

The amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 (“Habitats Regulations”) address current gaps and inconsistencies and create greater legal certainty in a number of areas.

The amendments will:

- simplify the species protection regime to better reflect the Habitats Directive;
- provide a clear legal basis for surveillance and monitoring of European protected species (EPS);
- toughen the regime on trading of all Annex IV species and not just those found in the UK;
- ensure that the requirement to carry out appropriate assessments on water abstraction consents and land use plans is explicit.

Key messages

Q1. Why are the provisions changing?

The 2005 European Court judgment in Case C-6/04, *Commission v United Kingdom*^{[1][1]} ruled that the species protection provisions in the Habitat Regulations were not compatible with the strict species protection regime required by Article 12 of the Habitats Directive. It also ruled that the UK's transposition was deficient in not specifically requiring land use development plans and water abstraction plans and projects to be subject to an appropriate assessment of their implications for Natura sites.

A separate judgement (Case C-131/05, *Commission v United Kingdom*) ruled that trade of all species listed on Annex IV of the Directive should be prohibited and not just those found in Great Britain.

Q2. What are the main changes?

The 2005 European Court judgment in Case C-6/04 ruled that many of the defences to regulation 39 of the Habitats Regulations

(protection of EPS) found in regulations 40 and 43 did not meet the strict derogations tests set out in Article 16 of the Habitats Directive. Therefore the majority of the defences have been removed from regulation 40 for animals and regulation 43 for plants. This includes the commonly used “incidental result defence” which covers acts which are the incidental result of an otherwise lawful activity which could not reasonably have been avoided.

The threshold of deliberately disturbing an EPS has been raised so only disturbance which is likely to have a significant effect will be illegal. Activities that have deliberately cause low level disturbance of EPS may continue if they are not likely to have a significant adverse effect on the group of animals involved, for example, an adverse effect on the ability of those animals to survive or breed or a significant adverse impact on the local distribution or abundance of the species. For disturbance to be illegal, it must have a significant effect on a significant group of animals.

The possession and trade (including transport and exchange) prohibition for specimens taken from the wild have been extended to include all species listed on Annex IV. Until now this protection only extended to those Annex IV species native to GB (EPS).

Water abstraction plans and projects are now expressly subject, through regulations 48 to 51 of the Habitats Regulations, to the obligations of Article 6(3) and (4). These cover assessment of implications on European sites, considerations of overriding public interest and consideration of existing decisions and consents. Land use plans are now also expressly subject to the obligations under Article 6(3) and (4) through a new Part IVA.

Previously these obligations had been applied via the general duty under regulation 3(4) which compels every competent authority in the exercise of any of their functions to have regard to the requirements of the Habitats Directive (including Article 6(3) and (4)), so far as they may be affected by the exercise of those functions.

Q3. What will be the benefits of these changes?

The changes will provide improved 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 EPS or, for specific purposes, obtain a licence to carry out an activity that would otherwise be unlawful. This will ensure that there will be no impacts on the favourable conservation status of EPS and may have some benefit to EPS.

The sale or trade of Annex IV species found in Great Britain (EPS) is already prohibited under the Habitat Regulations. The trade of other species listed on Annex IV will now also be prohibited and will require a licence to go ahead lawfully. There are certain exceptions which are detailed in Question 23 below. These tougher, wider ranging trade rules will act as a deterrent to the killing or taking of wild Annex IV specimens throughout Europe.

Whilst the general duty under regulation 3(4) compels every competent authority to have regard to the requirements of the Habitats Directive, it is for the competent authority to interpret how it should apply those requirements. This can lead to inconsistencies of application. Parts IV and IVA of the regulations sets out how the obligations of Article 6(3) and (4) – the consideration of effect on European sites – are to be applied in practice. This will lead to a consistent approach to such assessments with regards to land use and water abstraction plans and projects.

Q4. Surely they will be an increased burden on businesses and regulators?

There will be an increased burden, particularly on the forestry and agricultural sectors. Operators will need to consider the presence of EPS, or the risk of them being present on the site and follow good practice to minimise the possibility of committing an offence against an EPS. If they cannot avoid EPS then operators may need to apply for a licence to remain within the law. This will involve conducting surveys, reading guidance, filling in the licence application form and possibly obtaining professional advice. An increased regulatory burden will fall to the licensing authority as the number of licence applications is likely to increase.

