 1 of that Act to birds which have been bred in captivity and lawfully released into the wild as part of a re-population or re-introduction programme. The section also substitutes a new subsection 6(5) in the 1981 Act which has the effect of making it an offence under section 6(1) to sell, offer or expose for sale, or have in possession or transport for the purpose of sale any live, captive-bred wild bird included in the relevant list (under Part 1 of Schedule 3 to the 1981 Act) which has been released into the wild as part of a re-population or re-introduction programme.

### **Section 49: Registration etc. of certain captive birds**

132. This section amends section 7(3A) of the 1981 Act and makes it an offence to keep or have in one’s possession any bird listed in Schedule 4 to the 1981 Act within 5 years of having been convicted of an offence under section 7(1) of the 1981 Act. Under section 7(1) it is an offence to keep or have in one’s possession any bird included in Schedule 4 to the 1981 Act which has not been registered and ringed or marked in accordance with regulations made by the Secretary of State.

## **Invasive non-native species**

### ***Section 50: Sale etc. of invasive non-native species***

133. This section introduces a new section 14ZA into the 1981 Act.
134. Under section 14ZA(1), it is an offence to sell, offer or expose for sale, or to have in one's possession or transport for the purpose of sale, any animal or plant to which the section applies or anything from which such an animal or plant can be propagated, such as an egg or a seed. Under section 14ZA(2) it is also an offence to publish or cause to be published any advertisement for the purchase or sale of these animals and plants.
135. Section 14ZA(3) sets out the animals and plants to which the offences in section 14ZA(1) and (2) apply. These are live animals and plants which are included in section 14(1) or (2) of the 1981 Act (animals and plants which must not be released etc. into the wild) **and** which have been prescribed by an order made by the Secretary of State.
136. Under section 14ZA(5) there is a defence available to these new offences where the accused took all reasonable steps and exercised all due diligence to avoid committing the offence.

### ***Section 51: Codes of practice in connection with invasive non-native species***

137. This section introduces a new section 14ZB into the 1981 Act 1981 which gives the Secretary of State the power to issue codes of practice, or approve a code of practice issued by others, relating to non-native animal and plant species. It is intended that the codes will be used to provide recommendations, advice and information on how to stop the damage caused by non-native animals and plants.
138. Failure to comply with such a code is not in itself an offence; however it may be used as admissible evidence in any criminal or civil proceedings and a court must take account of a failure to comply with the code where it considers this to be relevant. For example, in proceedings for the release of a non-native species prohibited under section 14(1) of the 1981 Act, compliance with the code could be used to decide whether the accused may rely on the due diligence defence contained in section 14(3).

## **Enforcement etc of provisions relating to wildlife**

### ***Section 52: Enforcement powers in connection with wildlife***

139. This section introduces Schedule 5, which inserts various new sections relating to enforcement into the 1981 Act, and applies enforcement provisions under the 1981 Act to the other four main Acts that deal with licensing for the protection of wildlife: the Destructive Imported Animals Act 1932, the Conservation of Seals Act 1970, the Deer Act 1991 and the Protection of Badgers Act 1992.