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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2007 No.**

**The Conservation (Natural Habitats, &c.)  
Amendment (Scotland) Regulations 2007**

**PART II**

**AMENDMENTS TO THE CONSERVATION  
(NATURAL HABITATS, &c.) REGULATIONS 1994**

- 4.** The Conservation (Natural Habitats &c.) Regulations 1994(1) are amended in accordance with regulations 5 to 25.
- 5.** In regulation 2(1) (interpretation and application)–
  - (a) for the definition of “the Habitats Directive” substitute–

““the Habitats Directive” means Council Directive [92/43/EEC](#) on the conservation of natural habitats and of wild fauna and flora(2) as amended from time to time;”;
  - (b) omit the definition of “occupier”.
- 6.** In regulation 3(3) (implementation of Directive)(3), after “the Land Drainage Act 1991,” insert “Part 1 of the Water Environment and Water Services (Scotland) Act 2003(4), the Water Environment (Controlled Activities) (Scotland) Regulations 2005(5)”.
- 7.** After regulation 5(h) (relevant authorities in relation to marine areas and European marine sites)(6) insert–
  - (i) a National Park authority established by order under section 6 of the National Parks (Scotland) Act 2000(7)
- 8.** In regulation 10(1)(e) (meaning of “European site” in these Regulations)(8) omit “in Scotland”.
- 9.** After regulation 37 (nature conservation policy in planning contexts) insert–

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(1) S.I.1994/2716. The 1994 Regulations make provision for the purpose of implementing, for Great Britain, Council Directive [92/43/EEC](#) on the conservation of natural habitats and of wild fauna and flora.

(2) O.J. No. L 206, 22.7.1992, p.7.

(3) There are amendments to regulation 3 not relevant to these Regulations.

(4) [2003 asp 3](#).

(5) [S.S.I. 2005/348](#) as amended by [S.S.I. 2006/553](#).

(6) There are amendments to regulation 5 not relevant to these Regulations.

(7) [2000 asp 10](#); the Loch Lomond and The Trossachs National Park Authority was established by the Loch Lomond and The Trossachs National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2002 ([S.S.I. 2002/201](#)). The Cairngorms National Park Authority was established by the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 ([S.S.I. 2003/1](#)).

(8) Regulation 10(1)(e) was inserted by regulation 6 of the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004 ([S.S.I. 2004/475](#)).

**“Surveillance of conservation status of habitats and species**

**37A.**—(1) The Scottish Ministers shall make arrangements for the carrying out of surveillance of the conservation status of natural habitats of Community interest and species of Community interest, and in particular priority natural habitat types and priority species.

(2) Where, in the case of any species of wild fauna and flora listed in Annex V to the Habitats Directive, the Scottish Ministers consider that the results of surveillance under paragraph (1) makes it necessary to do so, they shall make arrangements for ensuring that the taking in the wild of specimens of such species, and their exploitation, is compatible with their being maintained at favourable conservation status.

(3) The arrangements to be made under paragraph (2) shall include arrangements for the carrying out of surveillance of the conservation status of the species in question, for the purpose of establishing whether the taking in the wild of specimens of such species, and their exploitation, is compatible with their being maintained at favourable conservation status.

(4) The Scottish Ministers shall, from time to time, review the arrangements they have made under paragraphs (1), (2) or (3) and if they think it appropriate, revise those arrangements.”.

**10.** Subject to regulation 31, for regulation 39 (protection of wild animals of European protected species) substitute—

**“Protection of certain wild animals**

**39.**—(1) It is an offence—

- (a) deliberately or recklessly to capture, injure or kill a wild animal of a European protected species;
- (b) deliberately or recklessly—
  - (i) to harass a wild animal or group of wild animals of a European protected species;
  - (ii) to disturb such an animal while it is occupying a structure or place which it uses for shelter or protection;
  - (iii) to disturb such an animal while it is rearing or otherwise caring for its young;
  - (iv) to obstruct access to a breeding site or resting place of such an animal, or otherwise to deny the animal use of the breeding site or resting place;
  - (v) to disturb such an animal in a manner that is, or in circumstances which are, likely to significantly affect the local distribution or abundance of the species to which it belongs; or
  - (vi) to disturb such an animal in a manner that is, or in circumstances which are, likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young;
- (c) deliberately or recklessly to take or destroy the eggs of such an animal; or
- (d) to damage or destroy a breeding site or resting place of such an animal.

