

EXPLANATORY MEMORANDUM TO
THE CONSERVATION OF HABITATS AND SPECIES (AMENDMENT) (EU EXIT)
REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument makes changes to the three existing instruments which transpose the Habitats and Wild Birds Directives so that they continue to work (are operable) upon the UK's exit from the European Union (EU). The existing instruments are: The Conservation of Habitats and Species Regulations 2017; The Conservation of Offshore Marine Habitats and Species Regulations 2017; and The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. This instrument also amends section 27 of the Wildlife and Countryside Act 1981 to ensure existing protections continue.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Conservation of Habitats and Species Regulations 2017 and The Conservation of Offshore Marine Habitats and Species Regulations 2017 ("the 2017 Regulations") are the principal pieces of secondary legislation which transpose the terrestrial and offshore marine aspects of the EU Habitats Directive (Council Directive 92/43/EEC) and certain elements of the EU Wild Birds Directive (Directive 2009/147/EC), commonly referred to as the Nature Directives, into domestic law. The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 ("the 2001 Regulations") apply to specific activities only. The Nature Directives lay down rules for the protection and management of habitats and the protection and exploitation of species.

Why is it being changed?

- 2.3 The 2017 and 2001 Regulations fulfil the objectives of the Nature Directives in the UK's terrestrial areas, inland waters and its inshore and offshore marine areas by ensuring that activities are carried out in a manner that is consistent with the Directives. This instrument provides changes to those parts of the 2017 and 2001 Regulations which would no longer work when the UK leaves the EU.

What will it now do?

- 2.4 The intention is to ensure habitat and species protection and standards as set out under the Nature Directives are implemented in the same way or an equivalent way when the UK exits the EU. There is no change to policy.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument varies between provisions.

3.3 This instrument amends two instruments that are limited to England and Wales, which are The Conservation of Habitats and Species Regulations 2017 and The Wildlife and Countryside Act 1981 and two that extend to England, Wales, Scotland and Northern Ireland but are not within devolved competence. Those are The Conservation of Offshore Marine Habitats and Species Regulations 2017 and The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom except for Part 2 which extends to England and Wales, and Part 3 which extends to England and Wales but is subject to regulation 2 of the Conservation of Habitats and Species Regulations 2017 which extend certain provisions in certain circumstances to Scotland and Northern Ireland.

4.2 The territorial application of this instrument is the United Kingdom except for Part 2 which applies to England and Wales.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey, has made the following statement regarding Human Rights:

“In my view the provisions of the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument corrects deficiencies in The Conservation of Habitats and Species Regulations 2017; The Conservation of Offshore Marine Habitats and Species Regulations 2017; and The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 which will arise when the UK exits the EU. It also amends section 27 of the Wildlife and Countryside Act 1981 to maintain existing protections and enforcement for species of wild birds. This instrument is being made using the powers in section 8 (1), and section 14(1) of, paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018. Without these amendments the UK would be unable to continue to apply some of the protection measures provided by EU Habitats Directive (Council Directive 92/43/EEC) and certain elements of the EU Wild Birds Directive (Directive 2009/147/EC).

7. Policy background

What is being done and why?

- 7.1 In order to maintain existing environmental protections when the UK exits the EU and for regulations to operate effectively any deficiencies in existing legislation arising from the UK's exit need to be corrected. This instrument addresses those deficiencies which arise in the 2017 Regulations, The 2001 Regulations, and the Wildlife and Countryside Act 1981 and ensures the UK will continue to meet its international commitments in particular under The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) and The Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention).
- 7.2 Part 1 of this instrument provides a short introduction.
- 7.3 In Part 2 a minor amendment is made to section 27 of the Wildlife and Countryside Act 1981 (WCA). Currently "wild bird" is defined in the WCA in terms of species found in or visiting the European territory of a Member State. On exiting the EU this would mean that species of wild birds found in the UK but not elsewhere in the EU would no longer be protected. To ensure such species of wild birds continue to be protected the definition is amended to add the UK. Species of wild birds found in or regularly visiting either the UK or the European territory of a Member State will continue to be protected.
- 7.4 Part 3 amends the Conservation of Habitats and Species Regulations 2017 (covering England and Wales) and Part 4 amends the Conservation of Offshore Marine Habitats and Species Regulations 2017 (covering the United Kingdom). The changes in Part 4 largely mirror changes made in Part 3. Paragraphs 7.7 to 7.14 provide additional information and detail the main changes.
- 7.5 Part 5 of these regulations amends the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 and is consistent with changes made to the 2017 Regulations.
- 7.6 The costs incurred by the Secretary of State for Business, Energy and Industrial Strategy (BEIS) in exercising imperative reasons of overriding public interest (IROPI) related functions under regulation 6 of the 2001 Regulations which would have previously been undertaken by the European Commission are recovered through fees charged to persons applying for consent to undertake such IROPI projects. These regulations amend the fees provision in regulation 20A of the 2001 Regulations to allow charging for work when carrying out this new activity.
- 7.7 References throughout these regulations are re-defined in a UK only context. For example,
- References to the territory of the EU become references to "the territory of the UK".
 - Sites designated under the Nature Directives previously contributed to the EU's Natura 2000 network. A national site network is created to retain the concept of a UK network of sites. The 'national site network' is defined as including Natura 2000 sites designated prior to EU exit and those Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) designated post EU exit.
 - There is also clarification that any guidance that refers to Natura 2000 is construed as referring to the national site network.

