

EU Exit: The Habitats Regulations in Scotland

December 2020

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Summary

As a consequence of EU exit, it has been necessary to make a number of changes to the Conservation (Natural Habitats, &c.) Regulations 1994^{1 2 3}, the Conservation of Habitats and Species Regulations 2017^{4 5}, the Conservation of Offshore Marine Habitats and Species Regulations 2017^{6 7}, and the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001^{8 9} (collectively known as “the Habitats Regulations”). The changes took legal effect on exit day and ensure that Scotland continues to maintain the standards required by the EU Habitats¹⁰ and Wild Birds¹¹ Directives (commonly referred to collectively as “the EU Nature Directives”). The Nature Directives set out rules for the protection and management of certain habitats and species and all wild bird species to ensure their conservation in the long term.

The Habitats Regulations remain in force, including the general provisions for the protection of European sites and the procedural requirements to undertake Habitats Regulations Appraisal (HRA) to assess the implications of plans or projects for European sites. The changes made were only those necessary to ensure that they remain operable now that the UK has left the EU. The guidance below sets out what these changes mean in practice, including how existing guidance relating to implementation of the Nature Directives should be interpreted.

¹ The Conservation (Natural Habitats, &c.) Regulations 1994.

<http://www.legislation.gov.uk/ukxi/1994/2716/contents/made>

² <http://www.legislation.gov.uk/changes/affected/ukxi/1994/2716>

³ The Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019

⁴ The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

⁵ The Conservation of Habitats and Species Regulations 2017

<http://www.legislation.gov.uk/ukxi/2017/1012/contents/made>

⁶ The Conservation of Offshore Marine Habitats and Species Regulations 2017

<http://www.legislation.gov.uk/ukxi/2017/1013/contents/made>

⁷ The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

⁸ The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001

<http://www.legislation.gov.uk/ukxi/2001/1754/regulation/2/made>

⁹ The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

¹⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0043>

¹¹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147>

Amendments to the Habitats Regulations

For Scotland's terrestrial and marine environments, the requirements of the Habitats Directive and the Wild Birds Directive are transposed by five pieces of legislation:

- The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended on numerous occasions¹²). These Regulations apply on land in Scotland, and in Scottish inshore waters (the area of sea adjacent to Scotland from 0 to 12 nautical miles);
- The Conservation of Habitats and Species Regulations 2017. These Regulations apply in England and Wales, but also apply to specific reserved and devolved activities on land in Scotland, and in Scottish inshore waters, including for consents under sections 36 and 37 of the Electricity Act 1989;
- The Conservation of Offshore Marine Habitats and Species Regulations 2017. These Regulations apply to all UK offshore waters (the area of sea beyond 12 nautical miles);
- The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001;
- The Wildlife and Countryside Act 1981.

Policy on the protections and standards afforded by the Habitats Regulations remains unchanged, but there have been some changes in terminology and the Scottish Ministers now exercise some functions that were previously carried out at an EU level.

- European sites are still protected in Scotland and the rest of the UK. The terms "European site", "European marine site", and "European offshore marine site", have been retained, as have "Special Area of Conservation" (SAC) and "Special Protection Area" (SPA).

