

Summary: Intervention & Options

Department /Agency: Defra Biodiversity Programme - International Protected Areas	Title: Impact Assessment of proposed amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended)	
Stage: Implementation	Version: V6	Date: 4 September 2009
Related Publications:		

Available to view or download at:

<http://www.defraweb/corporate/consult/conservation-habitats/index.htm>

Contact for enquiries: Andy Tully

Telephone: 0117 372 8570

What is the problem under consideration? Why is government intervention necessary?

Amendments to the Conservation (Natural Habitats &c) Regulations 1994 (as amended) are required to bolster transposition of Articles 6(2) and (3) of the EU Habitats Directive (92/43/EEC) in England and Wales. Government intervention is necessary to reduce the risk of potential damage to protected habitats and/or the disturbance of species. The amendments will extend existing powers and enable Special Nature Conservation Orders to be made that will restrict operations that occur on water, as well as those that take place outside a European protected site.

What are the policy objectives and the intended effects?

To meet our obligations under the Habitats Directive by ensuring that there are adequate controls available to protect the habitats and species listed on the annexes of the Habitats Directive. These extended powers do not increase our obligations under the Directive, but are intended to help bolster our ability to meet those existing obligations. There is potential for the number of SNCOs to increase but it is not possible to forecast if this will happen or if it does by how much, as these are last resort powers only to be used in exceptional circumstances.

What policy options have been considered? Please justify any preferred option.

The options considered were:

a) do nothing; b) to extend existing provisions in the Habitats Regulations to make a special nature conservation order (SNCO); c) to explore whether powers exist in other existing or proposed legislation to deal with the problem.

Option b) is the favoured option. Options a) and c) would not provide a solution in this case.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? August 2012

Ministerial Sign-off For SELECT STAGE Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option:	Description: extend existing powers to make Special Nature Conservation Orders (SNCO) under regs 22-27 and Sch 1 of the Habitats Regulations
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' It is difficult to forecast costs when a SNCO is made as this will depend on the nature of the operation to be controlled and the way the activity is controlled. We expect SNCOs to be made only in exceptional circumstances. The current admin burden to Natural England for issuing one SNCO is around £4.5k to £5k.		
	One-off (Transition) Yrs			
	£ N/A			
	Average Annual Cost (excluding one-off)			
	£ N/A	Total Cost (PV)	£ N/A	
Other key non-monetised costs by 'main affected groups' Other costs likely to arise from the making of an order are related to the administration of the process itself and may involve, for example discussions and correspondence with the nature conservation body and appeals.				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' All benefits are currently non-monetised.		
	One-off Yrs			
	£ N/A			
	Average Annual Benefit (excluding one-off)			
	£ N/A	Total Benefit (PV)	£ N/A	
Other key non-monetised benefits by 'main affected groups' Extended powers to make SNCOs will help the UK meet its obligations under the Habitats Directive. When a SNCO is made it will protect vulnerable species and/or habitats.				

Key Assumptions/Sensitivities/Risks SNCO powers are intended as a last resort to be used when all other mechanisms have failed; we are not changing or extending our obligations under the Habitats Directive, but seeking to take powers to help bolster our ability to meet existing obligations. The amendment will also reduce infraction risk.

Price Base Year 0	Time Period Years 0	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ N/A
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What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	1 October 2009			
Which organisation(s) will enforce the policy?	NE/CCW			
What is the total annual cost of enforcement for these organisations?	£ De Minimis			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £ N/A

Key: Annual costs and benefits: Constant Prices (Net) Present Value

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Title of proposal

Amendments to regulations 22-27 and Schedule 1 of the Conservation (Natural Habitats, &c.) Regulations 1994 (the 'Habitat Regulations') which are being made by Part 4 of the Conservation (Natural Habitats, &c.) (Amendment) (No.2) Regulations 2009.

Purpose and intended effect

Objective

1. The purpose of these amendments is to bolster transposition of Articles 6(2) and 6(3) of the Habitats Directive to ensure that we have sufficient controls to prevent damage or deterioration of European protected sites, and/or to ensure that operations with the potential to cause damage or deterioration are properly assessed under the Regulations. This will help enable us to meet the aims and objectives of the Habitats Directive, which is to achieve the favourable conservation status for the habitats and species listed in its annexes.

2. We intend to achieve this by making amendments to Regulations 22-27 and Schedule 1 of the Habitats Regulations which contain provisions for the Secretary of State, after consultation with the appropriate nature conservation body, to make in respect of land within a European site a special nature conservation order (SNCO) specifying operations which appear to be likely to destroy or damage the interest features of a European site. The amendments will extend existing powers and enable SNCOs to be made that can restrict operations taking place:

- a) on water as well as those on land; and
- b) outside the European protected site, as well as within it.

