

THE CONSERVATION (NATURAL HABITATS, &c.) (AMENDMENT) (ENGLAND AND WALES) REGULATIONS 2006

Response from Wildlife and Countryside Link

June 2006

INTRODUCTION

Wildlife and Countryside Link (Link) is a coalition of the UK's major environmental non-governmental organisations concerned with the conservation, enjoyment and protection of wildlife, the countryside and the marine environment. Taken together, our members have the support of over eight million people in the UK.

Link welcomes the opportunity to respond to the Defra consultation paper on the Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2006. This response is supported by the following organisations:

- Bat Conservation Trust
- Herpetological Conservation Trust
- Plantlife International
- Royal Society for the Protection of Birds (RSPB)
- The Wildlife Trusts
- Woodland Trust

GENERAL COMMENTS

1. Link supports the need to amend the Conservation (Natural Habitats, &c.) (England and Wales) (henceforth referred to as the Habitat Regulations) and thereby better transpose the Habitats Directive into UK law. We therefore are generally supportive of the suggestions laid out in this consultation.
2. The range of protection measures introduced under the current Habitat Regulations have made a vital contribution to the conservation of a number of wild species and natural habitat types in the UK. However, stronger and clearer regulations are required, particularly in the areas of species protection and Appropriate Assessment of land use plans in respect of European sites.
3. We agree with the statement included under Option 2 of Annex B 'Regulatory Impact Assessment' to the consultation document, which makes the point that the new Regulations will provide greater legal clarity and improve the protection afforded to important species and habitats for the benefit of the UK's biodiversity. This should be supported by a range of policy measures and statutory guidance to ensure the necessary coherence of conservation action and a proportionate approach in the interpretation of the legislation.
4. Link is particularly pleased to see that the new Regulations include stricter possession and sale controls concerning Annex IV species, the imposition of specific statutory duties relating to surveillance and monitoring of European Protected Species (EPS), and the requirement to undertake Appropriate Assessments of water abstraction consents and land use plans.

SPECIFIC COMMENTS

Surveillance requirements

5. Link welcomes the greater legal certainty provided by the inclusion of specific provisions to transpose the surveillance requirements in Articles 11 and 14(2) of the Habitats Directive.
6. We would be interested to learn what practical arrangements are being considered for carrying out surveillance of habitats and species of Community interest, and in particular, the involvement of non governmental nature conservation organisations. We are following the development by the European Commission of its guidance on the implementation of Article 17 with interest. We also note similarities between the Biodiversity Action Plan target setting process and the reporting requirements of the Directive that could help provide a cost effective approach for engagement between the statutory and non-statutory conservation sectors. The emerging report '*Towards European Habitats and Species – Assessment, Monitoring and Reporting of the Conservation Status of European Habitats and Species*' produced by the European Habitats Forum may provide guidance on a suitable approach.
7. Link welcomes the requirement proposed in paragraph 16 that the devolved administrations should consult each other in carrying out their obligations, and we believe this should apply to all surveillance, not just that of Annex V species.
8. We do not agree that the surveillance of Annex V species should be confined only to species for which Great Britain is within their natural range. It is predicted that climate change will cause a shift in the range of many species, and there are currently gaps in our knowledge of the natural range of some species. Availability of accurate and up-to-date ecological data is patchy across the UK, largely as a result of a lack of resources for biological recording, particularly at the local level.
9. Link would like to see both the more effective use of current resources, and additional resources provided, for national biological monitoring schemes and local records centres, in order to implement the surveillance requirements. Such data is required for many reasons, including the effective implementation of planning, use of agri-environmental funding, and the implementation of other European Directives (e.g. the Strategic Environmental Assessment, Water Framework, and Environmental Liability Directives).
10. We also wish to see a clearer link made between surveillance results and the necessary management response to ensure the relevant species, habitats and sites are maintained at and, where necessary, restored to favourable conservation status. This link between surveillance and management is essential if the aims of the Habitats Directive are to be met (as set out in Articles 2(2) and 3(1), and implemented for sites through Article 6(2)).

Annex IV species

11. We agree that regulation 39(2) should be amended to apply protection to all Annex IV(a) species, as this exercises precaution in the face of climate change and takes into account gaps that exist in our knowledge of the natural range of species (as discussed in paragraph 8 of this response).

12. Link supports the proposed licensing for continued possession of specimens of Annex IV(a) species. However, we would comment that additional resources will be required to ensure that the licensing system works efficiently and effectively as a result of this new requirement. These resources must not be diverted away from positive conservation activities (for example, licensing the continued possession of an already dead specimen that died of natural causes, or that was lawfully obtained, since these have no negative impact on conservation status), and care should be taken that the system is not overly bureaucratic and cumbersome.

Schedule 2 review

13. Link believes a mechanism should be established to allow review of schedule 2 to allow for both any future changes in Annex IV and also to cover species that become established, either naturally, or via legitimate re-introduction.
14. We support the addition of houting (*Coregonus oxyrhynchus*) to Schedule 2. We also suggest that the pool frog (*Pelophylax [formerly Rana] lessonae*) should also be included on the list of EPS at Schedule 2 following re-introduction of this Annex IV species: however it would be appropriate to limit the listing to the 'northern clade race' of this species.

