

European Protected Species, Development Sites and the Planning System

Interim guidance for local authorities
on licensing arrangements

October 2001

CONTACT

Duncan Isles
Wildlife and Habitats Unit
Scottish Executive Environment and Rural Affairs Department
Area 1-H
Victoria Quay
EDINBURGH
EH6 6QQ

E-mail: duncan.isles@scotland.gsi.gov.uk
Telephone: 0131 244 4435
Fax: 0131 244 4071

INTRODUCTION

1. This guidance is being issued to clarify the interim licensing arrangements which currently apply in cases where European protected species are present on any site which is the subject of a development proposal. In particular, it clarifies the role and responsibilities of planning authorities when determining planning applications in such cases and informs them of the advice and information that they will be asked to provide to the Scottish Ministers when a licence is required for a development site.
2. It is the intention of the Scottish Ministers to reform existing arrangements for the implementation of EC Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna (“the Habitats Directive”) in relation to European protected species and the land-use planning regime. This intention was announced in answer to a question (S1W-17156) in the Scottish Parliament on 20 July 2001.
3. A consultation paper setting out these reform proposals in more detail will issue to all local authorities and to other interested parties in the near future. In summary, however, the principal objective of the proposed changes will be to reflect the requirements of the Habitats Directive more precisely in situations where European protected species are present on development sites. This will be done by formally integrating the determination of derogations from the Directive within the land use planning process. At present, as this guidance indicates, such derogations require to be dealt with separately by means of a licensing regime operated by the Scottish Executive.
4. The interim arrangements described in this guidance will apply until legislation establishing the proposed new, and more closely-integrated, system comes into effect. This is expected to occur in early 2002. New guidance replacing this document will be issued at that stage to support implementation of the new arrangements.
5. This guidance supplements Scottish Office Circular 6/1995 (updated June 2000) on the implementation in Scotland of the Habitats and Birds Directives and the general guidance to be found in NPPG 14 *Natural Heritage* on the protection of species and habitats. A copy of the Habitats Directive can be found annexed to the update of Scottish Office Circular 6/1995.

BACKGROUND – THE PROTECTION OF SPECIES

6. The Habitats Directive is transposed into the law of Scotland by means of The Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 Regulations”).

7. Part III of the 1994 Regulations establishes a protective regime for the species of animal and plant which are listed, respectively, in Schedule 2 and Schedule 4 of the Regulations. These species are the “European protected species” to which the Regulations, and this guidance, apply. A list of the relevant species is attached to this guidance at Annex A for ease of reference.

8. The arrangements which exist within Part III of the Regulations, for the protection of particular species, are of course quite distinct from the arrangements in Parts II and IV, which govern the protection of European sites (eg Special Areas of Conservation – SACs). The June 2000 update to Circular 6/1995 deals with such sites in more detail. It is important to bear in mind that the protective regime established by Part III applies to European protected species wherever they occur. It is not limited in its effect merely to specific, designated areas such as Natura 2000 sites or SSSIs.

9. Within the Part III regime, Regulation 39 gives particular effect to the provisions of Article 12 of the Directive, by making it an offence:

- a) deliberately to capture or kill a wild animal of a European protected species;
- b) deliberately to disturb any such animal;
- c) deliberately 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.

10. Equivalent provisions, implementing Article 13 of the Directive, apply under Regulation 43 in respect of plants. It is therefore an offence deliberately to pick, collect, cut, uproot or destroy any wild specimen of a European protected species of plant.

11. There are very limited exceptions to the prohibitions in Regulations 39 and 43 and these are set out in Regulations 40 and 43 respectively.

12. It should be noted that the breeding sites and resting places of protected animals enjoy a particularly high degree of protection under Regulation 39(1)(d), in that damage to, or destruction of, such a site is an offence of strict liability. In contrast to the other offences under Regulations 39 and 43, the destructive act does not have to be deliberate or intentional for an offence to have been committed. This means - at its simplest level - that any act, even if entirely unintentional, which results in the damage or destruction of, for example, an otter holt, a bat roost or a breeding pond used by great crested newts, could potentially result in a criminal prosecution. This feature of the Regulations is one which should be particularly borne in mind by anyone carrying out work which has the potential to impact on a breeding or resting site used by European protected species.

LICENCES AND DEROGATIONS

13. Inevitably, circumstances do arise in which it may be appropriate to authorise - by licence and before work commences - actions which would otherwise be in breach of the protection afforded by Regulations 39 and 43.

14. This type of situation perhaps most obviously occurs in the context of development works, although action may also be necessary for conservation reasons, for the prevention of serious damage to agriculture or even for the purposes of scientific research. Hypothetical examples of such development-related situations might include: the disturbance of otters in the course of extending an important ferry terminal; the damaging or destruction of a bat roost as the result of the conversion or demolition of a building; or the transplanting of protected plants from a vital development site or from the path of an important new road.