Delays to land use plans being adopted have an impact on the development industry and also on those expecting to be able to occupy premises. However, these delays will lessen with time as it becomes easier for planning bodies to take account of their new obligations in drawing up project plans for their work. Furthermore, these delays are acceptable as the new requirements will ensure that the land use planning system takes full account of the existence of protected sites.

Q5. What is being done to reduce this burden?

Defra is working with the Statutory Conservation Agencies (Countryside Council for Wales, Natural England), Welsh Assembly Government and the Forestry Commission to produce guidance to help operators undertake a risk assessment of the presence of EPS and their breeding sites and resting places and advise on how to avoid committing an offence. We hope that this advice will reduce the burden on operators and minimise the need for a licence.

Similarly the Environment Agency and DCLG have published guidance for those who need to consider impacts on European sites with regards to land use and water abstraction plans and projects.

This guidance can be found at:

www.communities.gov.uk/index.asp?id=1502244 and;
www.communities.gov.uk/index.asp?id=1165623

and

www.environment-agency.gov.uk/subjects/waterres/1341275/564321/ .

Q6. Are plants included?

The amendments to the Habitats Regulations also change the protection provisions for plants. As with animals, it will no longer be a defence to show that the picking, cutting or destruction of a wild plant of a European Protected Species was the incidental and unavoidable result of an otherwise lawful activity. There will also be similar prohibitions on possession and trade of wild EPS plants

Q7. Will native EPS continue to be protected by Wildlife and Countryside Act 1981?

Due to the removal of defences in regulation 40 and 43(2) of the Habitats Regulations consequential amendments have been made to the Wildlife and Countryside Act 1981 (WCA) to remove the protection of EPS for certain offences. However the offences under the WCA for obstruction, disturbance and sale still apply to EPS. This is because the offences in the two sets of legislation do not match. It is hoped to remedy this inconsistency at a later stage.

To ensure that enforcement provisions under the Regulations are consistent with the WCA the new enforcement powers that were added to the WCA by the Natural Environment Rural Communities Act 2006 (NERC) 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.

Q8. Will there be changes to the licensing of EPS?

Licences will be issued under the Habitats Regulations by licensing authorities as at present; Natural England in England, Countryside Council for Wales and Welsh Assembly Government in Wales. In order to reduce the burden on licence applicants we have sought to simplify the regime as far a 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 permitted by the Directive, a new licensing purpose has been added to the Regulations 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 use of this purpose will be assessed on its merits, but elsewhere in Europe has been used to manage populations of protected species.

Q9. If I already have a licence, will I need to update it?

No. If you are an existing licence holder you do not need to update it as a result of the amendments. However existing terms and conditions will still apply. If in doubt, contact your licensing authority.

Possession and sale of EPS

Q10. Do I need a licence for EPS I already possess?

The offence in regulation 39(2) concerning the keeping, transportation, sale and exchange of European protected species has been amended and now includes species native to other member States.

It is now an offence to have in one's possession or control, transport, sell or exchange or offer for sale or exchange any live or

dead animal listed in Annex IV(a) of the Habitats Directive, or any part of or anything derived from such an animal, for example all species of bat. Annex IV lists species found in Great Britain (European protected species) and species found elsewhere in Europe, such as the beaver or wolf.

The offence does not apply to certain excepted populations of species, namely those listed in Schedule 2A and certain populations of the Wild Goat, the European Mouflon and the Houting.

There is a defence available where the animal concerned was taken lawfully from the wild. However, the scope of the defence is different depending on the species concerned.

Where the animal concerned is a European protected species, or is a Large copper butterfly, a subspecies of Fishers' estuarine moth or a subspecies of the Common lizard (i.e. found in Great Britain), then keeping, possessing or transporting, other than for the purposes of sale or exchange, is lawful provided that the person accused of the offence can show that the animal concerned was taken lawfully from the wild in the EC before the implementation date of the Habitats Directive in that member State[2][2], or that it was taken from outside the EC.

For other animals listed on Annex IV, (i.e. those not listed as EPS in the Regulations) the defence described above applies to all of the activities covered by the offence. That is, keeping, possession, transporting, sale or exchange and offering for sale or exchange of the other Annex IV species is lawful provided that the person accused of the offence can show that the animal concerned was taken lawfully from the wild in the EC before the implementation date of the Habitats Directive in that member State[3][3] or that it was taken from outside the EC.

