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STATUTORY INSTRUMENTS

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**2009 No. 6**

**WILDLIFE, ENGLAND AND WALES**

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

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|-------------------------------|---------|--------------------------|
| <i>Made</i>                   | - - - - | <i>5th January 2009</i>  |
| <i>Laid before Parliament</i> |         | <i>8th January 2009</i>  |
| <i>Coming into force</i>      | - -     | <i>30th January 2009</i> |

The Secretary of State is designated<sup>(1)</sup> for the purposes of making Regulations under section 2(2) of the European Communities Act 1972<sup>(2)</sup> in relation to the environment.

The Secretary of State makes these Regulations in exercise of the powers conferred by that section.

**Title, commencement and extent**

1.—(1) These Regulations may be cited as the Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2009 and come into force on 30th January 2009.

(2) These Regulations extend to England and Wales only.

**Amendments**

2. The Conservation (Natural Habitats, &c.) Regulations 1994<sup>(3)</sup> are amended as follows.

3. In regulation 2(1), omit the definition of “agriculture Minister”.

4. In regulation 4(4), in paragraph (2), for “In Parts IV and IVA” substitute “In regulations 37A and 41A and in Parts IV and IVA”.

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(1) [S.I. 2008/301](#).

(2) [1972 c. 68](#).

(3) [S.I. 1994/2716](#). Relevant amendments have been made by [S.I. 2007/1843](#) and [S.I. 2008/2172](#). The 1994 Regulations make provision for the purpose of implementing, for Great Britain, Council Directive [92/43/EEC](#) on the conservation of natural habitats and of wild flora and fauna (O.J. No. L206, 22.07.92, p.7) as last amended by Council Directive [2006/105/EC](#) of 20 November 2006 adapting Directives [79/409/EEC](#), [92/43/EEC](#), [97/68/EC](#), [2001/80/EC](#) and [2001/81/EC](#) in the field of environment, by reason of the accession of Bulgaria and Romania (O.J. No. L363, 20.12.06, p.368). In relation to Wales, the functions of the Secretary of State under the 1994 Regulations were transferred to the National Assembly for Wales (with the exception of those under regulations 71 to 78) by article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 ([S.I. 1999/672](#)). By virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006, the relevant functions were transferred from the National Assembly for Wales to the Welsh Ministers.

(4) Regulation 4 was substituted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (6).

5. In regulation 37A<sup>(5)</sup>—
- (a) in paragraph (1), after “arrangements” insert “in accordance with paragraphs (3A) to (3C)”;
  - (b) after paragraph (3) insert—
    - “(3A) The appropriate nature conservation body shall—
      - (a) assess how and to what extent surveillance of the conservation status of each relevant habitat and species needs to be carried out, having regard to—
        - (i) whether a habitat or species is a priority natural habitat type or priority species; and
        - (ii) the conservation status of the habitat or species; and
      - (b) advise the Secretary of State or the Welsh Ministers as to the need for such surveillance.
    - (3B) The Secretary of State (in England) and the Welsh Ministers (in Wales) shall ensure that the necessary surveillance is carried out on an ongoing basis.
    - (3C) Surveillance for the purposes of this regulation may be carried out by—
      - (a) a nature conservation body;
      - (b) any other person acting pursuant to, and in accordance with, an agreement with the Secretary of State, the Welsh Ministers or a nature conservation body.
    - (3D) In paragraph (3A), a “relevant” habitat or species means a habitat or species in England or Wales of a type referred to in paragraph (1).”.
6. In regulation 37B<sup>(6)</sup>—
- (a) for paragraph (1) substitute—
    - “(1) The Secretary of State shall, as required in the light of information derived from surveillance arranged under regulation 37A or otherwise arranged for the purpose of Article 11 of the Habitats Directive, ensure that measures are taken in England for the purpose mentioned in paragraph (2).”;
  - (b) in paragraph (3), for “Where the Secretary of State considers that measures are necessary under paragraph (1) he shall” substitute “Where measures are required under paragraph (1), the Secretary of State shall”;
  - (c) for paragraph (4) substitute—
    - “(4) The Welsh Ministers shall, as required in the light of information derived from surveillance arranged under regulation 37A or otherwise arranged for the purpose of Article 11 of the Habitats Directive, ensure that measures are taken in Wales for the purpose mentioned in paragraph (5).”;
  - (d) in paragraph (6), for “Where the Welsh Ministers consider that measures are necessary under paragraph (4) they shall” substitute “Where measures are required under paragraph (4), the Welsh Ministers shall”.
7. In regulation 39<sup>(7)</sup>—
- (a) in paragraph (1)(b), omit the words from “in such a way” to the end;
  - (b) after paragraph (1) insert—