15. In order to allow work of an imperative nature to proceed, the 1994 Regulations provide for licences to be granted for certain specified purposes. Thus, under Regulation 44, the provisions contained in Regulation 39 (protection of animals) and Regulation 43 (protection of plants) do not apply to anything done for any of the purposes defined in Regulation 44 **provided that** any action is carried out “under and in accordance with the terms of a licence granted by the appropriate authority”.

16. In the case of licence applications arising as a result of the need to carry out development works, the appropriate licensing authority is currently the Scottish Executive. The Executive is also responsible for licences under Regulation 44(2)(f) and (g) covering the prevention of disease and serious damage to agriculture.

17. Licences granted by the Scottish Ministers in accordance with Regulation 44 amount, in effect, to a specific, individual derogation from Article 12 or Article 13 of the Habitats Directive, as provided for in Article 16 of the Directive. As such the details of each licence require to be reported to the European Commission in a return submitted every two years.

THE LICENSING TESTS

18. The circumstances in which licences under Regulation 44 may be granted are narrowly defined. Three very specific tests require to be satisfied.

19. **The first test is that the licence application must demonstrably relate to one of the purposes specified in Regulation 44(2).** If the application does not meet this requirement a licence cannot be granted.

20. In the case of development, the purpose most likely to be relevant is that found at Regulation 44(2)(e). This purpose is defined as:

“preserving public health or public safety or other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment.”

21. It therefore follows that the applicant must be able to show that the licence (and the action which it authorises) is necessary in order to allow work to proceed for the purpose of preserving public health or public safety or that the proposed action is essential for some other “imperative reason of overriding public interest”. Supporting evidence for any assertions about the significance of the project, including its economic or social importance, will be required by the licensing authority.

22. **Two further tests** come into play once the licence applicant has demonstrated that the proposed activity falls within the parameters of Regulation 44(2). Under Regulation 44(3), **the licensing authority must not, in law, grant a licence unless it is satisfied that:**

- a) **there is no satisfactory alternative** (to the granting of a licence), and
- b) **that the action authorised will not be detrimental to the maintenance of the population of the European protected species concerned at a favourable conservation status** in their natural range.

23. The implication of the first of these two tests is that the applicant must be able to show that a full range of possible alternative courses of action have been properly examined and that evaluation of these alternatives clearly demonstrates that the only satisfactory means of proceeding requires the carrying out of activities which, legally, may only be conducted under licence.

24. Assessment of the second test - that is, whether the proposed action is likely to be detrimental to the favourable conservation status of a species - is a matter on which expert advice will be sought by the Scottish Ministers from their statutory advisor on nature conservation matters, Scottish Natural Heritage (SNH). A requirement to consult SNH is contained in Regulation 44(5).

25. It is important to note that **an application for a licence will fail if any one of the three tests are not satisfied**. Thus it may be clear that a project would not be detrimental to the favourable conservation status of a protected species, but if it does not satisfy the criterion that it must be for public health and safety or some other “imperative reason of overriding public interest” no licence could be granted. Similarly, a project may well prove to be of overriding public interest, and it may also be evident that no satisfactory alternative is available. But a licence would nonetheless be refused if it were established that the favourable conservation status of a protected species within its natural range would be damaged by the proposed action.

THE ROLE OF PLANNING AUTHORITIES

26. An important consideration for all local authorities in relation to European protected species and planning applications is that Regulation 3(4) of the 1994 Regulations requires every competent authority to have regard, in the exercise of its functions, to the provisions of the Habitats Directive “so far as they might be affected by those functions”. This requirement applies to local authorities when carrying out their functions under planning legislation.

27. The existing policy of the Scottish Ministers in this regard is based on the premise that the planning decisions reached by local authorities in Scotland must at all times be consistent with the obligations placed on the UK by the Habitats Directive. Accordingly it is the view of the Scottish Executive that the general obligation in Regulation 3(4) means that every planning decision taken by every local authority in Scotland must be reached in a manner which ensures that the provisions of the Habitats Directive are taken properly into account and that a breach of the Directive does not occur. This is a duty incumbent on local authorities as a matter of Community law.

