

**EXPLANATORY MEMORANDUM TO
THE WILDLIFE AND COUNTRYSIDE ACT 1981 (VARIATION OF SCHEDULE 5)
(ENGLAND) ORDER 2008**

2008 No. 431

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by command of her Majesty.

2. Description

2.1. The Wildlife and Countryside Act 1981 (Variation of Schedule 5) (England) Order 2008 adds 4 new species to Schedule 5 to the Wildlife and Countryside Act 1981 (WCA) and extends the current protection afforded to the water vole. Schedule 5 to the WCA is to be amended using powers under section 22(3) of the Act on representation from the Joint Nature Conservancy Committee (JNCC). Protection for the species will be achieved through the prohibition of certain activities under section 9 of the WCA as follows:

- i. Water Vole (*Arvicola terrestris*)** – will be protected against killing, injuring or taking (section 9(1)); possession or control (section 9(2)); damage or destruction of its places of shelter, or disturbance while such animals are occupying places of shelter (section 9(4)), and sale, possession or transport for the purpose of sale, and advertising the buying or selling of such animals (section 9(5));
- ii. Roman Snail (*Helix pomatia*)** – will be protected against killing, injuring or taking (section 9(1)); possession or control (section 9(2)) and sale, possession or transport for the purpose of sale, and advertising the buying or selling of such animals (section 9(5));
- iii. Spiny and short-snouted seahorses (*Hippocampus guttulatus* & *Hippocampus hippocampus*)** – will be protected against killing, injuring or taking (section 9(1)); possession or control (section 9(2)); damage or destruction of its places of shelter, or disturbance while such animals are occupying places of shelter (section 9(4)), and sale, possession or transport for the purpose of sale, and advertising the buying or selling of such animals (section 9(5)); and,
- iv. Angel Shark (*Squatina squatina*)** – will be protected against killing, injuring or taking (section 9(1)) on land and up to 6 nautical miles (nm) from English coastal baselines.

2.2. Protection under the WCA generally includes territorial waters (12 nm from coastal baselines). However, the protection for the Angel shark is limited to 6nm from coastal baselines due to the interaction with the Common Fisheries Policy (CFP). Under the CFP, a member state cannot apply unilateral discriminatory conservation measures to vessels from other member states. Fishing vessels from other member states have historical fishing rights between 6 and 12nm within English territorial waters and any prohibitions in this area would apply to foreign as well as UK vessels. Such prohibitions would therefore be in contravention of the CFP. However, no foreign vessels have fishing rights within 0-6nm so it is therefore possible to afford protection to the Angel shark within this area without contravening the CFP. Additionally, the species is predominantly a coastal species and therefore this measure is considered to be effective despite the restriction in area.

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

3.1. None

4. Legislative Background

4.1. Part 1 of the WCA repealed and re-enacted with amendments a number of pieces of legislation concerned with the conservation and protection of birds, wild creatures and wild plants.

4.2. The WCA provides protection for those animal listed on Schedule 5 to the Act through the prohibition of certain activities under section 9:

- 9(1) – prohibition of killing, injuring or taking;
- 9(2) – prohibition of possession or control;
- 9(4) – prohibition of damaging or destroying places of shelter, or disturbing such animals while occupying places of shelter;
- 9(5) – prohibition of sale, possession or transport for the purpose of sale, and advertising the buying or selling of such animals.

4.3. Exceptions to these prohibitions may be authorised by licence issued under section 16 of the WCA by Natural England.

4.4. The Secretary of State’s powers to vary the schedules are set out in section 22 of the Act. On representation from the GB conservation bodies acting through the Joint Nature Conservation Committee (JNCC), the Secretary of State may amend Schedule 5 either generally or with respect to particular provisions, particular areas of Great Britain or at particular times of the year.

4.5. Under section 24 of the Act, the JNCC has a statutory responsibility to review the species listed for protection under Schedules 5 and 8 to the WCA and to advise the relevant GB administrations every 5 years.

