



The deliberate disturbance of marine European Protected Species
Guidance for English and Welsh territorial waters and the UK offshore marine area

By

JNCC

March 2008

1. The disturbance offence

1.1. The offence

The [amended Conservation \(Natural Habitats &c.\) Regulations 1994](#) (i.e. the Habitats Regulations, HR) (for England and Wales) and the new [Offshore Marine Conservation \(Natural Habitats, &c.\) Regulations 2007](#) (the Offshore Marine Regulations, OMR) came into force in 2007 and contain a revised disturbance offence. Regulation 39(1)(b) of both the HR and the OMR state that a person commits an offence if he:

- (b) deliberately disturbs wild animals of any such species [i.e. a European Protected Species] in such a way as to be likely significantly to affect –**
- (i) the ability of any significant group of animals of that species to survive, breed, or rear or nurture their young; or**
 - (ii) the local distribution or abundance of that species.**

Marine European Protected Species (EPS) include all species of cetaceans, all species of marine turtles and the sturgeon (*Acipenser sturio*).

This definition of disturbance incorporates two elements, (i) and (ii), adapted from the Habitats Directive Article 12 guidance document produced by the European Commission¹. The first element is that, for it to be an offence, disturbance must be likely to have an ecologically significant adverse effect on a significant number of animals (**note:** for the purpose of simplification, in this guidance, references to ‘adversely affect(ed)’ should be taken to mean ‘significantly affect the ability to survive, breed, or rear or nurture their young’). The second element is that the disturbance must be likely to significantly affect the local distribution or abundance of the species. A disturbance offence would be committed if either of these elements occurred.

1.2. The application process and wildlife licences

The onus is on the developer or person (entity) carrying out an activity to i) assess the likelihood of committing a disturbance offence, using the guidance in this document; ii) consider the need for mitigation measures; and iii) decide whether to apply for a wildlife licence. When assessing the likelihood of committing a disturbance offence, and whether a wildlife licence might be needed, the following points should be considered:

- the likelihood that marine EPS occur in the area of potential disturbance;
- the characteristics of the activity and the potential factors of disturbance;
- the mitigation measures in place to avoid committing an offence;
- the likelihood that a significant group of animals of a marine EPS will be adversely affected; and
- the likelihood that the local distribution or abundance of a marine EPS will be significantly affected.

If there is a risk, which cannot be removed or sufficiently reduced by the taking of mitigation measures, then a wildlife licence may be granted by the regulatory authorities (following application) for a number of categories of activities or “purposes”, as set out in regulation 44(2) of the HR and regulation 49(6) of the OMR. These purposes include “imperative reasons of over-riding public interest” and “scientific and educational purposes”. **Licences can, however, only be issued where there is no satisfactory alternative and where the activity will not be detrimental to the maintenance of the populations of the species concerned at a Favourable Conservation Status (FCS, see appendix III for a definition) in their natural range** (regulations 44(3) and 49(7), respectively).

It is expected that the majority of activities will not require a wildlife licence to exempt them from regulation 39(1)(b), since their potential for disturbance will fall below the threshold of the offence in the Regulations (significant effects), or because mitigation measures can be put in place to minimise the likelihood of a disturbance offence. The flow chart in Appendix II summarises how the process of assessing the risk of committing an offence, and determining the need for a wildlife licence, will now operate.

The guidance in this document deals only with the offence of disturbing a marine EPS, and it should be borne in mind that where actions may result in other offences being committed, such as the **killing, injuring or taking of a marine EPS**, or the damage to or destruction of breeding sites or resting places, it will be necessary to consider how these offences can also be avoided and whether a wildlife licence is required.

1.3. Definitions and rationale for interpretation

Deliberate

The Habitats Directive Article 12 guidance¹ states that the disturbance covered by Article 12(1)(b) must be deliberate and not accidental. The term ‘deliberate’ has been considered in two European Court of Justice cases (C-103/00 and C-221/04) relating to the operation of the Habitats Directive. The guidance states “*the court seems to interpret the term ‘deliberate’ in the sense of conscious acceptance of consequences*” (European Commission, 2007). The term ‘deliberate’ therefore has to be interpreted as going beyond ‘direct intention’. The Habitats Directive Article 12 guidance then draws on the approach taken by the Court, to propose the following definition: “*deliberate actions are to be understood as actions by a person who knows, in the light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action*”. Although there is no relevant domestic case law defining the term in England and Wales, under regulation 2(2) of the HR (regulation 2(3) in the OMR) expressions used in the Regulations are considered to have the same meaning as in the Directive. ‘Deliberate’ action is thus wider than what we usually understand to be ‘intentional’ action under English and Welsh law.

Significant disturbance

The Habitats Directive Article 12 guidance¹ states that “*it would also seem logical that for disturbance of a protected species to occur a certain level of negative impact which is likely to be detrimental must be involved*”. Although not legally binding, this guidance¹ makes it clear that, in their view, disturbance must have some **ecological impact**, and that ‘trivial’ disturbance, such as scaring away a wolf from entering an enclosure of sheep in order to

prevent damage (their example), should not be considered as disturbance under Article 12. The Commission's guidance further states that "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a disturbance in terms of Article 12". This was used during the drafting of the amendments to the HR and the new OMR to better define the level of disturbance which should constitute an offence, with a view to excluding 'trivial' disturbance that had less than a certain level of negative impact on the protected species. Thus the offence is only intended to catch 'significant disturbance'. The question is when the threshold of effects that would constitute an ecological impact is reached and this is further explored in the next sections of this guidance.

