



**RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO THE DEFRA
AND STATUTORY NATURE CONSERVATION BODIES STAKEHOLDER
CONSULTATION ON THE 7TH QUINQUENNIAL REVIEW OF SCHEDULES 5 & 8 OF
THE WILDLIFE & COUNTRYSIDE ACT**

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This consultation response has been prepared by UKELA's Nature Conservation Working Party. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members.
3. The Wildlife and Countryside Act 1981 (WCA) was originally introduced to protect species from persecution. Today, species protection requirements have broadened considerably. As a result, the role of WCA in the context of other nature conservation instruments is currently unclear. Recent, open and upcoming consultations (e.g. Local Nature Recovery Strategies, Biodiversity Net Gain, the Nature Recovery Green Paper and targets required by the Environment Act 2021) are extremely relevant for species protection despite many of these being focused on habitats and ecosystems.
4. The UK's environmental commitments need to be considered holistically. If not, there is the risk of perverse application with, for example, changes in land management/use to meet one environmental obligation having a significant negative impact on our obligations for species protection.

Question 1: Do you agree with the eligibility criteria defined for the 7th Quinquennial Review (QQR7) for adding species to Schedules 5 and 8 of the Wildlife and Countryside Act 1981?

5. The Eligibility Criteria defined for QQR7 are not appropriate. These criteria have been restricted to those species facing 'imminent threat of extinction' in Great Britain (using the IUCN Red List Criteria at Regional and National Levels), i.e. those where active conservation interventions will be required to secure a future.
6. The Red List assessment does not provide a comprehensive assessment of existing threats to a species conservation status. The IUCN¹ state that assessment of extinction risk and setting conservation priorities are two related but different processes, with the assessment of extinction risk, including through the assignment of IUCN Red List Categories generally preceding the setting of priorities.
7. The purpose of the Red List categorisation is to produce a relative estimate of the likelihood of extinction. Setting conservation priorities, on the other hand, which normally includes the assessment of extinction risk, takes into account other factors including any required conservation actions. The assessment of extinction risk therefore should not be the only factor taken into consideration in adopting a framework for species protection measures.
8. The IUCN and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) identifies species as threatened if categorised as Critically Endangered (CR), Endangered (EN) or Vulnerable (VU). The further category of Near Threatened (NT) lists those that are likely to become threatened in the near future and which should be kept under urgent review. There is no known precedent for splitting the threatened grouping in the way proposed. It is also contrary to the Government's 25 Year Environment Plan² which states that action will be taken to '*recover threatened, iconic or economically important species*'. The high risk approach adopted for QQR7, therefore, requires explanation and explicit justification.
9. Protection of a species when it is CR or EN is likely to be too late for many species and intervention to support a species recovery should be made much earlier if it is to

¹IUCN Red List Categories and Criteria: Version 3.1. <https://portals.iucn.org/library/node/10315>

² A Green Future: Our 25 Year Plan to Improve the Environment
<https://www.gov.uk/government/publications/25-year-environment-plan>

be effective. Providing protection for species considered to be VU or NT will prove beneficial in the longer term, as early conservation action is more likely to be successful and cost effective. Such protections can aid improvements in conservation status and prevent possible extinction, thereby helping the UK to meet its domestic and international commitments to halt biodiversity loss. Also of concern is the exclusion of any species classified as Data Deficient (DD). A lack of data cannot be equated with the absence of any need for protection; some of these poorly known species may be those at greatest risk.

10. The wording in QQR7 is not clear on how species for which the UK has International Obligations will be considered. As proposed by the 2015 Law Commission³ review of wildlife law, using the UK's international commitments as a basis for the species listings is a sensible approach. However, for QQR7 a very limited selection of these international obligations and commitments has been applied. The eligibility criteria focus solely on the Bern Convention (appendix 1 and 2, with restrictions applied to species listed on appendix 3) and Bonn Convention (appendix 1 only considered). It is unclear why species listed on appendix 2 of Bonn convention have been excluded. These species are considered to have an unfavourable conservation status and are therefore likely to need protection.

11. The choice of international agreements ignores many of the UK's other commitments. Examples of which include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Wetlands of International Importance especially as waterfowl habitat (Ramsar), Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS) and Agreement on the Conservation of Populations of European Bats (EUROBATS). Many of these commitments provide appropriate regional assessments of conservation status, determining whether further protections are required to improve a species status. It is, therefore, unclear why the decision to ignore these other international obligations was taken. This is particularly relevant to CITES which controls the trade of protected species and is therefore obviously linked the requirements of the WCA.