4.6. Part I of the WCA extends to the territorial waters adjacent to Great Britain: 12 nautical miles from the coastal baseline (usually the low water mark around the coast)¹. The WCA does not extend to the offshore marine area or international waters.

5. Territorial Extent and Application

5.1. This instrument extends to England and Wales.

5.2. The powers of the Secretary of State under section 22(3) of the WCA were devolved to the Welsh Ministers.² The amendments made by this Order therefore substantively relate to England only. Under section 27(5) of the WCA, “England” includes the territorial waters adjacent to England (and the Order relates to England so defined).

6. European Convention on Human Rights

¹ The UK baseline is delineated in the Territorial Waters Order in Council 1964 (as amended by the Territorial Sea (Amendment) Order 1998, [SI 1998/2564](#)).

² See the reference to the Wildlife and Countryside Act 1981 in Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), and paragraphs 30 and 32 of Schedule 11 to the Government of Wales Act 2006 (c.32).

- 6.1. In respect of the this Order, the Minister for Climate Change, Biodiversity and Waste, Joan Ruddock, has made the following statement regarding Human Rights:
- 6.2. “In my view the provisions of the Wildlife and Countryside Act 1981 (Variation of Schedule 5) (England) Order 2008 are compatible with the Convention rights.”

7. Policy background

- 7.1. Defra’s Departmental Strategic Objective (DSO) for the natural environment is to achieve “a healthy, resilient, productive and diverse natural environment”. Within that our Intermediate Outcome (IO) is to ensure that ‘biodiversity is valued, safeguarded and enhanced’. Where it is considered appropriate, providing strict legislative protection for species that are considered to be at risk is one of the mechanisms by which the Department ensures that its nature conservation objectives are delivered. It is considered that the changes set out in this Order will result in conservation benefit for the species concerned.
- 7.2. Every five years JNCC advises Government on which animals and plants should be legally protected by listing on Schedule 5 (animals) and Schedule 8 (plants) of the WCA. This review process ensures that the schedules and protective regime are responsive to the current state of our wildlife. It is the mechanism by which species in need of protection (such as those listed in Red Data Books) can be added and those no longer in need of it can be removed and any regulatory burden thereby relaxed.
- 7.3. As part of the most recent review of the species listed in Schedules 5 and 8, JNCC recommended that the following species should be added to Schedule 5: water vole; short snouted seahorse; spiny seahorse; angel shark; common skate; Norwegian skate; long-nosed skate; white skate; Roman snail; Talisker burnet moth; Slender Scotch burnet moth. There were no recommendations with respect to Schedule 8 which applies to plant species. A public consultation, launched on 4th January 2005, consulted 224 organisations. 62 individuals and organisations replied before the closing date of 5th April 2005. Responses were received from a broad range of stakeholders and interested parties. The proposed protections were widely supported for all the proposed species by a large majority of the respondents.
- 7.4. Not all of the JNCC’s recommendations were taken forward. In relation to the skate species these were not included as advice from the Centre for Environment, Fisheries and Aquaculture Science (Cefas) indicated they were not normally found within English territorial waters (i.e. the area of the sea in which protection under the WCA would apply).
- 7.5. The recommendation to give the Burnett moth species (which are found only in Scotland), protection against sale in England has been postponed until such a time as the Scottish Government decides to implement appropriate protection in Scotland.
- 7.6. The remainder of the JNCC’s species recommended for protection are to be added to Schedule 5 through this Order.
- 7.7. **Water vole:** The water vole is found throughout Britain but is confined mainly to lowland areas near water. Once common and widespread, this species has suffered a significant decline in numbers and distribution. Prior to this Order, the water vole was listed only in respect of section 9(4) (intentionally or recklessly damaging/destroying a place of shelter or protection and intentionally or recklessly disturbing occupying specimens). JNCC’s proposal was to increase protection to include all of section 9 of the WCA.