Significant group of animals

The amended HR and the OMR provide some guidance as to the interpretation of the word 'significant' present in regulation 39(1)(b)(i) (first element of the offence). Regulations 39(12) and 39(7), respectively, state that 'significant' means **significant in relation to the objectives of the Habitats Directive**. This is drawn from the Article 12 guidance¹, which states that the strict protection obligations under Article 12 should aim to fulfil the objectives of the Habitats Directive. In addition, regulations 39(13) and 39(8) of the HR and the OMR, respectively, also require courts to have regard to any guidance given by the appropriate nature conservation body as to the criteria for determining whether a group of animals is significant. Relevant guidance in this document would, therefore, be expected to be taken into account during any court proceedings.

The aim of the Habitats Directive, described in Article 2, is to "contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States". Measures taken in the context of the Directive should be designed to maintain or restore, **at favourable conservation status (FCS)**, natural habitats and species of wild fauna and flora of Community interest, while taking into account economic, social and cultural requirements and regional and local characteristics. FCS can be described (in the species context) as a situation where a species is doing well in terms of quality (e.g. reproductive success, age-structure) and quantity (stable or increasing size) and has good prospects of continuing to do so in the future (see Appendix III).

A 'significant group' cannot easily be defined, and will vary between species, depending primarily on the size of the populations that a species may form.

The approaches taken by the nature conservation agencies' on the guidance on what constitutes a significant group differs slightly between terrestrial and marine species. For species that are social breeders such as some terrestrial EPS (e.g. bats), significant groups can be more easily identified, as most of the breeding females in a population will gather in one place during the breeding season. For cetaceans, this sort of behaviour is uncommon, and only certain species seem to form large breeding aggregations (e.g. Eastern Pacific grey whales breeding off Baja California), and this is not known to occur in the UK. Turtles and sturgeon will also form such groups in their breeding areas but these are outside UK waters.

In addition, due to the fragmentation of terrestrial habitats, many species form metapopulations (where each subpopulation is relatively independent of other subpopulations, with limited exchange of genetic material) and so it is fairly straightforward to identify discrete groups in space and time. Carrying out a survey of a site prior to development, for example, is often enough to certify that a certain number of animals will be present through

the duration of the activity and could get exposed to significant disturbance. Comparing those numbers with the size of groups formed by that particular species in that area would help assessing if the group should be considered as significant. A site-based approach can, therefore, be used for most terrestrial species since, if the group which is locally dependent on that site was significantly affected, this was likely to have ecological significance to the group-site unit.

For marine EPS, the above rationale would correspond to groups of animals that show some site-fidelity, where individuals persist in any particular area for long periods of time. While this might be true for species when looking at very large areas (e.g. the whole of the British North Sea), on current information, almost no marine EPS form such groups at finer scales in UK waters, the notable exception being coastal bottlenose dolphins. The more universal model in this area is for large populations, occupying large areas, at relatively small densities and with high levels of gene flow. The same individuals might range over 100s and 1000s of kilometres in one year. There is also huge seasonal and inter-annual variability in their distribution, often difficult to predict, and potentially reducing the value of abundance surveys prior to a development. As a consequence of this, for marine EPS, the term 'group' should be interpreted as the number of animals exposed to disturbance, and these do not necessarily need to be in close proximity or engaged in a similar activity).

Broadly, 'significant group' should therefore be interpreted as the **fraction of the population that, if exposed to disturbance in a way that that would adversely affect those animals, would result in detrimental effects at the population level** (although not necessarily affecting the species FCS status in UK waters, otherwise the activity should not go ahead in any circumstance).

In practice, this results in significant groups that are very small for marine EPS that form small populations, in the same way that individuals of a rare terrestrial EPS or one that forms small colonies are more significant to the population than individuals of common and abundant species. This part of the offence could include the disturbance of a single animal, but only where that would significantly affect the ability of a significant group of animals to survive, breed or rear or nurture their young. In practice, this seems unlikely, unless it is a critically endangered species with very few individuals left (e.g. northern right whale). It also seems unlikely that disturbance of an individual would significantly affect the local distribution or abundance of a species (see below).

Although guidance is being provided in this document on what would constitute a significant group of animals in order to help to assess the likelihood of committing a disturbance offence, it should be stressed that, in the ideal world, no animals should be disturbed in a way that would adversely affect them. The UK government and several stakeholders continue to fund research into what causes significant disturbance and into modifying activities' practices in order to reduce it to zero.

Local distribution or abundance

Even though the legislation itself does not provide guidance of 'local distribution or abundance', this should also be considered in the context of the objectives of the Habitats Directive, since all strict protection measures applied to EPS should aim to fulfil the objectives of maintaining and restoring populations of species at FCS in their natural range. 'Local' therefore needs to be considered in the context of the natural range of the populations

of a species; the movement patterns of animals in those populations; and, particularly, the natural variability in distribution and abundance within their natural range. Deviation from a population's natural variability in distribution and abundance could potentially result in detrimental effects at the **population level**. This could occur if a significant number of animals of a population known to persistently use an area were likely to be displaced from that area, or from a large fraction of their natural range, for long periods of time. This is particularly so if the animals were displaced from essential habitats to less suitable habitats. Conversely, if a few individuals were displaced from an area which is a small fraction of their natural range and which the animals use only intermittently, it would seem unlikely that an offence would be committed.

REFERENCES

1. EUROPEAN COMMISSION 2007 Guidance document on the strict protection of animal species of community interest under the Habitats Directive 92/43/EEC.