- Various terms in the Habitats and Wild Birds Directives that relate to the EU are amended to be relevant to the UK after EU exit. It also clarifies that any reference to the “the requirements of the Directive” should be understood to include the management objectives of the national site network. A power is also provided for the relevant appropriate authority¹ to provide guidance to interpret these requirements should there be a need for further clarification.
- 7.8 Current references to “European site”, “European Marine Site”, “Special Area of Conservation” and “Special Protection Area” are retained as there is no operability reason for these to change.
 - 7.9 Reporting requirements are transposed by these Regulations and reporting will no longer be to the European Commission. Each appropriate authority will report publically on the implementation of the Regulations within six years from the date of exit and every six years thereafter and the Secretary of State will compile these into a combined report within 2 years of that. Biennial reporting on the use of exemptions/derogations from protections is maintained.
 - 7.10 At present the European Commission considers the designation of new SACs in a 2-stage process based on criteria set out in Annex III of the EU Habitats Directive. The European Commission’s role is removed by transferring the assessment function to the appropriate authority acting on the advice of the appropriate nature conservation body and the Joint Nature Conservation Committee (JNCC). Where a site may be part way through designation at the time of exit the means is provided to either complete the designation process or explain why that process will not now go ahead.
 - 7.11 Management objectives are established for the national site network. Appropriate authorities are required to manage, and where necessary, adapt the national site network and co-operate with each other to meet the management of objectives of the national site network. The management objectives encompass the requirement to maintain or restore habitats and species to favourable conservation status and contribute to ensuring the survival and reproduction of birds in their area of distribution. These objectives need to be considered in combination with the existing general duty on Ministers to secure the requirements of the Directives when exercising their functions. Appropriate authorities must also have regard to these objectives for the management of SACs and SPAs.
 - 7.12 The role of the European Commission in giving an opinion as to whether imperative reasons of overriding public interest (IROPI) apply in relation to plans and projects adversely affecting priority habitats or species (as listed in Annex I and II of the EU Habitats Directive), where the overriding public interest reasons do not relate to human health, public safety or beneficial consequences of primary importance to the environment has been removed. Priority habitats and species are those which are considered to be under threat of disappearance such as saline lagoons. A competent authority (e.g. a planning authority) would now seek an opinion from the appropriate authority (Secretary of State in England or Welsh Minister in Wales) as to whether their reasons to proceed are to be considered imperative reasons of overriding public

¹ For the Conservation of Habitats and Species Regulations 2017 the ‘appropriate authority’ means the Secretary of State for England or Welsh Government. For the Conservation of Offshore Marine Habitats and Species Regulations 2017 the ‘relevant administration’ means either the Secretary of State for England, Welsh Government, Scottish Government or Northern Ireland Executive.

interest. The appropriate authority would need to take account of the national interest and consult widely, seeking advice from other Devolved Administrations, Joint Nature Conservation Committee (JNCC) and any other person the appropriate authority considers appropriate.

- 7.13 Currently, the definition of third country ships covers all ships not registered in the EU or Gibraltar, and provides such ships with exemptions from offences relating to damage to offshore nature conservation sites. This definition is extended to cover all non-UK ships as there is no longer any basis for treating such vessels differently and ensures the UK continues to comply with international law regarding freedom of passage.
- 7.14 Currently annexes to the Directives list those habitats, plants and animals to which the Directives apply and to which the European Commission can propose amendments. They also list other conditions such as the criteria for selecting SACs and prohibited methods of killing. A new instrument-making power is provided to make amendments as necessary for adapting the annexes in the Directives and schedules in the Regulations to technical and scientific progress. Prohibited methods of capturing and killing of wild animals, currently listed in the body of the Regulations, are transferred into new schedules to allow for future amendments for scientific or technical reasons using the instrument-making power.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8(1) and section 14(1) of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under the powers in paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 covering devolved administrations, the charging of fees and the consent of HM Treasury. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 None

10. Consultation outcome

- 10.1 No separate consultation exercise was conducted as the purpose of this instrument is intended to amend regulations to maintain continuity of the policy approach in the context of the UK leaving the EU and is not intended to change policy. Engagement with key stakeholder organisations took place to explain the purpose of the instrument. The Devolved Administrations have confirmed they are content with this instrument.

11. Guidance

- 11.1 Various guidance produced by Natural England, Natural Resources Wales, the Environment Agency, the Marine Management Organisation, Forestry Commission, the Joint Nature Conservation Committee, government departments and the European

Commission already exists. The most critical guidance is being made accessible in one place via .gov.uk for when the UK exits the EU.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no or no significant impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument as there are no significant impacts on business or the public sector.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring and review

- 14.1 The approach to monitoring of this legislation is set out in the 2017 Regulations and applies only in relation to England. The first review must be conducted by the Secretary of State England and published before 30th November 2022 and not more than every five years thereafter.
- 14.2 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Mark Baxter at the Department for Environment, Food and Rural Affairs Telephone: 0208 026 6794 or email: Mark.Baxter@defra.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Richard Pullen at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Thérèse Coffey, Parliamentary Under Secretary of State for the Environment at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

1.2 This is the case because: the Government has stated its intention that there should be no increase in cost or protection; there are no powers to introduce changes other than those which facilitate operability

2. Good reasons

2.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

2.2 These are: to ensure the regulations continue to operate effectively and maintain protections for habitats and species when the UK exits the EU and are set out at paragraphs 2.1, 2.2, 2.3 and 2.4 of this Memorandum.

3. Equalities

3.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey has made the following statement(s)

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

3.2 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Thérèse Coffey have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.