(2) Subject to the provisions of this Part, it is an offence to deliberately or recklessly disturb any dolphin, porpoise or whale (cetacean).

(3) It is an offence for any person—

- (a) on or after 1st May 2007 to possess or control;
- (b) on or after 1st May 2007 to transport;
- (c) to sell or exchange; or

- (d) to offer for sale or exchange,  
anything to which paragraph (4) applies.
- (4) This paragraph applies to—
- (a) any live or dead animal or part of an animal—
    - (i) which has been taken from the wild; and
    - (ii) which is of a species or subspecies listed in Annex IV(a) to the Habitats Directive; and
  - (b) anything derived from, such an animal or part of such an animal.
- (5) The offences in paragraph (1), (2) and (3) apply to all stages of the life of the animals to which they apply.
- (6) Subject to paragraph (7), a person shall not be guilty of an offence under paragraph (3) if that person shows that the animal, or part of the animal in question, or the animal or part of the animal from which the thing in question is derived, was lawfully taken from the wild.
- (7) The defence under paragraph (6) does not apply—
- (a) in respect of the offences in paragraph (3)(a) or (b) if—
    - (i) the animal in question is an animal of a European protected species, or the part or thing in question is derived from such an animal; and
    - (ii) the animal, part or thing in question was in the defender's possession, or transported by the defender, for the purpose of sale or exchange;
  - (b) in respect of the offences in paragraph (3)(c) or (d), if the animal is an animal of a European protected species, or the part or thing in question is derived from such an animal.
- (8) For the purposes of paragraph (6) an animal, or part of an animal, shall be treated as having been lawfully taken from the wild if—
- (a) it was taken from the wild in the European territory of a member State to which the Habitats Directive applies without contravention of the law of that member State and before the implementation date; or
  - (b) it was taken from the wild elsewhere without contravention of the law of the country or territory from where it was taken.
- (9) A person shall not be guilty of an offence under paragraph (3) if that person shows that the animal, or the animal from which the part or thing in question is derived—
- (a) is of a species listed in the second column of the table in Schedule 2A and was from a population occurring in a country or area which is specified in respect of that species in the third column of that Schedule;
  - (b) is of the species *Capra aegagrus* and was not from a naturally occurring population;
  - (c) is of the species *Ovis gmelini musimon* and was not from a naturally occurring population in Corsica or Sardinia; or
  - (d) is of the species *Coregenus oxyrhynchus* and either was from Finland or was not from an anadromous population.
- (10) Subject to the provisions of this Part, it is an offence to knowingly cause or permit to be done an act which is made unlawful by any of the provisions of this regulation.
- (11) Unless the contrary is shown, in any proceedings—
- (a) for an offence under paragraph (1) or (2), the animal in question shall be presumed to have been a wild animal; and

- (b) for an offence under paragraph (3) (as the case may be)—
  - (i) the animal or part of the animal in question shall be presumed to have been taken from the wild; or
  - (ii) the part or thing in question shall be presumed to be from an animal or part of an animal taken from the wild.

(12) Subject to paragraph (13), a person guilty of an offence under this regulation is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(13) A person guilty of an offence under paragraph (3) insofar as it relates to any live or dead animal or part of an animal, or any part of, or anything derived from an animal or part of an animal, which is of a species or subspecies which was not listed in Annex IV(a) to Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora as it stood immediately before it was amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or to both.