Protection of breeding sites/resting places

15. New regulation 39(7), which places an obligation on the courts to have particular regard to the extent to which a person could reasonably have avoided the damage or destruction of the breeding site or resting place of an EPS, is welcomed. We agree that the courts should take into account the extent to which operators have followed codes of practice or guidance in relation to the protection of EPS and we recommend that this should be stated explicitly in the legislation.
16. With regards to protection of breeding sites or resting places of EPS we would draw attention to A12 1(d) of the Habitats Directive which prohibits the 'deterioration or destruction of breeding sites or resting places of EPS'. The use of the term 'deterioration' is currently missing from the wording of regulation (39) (1) (d), and it therefore does not fully transpose the Directive. The inclusion of this critical wording could impose stricter protection measures for EPS than the current Regulations provide. We are aware of the views of the European Commission that regards Article 12 as a 'preventative' and 'prohibitive' measure rather than one requiring 'proactive' conservation and would see that this would have the obvious benefits for addressing negligence that could lead, for example, to persistent diffuse pollution. However, we are concerned about implications for landowner responsibility should the new Regulations be amended in this way and would agree that the interpretation and proposed application of this clause should be expanded via guidance.

Regulations 10 & 13

17. Link is entirely sympathetic to the need to protect EPS as set out in Article 12-15 of the Directive and to which Regulation 39 of the Habitat Regulations refer. As such we accept it is right and proper to seek to amend regulation 40 (transposed Article 16) in the light of European case law. However, we would urge great caution in 'gold plating' the interpretation of Article 16.
18. Link is concerned that the proposed removal of the 'incidental results' defences may lead to a reduction in appropriate management of sites where EPS are present. The

more onerous licensing regime may deter some landowners from undertaking activities that would benefit conservation as a whole. The licensing system will also be costly and difficult to administer in practice. We suggest that the wording of regulations 10 and 13 should be amended in order to better transpose the Directive by making reference to the text given in Article 16, as follows: “*Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b) ...in the interests of protecting wild fauna and flora and conserving natural habitats*”.

Regulation 40(2) – Implications for bat conservation

19. The removal of regulation 40(2) will significantly increase the workload of bat workers in the UK, most of who work on a voluntary basis. In addition, removal of 40(4) implies that rather than the current system which requires English Nature to provide advice, householders will be required to apply for a Defra licence at their own expense. This is unlikely to benefit bat conservation. Link considers that a new system is required that promotes compliance with the Habitats Directive whilst remaining quick and simple for householders to implement. Additional resources will be required, including support for continued provision of free advice for householders about the implications of the new regulations for protection of bats in dwelling houses.

Links to WCA provisions

20. Link does not agree that references to EPS should be removed from the provisions of the Wildlife and Countryside Act 1981 (WCA). As far as we understand, this would mean that the “reckless” offence in the WCA would be replaced by a “deliberate” offence in the Habitats Regulations, making it harder to prove that an offence had been committed in relation to an EPS. We do not consider this proposed amendment to be satisfactory in terms of affording the strict level of protection to EPS that is intended under the Habitats Directive.

Duty to monitor the incidental capture or killing of EPS

21. Link welcomes the new regulation 41A to transpose Article 12(4) of the Habitats Directive requiring monitoring of the incidental capture or killing of EPS. However, Article 12 states that the monitoring system should lead to ‘further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned’. This is not explicitly mentioned in the new Regulation. The wording should therefore be amended in order to better reflect the intended requirement for monitoring of EPS to be linked to their conservation needs.

Water abstraction

22. Link agrees that water abstraction works should be subject to the plans and projects assessment procedures stipulated in Part IV of the Habitat Regulations.
23. We consider that the seven-day rule should be removed from consents under the Water Resources Act. There should be no time limit for non-decision making in respect of those consents requiring appropriate assessment as that unduly constrains the assessment process, could result in consent for damaging projects

that have not been subject to Regulation 49 and 53, and conflicts with the standards applied to other consent regimes.

Appropriate Assessment of Land Use Plans

24. Link supports the inclusion of a new duty under Part IVA requiring planning authorities to undertake an Appropriate Assessment of the impact of land use plans on European sites. However, we would comment that the new Regulations should set parameters to guide the method by which assessments are carried out.
25. We are disappointed that the Government missed the opportunity to apply the Regulations to other land-use plans which “*have considerable influence on development decisions*”¹ and European sites e.g. shoreline management plans. This means the Government remains vulnerable to further infringement proceedings.

Ecological coherence of the Natura 2000 network

26. Link is concerned that the new Regulations do not address the need to transpose Article 10 of the Habitats Directive to make provision for the ‘*improvement of the ecological coherence of the Natura 2000 network*’. A new Regulation is required under Part IV of the Habitat Regulations to encourage the management of landscape features which are of importance for wild fauna and flora, such as buffer zones to European sites and habitat stepping stones, for example, ponds or hedgerows. Regulation 37 is insufficient.
27. The creation of functional landscapes that will allow migration and dispersal of species, including EPS, will become increasingly important as wildlife attempts to adapt to external pressures such as, climate change, diffuse pollution and development pressures. At a time of accelerating climatic and environmental change which will directly impact upon the natural range of habitats and species, the Natura 2000 series has to accommodate the imperative of acting to conserve biodiversity at a landscape scale.
28. If Article 10 were fully transposed into UK law, the Habitat Regulations would afford greater protection to semi-natural habitats outside Natura 2000 sites, improve the ecological coherence and resilience to climate change of the Natura 2000 network, and thereby better deliver the Directive.

¹ Paragraph 55, C-6/04 *Commission vs. United Kingdom*