

2008 No. 425

WILDLIFE

COUNTRYSIDE

**The Conservation (Natural Habitats, &c.) Amendment (No. 2)
(Scotland) Regulations 2008**

Made - - - - - *18th December 2008*

Laid before the Scottish Parliament *19th December 2008*

Coming into force - - - *26th January 2009*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972^(a) and section 26A of the Wildlife and Countryside Act 1981^(b) and all other powers enabling them to do so.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Conservation (Natural Habitats, &c.) Amendment (No. 2) (Scotland) Regulations 2008 and come into force on 26th January 2009.

(2) These Regulations extend to Scotland only.

Amendment of the Conservation (Natural Habitats, &c.) Regulations 1994

2. The Conservation (Natural Habitats, &c.) Regulations 1994^(c) are amended in accordance with regulations 3 to 6.

Regulation 37A

3. In regulation 37A (surveillance of conservation status of habitats and species)^(d)—

(a) in paragraph (1) after “arrangements” insert “in accordance with paragraphs (5) to (7)”;
and

(b) after paragraph (4) insert—

“(5) The arrangements made by the Scottish Ministers under paragraph (1) shall ensure that Scottish Natural Heritage implements a strategy for the surveillance of the conservation status of relevant habitats and species in Scotland.

(a) 1972 c.68. Section 2(2) was relevantly amended by the Scotland Act 1998 (c.46), Schedule 8, paragraph 15(3) and the Legislative and Regulatory Reform Act 2006 (c.51), section 27. The functions conferred upon the Minister of the Crown under section 2(2) of the European Communities Act 1972, insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

(b) 1981 c.69. Section 26A of the 1981 Act was inserted by paragraph 22 of schedule 6 to the Nature Conservation (Scotland) Act 2004 (asp 6) and amended by the Criminal Proceedings &c. (Reform) (Scotland) Act 2007 (asp 6), section 44(2).

(c) S.I. 1994/2716; relevant amendments are made by S.S.I. 2007/80 and 2008/17. The 1994 Regulations make provision for the purpose of implementing, for Great Britain, Council Directive 92/43/EEC.

(d) Regulation 37A was inserted by S.S.I. 2007/80, regulation 9.

- (6) In implementing that strategy Scottish Natural Heritage shall—
- (a) assess how and to what extent surveillance of the conservation status of relevant habitats and species needs to be carried out, having regard to—
 - (i) whether a habitat or species is a priority natural habitat type or a priority species; and
 - (ii) the conservation status of the habitat or species; and
 - (b) ensure that surveillance is carried out on an ongoing basis.
- (7) Surveillance for the purposes of this regulation may be carried out by—
- (a) Scottish Natural Heritage; or
 - (b) any other body or person pursuant to an agreement with Scottish Natural Heritage, provided that Scottish Natural Heritage is satisfied as to the standards and methods of surveillance used by that body or person.
- (8) In paragraphs (5) and (6) a relevant habitat or species means a habitat or species of a type referred to in paragraph (1).”.

Regulation 39

4. In regulation 39 (protection of certain wild animals)(a)—
- (a) omit “or” following paragraph (1)(b)(v); and
 - (b) at the end of paragraph (1)(b) insert—
 - “or
 - (vii) to disturb such an animal while it is migrating or hibernating;”.

Regulation 40

5. In regulation 40 (exceptions to regulation 39)(b) at the end insert—
- “(4) The exceptions to regulation 39 in paragraphs (1) and (2) shall not apply where it is shown that—
- (a) there was a satisfactory alternative to what was done; or
 - (b) what was done was detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.”.

Regulation 41A

6. For regulation 41A(c) substitute—

“Monitoring incidental capture or killing

41A.—(1) Scottish Natural Heritage must make arrangements in accordance with paragraphs (2) to (5) for monitoring the incidental capture or killing (a “monitoring system”) of animals of the species listed in Annex IV(a) to the Habitats Directive.

(2) Scottish Natural Heritage must, from time to time, review the monitoring system and, if they think it appropriate, revise it.