³ The Law Commission Wildlife Law 1: Report (LAW COM No 362). https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/11/lc362_wildlife_vol-1.pdf

12. Also of concern is the assumption that where other legislative measures are in place (e.g. through the Habitats Regulations, planning or fisheries management measures), listing on Schedule 5 or 8 is unnecessary. The lack of appropriate management under other legal regimes should not be a requirement in order for a species to be considered under the WCA. Whilst the desire not to replicate legislative protections is understandable, where international protection has been committed to, it would seem reasonable to expect those species to be listed for protection through the WCA. Many of the other measures are reviewed much more frequently than the WCA, which could result in protection being removed. As a minimum, reference to these alternative protections should be made explicit in the schedule listings to ensure that there is no loss of protection without good evidence.

Question 2: Do you agree with the decision criteria and the way they have been applied by the 7th Quinquennial Review (QQR7) for adding species to Schedules 5 and 8 of the Wildlife and Countryside Act 1981?

13. The decision criteria defined for the QQR7 are not appropriate. In order for a species to be listed or retained on the schedules, not only must it be in imminent risk of extinction but also at risk of direct human pressures (if not categorised as Critically Endangered or a European Protected Species). As noted above, this approach creates a division amongst the Threatened species (i.e. those categorised as CR, EN or VU) which is unprecedented.
14. For any threatened species, all pressures are going to add to their level of endangerment to some extent, even if they are not the principal cause. For example, Spanish catchfly (*Silene otites*) has been rejected for inclusion because it does not meet the Decision Criteria. It is an Endangered plant species found at only a few sites in the Norfolk and Suffolk Brecks, with a very limited range and is extremely vulnerable to collection and damage. There is, therefore, the potential for the species to become extinct in the UK very rapidly. Similarly, 'Vulnerable' species such as the hedgehog (*Erinaceus europaeus*) have also been rejected for inclusion. The UK hedgehog population has been steadily declining over many decades, with evidence of widespread actions that would constitute offences under S9(1) killing and injury and (4) disturbance (e.g. hedgehogs being rescued after being injured by development). If

the recorded decline continues, it will lead to the eventual extinction of the species in the UK.

15. The 2015 Law Commission review noted that a species listing should not be based solely on extinction risk. For example, protection of a particular species is required where it is an essential component of an ecosystem and exploitation may threaten the ecological balance of the ecosystem.
16. Interpretation of the decisions applied to species listings for Schedules 5 and 8 would have been aided by inclusion of additional information. The proposals to add, remove or regrade the legal protection of species has not been accompanied by any evaluation or justification for the decision made. As a minimum, the GB Red List assessment, the European assessment (derived from the biogeographic region Favourable Conservation Status assessment) and the IUCN global assessment where available for each species should have been provided. Without this information it is difficult to determine whether the criteria have been consistently applied across species to identify those to be added in comparison to those already listed. It would also have been useful to state the level of protection being provided for each species or group of species listed (i.e. full protection, killing and injury S.9[1], disturbance S.9[4A], and/or sale activities S.9[5]).

Question 3: Do you agree with the use of the ‘non-detriment’ approach for retaining species on Schedules 5 and 8 of the Wildlife and Countryside Act 1981 when they do not meet the eligibility/decision criteria but when populations would be harmed if protection were removed?

17. The term ‘non-detriment’ is not defined. Is this considered to be equivalent to CITES (Articles III and IV) ‘non-detriment finding’ definition that the action being licenced ‘will not be detrimental to the survival of that species’?
18. Unless it can be evidenced that removal of the protections will not be detrimental to the conservation status of a species, the species should be retained on the Schedules. However, this approach must take a long term view. Safeguards need to be included for the immediate re-insertion of any species removed from the schedules where declines are subsequently recorded as a result of that removal.

Question 4: Do you agree with the use of the precautionary approach for retaining species on Schedules 5 and 8 of the Wildlife and Countryside Act 1981 when they do not meet the eligibility/decision criteria?

19. The use of the precautionary principle for retaining species on the schedules is appropriate. However, the term precautionary principle has not been defined within the context of the WCA. This is important because the term can be defined and interpreted in a multiplicity of ways.
20. Unless it can be evidenced that removal of the protections will not be detrimental to the conservation status of a species, the species should be retained on the Schedules. Removal implies that there are no conservation concerns for a species over the long term. Moreover, adopting a precautionary approach to environmental policy is now embodied in legislation and policy for Scotland and England through the European Union (Continuity) (Scotland) Act 2021 and the Environment Act 2021, respectively.

Question 5: Do you think that the special protection of species by listing on Schedules 5 and 8 of the Wildlife and Countryside Act could be part of a range of measures designed to reverse the biodiversity loss we are currently experiencing?