We have retained the presumption that, in any proceedings for an offence under regulation 39(2), the animal in question, or the animal from which the relevant part came or thing was derived, had been taken from the wild. This means that it is for the defendant to show, if prosecuted for possessing etc. Annex IV species under this regulation, that the specimen in question did not originate from the wild (e.g. it was captive bred).

Q11. What do you mean by “lawfully taken from the wild”?

“Lawfully taken from the wild” means

- | a) the plant or animal was taken from the wild in the European territory of a member State,
 - | without contravention of the law of that member State, and
 - | before 10th June 1994; or, if the State from which the EPS was taken joined the EC after that date, the date it became a member State; or
- | b) the animal or plant was taken from the wild outside the EC

Q12. What if I possess a part of or something derived from an EPS?

The possession and sale prohibition applies to any live or dead wild sourced Annex IV animal or plant and to any part of or anything derived from such an animal or plant. It is considered that this would not include waste products of animals, such as droppings from bats or shed skins from reptiles.

As a guide, a specimen or any part of the specimen will need to be held under a licence if:

- | 1. The specimen is alive.
- | 2. It was necessary for the specimen to be dead to obtain it, or the part of it.
- | 3. Taking the item from a living specimen would have significantly compromised its ability to survive.

Q13. Do I need to apply for a licence for each specimen or parts or derivatives?

No. A licence will cover all items listed in the application form.

Q14. Will I be committing an offence if I do not have a licence to possess a specimen I already have when the regulations come into force?

There will be period of three months after the regulations come into force to allow people time to obtain licences. After that period it will be an offence to possess an Annex IV species without a licence unless a relevant defence applies.

Q15. If I find a dead EPS that I know is of interest to scientific projects such as post mortem of otters and monitoring of cetacean strandings can I take possession of it for the purpose of handing it to a licensed person?

It is advised that the finder should contact the relevant project leader to organise collection as the project leader will be licensed to possess and transport the EPS. If this is not possible, the finder should contact the licensing authority and give details of the circumstances and intended action, with a view to obtaining a licence to allow possession and transport for the specified purpose.

Q16. Will museums and research establishments need a licence to possess Annex IV species?

A general licence will be available Museums and research establishments to lawfully hold dead Annex IV specimens for educational and research purposes. The establishment must notify the licensing authority that they intend to rely on the general licence and must keep an up to date register of specimens to be made available at any time to the licensing authority.

Q17. If I lend a specimen to be used in a display will the person managing the display need a licence?

The person managing the display will require a licence as, although they do not permanently possess the specimen it is under their control.

Q18. Do I need to apply for another licence if the live Annex IV species in my possession dies?

If the EPS dies the licence will automatically cover the dead specimen.

Q19. How often will I need to renew a licence?

The period that a licence covers will be specified in the licence. It is the responsibility of the licence holder to renew the licence and update it if there are any changes of details such as address.

Q20. Will I need a licence to sell Annex IV species?

It is an offence to sell or exchange or offer for sale or exchange wild sourced non-native Annex IV animals and plants without possession of a licence permitting you to do so. This does not apply if the animal or plant was lawfully taken from the wild (see question 11 for a definition). However, it will be an offence to sell, without possession of a licence permitting you to do so, EPS even if the EPS was lawfully taken from the wild.

Q21. Will I need a licence to sell Annex IV species even though I have a CITES Article 10 certificate?

The CITES Article 10 certificate **does not** exempt the holder from the restrictions under the Habitats Regulations. Whether a licence is needed under the Habitats Regulations will depend on the species involved, and where and when it was taken from the wild. Where a licence under the Habitats Regulations would be required, an initial assessment of the application will be made to ensure that no charges are incurred for the CITES licence if the Habitats Regulations licence is not successful.

Q22. Do I need a licence for captive bred Annex IV species?

A licence will not be required to possess or sell a captive bred Annex IV species. In the prosecution proceedings, the Court will

presume that the specimen was taken from the wild unless the accused can show (e.g. through documentary evidence) that it wasn't.

Q23. Do I need to keep an inventory?

