

Department of Environment, Food & Rural Affairs

Summary of responses to the consultation on amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 8 June - 3 August 2009

October 2009

Background

The Conservation (Natural Habitats, &c.) Regulations 1994 (the “Habitats Regulations 1994”) transpose the obligations of the EC Habitats Directive¹ (the “Habitats Directive”) in Great Britain. The powers to make special nature conservation orders provide a means for meeting our obligations under Articles 6(2) and 6(3) of the Habitats Directive. Article 6(2) requires us to take appropriate steps to avoid the deterioration of protected sites, and article 6(3) requires us to ensure that any plan or project which may have a significant effect on such a site is subject to a rigorous assessment.

Defra invited views on amendments to the special nature conservation order (SNCO) provisions contained in regulations 22-27 of, and Schedule 1 to, the Habitats Regulations 1994. The amendments extend the existing powers to make special nature conservation orders, so that it would be possible to make orders to restrict operations taking place on water, and operations taking place outside a European site (European sites include Special Areas of Conservation [SACs] designated under the Habitats Directive and Special Protection Areas [SPAs] classified under the EC Birds Directive²).

The amendments also introduce a two stage process. First the Secretary of State (SoS) can make a SNCO which would specify operations which appear to him 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. Effectively this would be a warning stage to those operating within or near a European site. Secondly there will be a new step so that when a SNCO has been made, it only applies to a particular operator where the SoS has served a notice on that person. A notice will only be served where it appears that the operations are likely to damage the European site. This approach has the advantage of targeting the provision specifically at those persons that receive a notice. Where the notice cannot be served on an identifiable person(s), there is provision for it to be advertised and displayed in a suitable place.

The public consultation exercise commenced on 8 June and, with the agreement of the Minister for the Natural and Marine Environment, extended for 8 weeks until 3 August. The reduced period was agreed in view of the need to have the amended regulations in place by 1 October to reflect (a) the need to bolster transposition of the Habitats Directive;

¹ Council Directive 92/43/EEC

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

² Council Directive 79/409/EEC

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

and (b) to co-ordinate the amendments with other amendments to the regulations relating to implementation of the Planning Act 2008 and certain marine works.

Analysis of responses

The consultation document was circulated to over 1,200 individuals and bodies. It was also available on the Defra website as a public consultation open to all. 71 responses were received and these included responses from industry, business associations, government agencies, environmental groups and individuals. A list of respondents is at **Annex A**.

Respondent	No of responses	% of total*
Local Authority	16	23%
NGO	9	13%
NDPB	5	7%
Individual	5	7%
Marine Industry	23	32%
Energy Industry	6	8%
Fisheries Industry	6	8%
Transport	1	1%
Total	71	100%*

*Note that the total does not add up to 100% due to rounding

Questions asked in the consultation:

1 & 2. Do you agree with the proposal to amend regulations 22 - 27 and Schedule 1 of the Habitat Regulations 1994 to provide that the powers to make special nature conservation orders can be used to restrict operations taking place on water as well as those on land in order to protect European sites and to restrict operations taking place outside, as well as within, European sites?

Respondent	Yes	No	No strong view expressed either way	No answer	Total
Local Authority	14		1	1	16
NGO	5	1	3		9
NDPB	4	1			5
Individual	3		2		5
Marine Industry	1	16	6		23
Energy Industry			6		6
Fisheries Industry	2	1	3		6
Transport			1		1
Total	29	19	22	1	71

Of the 71 responses, 29 - principally from local authorities and conservation groups - expressed strong support for the amendments in order to provide better protection for European sites. 19 responses - principally the marine industry - did not support the

proposed changes and 22 were broadly supportive without expressing strong support or objection.

Around half of respondents were in favour of strengthening the SNCO powers to include operations undertaken outside a European site, indicating that it is important to bolster our transposition of the Habitats Directive.

Key issues raised

Issue 1: The potential impact of the proposals; the absence of an Impact Assessment; effects on rights of navigation; the operation of ports, fishing and aquaculture activities. The requirement for socio-economic factors to be taken into account.