21. Eligibility decisions for inclusion on WCA schedules have been based on IUCN Red Listings. Red Listing is a scientifically robust means of identifying the most threatened species (with the caveat that regional assessments need to be comprehensive in terms of species coverage and conducted regularly). However, protection under the Schedules is just one of the tools to help with the conservation of Red Listed species.
22. The UK has not met its international commitment under the Aichi targets and the Convention on Biological Diversity to halt biodiversity loss by 2020, and is amongst the most nature depleted countries in the world⁴. Conserving species has the potential to help prevent further loss of biodiversity, but only if the habitats of those listed species are also protected. Currently we are not currently meeting our international obligations for species protection. For example, the monitoring of conservation status for species

⁴ Natural History Museum's Biodiversity Intactness Index <https://www.nhm.ac.uk/our-science/data/biodiversity-indicators/about-the-biodiversity-intactness-index.html>

of European importance indicates that the percentage in a favourable or improving conservation status continues to decline⁵.

23. Reversing biodiversity loss implies an increase in the number of species in the future. It is therefore unclear how listing a species for protection under the WCA can reverse this decline unless there is an active programme of habitat improvement and a reintroduction programme for extinct native species. It is also important to ensure that widespread species remain abundant and to tackle threats such as non-native invasive species that can impact diversity.
24. Use of the WCA as the sole instrument for nature conservation would be inappropriate, and it must form part of a wider framework of effective nature conservation laws. There are concerns that parts of the nature conservation framework could be at risk (e.g. through sections 111 and 112 of the Environment Act, which enable the granting a protected species licence in relation to development for 'reasons of overriding public interest', and powers to amend the Habitats Regulations respectively). The long term implications of these provisions are unclear, but do add to the increasing importance of ensuring that the WCA provides adequate protection to as many species as possible.

Question 6: Do you agree with the provisional recommendations to retain, add, regrade or remove the species listed in Appendix 2 on Schedules 5 or 8 of the Wildlife and Countryside Act?

25. Because of the number of species listed and the lack of information with regard to either the Red List category or conservation status against which assessments were made, only certain consultation groups have been reviewed. Specialist groups should be approached to provide expert comment.

- Terrestrial mammals

The recommendations for water vole (*Arvicola amphibius*), mountain hare (*Lepus timidus*), pine marten (*Martes martes*), hazel dormouse (*Muscardinus avellanarius*), red squirrel

⁵ UK Biodiversity Indicators 2021 <https://jncc.gov.uk/our-work/uk-biodiversity-indicators-2021/>

(*Sciurus vulgaris*) and all shrews appear to be appropriate. Wildcat (*Felis silvestris*), Eurasian beaver (*Castor fiber*) and otter (*Lutra lutra*) should be granted full protection under the WCA.

All bats are European Protected Species and should be afforded full protection. They are also likely to be affected by offences under S. 9(1) killing and injury and 9(4) disturbance.

Hedgehog (*Erinaceus europaeus*) should be listed. Although it is categorised as Vulnerable, there is considerable concern about long-term declines. There is also evidence of widespread actions that would be offences under S.9(1) and (4) (e.g. hedgehogs requiring rescue following injury during development and being trapped/taken in order to protect wading birds).

The Orkney vole (*Microtus arvalis orcadensis*) should be added in Scotland only.

Harvest mouse (*Micromys minutus*) should be listed. Harvest mouse habitat is vulnerable to clearance as part of development, leading to a high likelihood that actions which are offences under S. 9(1) and (4) could occur. Harvest mice are considered Critically Endangered in Scotland and Vulnerable in Wales.

Polecat (*Mustela putorius*) meets both the Eligibility Criteria and Decision Criteria in Scotland and should therefore be included. The persecution of the polecat was the primary reason for its decline and near-extinction across Great Britain.

Wild boar (*Sus scrofa*) should be listed. The species is currently classed as Data Deficient, with extremely small and isolated populations as a result of reintroductions. The species faces a high likelihood of persecution due to a demand for their meat.

- Marine mammals

It is unclear why certain species of cetacean, most highly vagrant in UK waters, have been included specifically whilst others considered part of the UK's natural fauna are not. The term 'All cetaceans [Disturbance S.9(4A), Sale activities S.9(5)]' covers all vagrant species already. The UK has commitments to protect all cetaceans from injury and killing S.9(1), full protection should therefore be provided through WCA. All cetaceans occurring in UK waters are listed on Appendix 1 and 2 of the Bern Convention and/or are European Protected Species.

Of greatest concern is the lack of protection given to harbour porpoise (*Phocoena phocoena*) which is only protected in relation to sale activities S. 9(5) through WCA. The UK has

commitments for the conservation of this species through OSPAR and ASCOBANS. As noted in Question 2, whilst protection from killing and injury S.9(1) and disturbance S.9(4) for harbour porpoise may be provided through other legislation, the linkages need to be alluded to within the WCA to ensure that there is no loss of protection without good evidence.