¹² <http://www.legislation.gov.uk/changes/affected/uksi/1994/2716>

- European sites, European marine sites and European offshore marine sites in the UK (as defined by the Conservation (Natural Habitats, &c.) Regulations 1994, and the Conservation of Offshore Marine Habitats and Species Regulations 2017) are no longer part of the European Union’s Natura 2000 network. Instead, they form a UK-wide network of protected sites, referred to in the 1994 Regulations as the UK site network, and retain the same protections. The UK site network¹³ is made up of SACs and SPAs designated at various points in time before exit day (i.e. UK sites that formed part of the EU’s Natura 2000 network prior to exit day), and any sites designated under the Habitats Regulations after exit day. European sites continue to contribute to delivering the UK’s domestic and international biodiversity objectives, and still form the UK’s contribution to the Emerald Network of the Bern Convention. The UK also remains a contracting party to other international conventions such as the Convention on Biological Diversity, and the United Nations Convention on the Law of the Sea.
- Management objectives are established for the UK site network¹⁴. For such sites in Scotland (including those in Scotland’s inshore and offshore waters), the Scottish Ministers must work in cooperation with the other UK administrations to manage, and where necessary, adapt the UK site network to contribute to the achievement of these objectives.
- The objectives in relation to the UK site network are to:
 - i. maintain or restore certain habitats and species listed in the Habitats Directive to favourable conservation status (FCS)
 - ii. contribute to ensuring the survival and reproduction of certain species of wild bird in their area of distribution and to maintaining their populations at levels which correspond to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.
- The Scottish Ministers must also have regard to the importance of the protected sites for achieving the aims of the Directives; to the coherence of the UK site network, as well as to the threats of degradation or destruction to which protected sites may be exposed. They must also have regard to the importance of breeding, moulting and wintering areas and staging points along the migration routes of migratory species.

¹³ Referred to in the 1994 Regulations as the “UK site network” and in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017 as the “national site network”. These terms have exactly the same meaning and refer to the network of UK SACs and SPAs known collectively as European sites.

¹⁴ The term “national site” network is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

- The collective responsibility of the four UK administrations to manage the UK site network to contribute to achieving FCS for habitats and species applies only to those parts of their natural range that lie within the UK, and recognises that action to achieve FCS should be proportionate relative to the extent of the natural range occurring in the UK. This means that disproportionate effort is not required to contribute to FCS for species and habitats whose natural range largely lies outside this area where the UK has no control and the opposite applies for habitats and species whose natural range largely falls within the UK.
- The Nature Conservation (Scotland) Act 2004 provides for the notification, management and protection of Sites of Special Scientific Interest (SSSI). This designation underpins the majority of terrestrial SACs and SPAs, with the site protection provisions from SSSIs forming appropriate steps to comply with article 6.2 of the Habitats Directive.
- European marine sites and European offshore marine sites continue to contribute to Scotland's MPA network. The network also includes Marine Protected Areas (MPAs), Sites of Special Scientific Interest (SSSIs) and Ramsar sites.
- Before the UK left the EU, the European Commission played a role in the designation process for SACs in the UK. Following identification by the relevant UK administration as "candidate" SAC (at which point the Habitats Regulations applied), site proposals were sent to the European Commission for review and adoption as Sites of Community Importance (SCIs), and ultimately designated as SACs by the relevant UK administration within six years of adoption. Now that the UK has left the EU, the Scottish Ministers will designate as SACs sites in Scotland that they consider to contribute significantly to the achievement of favourable conservation status in their natural range of habitats listed in Annex I or species listed in Annex II of the Habitats Directive, and to the maintenance of biological diversity within the Atlantic biogeographic region. SACs will still be determined on the basis of criteria in Annex III of the Habitats Directive and SPAs on the basis of the UK SPA Selection Guidelines. The relevant conservation bodies advising the Scottish Ministers will be Scottish Natural Heritage (SNH) and/or the Joint Nature Conservation Committee (JNCC).
- The general provisions for the protection of European sites under the Habitats Regulations, including the procedural requirements to be undertaken by competent authorities to assess the implications of plans or projects for European sites and only grant consent if certain tests are met – known as Habitats Regulation Appraisal (HRA) – are unchanged.

