EXPLANATORY MEMORANDUM TO

THE OFFSHORE MARINE CONSERVATION (NATURAL HABITATS, &c.) REGULATIONS 2007

2007 No. 1842

THE CONSERVATION (NATURAL HABITATS, &c.) (AMENDMENT) REGULATIONS 2007

2007 No. 1843

THE TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE) (AMENDMENT) (ENGLAND) ORDER 2007

2007 No. 1844

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (SI 2007/1842)(the "Offshore Marine Regulations") seek to ensure that activities in marine areas where the United Kingdom has jurisdiction beyond its territorial sea - broadly from 12 nautical miles to 200 nautical miles from the United Kingdom's coastal baseline - are carried out in a manner that is consistent with Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive") and Council Directive 79/409/EEC on the conservation of wild birds (the "Wild Birds Directive"). The Regulations make provision in relation to the offshore marine area, offshore marine installations and certain ships and aircraft. The transposition of the Habitats and Wild Birds Directives beyond territorial waters will afford protection to marine species and wild birds listed by the respective Directives, as well as requiring habitats to be identified and protected as "European offshore marine sites" (see paragraph 2.4 below). The Offshore Marine Regulations also include provisions to deal with the requirements of Directive 2006/105/EC which has brought amendments of the Habitats and Wild Birds Directives as a result of the enlargement of the European Union to include two new member States (Bulgaria and Romania) in 2007.A transposition note at Appendix I sets out the transposition of the Directives in the offshore marine area.

2.2 The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 (SI 2007/1843) (the "Amendment Regulations") will amend the Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716) (the "Habitats Regulations") in order to address current gaps and inconsistencies and to create greater legal certainty in a number of areas. The Amendment Regulations also include amendments to deal with the requirements of Directive 2006/105/EC. A transposition note at Appendix II sets out the areas of the Directives that have been clarified or transposed.

2.3 The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2007 (SI 2007/1844) (the "Amendment Order") revokes the requirement in article 2B(15)(c) of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) (the "General Development Procedure Order") prohibiting the making of a local development order which would grant planning permission for development that is likely to have a significant effect on a "European site", as defined in regulation 10 of the Habitats Regulations. The Amendment Regulations insert into the Habitats Regulations a similar provision to the one revoked by the Amendment Order, though the new provision applies in respect of effects on "European offshore marine sites" as well as other "European sites".

2.4 In broad terms, "European sites" are Special Areas of Conservation designated pursuant to the Habitats Directive and Special Protection Areas classified pursuant to the Wild Birds Directive. In this memorandum, the term "European offshore marine site" is used to describe a "European site" located in the offshore marine area.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The JCSI should be aware that "intention" and "recklessness" (in some cases "intention" alone) have been used as the *mens rea* for the offences in regulation 32 of the Offshore Marine Regulations, while "deliberate" has been used in respect of the offences in regulations 34(1) and 39(1) of the Offshore Marine Regulations (and in new regulation 39(1) of the Habitats Regulations, as substituted by regulation 5(13) of the Amendment Regulations).

3.2 This distinction is deliberate, and results from the fact that the provisions implement different Articles of the Habitats and Wild Birds Directives.

3.3 Regulation 39(1) (of both sets of Regulations identified above) implements Article 12(1), which uses the term "deliberate" to define certain of the actions that must be prohibited in respect of protected species. The European Court of Justice (ECJ) has given two decisions relevant to the meaning of the word "deliberate" in this context.

3.4 In the first case, C-103/00 *Commission v. the Hellenic Republic*, of 30th January 2002, the ECJ held, in the context of Article 12(1)(b) of the Habitats Directive, which concerns the deliberate disturbance of a protected species, that:

> *35. It is apparent from the documents before the Court that at the time the facts were ascertained by the Commission's officials, the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there…*

> *36. It follows that the use of mopeds on the sand beach to the east of Laganas and the presence of pedalos and small boats in the sea area around Gerakas and Dafni constitute the deliberate disturbance of the species in question during its breeding period for the purposes of Article 12(1)(b) of the Directive."*

This clearly extends the terms "deliberate" beyond its literal scope.

