

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

Summary

Scottish Environment LINK members wish to highlight the following concerns with respect to the Scottish Statutory Instrument seeking to retain provisions under the EU Birds and Habitats Directives¹:

- 1) Deficient management objectives with respect to the use of 'proportionality' for Special Areas of Conservation
- 2) Lack of clarity with respect to the timeframe and process for developing statutory guidance
- 3) Absence of expert scientific input for amending Schedules and Annexes
- 4) Implications in terms of scope and clarity due to renaming of the Natura 2000 Network
- 5) Lack of clarity in terms of format, scope and review of reporting requirements
- 6) Residual differences and gaps compared to other UK country regulations
- 7) Incomplete references to international agreements in explanatory notes

Scottish Environment LINK² members welcome the effort to provide certainty through the [Scottish statutory instrument \(SSI\)³ to](#) the Conservation (Natural Habitats, &c.) Regulations 1994 to ensure that provisions of the Birds and Habitats Directives continue to be operable in Scotland.

LINK members consider that these Directives are of critical importance to Scotland's environment and planning system and note that this legislation is fit for purpose as confirmed by a recent EU-wide review⁴. What is more, LINK members also note that in 2016, the Scottish Government had stated its support for the Directives and that it did "not wish to seek the renegotiation of the directives"⁵.

However, as preparations for a No Deal EU Exit continue, LINK members remain concerned about the absence of any proposals from Scottish Government with respect to future or even interim environmental governance measures, which would be critical to ensuring the proper implementation of all retained environmental EU law. Members are concerned about the lack of clear proposals for addressing the identified environmental governance gap in the future, as articulated in previous LINK evidence and the "Environmental governance in Scotland after Brexit: report" commissioned by Cabinet Secretary Roseanna Cunningham⁶.

While at present the Committee's scrutiny is limited to the aforementioned instrument, it is LINK's view that efforts to retain EU law will be severely hampered if there are no governance mechanisms to ensure its implementation. This also would compromise the Scottish Government's own ambition "to maintain or exceed

¹ http://ec.europa.eu/environment/nature/legislation/birdsdirective/index_en.htm & http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

² Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

³ the Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019

⁴ Commission evaluation shows Nature Directives are fit for purpose:

http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm

⁵ <http://www.scotlink.org/public-documents/link-welcomes-minister-statement-on-eu-nature-directives/>

⁶ <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>

EU environmental standards”⁷. We hope the Committee can take this into account in its scrutiny of all relevant EU exit environmental statutory instruments.

In putting forward our views and concerns with respect to EU Exit SIs and SSIs, LINK members are doing so with a view to ensure that:

- (a) Instruments replicate in full current provisions and EU-derived protections
- (b) Any differentiated approach taken by any of the UK’s nations does not lead to environmental harm or reversal or lowering of standards

It should be noted that concerns about this instrument also apply to the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (amending the Offshore Marine Habitats Regulations and the terrestrial English and Welsh Habitats Regs) and the Conservation (Natural Habitats etc) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 (amending terrestrial NI Habitats Regs).

While there are some welcome provisions contained in the instrument, LINK members remain concerned about the following issues:

1. USE OF PROPORTIONALITY IN MANAGEMENT OBJECTIVES FOR SACS

We welcome the management objectives (new reg 9D⁸) and the helpful detail required to ensure that legal requirements for both Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) and their joint network are included.

However, the first SAC objective includes the following, apparently invoking the general principle of EU law of proportionality:

“favourable conservation status...so far as it lies in the United Kingdom’s territory, **and so far as is proportionate**” (new Reg 9D(2)(a), emphasis added)

This introduction of the proportionality test introduces the possibility of permitting activity within protected sites that would otherwise not be allowed.

While Regulation 9D(6)⁹ suggests that the proportionate language is an attempt to mirror Article 3(2) of the Habitats Directive,¹⁰ this would be erroneous. The reference to proportion in Article 3(2) is to do with the **designation** of sites, not their **management**.

The introduction of a proportionality test in Regulation 9D(2)(a) is thus a legal error since it creates a restriction that is not in the Habitats Directive. There is also a rule of law issue here since the SSI uses the technical legal terminology of ‘proportionality’ in a confusing and unclear way.