28. As far as European protected species are concerned, this requirement translates into a need not only for developers to comply with the 1994 Regulations, but also for planning authorities to take proper account of Articles 12, 13 and 16 of the Directive. In consequence, it is important for planning authorities, in considering any application for planning permission (and in providing advice to potential applicants), to address, *inter alia*, the following questions:

- Are European protected species present on the site for which planning permission has been sought?
- If European protected species are present, what implications do the proposals for the site have for the species in question? In particular, are the proposals for the site likely to lead to any action or overall outcome which would be contrary to Regulation 39 or 43, or which would otherwise conflict with obligations arising under Articles 12 or 13 of the Directive?
- In the event that potentially negative effects are evident, to what extent can these be prevented by either a voluntary alteration of the project design or by appropriate conditions to any grant of planning permission?
- If negative effects are likely and cannot be prevented by planning conditions, does the planning authority consider that the proposed development is likely to meet the first two of the three tests prescribed in Regulation 44 (which derive from Article 16 of the Directive)?
- In essence, does the planning authority believe that the development is a) necessary for one of the purposes contained in Regulation 44(2) and Article 16 (most usually, for preserving public health or public safety or for some other imperative reason of overriding public interest), and b) that there is no satisfactory alternative to derogating from the Directive?
- Finally, if European protected species are present, planning authorities will also wish to seek advice from SNH on the likely consequences of any proposed development for favourable conservation status. This is the third test prescribed in the Directive and the 1994 Regulations. A development which has a negative impact on the maintenance of the population of the species concerned at a favourable conservation status in its natural range would be in breach of the Directive. The granting of planning permission would therefore be in conflict with the duty placed on planning authorities by Regulation 3(4).

29. In view of the above, it is clearly essential that planning permission is not granted without the planning authority having satisfied itself that the proposed development either will not impact adversely on any European protected species on the site or that, in its opinion, all three tests necessary for the eventual grant of a Regulation 44 licence are likely to be satisfied. To do otherwise would be to risk breaching the requirements of the Directive and Regulation 3(4). It would also present the very real danger that the developer of the site would be unable to make practical use of the planning permission which had been granted, because no Regulation 44 licence would be forthcoming. Such a situation is in the interests of no-one.

30. Under current arrangements, it remains the case that - whatever the planning authority may decide, and irrespective of whether it grants planning permission or regards the three tests as having been satisfied - a development which entails any action which is contrary to Regulations 39 or 43 may not in practice proceed until the developer is successful in obtaining a licence from the Scottish Ministers under Regulation 44. The licence in effect acts as a failsafe, preventing the potentially damaging features of the development from going ahead, even in circumstances where planning permission may already have been granted.

31. Thus, for the time being – and until new arrangements are implemented - the determination of planning applications, and the granting of licences derogating from Articles 12 and/or 13 of the Directive, remain formally separate procedures.

32. Nonetheless, the Regulation 3(4) obligation on all planning authorities to have proper regard to the requirements of the Directive does mean that the majority of the questions and issues to be addressed by the licensing authority should already have been examined in depth by the planning authority and that any planning decision should reflect this careful consideration of the Directive's requirements. The planning decision should be entirely consistent with the obligations imposed by the Directive.

33. It is therefore appropriate for the Scottish Executive, in its role as licensing authority, to call upon the relevant planning authority to provide information and advice relating to any development site for which a licence has been sought, and to detail its thinking in relation to any grant of planning permission which may have been made. The type and scope of this information, and the further advice which might be provided, are explained in the next section of this guidance.

CURRENT LICENSING PROCEDURES

34. The vast majority of applications for licences arise following the grant of planning permission by the local planning authority. In such cases, the Scottish Ministers will seek information from the planning authority in the normal manner, described below.

35. In cases where the planning position has yet to be resolved, the Scottish Executive will progress applications as far as is possible on the basis of information provided by the applicant and by other relevant sources, such as SNH. But no final decision will be taken by the Scottish Ministers until the planning position has been resolved.

36. The information which Scottish Ministers will seek from local authorities when considering a licence application will include the following:

- A copy of the report to the Planning Committee on the planning application.
- A copy of the minutes of the Planning Committee meeting at which the application was decided, or the equivalent papers if the application was decided by an officer.
- If not already contained in the above documents, an explanation of how the planning authority, in reaching a decision on planning permission, fulfilled the general requirement established under Regulation 3(4) to have regard to the provisions of the Habitats Directive, and in particular to the provisions of Articles 12 and 13 of the Directive and Regulations 39 and 43 of the 1994 Regulations. This explanation should include details of the consideration given by the planning authority to the types of question highlighted in paragraph 28 of this guidance.
- An opinion as to how the tests specified in Article 16(1) of the Habitats Directive and in Regulation 44 of the 1994 Regulations should, in the view of the planning authority, be addressed in the case in question. In particular, this should include any assessment made of the importance of the development against the background of national planning policy guidance, and structure and local plans. The detail of any other material considerations which the planning authority believes should be taken into account when assessing whether the development is an “imperative reason of overriding public interest” should also be provided.
- The details of any conditions attached to the planning permission to take account of the presence on site of any European protected species.
- Information about any modification to the planning application necessary to take account of the presence on site of any European protected species.
- Any other information which the planning authority believes is relevant to consideration of the licence application and in particular to the tests specified in article 16(1) of the Habitats Directive and regulation 44 of the 1994 Regulations.