Defra's response

Although the new powers represent an extension of the powers in terms of the geographical areas and activities they might cover, they are very much last resort powers, to be used in exceptional circumstances when other mechanisms in the Habitat Regulations have failed. Existing powers to make SNCOs are not used frequently and there is no reason to expect the situation to change. The evidence from the use of existing powers is that SNCOs would be used to control unregulated activities which are not otherwise subject to any kind of consent regime. On the basis of existing SNCOs, economic impact is not likely to be significant.

An Impact Assessment has now been produced and is available at:

<http://www.defra.gov.uk/corporate/consult/conservation-habitats/index.htm>

It has been difficult to quantify potential impacts with any certainty as this will depend on the person or body on whom the notice is served, the nature of the operation being controlled and the particular way that the activity is controlled. The new powers will not impose any general burden on small businesses, the third sector or charities.

Where an individual wishes to apply for consent to carry out an operation prohibited by a SNCO, the appropriate nature conservation body would need to consider whether to carry out an appropriate assessment. Following a negative assessment and the absence of feasible alternatives, the matter may be referred to the SoS to consider whether the operation must be carried out for imperative reasons of overriding public interest, and this could include economic, social and cultural considerations.

Issue 2: The extent of science/evidence based decisions and the extra difficulties of this in the marine environment.

Defra's response: SNCOs will only be used in the exceptional circumstances in consultation with the appropriate nature conservation body. In some circumstances there may be limitations to the extent of science/evidence available. However, decisions should be made on a precautionary basis. Where an application for consent to carry out an

activity specified in a SNCO is made, an appropriate assessment would need to be carried out where the operation may have a significant effect on a site. Additional science/evidence would likely be required under this process and the operation would only be authorised where it was certain that it will not adversely affect the integrity of the European site (ie where no reasonable scientific doubt remains as to the absence of such effects³).

Issue 3: Outside sites needs definition.

Defra's response: The application of the SNCO provision to take account of activities that occur outside a European site will depend on the nature of the activity and whether such activity appears to the SoS to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy the interest features of a European site.

Issue 4: Clarity on the role of Sea Fisheries Committees (SFCs)/Inshore Fisheries and Conservation Authorities (IFCAs). Will other bodies be identified to fulfil enforcement roles? How will these changes relate to the Marine and Coastal Access Bill?

Defra's response: Making the Order and enforcing its provisions is a matter for the appropriate Nature Conservation Agency (ie Natural England or the Countryside Council for Wales) and/or the SoS. It is possible that depending on the circumstances other bodies will have a role as consultees. This will be clarified in the procedural guidance.

The Marine and Coastal Access Bill makes provision for marine planning and introduces new arrangements for marine licensing, which means that activities in the marine environment, and potential conflicts, will be better managed in the future. Part 5 and Schedule 11 of the Bill includes provisions to control activities through byelaws to protect European marine sites from harmful activities, and this may reduce the need to apply a SNCO in the marine environment. We will review the relationship between the SNCO and Marine Bill provisions in due course.

Issue 5: Most regulatory controls are applied by relevant authorities other than statutory nature conservation agencies. Does this apply to SNCOs?

Defra's response: SNCOs can only be made by the SoS or Welsh Ministers after consultation with the appropriate nature conservation body. They would principally be used in circumstances where existing provisions to control operations likely to damage a European site, such as consenting regimes under Part IV of the Habitat Regulations or management agreements, are not applicable or have not worked. They can also be used to require an appropriate assessment to be carried out in relation to a proposed activity which is not otherwise subject to any regulatory control.

Issue 6: No mention of the word 'water' within the SI.

³ Waddenzee judgement ECJ Case C-127/02

Defra’s response: The SNCO provisions are intended as a mechanism to protect European sites from any harmful activity, regardless of where that activity takes place. The Habitats Directive does not restrict the obligation to protect European sites by reference to where the harmful activity is taking place. As a result, the amendments have been drafted widely to refer to operations taking place on land “or elsewhere”. This could, of course, include operations taking place on water.

Issue 7: Clarification of the term ‘operations’.

Defra’s response: This term has been in use for many years and is meant to be interpreted broadly. We are not aware that problems have arisen and do not propose any clarification of the term. However, we will consider this in the context of forthcoming guidance.

Issue 8: Clarification of the term geological or physiographical features – there is no mention of this term in the Habitats Directive.