Due to this error, the SSI, as drafted, does not faithfully carry over the Directive’s provisions into Scots law. If the current affirmative process does not permit any change now, we seek a commitment that this will be reviewed, as soon as possible, as part of any subsequent ‘wash-up’.

2. NO TIMEFRAME AND PROCESS FOR DEVELOPING STATUTORY GUIDANCE

⁷ Scottish Government environmental principles and governance in Scotland consultation paper: <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

⁸ Reg 11, Amending Reg

⁹ “proportionate to the relative importance of— (a) the part of the natural range lying in the United Kingdom’s territory; and (b) the part of the natural range lying outside the United Kingdom’s territory; for achieving a favourable conservation status.”

¹⁰ “Each Member State shall contribute to the creation of Natura 2000 **in proportion** to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1”

We welcome the new provision for Statutory Guidance (new Reg 2A(4)¹¹) and explicit commitment to consult with the appropriate nature conservation bodies.

However, we would also suggest that this guidance is urgently required to ensure clarity across sectors and stakeholders on the meaning of all the changes. At the moment, stakeholders and operators rely on extremely useful guidance from the European Commission (EC). It is therefore imperative for guidance to be issued speedily. We would strongly advocate that this retains the majority of existing EC guidance content and ensure consistency with the European Court of Justice rulings, as appropriate.

Scottish Ministers should undertake to produce statutory guidance within three months of the SSI passing and we would welcome the opportunity to provide input.

We understand that there is an ongoing Defra-led process for developing a terminology and explanations document. We expect that all UK governments will be involved in this process to ensure legal certainty and consistency of interpretation and avoid the potential for confusion for all stakeholders.

3. ABSENCE OF EXPERT SCIENTIFIC INPUT FOR MAKING CHANGES TO SCHEDULES

The amending regulations (reg 25) introduce a new power for the Scottish Ministers to make changes to Habitat Regulations schedules (which will, due to the amendments, include prohibited methods of capturing and killing) and the Birds and Habitats Directives Annexes (new regs 113 to 115).

Although this power is restricted to changes only being allowed due to “technical and scientific progress” these terms are undefined. What is more, **there is no specific requirement for expert input or even a duty to consult relevant statutory nature conservation advisers and take account of their advice.** This is particularly concerning for those changes that can be made without an affirmative SI and its additional processes.

Defra has confirmed¹² that there will be guidance (once the UK SI is passed) in which the UK Ministers will confirm the process by which they will *seek expert input, including from their statutory advisers, in deciding on any amendment to the schedules and annexes.* And LINK strongly suggests the Devolved Administrations are included from the outset to agree how that important expert input is provided and taken account of.

The Scottish Government must provide, at minimum, similar reassurances and explain how it will seek expert scientific input for making changes to the Schedules.

4. RENAMING TO THE NATURA 2000 NETWORK

Although we welcome the proposed renaming in the Scottish Amending Regs to “the UK Site Network”¹³ and have submitted concerns to Defra about their proposed change to “National Sites Network”, we do have concerns about the resulting confusion for sectors and stakeholders that operate within Scotland and the other UK Countries or the offshore marine environment, due to the same network having different names.

We continue to strongly recommend that the network should be called the International Sites Network to recognise the status of the sites (and their habitats and species) it includes and for it to also include Ramsar sites and their listed features in line with government policy¹⁴ (and also in recognition of their international

¹¹ Reg 5, Amending Regulations

¹² As set out in its response to the House of Lords, Second Legislation Scrutiny Committee, <https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Habitats%20Defra%20Response.pdf>

¹³ Reg 4(2)(g), 4(6) and 11, Amending Regulations

¹⁴ In this respect, we are particularly concerned about the current confusion, despite Cabinet Secretary, Roseanna Cunningham’s confirmation that Ramsar sites and their listed features should be given the same level of protection as SACs and SPAs, there appears to be an attempt to lower this level of protection through the SG’s note (22nd January 2019) undermining the international importance of these sites and their features.

importance). This would avoid any confusion with the current national network of SSSIs and Marine Protected Areas.

5. LACK OF CLARITY IN TERMS OF SCOPE, FORMAT AND REVIEW OF NEW REPORTING REQUIREMENTS

We welcome the new provisions for reporting (new reg 3ZA¹⁵) to bring into domestic legislation the Birds and Habitats Directives requirements for:

- six yearly reporting requirements of Article 17, Habitats Directives and Article 12, Birds Directive;
- Defra to provide a UK composite report within two years and that all reports will be publicly available; and
- the biennial reporting requirements of Article 16, Habitats Directive and Article 11 Birds Directive on exceptions/derogations allowed from the strict species protection provisions.