3.5 In the second case, C-221/04 *Commission v. the Kingdom of Spain*, of 18 May 2006, the ECJ held, in the context of Article 12(1)(a) of the Habitats Directive, which concerns deliberate capture or killing of a protected species, that:

> *71. For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.*

Again, this clearly goes beyond the literal meaning of the word "deliberate".

3.6 The extent of the term "deliberate" for the purposes of each of the sub-paragraphs of Article 12(1) of the Habitats Directive is not clear at present. For example, it is unknown whether a broad interpretation of "deliberate" would also apply to Article 12(1)(c), which concerns the deliberate destruction or taking of eggs. Additionally, it may be the case that the ECJ will further refine its definition(s) of this concept in future decisions. In the circumstances, Defra did not feel it would be appropriate, in transposing Article 12(1), to adopt anything other than a copy-out approach. Hence, the word "deliberate" has been used in regulation 39(1). The implications of the ECJ's decision have, however, been fully explained in guidance.

3.7 It is considered that the ECJ would be likely to apply a similar interpretation to the term "deliberate" in Article 5 of the Wild Birds Directive, which is transposed by regulation 34 of the Offshore Marine Regulations, where again "deliberately" has been used in paragraph (1).

3.8 The extended meaning given by the ECJ to the word "deliberate" also explains why regulations 34(4) to (6) and 39(9) to (11) of the Offshore Marine Regulations (and the equivalent paragraphs of new regulation 39 of the Habitats Regulations, as substituted by the Amendment Regulations) contemplate that the offence of deliberate capture, killing, injury or disturbance might be committed where the defendant did not intend that his action would result in a capture, killing, injury or disturbance.

3.9 In contrast to the above position, regulation 32, which creates a number of offences in respect of European offshore marine sites, relies on the *mens rea* "intention" and "recklessness". This is because the difficulties identified above do not exist in the context of this provision, which implements Article 6(2) of the Habitats Directive.

3.10 Article 6(2) requires Member States to take appropriate steps to avoid, in European sites (including European offshore marine sites), the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive. In terms of "appropriate steps", Defra has chosen to implement Article 6(2) in the offshore marine area by, amongst other things, offences of "intention" and "recklessness" in regulation 32.

4. Legislative Background

4.1 The Habitats Regulations are the principal means by which the Habitats Directive is transposed for Great Britain and its territorial seas. Similar Regulations, the Conservation (Natural Habitats, &c.) Regulations (Northern Ireland) 1995 (SR (NI)1995/380), transpose the Habitats Directive in relation to Northern Ireland.

4.2 The Offshore Marine Regulations and the Amendment Regulations are being made to comply with two recent ECJ judgments against the United Kingdom, C-6/04 *Commission v United Kingdom* and C-131/05 *Commission v United Kingdom*, concerning the failure of the United Kingdom of Great Britain and Northern Ireland to fulfil its obligations under Articles 6(2), 6(3), 6(4), 11, 12(1), 12(2), 12(4), 13(1), 14(2), 15 and 16 of the Habitats Directive, as well as the whole Directive beyond the United Kingdom's territorial waters.

4.3 Scottish Ministers have made (SSI 2007/80) and the Department of the Environment for Northern Ireland are making regulations, similar to the Amendment Regulations, for Scotland and Northern Ireland respectively.

4.4 The Offshore Marine Regulations will ensure that activities in marine areas where the United Kingdom has jurisdiction beyond its territorial sea are carried out in a manner that is consistent with the Habitats and Wild Birds Directives. Two sets of legislation are already in place which transpose parts of the Habitats Directive in respect of the offshore marine area in relation to specific activities, namely:

- the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (SI 2001/1754) with respect to oil and gas activities.
- the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007 (SI 2007/1067) (hereafter referred to as the "Marine Dredging Regulations") with respect to marine minerals dredging.