<sup>(5)</sup> Regulation 37A was inserted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (12).

<sup>(6)</sup> Regulation 37B was inserted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (12).

<sup>(7)</sup> Regulation 39 was substituted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (13), and amended by [S.I. 2008/2172](#), regulation 3.

“(1A) For the purposes of paragraph (1)(b), disturbance of animals includes in particular any disturbance which is likely—

- (a) to impair their ability—
  - (i) to survive, to breed or reproduce, or to rear or nurture their young; or
  - (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
- (b) to affect significantly the local distribution or abundance of the species to which they belong.”;

(c) for paragraphs (12) and (13) substitute—

“(12) Guidance as to the application of the offences in paragraph (1)(b) or (d) in relation to particular species of animals or particular activities may be published by—

- (a) the Secretary of State (in relation to England) or the Welsh Ministers (in relation to Wales); or
- (b) the appropriate nature conservation body, with the approval of the Secretary of State (in relation to England) or the Welsh Ministers (in relation to Wales).

(13) In proceedings for an offence under paragraph (1)(b) or (d), a court shall take into account any relevant guidance published under paragraph (12).”; and

(d) omit paragraphs (14) to (16).

**8.** In regulation 40(8), after paragraph (4) insert—

“(4A) The defences in paragraphs (1) to (4) do not apply where it is shown by the prosecution that the defendant’s action did not satisfy the conditions in paragraph (4B).

(4B) Those conditions are that—

- (a) there was no satisfactory alternative; and
- (b) the action was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.”.

**9.** In regulation 41A(9)—

(a) in paragraphs (1) and (3), after “arrangements”, insert “in accordance with paragraphs (4A) to (4C)”;

(b) after paragraph (4) insert—

“(4A) The appropriate nature conservation body shall, in relation to the species of animals listed in Annex IV(a) to the Habitats Directive which are found in England or in Wales (as the case may be)—

- (a) identify the risks of incidental capture and killing to which those species are subject, and the activities which give rise to such risks;
- (b) maintain a record of instances of incidental capture or killing of animals of those species of which the nature conservation body is aware as a result of the surveillance carried out under regulation 37A, the monitoring carried out under this regulation or otherwise;
- (c) assess to what extent monitoring of incidental capture and killing is needed, having regard to—
  - (i) the risks identified under sub-paragraph (a);

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(8) Regulation 40 was substituted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (14).

(9) Regulation 41A was inserted in relation to England and Wales by [S.I. 2007/1843](#), regulation 5(1) and (16).

- (ii) the instances of incidental capture or killing recorded under subparagraph (b);
- (iii) whether the species is a priority species; and
- (iv) the conservation status of the species; and
- (d) advise the Secretary of State or the Welsh Ministers as to the need for such monitoring.

(4B) The Secretary of State (in England) and the Welsh Ministers (in Wales) shall ensure that the necessary monitoring of incidental capture and killing is carried out.

(4C) Monitoring for the purposes of this regulation may be carried out by—

- (a) a nature conservation body;
- (b) any other competent authority;
- (c) any other person acting pursuant to, and in accordance with—
  - (i) an agreement with the Secretary of State, the Welsh Ministers or a nature conservation body; or
  - (ii) a condition of a licence or other authorisation granted by a competent authority.”.