(14) In this regulation—

“the implementation date” means—

- (a) where the relevant State became a member State before 10th June 1994, 10th June 1994; and
- (b) in any other case, the date on which the relevant State became a member State; and

“relevant State” means the State in whose territory the animal, or part of it, was taken from the wild.”.

11. For regulation 40 (exceptions from regulation 39) substitute—

**“Exceptions to regulation 39**

**40.—**(1) A person shall not be guilty of an offence under regulation 39(1)(a) or (b), (2), or (3)(a) or (b), if that person shows that what was done—

- (a) was in relation to an animal that had been seriously disabled otherwise than by that person’s unlawful act and there was no reasonable chance of its recovering; and
- (b) was done solely for one or more of the purposes of—
  - (i) ending the animal’s life in a humane manner; or
  - (ii) where the animal’s life had been so ended, disposing of it (otherwise than by sale or exchange) as soon as practicable after it was dead.

(2) A person shall not be guilty of the offence under regulation 39(1)(a) of deliberately or recklessly capturing a wild animal of a European protected species, or an offence under regulation 39(3)(a) or (b), if that person shows that what was done—

- (a) was in relation to an animal that had been disabled otherwise than by that person’s unlawful act; and
- (b) was done solely for one or more of the purposes of—
  - (i) tending it and releasing it when no longer disabled; or

(ii) releasing it after it had been tended,

and was done in a manner or in circumstances unlikely to cause the animal unnecessary suffering.

(3) A person shall not be guilty of an offence by reason of any act made unlawful by regulation 39 if that person shows that the act was carried out in relation to an animal bred and, at the time the act was carried out, lawfully held in captivity.”.

12. In regulation 41 (prohibition of certain methods of taking or killing wild animals)(9)–

(a) at the end of paragraph (2)(a) omit “or”; and

(b) at the end of paragraph (2)(b) insert– “, or

(c) any other means of taking or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in Schedule 3 to these Regulations or any European protected species of animal.”.

13. After regulation 41 insert–

**“Monitoring incidental capture and killing**

**41A.**—(1) The Scottish Ministers shall make arrangements for monitoring the incidental capture and killing of animals of the species listed in Annex IV(a) to the Habitats Directive.

(2) In light of the information gathered from monitoring under paragraph (1), the Scottish Ministers shall make arrangements for the carrying out of such research or the taking of such conservation measures as are necessary for ensuring that such incidental capture and killing does not have a significant negative impact on the species in question.

(3) The Scottish Ministers shall, from time to time, review the arrangements they have made under paragraph (1) or (2) and, if they think it appropriate, revise those arrangements.”.

14. Subject to regulation 31, for regulation 43 (protection of wild plants of European protected species) substitute–

**“Protection of certain wild plants**

**43.**—(1) It is an offence deliberately or recklessly to pick, collect, cut, uproot or destroy a wild plant of a European protected species.

(2) It is an offence for any person–

(a) on or after 1st May 2007 to possess or control;

(b) on or after 1st May 2007 to transport;

(c) to sell or exchange; or

(d) to offer for sale or exchange,

anything to which paragraph (3) applies.

(3) This paragraph applies to–

(a) any live or dead plant, or part of a plant–

(i) which has been taken in the wild; and

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(9) Regulation 41(6), which imposes penalties for offences under that regulation, was amended by the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004 (S.S.I. 2004/475), regulation 12.