- Before the UK left the EU, the UK was required to seek the European Commission's opinion in certain circumstances on whether there were imperative reasons of overriding public interest for granting consent for a plan or project despite a competent authority being unable (following completion of an HRA) to ascertain no adverse effect on site integrity. It will now fall to the Scottish Ministers to give this opinion in relation to sites in Scotland and Scotland's inshore and offshore waters. Ministers will need to take account of the national interest and to consult the other UK administrations, the JNCC and any other person they consider appropriate.
- The UK will continue to publish reports on the conservation status of habitats and species that occur in European sites and on the conservation measures implemented. Reports under the 1994 Regulations will be published by Scottish Ministers every six years (from exit day), and a composite UK report published by the Secretary of State within two years of this. Reports under the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species 2017 will be published by the Secretary of State. These arrangements will ensure transparency and allow for parliamentary and public scrutiny.
- The UK will also continue to publish reports on licences granted for activities which might affect a European protected species or wild birds, such as for research purposes and to prevent the spread of disease. Reports will be published by the appropriate authorities every two years (from exit day) and will ensure transparency and allow for parliamentary and public scrutiny.
- The relevant habitats and species, criteria for the selection of SACs, and prohibited methods of taking or killing wild animals are listed in the annexes to the Habitats Directive and schedules of the Habitats Regulations. References in the Habitats Regulations to the annexes to the Habitats and Wild Birds Directives are references to those annexes as at exit day.
- The Habitats Regulations now include powers to amend the annexes to the Habitats and Wild Birds Directives (to the extent that they apply to the Habitats Regulations) and schedules of the Habitats Regulations. In relation to the 1994 Regulations, these powers are for the Scottish Ministers, and, in relation to the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species 2017, the Secretary of State. Such amendments would add species listed in Annex IV of the Habitats Directive where their natural range includes any area in Scotland (on land and in inshore and offshore waters) and reflect advances in technology and scientific understanding. This provides equivalent powers to those held by the European Commission.

- For the avoidance of doubt, any amendments adopted by the European Council to the Habitats or Wild Birds Directives after exit day will not apply in the UK. Introducing these new powers means the lists will remain fit for purpose in future, for example if the range of species changes as a result of climate change to include Scotland, or to make sure that new technologies are included on the list of prohibited methods. The appropriate authorities will seek advice from statutory nature conservation advisors before making any such amendments and will work with the other UK administrations to ensure a consistent approach is taken across the UK, where appropriate to do so. As was the case before EU exit, there may be instances where it is appropriate to take a different approach in Scotland.
- The Habitats Regulations still contain references to the Habitats and Wild Birds Directives. Where the provisions of the Directives being referred to contain references that do not make sense for the purposes of the Habitats Regulations now that the UK is no longer a Member State, the amendments set out how the provisions are to be read in order for it to make sense. For example, references to “Member States” in certain provisions of the Nature Directives are to be read as if the UK were a Member State.
- There are new powers for the Scottish Ministers (in relation to the 1994 Regulations) and the Secretary of State (in relation to the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species 2017) to issue guidance on interpreting the requirements of the Nature Directives. The guidance will be prepared in consultation with the appropriate nature conservation body.

Use of existing guidance documents

There is a large body of existing EU-derived guidance documents, designed to aid interpretation and effective implementation of the Nature Directives.

This includes guidance from Scottish Ministers, Scottish Natural Heritage, the UK Government (in relation to offshore waters and reserved matters), the Joint Nature Conservation Committee and the European Commission.

In the longer term, guidance may be updated and/or new guidance may be produced, for example to replace guidance by the European Commission. However, in the shorter term existing guidance continues to apply and should still be used.

Although existing guidance should still be used, users will need to read it differently in places. Some examples include:

- References to the role of the European Commission. These functions have been transferred to appropriate UK authorities or bodies, so users will need to keep this in mind when reading guidance documents.
- The UK is no longer an EU Member State, so in most cases, depending on the context within the guidance, you will need to read references to Member States as though this includes the UK. Where documents refer to other Member States, this now just means EU Member States.
- Where guidance refers to Natura 2000 sites, these sites in the UK are now part of a UK-wide site network. This includes Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) designated before EU exit, and any designated after EU exit. The terms SAC, SPA and European site are still being used.

A more comprehensive interpretation guide is available in Annex 1.

Links to some commonly used guidance documents are provided in Annex 2. This is not an exhaustive list.