**10.** In regulation 41B(10)—

- (a) for paragraph (1) substitute—

“(1) The Secretary of State shall (in England), as required in the light of information derived from monitoring arranged under regulation 41A or otherwise arranged for the purpose of Article 12(4) of the Habitats Directive, make arrangements for further research for, or ensure that conservation measures are taken for, the purpose specified in paragraph (2).”;

- (b) for paragraph (3) substitute—

“(3) The Welsh Ministers shall (in Wales), as required in the light of information derived from monitoring arranged under regulation 41A or otherwise arranged for the purpose of Article 12(4) of the Habitats Directive, make arrangements for further research for, or ensure that conservation measures are taken for, the purpose specified in paragraph (4).”.

**11.** In regulation 44(11)—

- (a) in paragraph (4)(b), for “the agriculture Minister” substitute “the Secretary of State (in relation to England) or the Welsh Ministers (in relation to Wales)”;
- and

- (b) for paragraph (5) substitute—

“(5) The Secretary of State shall from time to time consult with Natural England as to the exercise of the Secretary of State’s functions under this regulation, and shall not grant a licence of any description unless Natural England has advised as to the circumstances in which, in its opinion, licences of that description should be granted.

(6) The Welsh Ministers shall from time to time consult with the Countryside Council for Wales as to the exercise of the Welsh Ministers’ functions under this regulation, and shall not grant a licence of any description unless the Countryside Council for Wales has advised as to the circumstances in which, in its opinion, licences of that description should be granted.”.

(10) Regulation 41B was inserted in relation to England and Wales by S.I. 2007/1843, regulation 5(1) and (16).

(11) Regulation 44 was amended in relation to England and Wales by S.I. 2007/1843, regulation 5(1) and (18).

5th January 2009

*Hilary Benn*  
Secretary of State  
Department for Environment, Food and Rural  
Affairs

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend, in relation to England and Wales, the Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”), which make provision implementing Council Directive [92/43/EEC](#) on the conservation of natural habitats and of wild flora and fauna (“the Habitats Directive”) (O.J. No. L206, 22.07.92, p.7).

Regulations 5 and 6 amend regulations 37A and 37B of the 1994 Regulations to specify in greater detail the arrangements to be made for surveillance of the conservation status of natural habitat types of Community interest and species of Community interest, and to clarify the duty to take action in the light of that surveillance. Similarly, regulations 9 and 10 amend regulations 41A and 41B of the 1994 Regulations to specify in greater detail the arrangements to be made for monitoring the incidental capture and killing of animals of the species listed in Annex IV(a) to the Habitats Directive, and to clarify the duty to take conservation measures in the light of that monitoring.

Regulation 7 amends regulation 39 of the 1994 Regulations by:

- (a) amending the terms of the offence in regulation 39(1)(b) of deliberately disturbing a European protected species of animal;
- (b) making provision for the publication of guidance as to the application of the offences in regulation 39(1)(b) and (d) in relation to particular species of animals or particular activities, and requiring the court to take account of any such guidance in proceedings for an offence under those provisions; and
- (c) revoking regulation 39(14) to (16), which contained special provision as to the interpretation of the offence in regulation 39(1)(b) in relation to sea fishing.

Regulation 8 amends regulation 40 of the 1994 Regulations, which contains defences to the offences relating to European protected species in regulation 39, by providing that those defences do not apply if the prosecution shows that there was a satisfactory alternative to the defendant’s action, or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

A transposition note setting out how the amendments transpose the provisions of the Habitats Directive is available from the Wildlife, Habitats and Biodiversity Division, Defra, Temple Quay, Bristol BS1 6EB, and is annexed to the Explanatory Memorandum which is available along the instrument on the OPSI website. A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.