37. To allow consideration of the test of whether the granting of a licence would be “detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range,” the Scottish Ministers will continue to seek the advice of Scottish Natural Heritage.

38. SNH advise on all conservation matters, including conservation status and the appropriateness and necessity of mitigation measures in development cases. SNH are also a key source of advice for both local authorities and developers and both should continue to consult SNH at as early a stage as possible where any development proposal may be likely to affect a European protected species.

39. In order that licence applications can be processed as quickly and efficiently as possible, the Scottish Executive will be looking for the co-operation of local planning authorities in this matter. The Scottish Ministers will normally ask planning authorities to provide the relevant information within 10 working days of receiving the request.

OTHER LEGISLATION

40. Recipients of this guidance are reminded that compliance with the 1994 Regulations and with the Habitats Directive does not relieve developers or planning authorities of obligations which might arise under other legislation.

41. In particular, there is a measure of overlap between the animals listed in the 1994 Regulations and those included on Schedule 5 to the Wildlife and Countryside Act 1981 (WCA). The presence of birds on a site also falls within the scope of the WCA and the relevant European Directive, namely 79/409/EEC on the Conservation of Wild Birds (“the Birds Directive”). Other legislation, such as the Protection of Badgers Act 1992 also has relevance in connection with development projects.

ANNEX A - EUROPEAN PROTECTED SPECIES.

Animals (Common Name)	(Scientific Name)
Bats, Horseshoe (all species)	<i>Rhinolophidae</i>
Bats, Typical (all species)	<i>Vespertilionidae</i>
Butterfly, Large Blue	<i>Maculinea arion</i>
Cat, Wild	<i>Felis silvestris</i>
Dolphins, porpoises and whales (all species)	<i>Cetacea</i>
Dormouse	<i>Muscardinus avellanarius</i>
Lizard, Sand	<i>Lacerta agilis</i>
Newt, Great Crested (or Warty)	<i>Triturus cristatus</i>
Otter, Common	<i>Lutra lutra</i>
Snake, Smooth	<i>Coronella austriaca</i>
Sturgeon	<i>Acipenser sturio</i>
Toad, Natterjack	<i>Bufo calamita</i>
Turtles, Marine (5 species)	<i>Caretta caretta</i>
	<i>Chelonia mydas</i>
	<i>Lepidochelys kempii</i>
	<i>Eretmochelys imbricata</i>
	<i>Dermochelys coriacea</i>
Plants (Common Name)	(Scientific Name)
Dock, Shore	<i>Rumex rupestris</i>
Fern, Killarney	<i>Trichomanes speciosum</i>
Gentian, Early	<i>Gentianella angelica</i>
Lady's-slipper	<i>Cypripedium calceolus</i>
Marshwort, Creeping	<i>Apium repens</i>
Naiad, Slender	<i>Najas flexilis</i>
Orchid, Fen	<i>Liparis loeselii</i>
Plantain, Floating-leaved water	<i>Luronium natans</i>
Saxifrage, Yellow Marsh	<i>Saxifraga hirculus</i>

Legal protection afforded to European protected species

It is an offence, with certain exceptions, under the Conservation (Natural Habitats, &c.) Regulations 1994,

- deliberately to capture or kill any **wild animal of a European protected species**;
- deliberately to disturb any such animal;
- deliberately to take or destroy eggs of such an animal;
- to damage or destroy a breeding site or resting place of such an animal;
- deliberately to pick, collect, cut, uproot or destroy a **wild plant of a European protected species**;

It is also an offence, with certain exceptions, to keep, transport, sell or exchange, or offer for sale or exchange, any live or dead wild animal or plant of a European protected species, or any part or anything derived from such an animal or plant.



Small changes in the way we perform everyday tasks can have huge impacts on Scotland's environment.

Walking short distances rather than using the car, or being careful not to overfill the kettle are just two positive steps we can all take.

This butterfly represents the beauty and fragility of Scotland's environment. The motif will be utilised extensively by the Scottish Executive and its partners in their efforts to persuade people they can do a little to change a lot.

© Crown copyright

Further copies are available from

The Stationery Office Bookshop,
71 Lothian Road, Edinburgh EH3 9AZ
Tel: 0870 606 55 66

ISBN 0-7559-2137-2



9 780755 921379