Defra response: The term reflects the SSSI underpinning (Sites of Special Scientific Interest) of most of our European sites, as SSSIs are designated by reason of their flora, fauna or geological or physiographical features.

3. Do you agree with the proposal to introduce a two-stage process which involves the new stage of serving a notice on person/persons proposing to undertake an operation capable of damaging a European site?

Respondent	Yes	No	No strong view expressed either way	No answer	Total
Local Authority	14		1	1	16
NGO	6	1	2		9
NDPB	2	2	1		5
Individual	3		2		5
Marine Industry	7	4	6	6	23
Energy Industry			4	2	6
Fisheries Industry	1	1	4		6
Transport				1	1
Total	33	8	20	10	71

The comments received from the consultation indicated that just under half were in favour of the proposed two stage process and a further 20 expressing no strong view either way. 8 consultees did not support the two-stage process.

Key issues raised

Issue 9: The apparent lowering of the threshold for making an order from ‘likely to destroy or damage’ to ‘capable of causing damage’; the notice serving process in the marine environment where local papers/notices may not be an effective means of notifying

potentially affected individuals and/or groups; the additional burden placed on the Nature Conservation Agencies.

Defra's response

As originally drafted the proposed amendments did not, in practice, change the threshold at which the prohibition of activity occurs (ie where such activity is likely to destroy or damage the interest features of a European site). However, in light of the responses we received, we have reworded the threshold for the first step of the procedure. It now allows the SoS to issue a SNCO specifying operations which appear to the SoS to be of a kind which, if carried out in certain circumstances or in a particular manner, would be likely to destroy the interest features of a European site. This is effectively a warning stage to those operating within or near a European site.

The new second step allows the SoS, in respect to any land within a European site in respect of which a SNCO is made, to serve a notice on a person carrying out or proposing to carry out, any operation of a kind specified in that order which appears to the SoS to be likely to destroy or damage the interest features of the European site. It is the notice which now triggers the prohibition of activity, and this retains the current threshold.

We agree that the publication of notices for SNCOs issued in the marine environment will need careful management in order to capture all those who may be affected by such an order. This will be covered in the procedural guidance we propose to issue in due course.

In order to reduce the burden on the Nature Conservation Agencies, the Regulations now place the duty to serve both the order and the notice on the SoS. However, it is proposed that the appropriate statutory nature conservation body may in some circumstances undertake certain procedural tasks on behalf of the SoS.

Issue 10: Can the notice be challenged? If so what would be the process?

Defra's response: The regulations already contained provisions to enable representations to be made against the serving of a SNCO. The amendments do not substantially change these provisions. This issue will be covered in the procedural guidance to be made available in due course.

4. Are there any other comments relating to the proposed amendments that you would like to make?

Around half of those who responded to the consultation made additional comments.

Issue 11: Many of those with additional comments had concerns over the term 'minor amendments' in view of the potential for significant impacts on industry.

Defra's response

Powers to make special nature conservation orders have existed in legislation for many years. It is accepted that extended powers to cover operations on water, and operations taking place outside the protected site, have the potential to be significant. However, while it is impossible to forecast the future with any certainty, there is no evidence to suggest that the extended powers will result in large numbers of new SNCOs or the introduction of significant new controls. SNCO powers are ones of last resort, and as a result are used infrequently (currently, under the existing land-based provisions, there are 14 SNCOs in place).

Issue 12: What is the relationship with the Environmental Damage (Prevention and Remediation) Regulations 2009?

Defra's response: The Environmental Damage (Prevention and Remediation) Regulations 2009 contains powers which could be used to prevent damage to European sites. However, an analysis of these powers confirmed that they would not necessarily enable us to meet all our obligations under the Habitats Directive. For example, these regulations only apply to economic activities and purely domestic or recreational activities are not covered.

Issue 13: What will be the effects on existing SNCOs?

Defra's response: Existing SNCOs are unaffected by the amending Regulations.

Issue 14: Would SNCOs be used to stop a planning application which previously had been approved but had an unexpected impact on a European site?

Defra's response: The Habitats Regulations (regulation 50) already contain provisions requiring existing consents that may affect a European protected site to be reviewed in certain circumstances. However, in theory at least it is possible that SNCO powers could be used in respect of an operation that had received some kind of formal consent in the past.