The new Regulations will not duplicate the effect of these instruments.

4.5 The Amendment Regulations will:

- amend the species protection regime to better reflect the requirements of the Habitats Directive;
- provide a clear legal basis for surveillance and monitoring of European protected species (EPS);
- extend trade controls so the regime applies to all wild Annex IV and II(b) species (other than bryophytes) and not just those whose natural range includes Great Britain;
- ensure that the requirement to carry out "appropriate assessments" (under Article 6(3) of the Habitats Directive) of water abstraction consents and land use plans is explicit.

4.6 In addition, the Amendment Regulations will:

- amend Section 10 of the Conservation of Seals Act 1970 to ensure that any licence issued under the Act does not authorise the use of methods for killing or taking seals which are prohibited under regulation 41 of the Habitats Regulations.
- amend the Wildlife and Countryside Act 1981 (WCA) so that EPS are removed from the scope of certain WCA offences. This ensures that there is no conflict between the two pieces of legislation.

4.7 The Offshore Marine Regulations and the Amendment Regulations were agreed by the Ministerial Committee on European Policy on 16th March 2007

4.8 Part IV of the Habitats Regulations transposes the requirements of Article 6 of the Habitats Directive, which requires, amongst other things, "appropriate assessments" to be carried out where proposed development is likely to have a significant effect on a European site. As stated in paragraph 4.2 above, part of the ECJ's judgment in case C-6/04 was that the United Kingdom had failed adequately to transpose the Directive in that the obligations imposed by the Directive extend to the offshore marine area and hence, amongst other matters, impose obligations in respect of European offshore marine sites.

4.9 The Amendment Order is made in conjunction with the Amendment Regulations which, amongst other matters, amend the Habitats Regulations to provide for appropriate assessments to extend, in respect of European offshore marine sites, to those planning consents set out in Part IV of the Habitats Regulations. A new regulation 64A is inserted into the Habitats Regulations by the Amendment Regulations to prohibit the making of a local development order which would grant planning permission for development that is likely to have a significant effect on a European offshore marine site or other European site (e.g. sites located in terrestrial areas, internal waters or the territorial sea). Consequently, the Amendment Order revokes the provision in article 2B(15)(c) of the General Development Procedure Order, which was to similar effect as new regulation 64A of the Habitats Regulations, though it did not, of course, extend to European offshore marine sites.

5. Territorial Extent and Application

5.1 The Offshore Marine Regulations apply to the United Kingdom's offshore marine area, which means any part of the seabed and subsoil situated in any area designated under section 1(7) of the Continental Shelf Act 1964 (effectively the United Kingdom sector of the continental shelf) and any part of the waters within British fishery limits (except the internal waters of, and the territorial sea adjacent to, the United Kingdom, the Channel Islands and the Isle of Man).

5.2 The Amendment Regulations principally extend only to England and Wales, and, in so far as they amend the Habitats Regulations in relation to England and Wales, similar amendments to the Habitats Regulations have been made in respect of Scotland by SSI 2007/80. However, certain amendments contained in the Amendment Regulations also extend to Scotland, and certain other amendments only extend to Scotland. In terms of territorial application, the Amendment Regulations and the Habitats Regulations apply to terrestrial areas, internal waters and the territorial sea (i.e. out to 12 nautical miles).

5.3 The Amendment Order applies in relation to England only

6. European Convention on Human Rights

6.1 As the Offshore Marine Regulations and the Amendment Order are subject to negative resolution procedure and do not amend primary legislation, no statement is required with regard to those instruments.

6.2 In respect of the Amendment Regulations, the Minister for Biodiversity, Landscape and Rural Affairs, Mr Barry Gardiner, has made the following statement regarding Human Rights:

"In my view the provisions of the Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 are compatible with the Convention rights."