- (ii) which is of a species or subspecies listed in Annex II(b) (other than any bryophyte) or IV(b) to the Habitats Directive; and
- (b) anything derived from such a plant or part of such a plant.
- (4) The offences in paragraphs (1) and (2) apply to all stages of the biological cycle of the plants to which they apply.
- (5) Subject to paragraph (6), a person shall not be guilty of an offence under paragraph (2) if that person shows that the plant or part of the plant in question, or the plant or part of the plant from which the thing in question is derived, was lawfully taken in the wild.
- (6) The defence under paragraph (5) does not apply—
  - (a) in the case of the offences in paragraph (2)(a) or (b) if—
    - (i) the plant in question is a plant of a European protected species, or the part or thing in question is derived from such a plant; and
    - (ii) the plant, part or thing in question was in the defender’s possession or control, or transported by the defender, for the purpose of sale or exchange;
  - (b) in the case of the offences in paragraph (2)(c) or (d) if the plant in question is a plant of a European protected species, or the part or thing in question is derived from such a plant.
- (7) For the purposes of paragraph (5) a plant, or part of a plant, shall be treated as having been lawfully taken in the wild if—
  - (a) it was taken in the wild in the European territory of a member State to which the Habitats Directive applies without contravention of the law of that member State and before the implementation date; or
  - (b) it was taken in the wild elsewhere without contravention of the law of the country or territory in which it was taken.
- (8) Subject to the provisions of this Part, any person who knowingly causes or permits to be done an act which is made unlawful by any of the provisions of this regulation shall be guilty of an offence.
- (9) Unless the contrary is shown, in any proceedings—
  - (a) for an offence under paragraph (1), the plant in question shall be presumed to have been a wild plant; and
  - (b) for an offence under paragraph (2) (as the case may be)—
    - (i) the plant or part of the plant in question shall be presumed to have been taken in the wild; or
    - (ii) the part or thing in question shall be presumed to be from a plant or part of a plant taken in the wild.
- (10) A person guilty of an offence under this regulation is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
- (11) In this regulation—
  - “the implementation date” means—
    - (a) where the relevant State became a member State before 10th June 1994, 10th June 1994; and
    - (b) in any other case, the date on which the relevant State became a member State; and

“relevant State” means the State in whose territory the plant, or part of it, was taken in the wild.”.

**15.** In regulation 44 (grant of licences for certain purposes)(10)–

(a) after paragraph (2) insert–

“(2A) Subject to paragraph (2B), the appropriate authority may grant a licence to permit the taking or the possession or control of certain specimens of any of the species listed in Annex IV to the Habitats Directive notwithstanding that the licence is for a purpose not falling within paragraph (2).

(2B) The appropriate authority shall only grant a licence under paragraph (2A) where it is satisfied that the grant of the licence would be compatible with the restrictions in Article 16(1)(e) of the Habitats Directive.

(2C) Regulations 39, 41 and 43 do not apply to anything done under and in accordance with the terms of a licence granted by the appropriate authority under paragraph (2A).”;

(b) for paragraph (4)(b) substitute–

“(b) in the case of any other licence granted under this regulation, the Scottish Ministers.”; and

(c) for paragraph (5) substitute–

“(5) The Scottish Ministers shall from time to time consult with the nature conservation bodies as to the exercise of the Scottish Ministers' functions under this regulation; and they shall not grant a licence of any description unless they have been advised by the appropriate nature conservation body as to the circumstances in which, in the opinion of the appropriate nature conservation body, licences of that description should be granted.”.

**16.** In regulation 45 (licences: supplementary provisions)–

(a) at the beginning of paragraph (1) insert “Subject to the provisions of this regulation,”; and

(b) after paragraph (4) insert–

“(4A) A licence granted under regulation 44(2A) shall specify–

(a) the species of animal or plant the specimens of which the person authorised by the licence may take or possess or control;

(b) the maximum number of specimens which the person authorised by the licence may take or possess or control, or which particular specimens that person may take or possess or control; and

(c) the conditions subject to which the action authorised by the licence may be taken and in particular–

(i) the methods, means or arrangements by which specimens may be taken or be in the possession or control of the person authorised by the licence;

(ii) when or over what period the action authorised by the licence may be taken; and

(iii) where it authorises any person to take specimens, the area from which they may be taken.”.

**17.** After regulation 46 (false statements made for obtaining licence) insert–

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(10) There are amendments to regulation 44 not relevant to these Regulations.