We recommend that you do so. Although an inventory may not in all cases provide conclusive proof that the animals are lawfully kept (i.e. because they are captive bred specimens, or they were taken from the wild before the relevant implementation date (10th June 1994 for the UK) or taken from outside the EC) it will allow keepers to demonstrate to other parties that they are taking reasonable and responsible actions to explain the provenance of their animals.

Q24. Surely this burden of keeping documentation will lead to captive bred animals being released in to the wild?

It is an offence under the Wildlife and Countryside Act 1981 to release or allow species not normally resident in Great Britain to escape in the wild. Such action is considered to be abandonment under the Animal Welfare Act 2006, and would, therefore, be an offence under the duty to promote welfare ('duty of care') or possibly as a result of failure to prevent harm, where unnecessary suffering occurred. We consider that the mass release of non-native species into the ecosystem is **not** an inevitable consequence of these revised regulations and would condone any such actions.

Q25. Isn't the reverse burden of proof (i.e. the defendant proves their innocence rather than the prosecution proving they are guilty) against Human Rights?

The requirement for the prosecution to prove the guilt of the defendant beyond a reasonable doubt is a fundamental principle of English criminal law (the "presumption of innocence"). This requirement has a long and distinguished history and is now enshrined in the Human Rights Act 1998, article 6(2) of which reads: "Everyone charged with a criminal offence shall be assumed innocent until proven guilty according to law." Whilst the Act does not prohibit provisions which transfer the burden of proof onto the accused, such transfers must be confined within reasonable limits.

In the regulatory sphere, reverse burdens as to the accused's knowledge or state of mind have been upheld by the courts as compatible with article 6 rights, particularly so where the prosecution would have difficulty but the accused relative ease in proving the matter in question. Indeed, it is common in wildlife protection legislation (as in the Wildlife and Countryside Act 1981) to have a reverse burden of proof as it is often the defendant who is better placed to provide information to prove their innocence rather than the prosecutor to obtain evidence to the contrary.

With regards to the offences under the Habitats Regulations, there has always been a presumption that an animal or plant has been taken from the wild. However, the main change is that the offence covering possession and sale etc., and therefore this presumption, will now apply to all Annex IV species. Similarly, it has always been for the defendant to show that the 'lawfully taken' defence applies.

Keeping and trading in protected species is a regulated field of activity. Restricting the lawful possession of and trade in protected animals and plants has an important purpose in that, by cutting off a market for unlawfully killed specimens, it underpins the objective of eliminating the unlawful killing and taking of protected species. It is important that this purpose is not thwarted by evidential problems on the part of the prosecution in showing the origin of a species beyond reasonable doubt.

It should also be noted that the accused need only show the lawful origin of the specimen on the balance of probabilities, rather than to the prosecution's standard of beyond reasonable doubt.

Q26. Are there any exceptions to these offences?

There are exceptions to the offences for certain populations of the Wild Goat, the European Mouflon and the Houting and animals listed in Annex 2A of the regulations.

It is also a defence to possess or transport an Annex IV species without a licence for purposes of tending or mercy killing and also for investigating whether an offence has been committed under the Habitats Regulations, the Wildlife and Countryside Act 1981, the Control of Trade in Endangered Species 1997 (COTES) and the Offshore Marine Conservation Regulations 2007.

Q27. Where do I obtain more information on the changes to licensing and how obtain a licence application form?

Further information on changes to licensing may be found on:

www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm

Sector specific issues

Taxidermy

Q28. How will the changes affect taxidermy practices?

Specimens of wild sourced Annex IV specimens taken from with wild in the EC kept for taxidermy purposes will need a licence if the specimen was unlawfully taken from the wild or taken after 10th June 1994 (this date will be later when the specimen was taken from one of the new member States). The licence application will need to show the circumstances in which the specimen taken from the wild, e.g. if it was killed accidentally by a car. It is unlikely that a licence would be granted for a specimen which was unlawfully taken from the wild. Depending on the circumstances, a licence is also likely to be required for sale of the taxidermy specimen.

Q25. Will a licence be required by a taxidermist to possess a specimen if they have been commissioned to by the owner to mount the specimen?

The owner of the specimen will need to obtain a licence to possess the specimen. The taxidermist will also need a licence while the specimen is in their possession or control. A taxidermist who is a registered member of the Guild of Taxidermist will be able to rely upon a general licence that allows the lawful possession of dead specimens for the purposes of research and education. They must notify the licensing authority and keep an up to date register of specimens to be made available to the licensing authority at any time. Any specimens held for any other purposes will require an individual licence.