(3) In light of the information gathered from the monitoring system, Scottish Natural Heritage must—

- (a) make arrangements for the carrying out of such research, or

(a) Regulation 39 was substituted by S.S.I. 2007/80, regulation 10 and amended by S.S.I. 2008/17, regulation 2.
 (b) Regulation 40 was substituted by S.S.I. 2007/80, regulation 11.
 (c) Regulation 41A was inserted by S.S.I. 2007/80, regulation 13.

(b) where appropriate, advise the Scottish Ministers on such conservation measures as appears or appear to Scottish Natural Heritage to be necessary to ensure that such incidental capture or killing does not have a significant negative impact on the species in question.

(4) In implementing that monitoring system Scottish Natural Heritage must, in relation to the species of animal listed in Annex IV(a) to the Habitats Directive which are found in Scotland—

- (a) identify the risks of incidental capture or killing to which those species are subject, and the activities which give rise to such risks;
- (b) maintain a record of instances of incidental capture or killing of animals of those species of which Scottish Natural Heritage is aware as a result of the surveillance carried out under regulation 37A, the monitoring carried out under this regulation, or otherwise;
- (c) assess to what extent monitoring of incidental capture or killing is needed, having regard to—
 - (i) the risks identified under sub-paragraph (a);
 - (ii) the instances of incidental capture or killing recorded under sub-paragraph (b);
 - (iii) whether the species is a priority species; and
 - (iv) the conservation status of the species; and
- (d) ensure that monitoring of incidental capture or killing is carried out.

(5) Monitoring for the purposes of this regulation may be carried out by—

- (a) Scottish Natural Heritage; or
- (b) any other body or person—
 - (i) pursuant to an agreement with Scottish Natural Heritage, provided that Scottish Natural Heritage is satisfied as to the standards and methods of monitoring used by that body or person; or
 - (ii) as a condition of a licence or other authorisation granted by a competent authority.

(6) The Scottish Ministers may, from time to time, give directions to Scottish Natural Heritage as to the exercise of its functions under paragraphs (1) to (5).”.

MICHAEL W. RUSSELL
Authorised to sign by the Scottish Ministers

St Andrew's House,
Edinburgh
18th December 2008

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which extend to Scotland only, make further provision for the transposition of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (O.J. No. L 206, 22.7.1992, p.7) (“the Habitats Directive”). In doing so they amend the Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”).

Regulation 3 amends regulation 37A (surveillance of conservation status of habitats and species) of the 1994 Regulations by adding new paragraphs (5) to (8). These new provisions require the arrangements made by the Scottish Ministers under that regulation to ensure that Scottish Natural Heritage (“SNH”) implements a surveillance strategy in respect of the habitats and species to which regulation 37A applies, and set out requirements which must be met in implementing that strategy. Paragraph (7) provides that surveillance may be carried out by SNH or by another body or person pursuant to an agreement with SNH.

Regulation 4 amends regulation 39 (protection of certain wild animals) to provide that, in addition to the offences which regulation 39(1)(b) currently provides for, it is an offence deliberately or recklessly to disturb a wild animal or a group of wild animals of a European protected species while it is migrating or hibernating.

Regulation 5 amends regulation 40 (exceptions to regulation 39) by adding a new paragraph (4), which provides that the exceptions to regulation 39 created by regulation 40(1) and (2) (mercy killing and tending of certain injured animals) shall not apply where it is shown that there was a satisfactory alternative to what was done or that what was done was detrimental to the maintenance of the populations of the species concerned.

Regulation 6 substitutes a new regulation 41A (monitoring incidental capture or killing). The new regulation provides that SNH must make arrangements in accordance with the requirements of that regulation for monitoring the incidental capture or killing of animals of the species listed in Annex IV(a) to the Habitats Directive. Paragraph (3) requires SNH, in the light of information gathered from the monitoring system, to arrange the carrying out of such research or (if appropriate) advise the Scottish Ministers on such conservation measures as seems or seem necessary to ensure there is not a significant negative impact on the species in question.

Paragraph (4) of new regulation 41A sets out requirements which must be met in implementing the monitoring system, and paragraph (5) provides that the monitoring may be carried out by SNH or by any other body or person either pursuant to an agreement with SNH or as a condition of a licence or other authorisation granted by a competent authority.

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