However, we have a number of concerns about what is absent from these reporting requirements as it is not clear exactly what these reports will cover and whether their format will be comparable between the different requirements, including:

1. **differences in information required for protected species and habitats;**
2. **difference in information required for different types of protected sites – with more information required for SACs than SPAs without explanation as to why; and**
3. **country specific requirements.**

We note that Defra's response to the House of Lords, Secondary Legislation Scrutiny Committee¹⁶ helpfully sets out the current EU processes with respect to the extent and format of these reports being determined in consultation with experts across Member States:

“after Exit Ministers would expect to determine the format of such reports administratively in consultation with our statutory advisers and with those from Devolved Administrations including that we ensure we meet our international reporting obligations.”

We would welcome reassurances from Scottish Ministers that they are committed to the same objectives and approach.

In addition, the Amending Regulations make no provision for these reports to be reviewed and failures highlighted as is currently undertaken by the European Commission. Although we note the requirement to submit these reports to the Bern Convention¹⁷ and welcome the UK Minister's letter confirming the UK's continued commitments to that Convention and its Emerald Network¹⁸ we continue to question whether making reports public and sending to the Bern Convention will ensure timely identification of concerns/additional measures needing to be taken.

Therefore, we continue to suggest that a requirement for an independent review is included within legislation along with recommendations regarding any further action and/or measures needed. For example, the Joint Nature Conservation Committee could be given responsibility for reviewing as an interim measure although ultimately it would be best if any new governance body/bodies undertook these functions.

6. RESIDUAL DIFFERENCES AND GAPS WITH OTHER UK COUNTRY REGULATIONS

¹⁵ Reg 7, Amending Regulations

¹⁶ <https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Habitats%20Defra%20Response.pdf>

¹⁷ Convention on the Conservation of European Wildlife and Natural Habitats, along with the Article 9, Bern Convention requirements to *submit biennial reports on exceptions that have been permitted to the protection of wild flora and fauna and an assessment of their impact*. It should be noted that this requirement in part is in the Offshore Habitats Regulations (Regulation 72(1)(a)) but absent from the Scottish Habitats Regulations despite the amendments discussed above.

¹⁸ Theresa Coffey's letter to the Bern Convention Secretary, 22nd November 2018 (attached).

We welcome the extra new regulations introduced by these Amending Regulations meaning that the Scottish Habitats Regulations will include provisions currently found in the UK offshore, English & Welsh and NI terrestrial Habitats Regulations thus ensuring a consistency of approach and application across all four countries of the UK.

However there appear to be some residual differences and despite all the additions proposed the Scottish Habitats Regulations still do not include all provisions introduced into the UK Marine and English & Welsh Habitats Regulations in 2017.

We would therefore welcome a commitment for a further review once the pressure of around preparations for EU exit have passed and the opportunity to pass on any remaining gaps we identify for your consideration.

7. INCOMPLETE REFERENCES TO INTERNATIONAL AGREEMENTS IN EXPLANATORY NOTES

In Defra's Amending Regulations Explanatory Memorandum reference is made both the Bonn and the Bern Conventions whereas in the Scottish Government's Policy Note there is only the following:

"This will ensure that the UK will continue to meet its international commitments, particularly under the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention)."

We strongly recommend that reference is also made to the Bonn Convention as very relevant for these Habitats Regulations. We suggest that there are other international conventions to which the UK is a signatory and which are also relevant due to the UK in part relying on its compliance with the Birds and Habitats Directives for its ratification and implementation of those conventions.

These include:

- United Nations Convention on the Law of the Sea,
- Convention on Biodiversity;
- Ramsar Convention; and
- the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR).

This LINK Parliamentary Briefing is supported by the following member organisations:

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| • Badenoch & Strathspey Conservation | • Scottish Raptor Study Group |
| • Buglife Scotland | • Scottish Wild Beaver Group |
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For more information contact:

Daphne Vlastari, Scottish Environment LINK Advocacy Manager

Email: daphne@scotlink.org | Tel: 0131 225 4345

www.scotlink.org

www.fightforscotlandsnature.scot

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