The addition of harbour seal (*Phoca vitulina*) and grey seal (*Halichoerus grypus*) to Schedule 5 is appropriate. However, it is unclear what level of protection is being provided. Inclusion of other seal species occasionally recorded in UK water as 'Vagrant seal species' as a group is a sensible approach. This comment assumes that the vagrant species are not being listed individually. It is again unclear what level of protection is being provided for these vagrant species.

It is unclear why walrus (*Odobenus rosmarus*) is the only marine mammal receiving full protection through the WCA. Whilst sightings of the species have been a little more frequent in recent years, the species is a vagrant and not considered part of the UK's natural fauna. The protection given the walrus has been justified through the species being listed on Appendix 2 of the Bern Convention. As already highlighted and for consistency, all regularly occurring marine mammals in UK waters should also receive the same level of full protection through the WCA as they are also listed on Appendix 2 of the Bern Convention and/or are European Protected Species.

- Fish

European eel (*Anguilla anguilla*) should be listed under the WCA. The species is considered to be critically endangered at the global level, with no European level assessment. The UK has international obligations to protect this species through OSPAR and Appendix II of the Bonn Convention. As noted in Question 2, whilst protection may be provided through other legislation, these are more easily altered to remove that protection.

The leafscale gulper shark (*Centrophorus squamosus*) should be listed under the WCA. The species is considered to be endangered at the global level, with no European level assessment. It is also listed as a threatened and declining species by OSPAR. Although target fisheries have ceased, there is no evidence for population improvements. As such, in 2020, ICES advised OSPAR that the species should remain on its threatened and declining species list.

Cod (*Gadus morhua*) should not be removed. The UK has international obligations to protect this species (e.g. OSPAR threatened and declining species) and it is considered vulnerable at the global level. Whilst significant fisheries measures have been put in place to improve the status of this commercially important species, it is far too soon to remove the species from the WCA. As noted in Question 2, whilst protection may be provided through other legislation, these are more easily altered to remove that protection.

Salmon (*Salmo salar*) should be listed under the WCA. The UK has international obligation to protect salmon through OSPAR and UN Convention for the Conservation of Salmon in the North Atlantic Ocean. Although it is recognised that the species is considered least concern globally, the 2019 Atlantic biogeographic regional assessment was unfavourable-bad. Scotland have also just launched a Wild Salmon Strategy⁶, recognising our international responsibilities for the future protection and conservation of the species.

The giant goby (*Gobius cobitis*) is being retained on the list despite no international obligation to protect and a global status of least concern. It is recognised, however, that there is little understanding of the status of the species in UK waters and that the precautionary principle was used to retain the species listing.

Spurdog (*Squalus acanthias*) should be listed under the WCA. The species is considered vulnerable at the global level, with no European level assessment. Spurdog is a prohibited species for commercial fishing in EU, UK, and Norwegian waters with the exception of bycatch within some approved avoidance programmes (UK/EU waters) and landing of dead bycatch (Norway). The UK has international obligations to protect this species through OSPAR and Appendix II of the Bonn Convention. In 2020, whilst recognising the improvements achieved through fisheries management, ICES advised OSPAR that the species should remain on its threatened and declining species list.

- Cnidarian

Removal of protection for the Starlet sea anemone (*Nematostella vectensis*) which is considered a non-native species is appropriate.

⁶ [Scottish Wild Salmon Strategy 2022 \(www.gov.scot\)](http://www.gov.scot)

- Molluscs

Reducing the protection for fan mussel (*Atrina fragilis*) to sale activities S.9(5) only and removing protection from killing & injuring S.9(1) (part) and possession S.9(2), appears to be based on the assumption that the species only occurs in deeper waters thus preventing collection. This is entirely erroneous. The species occurs in shallow coastal waters, being most abundant between 25 and 50m depth. They are easily accessible by divers and may, therefore, be subject to killing, injury and collection.

- Vascular Plants

It has not been feasible to review the entire list of vascular plants, which comprises over 300 species on the consultation spreadsheet. The exclusion of EN species that do not meet the decision criteria and VU species, particularly those with restricted ranges, means that species threatened by collection, development and other activities (e.g. mowing, herbicide application) are not being protected. Examples of such species include the fly orchid (*Ophrys insectifera*), the late spider-orchid (*Ophrys fuciflora*), the pyramidal orchid (*Anacamptis pyramidalis*), Spanish catchfly (*Silene otites*), childing pink (*Petrorhagia nanteuillii*), narrow leaved helleborine *Cephalanthera longifolia*, starved wood-sedge (*Carex depauperata*), dwarf milkwort (*Polygala amarella*) and Deptford pink (*Dianthus armeria*).

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