Q26. As a Taxidermist, will I be able to sell a specimen (of an Annex IV species)?

Whether a licence is required will depend on the species concerned and where and when it was taken from the wild.

Where the species is an EPS or is a Large copper butterfly, a subspecies of Fishers' estuarine moth or a subspecies of the Common lizard (i.e. found in Great Britain), sale or exchange of a specimen of that species will require a licence irrespective of when it was taken from the wild.

Where the species is any other Annex IV species and taken from within the EC, sale or exchange of a specimen of that species will require a licence if it was taken from the wild after 10th June 1994 from most EC countries. However, the date will be later for the recent accession countries and will be the day they joined the EC. A specimen taken before 10th June 1994 can be kept without a licence so long as it can be shown that it was taken in accordance with the law of the member State in which it was taken. There are certain excepted populations of species, namely those listed in Schedule 2A of the Regulations (such as beaver and wolf from certain countries and geographical regions) and certain populations of the Wild Goat, the European Mouflon and the Houting.

Where the species is any other Annex IV species and taken from outside the EC a licence will not be required.

The licence application will need to meet the strict derogation tests. For example Annex IV species may be sold for educational or scientific reasons and there must be no satisfactory alternative to the sale.

EPS, the Large copper butterfly, a subspecies of Fishers' estuarine moth or a subspecies of the Common lizard are also protected from sale under section 9(5) of the Wildlife and Countryside Act 1981. As the sale offence could be committed under both pieces of legislation a licence will be required under both licensing regimes. It is realised that this situation creates an increased burden on the applicant and we hope to rectify the situation at a later date.

Q29. Will I need a licence to possess a dead bat or otter if I take it to a taxidermist?

A licence will be required by the owner to possess the dead bat or otter if it was acquired after 10th June 1994. The taxidermist will not need a licence unless they are permanently given the specimen.

Tending injured animals and mercy killing

Q30. Will I need a licence if I have to put down an animal or otherwise tend to its injuries?

A licence will not be required for mercy killing and tending as these defences have been retained (in an amended form) in regulation 40. It is a defence to kill an EPS if it had no possibility of it recovering. It is also a defence to possess any Annex IV species for the purposes of tending it in order to release it back to the wild. After a certain period if the release is not possible and the EPS needs to be kept permanently in captivity the defence will not apply and a licence will be required.

Working with bats

Q31. I am a bat worker. Do I need to apply for a licence to possess bats?

Bat workers are trained volunteers and licensed by the Statutory Nature Conservation Agencies to carry activities such as roost visits and bat surveys. Many bat workers already possess bats both live and dead for educational purposes. Bat workers will need to obtain a licence to possess any specimens, unless these were lawfully taken from the wild.

Q32. What do I do if I find a dead or injured bat?

If you find an injured or dead bat it is advisable to contact the Bat Conservation Trust or a local bat worker for advice.

The Bat Conservation Trust
Unit 2, 15 Cloisters House
8 Battersea Park Road

London SW8 4BG

Bat Helpline

Tel: 0845 1300 228 (local rate)

Email: enquiries@bats.org.uk

On-going activities (e.g. forestry and agricultural practices)

Q33. What will the impact be on forestry and agriculture operators?

There will be an increased burden on forestry and agriculture operators 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.

Q34. Surely every activity will now need to be licensed?

An activity will only need to be licensed if it will result in an offence being committed against an EPS i.e. it will

- deliberately capture, injure, or kill an EPS animal, or
- deliberately pick, cut or destroy an EPS plant, or
- deliberately take or destroy the eggs of an EPS animal ; or
- deliberately disturb animals of an EPS significantly to effect the ability of a significant group of animals of that species to survive, breed, or rear or nurture their young, or the local distribution or abundance of that species; or
- damage or destroy in a breeding site or resting place of an EPS.

If it is thought highly likely that such an offence will be committed by an activity, it is recommended that you contact your licensing

authority for advice as to whether a licence will be required.

Q35. How do I avoid committing offences and therefore a need for a licence?