Annex 1 – Interpreting existing guidance

Term	Interpretation	Notes
Conservation Objectives	None required	This term is being retained.
European Economic Area (EEA) States	References to EEA States should be read as no longer including reference to the United Kingdom	Legislation that implements the requirements of the EIA Directive has been amended so that references to ‘another EEA State’ are now read as references to ‘an EEA State’. This ensures that requirements to notify EEA States of proposed projects likely to have significant transboundary effects remain in place.
Environmental Impact Assessment (EIA)	None required	This term is being retained.
The European Commission	References to any role of the European Commission should be read as the appropriate authority (the appropriate authority will depend on the Regulations being referred to)	Amendments to the Habitats Regulations transfer functions previously carried out by the European Commission (for example giving opinions relating to IROPI) to appropriate authorities. Who this is varies depending where and what the Regulations apply to, but as a general rule it is Scottish Ministers for devolved matters related to Scotland.
European protected species' or 'EPS'	None required	This term is being retained and will continue to refer to European Protected Species as listed in Annex IV of the Habitats Directive.

Term	Interpretation	Notes
European sites	None required	This term is being retained and will continue to refer to sites already designated at the time of exit as well as any new sites brought forward under the appropriate regulations after EU exit. European sites now form part of a UK-wide network of protected sites ¹⁵ , as defined in the 1994 Regulations (as amended).
European marine site / European offshore marine site	None required	These terms are being retained and will continue to refer to marine SACs and SPAs already designated at the time of exit as well as any new sites brought forward under the appropriate regulations after EU exit. Scotland's European marine sites and European offshore marine sites now form part of the UK-wide network of protected sites ¹⁶ , as defined in the 1994 Regulations (as amended).
Favourable Conservation Status or 'FCS'	None required.	The use of the term Favourable Conservation Status will not change and the term still has the meaning given by Article 1 of the Habitats Directive.
Habitats Regulations Appraisal or 'HRA'	None required	This term is being retained and will retain its current meaning as UK leaves the EU. Associated terms and processes are being retained such as 'likely significant effect' and 'appropriate assessment' and these continue to mean the same thing as before.

¹⁵ The term "national site network" is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

¹⁶ The term "national site network" is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

Term	Interpretation	Notes
Imperative reasons of overriding public interest or 'IROPI'	None required	The phrase and processes associated with imperative reasons of overriding public interest in relation to plans or projects in SACs or SPAs still apply. Amendments to the Habitats Regulations have transferred functions previously held by the European Commission to the appropriate authority/relevant administration in the UK (generally speaking, the Scottish Ministers for devolved matters relating to Scotland, but the relevant legislation should be referred to for the avoidance of doubt). Readers of guidance will need to be mindful of this if there are references to the role of the European Commission.
Member State	References to 'Member State' or 'Member States' should be read as though it includes reference to the United Kingdom. References to another 'Member State' should be read as 'a Member State'	Depending on the context, references to 'Member State' should now be read as referring to the appropriate authority, competent authority, or statutory nature conservation body within the UK depending on the obligation. Depending on the context of the term's use in documentation, references to 'another Member State' should be read as 'a member state.'
Natura sites or Natura 2000 Network	References to the Natura 2000 network should be read as references to the UK site network.	The UK site network ¹⁷ means the network of SACs and SPAs in the UK's territory consisting of Natura 2000 sites designated before exit day and any European Sites, European Marine Sites and European Offshore Marine Sites designated after EU Exit.

¹⁷ The term "national site network" is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

Term	Interpretation	Notes
Secretary of State	References to the Secretary of State may need to be read as references to relevant administration.	Depending on the context of the term's use in documentation, some references to the Secretary of State in relation to the Conservation of Offshore Marine Habitats and Species Regulations 2017 should now be “the relevant administration.” In relation to devolved matters in Scottish offshore waters, the ‘relevant administration’ usually means the Scottish Ministers, but the relevant legislation should be referred to for the avoidance of doubt.
Site integrity	None required	This term is not currently defined in the Habitats Regulations or the Directive but is described in domestic and EU guidance and is central to the assessment provisions of the Regulations (and consequentially, all Conservation Objectives). The term will continue to be used.
Site of Community importance or ‘SCI’	References to Sites of Community Importance will need to be read as ‘Site of national importance’	Amendments have been made to the Habitats Regulations so that the appropriate authority will now designate as SACs sites that they consider to contribute significantly to the achievement of favourable conservation status in their natural range of habitats listed in Annex I or species listed in Annex II of the Habitats Directive, and to the maintenance of biological diversity within the Atlantic biogeographic region.
Special Protection Area or ‘SPA’	None required	This term is being retained and will continue to refer to sites already classified at the time of exit and new sites classified under the appropriate regulations after EU exit. SPAs now form part of the UK site network ¹⁸ , as defined in the 1994 Regulations (as amended).