- 7.8. There was some concern that the increased protection would impact negatively on lawful development and waterways management as there is no licensing ground in the WCA which specifically covers development works
- 7.9. When considering these concerns, the first thing to note is that the *mens rea* of the offence in section 9(1) (killing/injury etc.) is one of intent. This will mean that accidental killings/injury will not be caught.
- 7.10. Secondly, where harm occurs as a result of a lawful activity, those concerned may be able to rely upon the incidental result defence (in section 10(3)(c)) provided that the consequences (i.e. the harm to the water voles) could not reasonably have been avoided.
- 7.11. NE will be providing Guidance on the application of the new protection for water vole, which will be published before the Order comes into force.
- 7.12. **Roman Snail** This species is distributed chiefly in a broad band of England running from the Cotswolds to the Chilterns and is also scattered along the North Downs of Surrey and Kent with further isolated colonies in central and southern England. The major threat to this species comes from commercial collection and collection by amateur cooks and ‘food for free’ enthusiasts. Although some restaurants will use wild caught snails the majority use farmed animals.
- 7.13. Although the Roman snail is essentially a non-native species its protection is justified under the WCA as:
- i. It is endangered in its native range,
 - ii. It does not have an adverse impact on important native species or ecosystems, and
 - iii. It is naturalised and benign.
- 7.14. Addition to Schedule 5 to the WCA will protect this species preventing both casual and commercial collection, which is increasingly putting the wild UK population at risk.
- 7.15. **Spiny and short-snouted seahorses** Both UK seahorses are coastal species found in eel grass beds (spiny seahorse) and rocky/macro algae areas (short-snouted seahorse) in spring and summer, moving to deeper waters in the winter.
- 7.16. Aside from habitat damage, the greatest threats to seahorse populations are from the aquarium and traditional medicine trades. There is limited evidence that UK seahorse populations are targeted for this trade. However, given that little is known about UK seahorse populations coupled with the threat of the populations becoming increasingly targeted protections to mitigate this are justified.
- 7.17. Both seahorse species are listed under CITES Appendix II and Annex B of the EU Wildlife Trade Regulations (Regulations No. 338/97), which implement CITES in the EU. Individuals who trade in Annex B species have to be able to show, when challenged, that the specimens were obtained legally. Affording these species protection under section 9(1) (killing, taking and injuring) would have the effect of restricting the circumstances under which specimens taken from England can be lawfully traded under CITES.
- 7.18. The intention of protection against sale under section 9(5) would be to prevent any legal market for wild-taken specimens of these species in England (unless the seller had a licence to sell in England). This would include any specimens taken lawfully (relying on exceptions to

section 9(1) of the Act) and will also strengthen the message with regard to the importance of protecting this species in the wild.

7.19. In addition to the killing, taking and sale prohibitions, the two seahorse species are to be protected under section 9(4) prohibiting intentional or reckless damage to a place of shelter or protection, disturbing the animal in a place of shelter or protection or obstructing access to a place of shelter or protection.

7.20. **Angel Shark.** A critically endangered Species that is now considered extinct in the North Sea. The angel shark is a large demersal predator over large areas of coastal and outer continental shelf in northeast Atlantic, Mediterranean and Black Seas. Once taken in directed fisheries until stocks collapsed, or utilised as by-catch in multi-species fisheries. These species are threatened as a result of by-catch in demersal fisheries and by-catch fisheries. Under current fishing pressures, few young survive long enough to reach maturity and breed. Because of the vulnerability of the angel shark to fishing pressure JNCC recommended the inclusion of this species on Schedule 5 to prevent targeted fishing. For reasons discussed in section 2.2 above the protection for this species is to be limited to 0-6nm from coastal baselines.

8. Impact

8.1. As there are no significant economic impacts from the proposals an Impact Assessment has not been carried out.

9. Contact

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