Background

3. The Habitats Directive (together with the Birds Directive) forms the cornerstone of Europe's nature conservation policy. It is built around two pillars: the Natura 2000 network of protected European sites and the strict system of species protection. 'European site' is defined in regulation 10 of the Habitats Regulations but includes Special Areas of Conservation (SAC) designated by Member States under the Habitats Directive and Special Protection Areas (SPAs) classified under the Birds Directive. Collectively, the UK's SACs and SPAs form part of the European network of protected sites known as Natura 2000.

4. Article 6(2) of the Habitats Directive requires Member States to "take appropriate steps to avoid, in the special area of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated....."

5. Our obligations under the Directive are achieved through a variety of means. The Habitats Regulations (and other instruments) specify a number of mechanisms to ensure that operations with the potential to damage a European site are properly assessed to ensure that damage does not arise, or where it does there are good reasons for doing so and compensatory measures are undertaken. One of these mechanisms, which is specifically designed to meet our obligations under Article 6(2) of the Directive, is the power to make special nature conservation orders (SNCO) to restrict or control operations likely to destroy or damage the flora, fauna or geological or physiographical features, by reason of which the land is a European site.

6. Special nature conservation orders are regarded as last resort powers and have been rarely used in the past. Currently there are some 14 SNCOs in operation, although the powers have been in existence (albeit initially in different legislation) since 1982. The last SNCO was made in 2001. They have been used in the past primarily to control activities which are not regulated by a consent regime.
7. Currently, regulation 23(1) provides that “no person shall carry out on any land within a European site...any operation specified in the order...”. In our view this means that an order could not be used to restrict or prohibit operations being carried out on water that are likely to damage a European site. Nor could the power be used to prohibit operations undertaken outside the European site, but which have a damaging effect on it. We are therefore proposing changes to the Habitats Regulations to address these issues and bolster our transposition of the Directive.
8. If circumstances require, the proposed changes would allow the Secretary of State (or Welsh Minister in respect of Wales), after consultation with the appropriate nature conservation body (eg Natural England or the Countryside Council for Wales), to restrict any person from carrying out an operation on land or water, within or outside a European site, which appears to the Secretary of State to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy or damage the interest features of a European site.
9. We also propose to make a procedural change to the order making process, to enable the order to be targeted at specific persons or organisations, where such a course would be appropriate. This is necessary because the existing SNCO procedures are focussed on activities undertaken or permitted by owner/occupiers of the land within the European site.
10. The current procedures cater for this by requiring the order to be served on all such persons. However, by extending the scope of the powers in the manner proposed, we envisage that this will bring operations undertaken by persons who are not necessarily owners/occupiers of land within the European site within scope of the proposed SNCO powers. To cater for this we propose to introduce a new power for the appropriate nature conservation body to serve a notice on such persons carrying out the damaging activity (see below). Another benefit of this new step in the process is that it enables prohibitions to be targeted, rather than to necessarily apply to all persons carrying out a specific operation.
11. Under the proposed amendments, the two-stage process would be as follows:
 - (1) the Secretary of State or Welsh Minister can make a SNCO. The SNCO would specify operations (taking place on land and/or water) which appear to the Secretary of State to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy or damage the flora, fauna, or geographical or physiographical features by reason of which the land is a European site (effectively this would be a warning stage to those operating within or near a European site);
 - (2) a new step so that when an SNCO has been made, it only applies to a person proposing to carry out such an operation where the Secretary of State or Welsh Minister has served a notice on that person. A notice would only be served where it appears that the operations are likely to destroy or damage the flora, fauna, or geological or physiographical features of the European site. It would be a criminal offence for a person who has received a notice to carry out an operation which has been specified in the SNCO, unless one of the exceptions applies.
12. Where there are a number of unknown persons carrying out a damaging activity and it is not reasonably practicable to identify them, Defra proposes that the Secretary of State or Welsh Minister need not serve a notice on every person. Instead the Secretary of State or Welsh

Minister must publish a notice in one local newspaper in the relevant area and fix copies of the notice to conspicuous objects on the land to which the notice relates.

13. This approach will keep the current legislation largely intact in relation to the making of the SNCO itself, whilst enabling the effect of the order to be targeted specifically on those persons that receive a notice. The new notice serving power will entail some amendments to Regulation 23 and Schedule 1 of the Habitats Regulations, which sets out the procedures for making orders.