It is recommended that operators follow good practice guidance issued by Natural England and Forestry Commission. This gives advice on assessing the presence of EPS, assessing the possible impact of operations and practical strategies for avoiding committing offences. Following this guidance does not remove totally remove the risk of committing an offence. However, any prosecution proceedings is likely to take this into account in deciding whether it is in the public interest to take forward a prosecution. Further guidance may be found on:

www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm

Q36. Will some activities be restricted or no longer be carried out?

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 there is no satisfactory alternative and 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 the favourable conservation status is maintained.

Q37. Will I be prosecuted if I accidentally damage or destroy a breeding site or resting place?

As the incidental result of a lawful operation defence has been removed operators are now open to this strict liability offence, whether the damage occurs 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 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 CPS in deciding whether to take forward a prosecution will assess whether it would be in the public interest to do so.

Q38. How will I know that I am committing an offence of deliberately and significantly disturbing an EPS?

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 is likely to significantly affect a group of animals of that species' ability to survive, breed, or rear or nurture its young or the local distribution or abundance of that species. Further guidance on the disturbance offence may be found on: www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm

Deliberate disturbance (trivial or not) of a protected animal (species on Schedule 5 which includes EPS) in its place of shelter or protection will continue to be an offence under the Wildlife and Countryside Act 1981. However, the incidental result of a lawful operation defence will be available for that offence provided the disturbance could not have been reasonably avoided.

Q39. What do you mean by “deliberately”?

The offences to capture, injure or kill, disturb or, take or destroy eggs under regulation 39(1) continue to require a deliberate action. “Deliberately” has a broad meaning. In the context of capture and killing, the European Court of Justice has interpreted it to include “accepting the possibility” of such capture or killing (see paragraph 71 of ECJ case C-221/04[4][4]). In other words, an offence may be committed by a person who might not intend to capture or kill an EPS specimen but nevertheless performs the relevant action, being sufficiently informed and aware of the consequences his action will most likely have. Whether this wide interpretation applies more generally is unclear from the judgment. However, it would appear likely that this broad meaning will also be taken to apply to the other offences in regulation 39 (and regulation 43) where the term is used.

Q40. How do I know that EPS and their breeding sites or resting places are present and will be affected by operations?

Individuals and organisations will need to assess the risk of committing an offence against EPS and act accordingly. This may involve carrying out surveys to ascertain whether EPS are present

and, if they are present, deciding whether to go ahead or modify practices to avoid committing an offence. If committing an offence is unavoidable, a licence may be required. Guidance will be provided by Natural England, Countryside Council for Wales and Forestry Commission on how to assess these risks particularly in identifying the presence of EPS and their breeding sites or resting places.

Q41. Will I need a licence if I am part of a government funded scheme such as woodland grant scheme and environmental stewardship?

A licence may be required if the activities carried out under these schemes are likely to commit an offence against EPS and cannot be avoided. Guidance will be provided by Natural England, Countryside Council for Wales and the Forestry Commission.

Q42. I have an agri-environment agreement. Does this exempt me from the changes being made to the Habitats Regulations?

Having an agri-environment agreement does not exempt you from offences covered by the Habitats Regulations. An agri-environment agreement holder could commit offences against EPS when following their agreement prescriptions.

In general most Entry Level Scheme (ELS) and Organic Entry Level Scheme (OELS) options present little risk of breaching the Regulations. However, there are some options such as enhanced hedgerow management and ditch management where there may be a small risk. We intend to contact all affected agreement holders to inform them of the situation and to provide simple guidance to help them assess the impacts of the changes on their operations and whether they need to change them to avoid committing an offence.

There is a higher risk that Higher Level Scheme (HLS) options will breach the Regulations as they are targeted at the high priority habitats which are more likely to support protected species. The advisers to these agreements will have access to updated guidance and will be able to advise individual HLS agreement holders of the impact of the changes.

Q43. Will I need a licence for EPS when applying for a felling licence?

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.

Q44. Do I need to consider EPS when meeting my cross-compliance commitments for the Single Farm Payment?

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

Q45. Will the changes apply to Government owned land?

The amendments will apply to all land owned and managed by the Government including land owned by the MOD, Forestry Commission and the Highways Agency.

Q46. Will I need to obtain professional advice to help me apply for a licence?

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. Some species are more easily detected than others, and certain times of year are better than others for surveying. 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.