Issue 15: Why is compensation not being extended to the marine area (ie agricultural units only)?

Defra's response: The compensation provisions in relation to SNCOs (contained in regulation 25) provide for compensation to be paid to those with an interest in the land to reflect the reduction in value of the land as a result of operations on that land being prohibited (note that compensation applies to agricultural units only). These provisions are unlikely to be relevant in the context of operations taking place in the marine area.

Issue 16: Will guidance be issued?

Defra's response: We are aiming to produce guidance on the operation of these controls in due course, which will provide further clarity on how the procedure will operate.

Issue 17: Why not extended to the offshore marine area?

Defra's response: The SNCO provisions have always been targeted at and thus designed for the protection of land within protected sites. The amendments do not alter this. Regulation 23 of the 2007 Offshore Marine Conservation Regulations contains provisions to avoid the deterioration of European sites. Our conclusion was that this general position should be maintained.

Issue 18: Details of extant SNCOs should be available on Government websites.

Defra's response: SNCOs are not currently available on Government websites. However, we will discuss this issue with the relevant Country Agencies.

Summary and conclusion

The Department has carefully analysed the responses and is grateful for the many constructive comments made which have resulted in amendments to the regulations. As a result of the consultation process we also propose to produce guidance in due course which we hope will give further reassurance about the procedures to be followed when a SNCO is made.

However, the key consideration throughout has been the need to ensure the appropriate transposition of our obligations under the Habitats Directive. In view of the need to bolster transposition – particularly in respect of our obligations to protect sites from deterioration under Articles 6(2) and 6(3) of the Habitats Directive – our conclusion was that we should amend the Habitats Regulations 1994 to extend the powers to make a special nature conservation order. Amended regulations were therefore laid in Parliament on 9 September, and came into effect on 1 October 2009.

Consultees who responded:

- Associated British Ports; Group Sustainable Development
- Berthon Boat Company Ltd
- Birmingham City Council
- Borough Council of Kings Lynn and West Norfolk
- British Marine Aggregate Producers Association
- British Marine Federation
- British Ports Association
- British Shipping
- British Wind Energy Association (BWEA)
- Broads Authority
- Business Council for Sustainable Energy UK
- Country Land and Business Association
- Countryside Council for Wales
- E.ON UK
- East Lindsey District Council
- East Riding of Yorkshire Council
- English Heritage
- Environment Agency
- Falmouth Docks & Engineering Co
- Falmouth Harbour Commissioners
- Farmers Union of Wales
- Hampshire County Council Environment Department
- Hartlepool Borough Council
- Harwich Haven Authority
- Hutchinson Ports (UK) Limited
- Kent County Council, Natural Environment and Coast Team
- Kirklees Council Environment Unit
- London Borough of Redbridge Culture, Sport & Community Learning
- Lymington Harbour Commissioners
- Lymington River Association
- Maidstone Borough Council
- Marina Projects Ltd
- Marine Conservation Society
- Milford Haven Port Authority
- Mineral Products Association
- National Farmers' Union
- National Federation of Fishermen's Organisations
- Natural England, Regulatory Services and Access Team
- Network Rail Infrastructure Ltd
- Norfolk and Suffolk Boating Association
- Norfolk County Council
- North Western and North Wales Sea Fisheries Committee
- Northumberland Sea Fisheries Committee

- Oxfordshire County Council, Countryside Service
- Port of London Authority
- Renewable Energy Association
- River Hamble Harbour Office
- River Yar Boatyard
- Royal Society for the Protection of Birds
- Royal Yachting Association
- Rutland County Council
- RWE Npower plc
- Savills (L&P) on behalf of MDL Developments Ltd
- Scottish Fishermen's Federation
- Scottish Power Renewables
- Seabed User & Developer Group
- Sea Fish Industry Authority
- Shepway District Council
- South Wales Sea Fisheries Committee
- Southampton Solent University
- Taunton Deane Borough Council
- The Broads Society
- The Lymington Society
- Titchmarch Marina (Walton-on-Naze) Ltd
- UK Major Ports Group
- Wightlink Ltd

A further five responses were received from individual members of the public.