Geographical extent

14. The amendments will apply to England and Wales only.

Consultation

15. In preparing the amendments, Defra has consulted:

a) Within Government

Key departments were consulted in advance of the launch of the public consultation and further discussions will take place throughout the negotiations on this proposal and into implementation of the final Regulations.

b) Devolved Administrations

This included the Welsh Assembly Government, Scottish Executive and the Department of Environment Northern Ireland

c) Stakeholders and the general public

Stakeholders and the general public were invited to comment on the proposed amendments via a public consultation exercise that took place between June and August 2009. Responses have been analysed and taken into account in the final proposed amendments to the Regulations. Copies of the responses will be available in due course on the Defra website.

Options

Option a - Do nothing

16. This is not considered a viable option as we have a legal obligation to ensure implementation of the Habitats Directive. If we do nothing;

- a) in some cases, we may be unable to control potentially damaging activities which may have a negative effect on vulnerable habitats and species;
- b) the UK could be subject to infraction proceedings and potentially fined for not transposing the Habitats Directive adequately, harming the UK's reputation and resulting in additional burden on the public purse;
- c) legal uncertainty/costs on bodies or individuals where their activities may have an adverse effect on a European site but appear to fall outside existing consenting regimes.

Option b – Amend the Conservation (Natural Habitats, &c.) Regulations 1994

17. The strengthening of the SNCO provisions within the regulations will enable us to control potentially damaging operations where other mechanisms have failed. This will allow the UK to better protect vulnerable habitats and species and therefore assist in the aim of achieving their favourable conservation status. Furthermore it will significantly reduce the risk of infraction proceedings and help to ensure that the UK retains its good reputation in regard to meeting its biodiversity obligations under the Birds and Habitats Directives.

Option c – Explore whether other controls are available that could be used to implement the Habitats Directive.

18. Investigation focussed on three alternatives. First, the byelaw making powers likely to be available in the Marine and Coastal Access Bill. The difficulty here is that those powers are not yet approved by Parliament and are thus not yet available. They would therefore not necessarily provide a solution in time to protect the UK from legal proceedings either in the domestic or European courts. Also, the new byelaw powers will only apply to marine sites.

19. The second set of powers considered were those available via the Environmental Damage (Prevention and Remediation) Regulations 2009. However, an analysis of these powers confirmed that they would not necessarily enable us to meet all our obligations under the Directive. For example, these regulations only apply to economic activities and purely domestic or recreational activities are not covered.

20. The third set of powers are those available under Harbour Acts to make byelaws/Harbour Revision Orders. Investigation revealed that making of such byelaws/orders involves a lengthy administrative process and would not be suitable mechanisms when urgent action to control operations is required.

21. As none of these controls provide a solution to the problems, they have not been regarded as feasible alternatives for the purpose of this Impact Assessment.

Defra's chosen option – option b

22. Option b would allow us to control potentially damaging operations to European sites where other measures have failed, and therefore better enable us to bolster our implementation of the Habitats Directive.

23. Although the new powers represent a significant extension of the powers in terms of the geographical areas and operations they might restrict or control, the key issue is the extent to which the powers are likely to be used. At present there is no evidence to suggest that the extended powers will need to be used frequently. The evidence from the use of existing powers supports this – only 14 SNCOs remain in operation although the powers have been available for almost 30 years. Improved powers available to the statutory nature conservation bodies to enter into management agreements have resulted in only one SNCO being made in the last 8 years (in 2001).

24. The comments received from the consultation indicate that around half of respondents were in favour of strengthening the SNCO powers to include operations on water and operations undertaken both within and outside a European site. Such respondents agreed that it is important to properly transpose our obligations under the Directive.

25. The main concern expressed by those objecting to the proposals was about the potential impact of the extended powers. A number of respondents were concerned that their use in the marine environment could interfere with navigation rights, fisheries and aquaculture activities, where under the precautionary principle, such activities could be stopped despite an incomplete understanding of the impacts on biodiversity from such activities.

26. There can be no dispute that the extended powers have the potential to have a significant economic impact in circumstances, for example where a significant shipping, fishery or port operation had to be curtailed by the making of an SNCO. However, this concern needs to be put into perspective and Defra would make the following comments:

- there is no evidence to suggest that the existing powers to make SNCOs on land within a protected site have ever had any significant economic impact. A number of the Orders currently in place regulate relatively minor activities such as fencing, ploughing or third party vehicular use. In circumstances where commercial activities – bait digging and peat extraction by the

owner/occupier - have been curtailed by an Order the impact would have been localised and specific.