Q47. What will happen if I do not follow licence conditions?

It will now be an offence to not follow conditions set out in an EPS licence. However, there is a defence available where you can

show that 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.

EPS in dwelling houses (bats)

Q48. How will the changes affect EPS in dwelling houses?

The defences for EPS in dwelling houses have been removed. It will now be an offence to damage or destroy a breeding site or resting place of an EPS or deliberately disturb an EPS within a dwelling house in any circumstances.

Q49. Will I need a licence to exclude bats from my loft?

Previously, householders with bats in their loft could rely on the defence in regulation 40 of the Regulations to interfere with or exclude bats. This meant that if they notified the appropriate nature conservation body of a proposed action, such as exclusion from a loft, and allow them reasonable time to provide advice they would have defence against the offences under regulation 39. However, this defence has now been removed as a result of the recent ECJ judgment against the UK. This means that householders will need a licence before taking action against bats in their homes.

Exclusion of bats from lofts is viewed as the last resort and advice is available from Natural England and Countryside Council for Wales on how to ‘live with bats’. If exclusion cannot be avoided after considering and discounting other options, it will be possible to exclude bats under licence for certain purposes such as health and safety.

Amendments to the Wildlife and Countryside Act 1981 mean that the places of shelter or protection used by animal EPS (such as bats) are still protected from obstruction under the WCA. Obstruction may affect different species in different ways depending on how they use these places. In many cases, the act of obstructing a place of shelter or protection, for example a bat roost, will have the same effect on the animals concerned as destroying that roost. In such cases, we consider the offence under reg. 39(1) (damaging or destroying a breeding site or resting place) to be applicable too.

Q50. Will a bat worker help me?

If you have concerns about the presence of bats in your loft, you should contact Natural England, the Countryside Council for Wales or the Bat Conservation Trust for advice (see the ‘working with bats’ section above). A bat worker will provide advice over the phone and will visit if necessary to give further advice. The bat worker will advise the householder on the options available before carrying out exclusion. The bat worker will notify the appropriate nature conservation body by sending in a roost report form. The bat worker will give advice to the householder on how to apply for a licence to exclude bats from their loft after other options have been explored.

Q51. Will this also apply to churches?

Anyone who wishes to exclude bats from churches will continue to follow current procedures and apply for an EPS licence.

Q52. How do I go about repairing to my roof without affecting bats in the loft?

It is possible to carry out works at certain times of the year and in certain ways without affecting the bats and their roosts and therefore without the need for a licence. Advice should be obtained from Natural England or the Countryside Council for Wales.

Q53. Surely it will be an offence to remove a bat from my living room?

Bats, particularly the very young, occasionally find their way into the living area of a house from the loft. The bat may be encouraged to leave the room by turning off the lights and open windows. Further advice is available from the Natural England, the Countryside Council for Wales or the Bat Conservation Trust.

Prohibition of the use of indiscriminate means of capture and killing

Q54. What will be the impact of the changes?

A general prohibition on the use of indiscriminate means of capture and killing has been added to the Regulations. This will cover any indiscriminate methods that are not already listed in regulation 41.

Q55. Will there be, as a result of the amendments, restrictions on the types of legal methods used to capture protected species?

The amendments do not make any further restrictions under the Habitats Regulations on the legal methods, such as the use of traps and snares, used to capture or kill Annex V species and Annex IV species (where the taking of the latter is permitted by virtue of a relevant defence or licence). However, you should still refer to guidance and relevant legislation with regards to what methods are or are not legal in what circumstances (for example “Traps & snares - a field guide to legal and illegal traps and snares” produced by the British Association for Shooting (BASC)).

Q56. What will be the impact of changes to Conservation of Seals Act 1970?

The Conservation of Seals Act 1970 will be amended to clarify the obligations under the Habitats Regulations to ensure that any licence does not authorise the use of methods of killing or taking seals which are prohibited under regulation 41.

Surveillance and Monitoring

Q57. What changes will be made to surveillance and monitoring of European protected species?

Some surveillance and monitoring of species of Community interest (including EPS) is already being undertaken and co-ordinated by JNCC, Natural England, the Countryside Council for Wales and partner organisations. We will work with JNCC and others to assess the continued requirements and any gaps in surveillance and monitoring which may, subject to resources, need

to be filled.