7. Policy background

7.1 The objective of the Habitats Directive is to protect biodiversity through conservation of natural habitats and species of wild fauna and flora. The objective of the Wild Birds Directive is to conserve wild bird populations. Both lay down rules for the protection, management and exploitation of such species. The Offshore Marine Regulations fulfil these objectives in the United Kingdom's offshore marine area (broadly, beyond 12 nautical miles from the coastal baseline and out to 200 nautical miles) by ensuring that activities beyond territorial waters are carried out in a manner that is consistent with each Directive. The Habitats Regulations aim to fulfil the objectives of the Habitats Directive in respect of terrestrial areas, internal waters and the territorial sea.

7.2 Apart from the United Kingdom's legal obligations to protect European marine species and habitats, the Government is committed to a vision of *'clean, healthy, safe and productive and biologically diverse oceans and seas'*. Development and exploitative human activity in the marine environment has been found to degrade the environment and negatively impact on marine biodiversity, as set out in the Government report *Charting Progress – An Integrated Assessment of the State of UK Seas.*

7.3 Current legislation does not fully implement the Habitats and Wild Birds Directives in the offshore marine area, and without statutory protection, there would be a decline in species and habitats of European importance. Hence the need for the Offshore Marine Regulations. Lack of protection of these species and habitats could also contribute to a reduction in the resilience of marine ecosystems which could affect the value of marine biodiversity. In turn this could have an effect on fisheries, recreational use as well as the role the sea plays in climate change regulation.

7.4 With regards to the Amendment Regulations and the changes introduced to the species protection provisions in the Habitats Regulations, the objective is to improve species protection by toughening up and extending the trade rules and creating stronger laws for the protection of such species (animals and plants). The latter objective will be achieved by removing many of the defences available in respect of the offences against EPS. For example, it will no longer be a defence to show that the capturing, killing, destruction or disturbance of wild EPS animals was an incidental and unavoidable result of an otherwise lawful activity. The same applies to the picking, cutting or destruction of wild EPS plants. If an activity is likely to result in an offence being committed, those involved will have to consider alternative options or look to avoid impacts. If this is not possible a licence may be required

before the activity can lawfully be undertaken. Tougher, wider ranging trade rules which prohibit the possession and sale of all species listed on Annex IV and Annex II(b) (other than bryophytes) of the Habitats Directive will act as a deterrent to the capturing, killing or taking of wild protected species throughout Europe.

7.5 Changes to Part IV of the Habitats Regulations, which transposes the requirements of Article 6 of the Habitats Directive, ensure that water abstraction plans and projects are now expressly subject, through regulations 48 to 51 of the Habitats Regulations, to the obligations of Article 6(3) and (4) of the Habitats Directive. These provisions cover "appropriate assessment" of implications on European sites, considerations of overriding public interest and reviews of existing decisions and consents. Land use plans are now also expressly subject to the obligations under Article 6(3) and (4) through a new Part IVA of the Habitats Regulations.

7.6 Previously these obligations had been applied via the general duty under regulation 3(4) of the Habitats Regulations, which compels every competent authority in the exercise of any of their functions to have regard to the requirements of the Habitats Directive (including Article 6(3) and (4)), so far as they may be affected by the exercise of those functions. Whilst the general duty under regulation 3(4) compels every competent authority to have regard to the requirements of the Habitats Directive, it is for the competent authority to interpret how it should apply those requirements. This can lead to inconsistencies of application. Parts IV and IVA of the Habitats Regulations set out how the obligations of Article 6(3) and (4) – the consideration of effects on European sites and considerations of overriding public interest – are to be applied in practice. This will lead to a consistent approach to such issues with regards to land use plans, water abstraction plans and projects, and other plans and projects currently covered by Part IV.

7.7 The Amendment Regulations will also ensure that plans and projects in terrestrial areas, internal waters and the territorial sea will not adversely affect the integrity of offshore marine sites. This is achieved by amendments to regulations 47 to 85 (adaptation of planning and other controls provisions) so that the effects of such plans and projects on European offshore marine sites will in future have to be considered.