¹⁸ The term “national site network” is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

Term	Interpretation	Notes
Special Area of Conservation or 'SAC'	None required	This term is being retained and will continue to refer to sites already designated at the time of exit and new sites designated under the appropriate regulations after EU exit. SACs now form part of the UK site network ¹⁹ , as defined in the 1994 Regulations (as amended).
References to EU Directives, including general references, or references to specific provisions of Directives	References to provisions of Directives may need to be read differently.	References to EU Directives are references to those Directives as at exit day. These references continue to work, however, in a number of cases the amended Habitats Regulations set out how the Directives should be read so that the provisions make sense now that the UK is not part of the EU. Users of guidance will need to be mindful of this. For example, references to 'Member State' or 'Member States' within Directives should be read as though this includes reference to the United Kingdom.
References to legislation implementing the requirements of EU Directives	References will need to be read as the latest version of the legislation, including any amendments made to ensure operability after EU exit.	Environmental legislation, including instruments implementing requirements of various EU Directives, has been amended to ensure it continues to operate. References to specific pieces of legislation will need to be read as the latest version of that legislation, as amended. This will apply to various instruments, including those transposing the Habitats and Wild Birds Directives, the EIA Directive and the Marine Strategy Framework Directive.

¹⁹ The term "national site network" is used in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017. The two terms refer to the same network of sites.

Annex 2 – Existing guidance

This annex provides examples of commonly used guidance documents relating to the legislation covered in this guidance. This existing guidance should continue to be used after exit day; using the interpretation table in Annex 1 to understand where terms and phrases will need to be read differently following amendments to legislation to ensure it continues to operate.

This is not an exhaustive list.

Implementing the Habitats and Wild Birds Directives

Designating European sites	European Commission note on the designation of Special Areas of Conservation (SACs) European Commission guidelines for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives.
Setting conservation objectives	European Commission note on setting conservation objectives for Natura 2000 sites
European protected species	European Commission guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC Marine Scotland guidance for Scottish inshore waters – The protection of marine European protected species from injury and disturbance Further information on European protected species from the Scottish Government Further information on European protected species from NatureScot

<p>Management of European sites</p>	<p><u>European Commission note on establishing conservation measures for Natura 2000 sites</u></p> <p><u>European Commission guidance on managing Natura 2000 sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC</u></p> <p><u>European Commission guidance on assessment of plans and projects significantly affecting Natura 2000 sites – Methodological guidance on the provisions of article 6(3) and (4) of the Habitats Directive 92/43/EEC</u></p> <p><u>Further guidance, including sectoral guidance, from the European Commission.</u></p> <p><u>Guidance from the European Commission on European marine sites, including on establishing fisheries management measures under the Common Fisheries Policy.</u></p> <p><u>NatureScot– Natura sites and the Habitats Regulations – how to consider proposals affecting SACs and SPAs in Scotland – the essential quick guide.</u></p>
<p>Wild Birds Directive</p>	<p><u>European Commission guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds “The Birds Directive”</u></p> <p><u>Further guidance from the European Commission on the Wild Birds Directive</u></p>

Licensing and consents

Marine licensing	Marine Scotland guidance for marine licence applicants Marine Scotland guidance on marine licensable activities subject to pre-application consultation
Renewable energy consenting and licensing	Marine Scotland offshore wind, wave and tidal energy applications: consenting and licensing manual



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80004-449-4 (web only)

Published by The Scottish Government, December 2020

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS806746 (12/20)

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