Q58. Will further measures be undertaken following surveillance and monitoring?

Further measures may be undertaken in light of the results of surveillance and monitoring such as increased protection, prohibition on taking and quotas, which will be put into action as and when necessary.

Introduction of new species from ships

Q59. Why has an offence been added for the deliberate introduction of new species from release of ballast water from ships?

Non native species introduced in UK waters can have a negative effect on native fauna and flora. The offence has been added to provide consistency with the Offshore Marine Conservation Regulations where a similar offence applies in respect of the offshore marine area. Release of non native species in ballast water may occur within and outside 12nm and it was thought desirable to have the same restrictions in place.

Q60. Is there a defence?

An introduction is allowed if it results from a discharge of water carried as ballast, the discharge was necessary for the purpose of protecting the safety of any person or ship and all reasonably practicable steps were taken to avoid it and to minimise any resulting harm.

Q61. Will there be guidance available on how to avoid committing the offence?

Yes. Guidance will be made available that will provide an outline of how preventative action may be taken to avoid committing the offence.

Plans and Projects

Q62. Why did you not go beyond the immediate requirement of the judgment and make all plans and projects subject to Part IV of the Habitats Regulations to fully reflect the requirements of Article 6(3) of the Habitats Directive.

Currently the general duty under regulation 3(4) compels every competent authority in the exercise of any of their functions to have regard to the requirements of the Habitats Directive (including Article 6(3) and (4)), so far as they may be affected by the exercise of those functions. However, following these amendments, we intend to further review the Habitats Regulations to, amongst other things, address transposition gaps filled by general duties and look to expressly fill those gaps on the face of the regulations. This will include the requirement to address the deficiencies of Part IV (which does not include specific reference to all relevant plan or project regimes) so all relevant regimes are expressly captured by the regulations.

Q63. Does this mean that the effect on European sites has not been considered with regards to water abstraction operations?

In terms of assessing and reviewing abstraction licences, the Environment Agency who consider abstraction licences is, through the general duty under regulation 3(4), already undertaking what it is obliged to do under Article 6(3) and (4). Where a Catchment Abstraction Management Strategy (CAMS) area contains a European site, the development of the strategy will take account of the associated water requirements for that site.

The Environment Agency have produced extensive guidance for water abstractors which can be accessed via:

<http://www.environment-agency.gov.uk/subjects/waterres/1341275/564321/>

Q64. Does this mean that the effect on European sites has not been considered with regards to land use plans?

Planning authorities have always considered impact on European

sites. However, until the judgment, it was not thought appropriate to undertake assessments of effect on European sites at the land use plan stage, but later with regards to specific proposals. However, the European Court of Justice held that plans which are still subject to some further future consent can still be said to be capable of having a significant effect on European sites. The Court held that, in line with the precautionary principle, "such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned." If this test cannot be met then an appropriate assessment will be required.

Draft departmental guidance for regional planning bodies and local planning authorities has already been published by the Department for Communities and Local Government (DCLG) regarding compliance with the requirement to undertake appropriate assessments in connection with regional special strategies and local development documents. This guidance can be found at:

www.communities.gov.uk/index.asp?id=1502244
www.communities.gov.uk/index.asp?id=1165623

Further advice

Q65. Where can I obtain further advice on the Amendments to the regulations?

For further advice on the changes to the regulations and licensing please see www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm (Defra website, WAG website)

Q66. Where can I obtain further advice with regards to undertaking appropriate assessments?

For further advice on the obligations of Article 6 of the Habitats Directive (which includes the requirement to carryout appropriate assessments) see;

http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

For further advice on the obligations of Part IV of the Habitats

Regulations (which transposes Article 6 into domestic law) see the following Habitats Regulations Guidance Notes, that address various aspects of the Habitats Regulations, including:

- the '[determination of likely significant effect](#)' HRGN 3
- the need for '[appropriate assessment](#)' (Regulation 48) HRGN 1
- assessment of '[in-combination](#)' or cumulative effects HRGN 4
- the requirement to review [existing approvals or consents](#) HRGN 2
- [permitted development rights](#) HRGN 6;

These can be downloaded via;

http://www.mceu.gov.uk/MCEU_LOCAL/FEPA/Conserv-reg.htm

For further advice and guidance regarding the impact on activities please see NE, CCW and FC website links.