7.8 The Amendment Order is made as a consequence of the Amendment Regulations (see paragraph 4.9 above).

Consultation

7.9 Two consultations were carried out on the draft Offshore Marine Regulations: one in August 2003 (ending in October 2003) and one in May 2006 (ending on 30 June 2006). The second consultation took into account a number of new issues including the two ECJ judgments referred to in paragraph 4.2 above.

7.10 For the first consultation, 179 organisations were consulted and 38 responses were received. Over half of the responses indicated broad support for the proposed implementation of the Habitats and Wild Birds Directives beyond 12 nautical miles, to include the offshore marine area, recognising that the proposed Regulations would provide a foundation to ensure the requirements of both Directives are met in the offshore marine area.

7.11 For the second consultation in 2006, of the 254 organisations consulted, 37 responses were received. Most responses focussed on the specific areas of the Regulations that directly related to the organisations' operations. The majority of respondents (between 70 – 99%) indicated broad support for the Regulations.

7.12 From a breakdown of the responses by stakeholder; the largest number of responses (36 %) were received from organisations representing industry; 32 % were from non government organisations (NGOs), 24 % of responses were received from Government Agencies and advisory bodies; and a small percentage (4 % each) from individuals and other organisations. The Regulatory Impact Assessment (Appendix III) provides a summary of each consultation exercise (section 3) and the key issues that were raised by stakeholders.

7.13 In terms of the Amendment Regulations, consultation on draft amendments to the Habitats Regulations in England originally took place concurrently with the consultation on draft Offshore Marine Regulations between August and October 2003. A consultation on the principles of amendments in Wales, had already taken place in 2002. A second consultation on draft amendments, this time for both England and Wales, again took place concurrently with the consultation on the draft Offshore Marine Regulations in May 2006 ending on 30 June 2006. As per the Offshore Marine Regulations, the second consultation took into account a number of new issues including the two ECJ judgments mentioned in paragraph 4.2 above. Scotland undertook similar consultations for amendments in Scotland in March 2003, and again in June 2006 ending on 28 July 2006.

7.14 The first consultation exercise, launched on 6 August 2003, consulted 120 organisations. 49 individuals and organisations replied before the closing date of 29 October 2003. Responses were received from a broad range of stakeholders and interested parties including Local Authorities, Non Government Organisations (NGOs) and Government advisors on conservation matters.

7.15 For the second consultation in 2006, of the 1387 organisations consulted, 97 responses were received. Most responses focussed on the specific areas of the regulations that directly related to the respondent's operations.

7.16 The largest number of responses was received from Government Agencies and advisory bodies (47 %). 19% of responses were received from organisations representing industry, 25% were from non government organisations (NGOs), with 8% and 1% respectively from individuals and other organisations. In addition, five organisations offered no opinion.

7.17 Overall, respondees were supportive of the proposed amendments. 100% of the responses supported the amendments to: extend the definitions within the Habitats Regulations to include new Member States and to extend the definition of European Marine Site to include offshore marine sites. The proposed amendments to the Conservation of Seals Act 1970 were also fully supported.

7.18 Broad support (ranging from 70-92%) was given for all other amendments. However, four key issues were identified where concerns were raised, specifically relating to the species protection provisions and extending the scope of the "appropriate assessment" provisions of the Regulations to include other plans and projects. The Regulatory Impact Assessment for the Amendment Regulations (Appendix IV) provides a summary of the responses and how the Department has sought to find solutions to the concerns that were raised by stakeholders.

7.19 No consultation was carried out with regards to the Amendment Order. This was because the provision being revoked by the Order is replicated in the Amendment Regulations (see paragraph 4.9 above).