- the Habitats Regulations contain provisions in regulations 48 and 49 to ensure that the impact on protected sites of operations subject to a consent regime are properly assessed before any consent is given. The powers to make a SNCO would therefore only be needed as a last resort where for some reason the provisions in regulations 48 and 49 did not apply, or had not been complied with. Our conclusion therefore, is that the use of SNCO powers to control otherwise regulated operations would only arise in very exceptional circumstances. Furthermore, there are a number of ways that the SNCO powers could be used and there are circumstances when its use may not have any economic or other impact at all. For example, where the powers are used to ensure that an operation is properly assessed under the Directive, and following such an assessment it is decided that the operation may continue because there are imperative reasons of overriding public interest, and compensatory measures are implemented.

- the evidence, from the use of existing powers, is that SNCOs would be used to control relatively minor unregulated activities which are not otherwise subject to any kind of consent regime and thus the economic impact is not likely to be significant.

27. Given the uncertainties surrounding the operations that might be controlled by an SNCO and the manner in which any controls would be applied it is impossible to quantify impacts. No evidence is available of the economic impact of existing SNCOs.

Costs and benefits

Groups affected

28. In theory, the groups likely to be most affected by the extended powers are those operating in the marine environment, but whose operations might adversely impact on land within a European site. However, evidence from the use of existing powers suggests that those groups most likely to be affected are those engaged in unregulated activities which are likely to damage a European site and which are not effectively managed. The consultation highlighted concerns among those groups who exercise navigation and/or fishing rights. Where such activities are likely to cause damage to a European site, in the absence of an effective management agreement or other suitable measures to control such damage, a SNCO could potentially be served to stop or restrict the exercise of such rights, where these are likely to damage or destroy a European site.

Enforcement

29. We are not proposing any changes to the current enforcement provisions contained within the Habitat Regulations. As SNCOs are intended as a last resort where other mechanisms have failed, it is impossible to estimate enforcement costs. However, given that their use is likely to be minimal, enforcement costs are unlikely to be high.

30. SNCO notices would need to be publicised, and in the terrestrial environment these costs are unlikely to be very high given that we only anticipate SNCOs being used in a small number of cases, and as a last resort. However, where a SNCO may impact on marine bodies (eg fishermen) additional resources may be required in order to ensure all affected groups are aware of the notice. The current administrative burden to nature conservation agencies making a SNCO is around £4.5k to £5k for each SNCO.

Compensation

31. No significant amendments are being made to the provisions relating to the payment of compensation. We see no reason to extend the scope of compensation. There are arrangements in other mechanisms (ie management agreements) that provide for payments in return for undertaking operations in a manner which does not cause damage to a protected site.

Sanctions

33. It will be a criminal offence for a person who has received a notice to carry out an operation which has been specified in the SNCO, unless one of the exceptions applies. This is consistent with the existing approach where it is a criminal offence for a person to carry out an operation specified in an SNCO. We do not anticipate a marked rise in the application of SNCOs brought about by the strengthening of the SNCO provisions, and therefore do not expect that the amendments to have a significant impact on the courts.

Specific Impact Tests

Competition Assessment

34. It is unlikely that the amended regulations will raise any competition issues and should not advantage or disadvantage particular groups or individuals. Although the new provisions enable the SNCO to be targeted on a specific person or persons, rather than an activity, this will only arise where such a person or persons are carrying out the activity in such a way that is likely to damage or destroy a European site.

Small Firms Impact Test

35. The amended regulations are not directed at business generally (thus there is no imposition of a general burden). The preferred option creates the possibility of a potential impact on small firms but, as stated above, there is no evidence to suggest that there will be any significant direct impact on small firms generally.

Legal Aid

36. None of the policy options make any changes to the provision of criminal sanctions in the current regulations.

Sustainable development

37. None of the policy options make any significant impact on five principles of sustainable development.

Carbon assessment

38. Not applicable.

Other environmental issues

39. It is possible, in certain specific circumstances, that making a SNCO would result in an operation taking place elsewhere, in a location where it would not impact on a protected site. This would be a beneficial result of the SNCO because it moves operations to a location where they would have no adverse environmental impact on the protected site.

Health impact assessment

40. None

Race, disability and gender equality

41. The preferred policy option will not have any effect on race, disability or gender equality.

Human rights

42. The preferred policy option does not raise any issues with respect to the Human Rights Act 1998.

Rural proofing

43. The preferred policy options will not impact unfairly on rural communities.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

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