**“Offence of breaching licence condition**

**46A.**—(1) It is an offence for any person authorised by virtue of a licence granted under regulation 44 on or after 15th May 2007 to contravene, or fail to comply with, any condition imposed on the grant of a licence.

(2) A person shall not be guilty of an offence under paragraph (1) if that person shows that—

- (a) that person took all reasonable precautions and exercised all due diligence to avoid commission of the offence; or
- (b) the commission of the offence was otherwise due to matters beyond that person’s control.

(3) A person guilty of an offence under paragraph (1) is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or to both.”.

**18.** At the end of regulation 48(2) (assessment of implications for European site) insert—

“or to enable the competent authority to determine whether an appropriate assessment is required”.

**19.** For regulation 49(2)(b) (considerations of overriding public interest) substitute—

“(b) any other imperative reasons of overriding public interest, provided that the competent authority has had regard to the opinion of the European Commission in satisfying itself that there are such reasons.”.

**20.** After regulation 84A (permits under the Pollution Prevention and Control (Scotland) Regulations 2000)(**11**) insert—

**“Abstraction and works authorised under water legislation**

**84B.**—(1) Regulations 48 and 49 apply in relation to—

- (a) the grant of an authorisation under regulation 8 (registration) or 9 (water use licence);
- (b) the variation under regulation 19 (variation of authorisation) in accordance with either regulation 20 (procedure for variation) or regulation 21 (request for variation), as the case may be, or the partial variation under regulation 25(4) (determination of application for surrender) of an authorisation; and
- (c) the determination of an appeal under regulation 47 (determination of appeals) against a decision of the Scottish Environment Protection Agency referred to in regulation 46(a), (b), (c), (d), (e), (ee) or (g),

of the Water Environment (Controlled Activities) (Scotland) Regulations 2005(**12**) (“the 2005 Regulations”).

(2) In a case referred to in paragraph (1), where the competent authority considers that any adverse effects of the plan or project on the integrity of a European site would be avoided if the grant or variation of the authorisation were subject to conditions or, as the case may be, further conditions, it may grant or vary the authorisation subject to those conditions.

(3) Regulations 50 and 51 apply to authorisations under regulation 8 or 9 of the 2005 Regulations.

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(11) Regulation 84A was inserted by the Pollution Prevention and Control (Scotland) Regulations 2000, Schedule 10(2), paragraph 12 (S.S.I. 2000/323).

(12) S.S.I. 2005/348 as amended by S.S.I. 2006/553.



(4) Where on the review of an authorisation under regulation 8 or 9 of the 2005 Regulations, the competent authority considers that any adverse effects on the integrity of a European site of the carrying out or, as the case may be, the continuation of the activity authorised would be avoided by a variation of the authorisation, it may vary the authorisation, or cause it to be varied, accordingly.”.

**21.** In regulation 85(1) (discharge consents under water pollution legislation), omit “, or” and sub paragraph (b).

**22.** After Part IV (adaptation of planning and other controls) insert Part IVA as set out in Schedule 1 to these Regulations.

**23.** In regulation 101A (application of sections 19ZC and 19ZD of the Wildlife and Countryside Act 1981)(**13**) substitute “39(3)” for “39(2)” where it appears in paragraphs (3)(a), (c) and (e), and (4)(c) and (d).

**24.** After regulation 104 (savings for other protective provisions) insert–

**“Application of criminal offences to the Crown**

**104A.**—(1) No contravention by the Crown of any provision of these Regulations makes the Crown criminally liable; but the Court of Session may, on the application of any public body or office holder having responsibility for enforcing that provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.

(2) Despite paragraph (1), the provisions of these Regulations apply to persons in the public service of the Crown as they apply to other persons.”.

**25.** After Schedule 2 insert Schedule 2A as set out in Schedule 2 to these Regulations.

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(13) Regulation 101A was inserted by regulation 18 of the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004 (S.S.I. 2004/475).