Guidance

7.20 Prior to the Offshore Marine Conservation Regulations coming into force, the Government is informing all key stakeholders of the legislative changes that will be made by this instrument. A letter of guidance will be available from the Defra website; **http://www.defra.gov.uk/marine/biodiversity/index.htm**. The Joint Nature Conservation Committee will play a key role in identifying SACs and SPAs in the offshore marine area and will provide ongoing guidance and advice to marine stakeholders on conservation matters relating to the Offshore Marine Regulations.

7.21 Guidance is being provided on the amendments to the species protection provisions of the Habitats Regulations. This includes a simplified guide to the amended Regulations setting out the key changes and an associated guide on how these changes will impact on protected species licensing. Further practical guidance will be developed, focussing on specific species and sectors of activity. This will include, in the first instance, the possession of Annex IV specimens, exclusion of bats from dwelling houses and generic guidance on managing woodland in relation to EPS. Guidance will also be provided for the species protection provisions in the marine environment. This guidance will be available from the Defra website **http://www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm**.

7.22 In terms of assessing and reviewing water abstraction licences, the Environment Agency is, through the general duty under regulation 3(4) of the Habitats Regulations, already fulfilling obligations under Article 6(3) and (4) by assessing effects on European sites. The Environment Agency has produced extensive guidance for water abstractors which can be accessed via:
http://environment-agency.gov.uk/subjects/waterres/564321/?version=1&lang=_e

7.23 Draft departmental guidance for regional planning bodies and local planning authorities has already been published by the Department for Communities and Local Government (DCLG) regarding compliance with the requirement to undertake appropriate assessments in connection with regional special strategies and local development documents. This guidance can be found at:
http://communities.gov.uk/index.asp?id=1502244 and**;**
http://communities.gov.uk/index.asp?id=1165623

Consolidation

7.24 The Amendment Regulations amend the Habitats Regulations, the Conservation of Seals Act 1970 and the Wildlife and Countryside Act 1981. Defra has primarily looked to address the findings of the two ECJ judgments referred to in paragraph 4.2. above. Extending the remit of the amendments to include an element of consolidation would have added to the complexity of the exercise and therefore led to further delays, when the Department was subject to stringent infraction deadlines.

7.25 It is intended that once the above Regulations are made, a review and consolidation of the UK's transposition of the Habitats Directive will take place.

7.26 In order that we may quantify the potential size of the task and resources required, we will review and analyse the scope for consolidation, including further harmonisation between the Habitats Regulations and Offshore Marine Regulations and interface with habitats related provisions in other legislation such as the Environmental Liability Directive and the Marine Dredging Regulations (SI 2007/1067).

7.27 This scoping study started in April 2007 and should take two or three months. Defra will then consider the best way forward.

8. Impact

8.1 Regulatory Impact Assessments for the Offshore Marine Regulations and the Amendment Regulations are appended to this memorandum (Appendices III and IV respectively) and are also available at:
http://www.defra.gov.uk/marine/biodiversity/index.htm and
http://www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm respectively. The Assessments include consideration of the impact of the Regulations on the business and public sectors.

8.2 A Regulatory Impact Assessment has not been prepared for the Amendment Order as it has no impact on business, charities or voluntary bodies.

8.3 The impact on the public sector is nil, as the Order repeals provisions that are similarly provided for in the Amendment Regulations.

9. Contacts

9.1 Emily Musson at the Department for Environment, Food and Rural Affairs Tel: 0117 372 8523 or e-mail: **Emily.Musson@eden.defra.gsi.gov.uk** can answer queries regarding the Offshore Marine Regulations.

9.2 Simon Liebert at the Department for Environment, Food and Rural Affairs Tel: 0117 372 8341 or e-mail: **Simon.Liebert@eden.defra.gsi.gov.uk** can answer queries regarding the Amendment Regulations.

9.3 Linda Rawlings at the Department for Communities and Local Government Tel: 020 7944 3982 or e-mail: **Linda.Rawlings@communities.gsi.gov.uk** can answer any queries regarding the Amendment Order.