

Protected species, licensing & development



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How are they protected in Scotland?

- **The Wildlife and Countryside Act 1981**
- **The Conservation (Natural Habitats &c.) Regulations 1994 (usually referred to as ‘The Habitats Regulations’)**
- **The Protection of Badgers Act 1992**



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Wildlife and Countryside Act 1981

- Protects all wild birds
- Specially protected wild animals (Schedule 5)
- Protects wild plants + specially protected plants (Schedule 8)
- Protects against introduction of non-native species
- Various exceptions to or defences against offences including licensing



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Wildlife and Countryside Act 1981

Specially protected animals (Schedule 5)

- Protected against killing, injuring or taking
- Protects places used for shelter and breeding
- Protects against disturbance whilst animal is in its shelter
- Protects against certain methods of killing or taking
- Illegal possession – live or dead
- Harassment of certain species
- Closed seasons for hares



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Schedule 5 Species in Ayrshire:

Red squirrel – e.g. in forestry surrounding Loch Carron Reservoir in North Lanarkshire. Live in all types of woodland. Seed eaters (+ fungi, shoots, fruit, bird eggs). Need sufficient food source all year round. Main threats - grey squirrel (squirrelpox virus) and habitat loss / fragmentation.

Water vole - Traditionally live by rivers, burns, canals, ditches, dykes, lakes and ponds. Generally need sites with wide swathes of riparian vegetation for food and shelter - with sandy/silty soil that is easily excavated, not too much shade, and slower flowing water > 1m deep. Mink is their major predator.



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Schedule 5 species in Ayrshire:

Pine Marten – Found in woodland habitat, with den sites in tree cavities, buildings, old squirrel dreys, nests, and among rocks. Largely nocturnal and are classed as carnivores – but will eat voles, fruit, berries, small birds, insects and carrion. Distribution appears to be moving south – e.g. recent records near Bishopton in Renfrewshire.

Adder, slow-worm, common lizard – Found on heathland, grassland, woodland, scrub and brownfield sites. Lots of slow-worms on Ailsa Craig!

Always search the National Biodiversity Network – nbn.org.uk



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Habitats Directive 1992 (Articles 12,13,15 &16)

- Articles 12 & 13 of the Directive require a ‘**system of strict protection**’ for species listed on Annex IV of the Directive wherever they occur.
- Article 15 – Lists prohibited means of killing & taking such animals.
- Article 16 – Provides a derogation scheme (**licensing to permit otherwise illegal acts**).



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Habitats Regulations 1994 (as amended in Scotland) (Regs 38 – 46A)

- The Habitats Regulations transpose the EC Habitat Directive into Scots Law.
- European Protected Species (EPS) are those species listed on Annex IV of the EC Habitats Directive whose natural range includes any area of Britain. Animal EPS are listed on Schedule 2 of the Regulations, plants on Schedule 4.
- The Habitats Regulations have been amended many times in Scotland since 1994 so do not exactly mirror the similar Regulations that apply in England & Wales.



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Which Animals and Plants are EPS?

Scottish animal species listed on Schedule 2 of the Habitats Regulations:

Bats (all species)

Wildcat

Great crested newt

Otter

Cetaceans (all species)

5 marine turtles

Natterjack toad

Sturgeon (?)

And now... Beaver. A recent announcement by the Scottish Govt. Cabinet Secretary for the Environment means that European beavers will be added to the list of EPS in Scotland in May 2019.

Scottish vascular plants listed on Schedule 4 of Regulations

- **Killarney fern, Slender naiad, Yellow marsh saxifrage**



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Offences against animal EPS (Regulation 39)

To deliberately or recklessly

- capture, injure, kill, harass, take or destroy eggs
- disturb in specific circumstances (**see next slide**)
- obstruct access to or deny use of a breeding site or resting place

This protection applies to all life stages & to wild animals only.

It is also a strict liability offence (i.e. you commit an offence whether you act deliberately, recklessly or even accidentally) to:

- **damage or destroy a breeding site or resting place** (regardless of whether the animal is using it at the time).



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* Disturbance offences

(from previous slide)

It is an offence to deliberately or recklessly disturb EPS:

- whilst occupying a shelter/place of protection
- whilst rearing/caring for young
- in a manner likely to significantly affect distribution or abundance
- in a manner likely to impair ability to survive or breed
- whilst hibernating or migrating



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Protection of Badgers Act 1992

Interfering with a badger sett:
Intentionally or recklessly...

- Damaging a badger sett or any part of it
 - Destroying a badger sett
 - Obstructing access to, or any entrance of a badger sett, or
 - Disturbing a badger when it is occupying a badger sett
- Also an offence to knowingly cause or permit any such act

Badger in Strathclyde & Ayrshire

Setts most often found in woodland, dense scrub, hedgerows, steep banks and easily excavated soils. Also in open fields, railway embankments, old quarries, rock cavities, landfill sites. Surrounding grassland for foraging for their invertebrate prey.



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Protected Species Licensing

- A licence is required to permit actions which would otherwise constitute an offence in relation to protected species.
- Issued to a specified person.
- Can only be issued for specific purposes* and to permit specific actions.
- They are issued subject to compliance with specific conditions.



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* Licensing purposes?

Protection of Badgers Act 1992

- Licences can be issued (among other things) for the specific purpose of allowing development.



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* Licensing purposes?

Wildlife & Countryside Act 1981

Birds – Where there is no other satisfactory solution, licences can be issued for the purposes of

- prevention of serious damage
- preserving public safety or air safety
- science, research and education
- conserving wild birds etc.

There is no licensable development purpose for protected birds.

Animals – The same as for birds but additionally -

“ for any other social, economic or environmental purpose”, which is taken to include development

In all cases the licensing authority must be satisfied that the licence will:

“give rise to, or contribute towards the achievement of, a significant social, economic or environmental benefit” & “ that there is no other satisfactory solution”



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* Licensing purposes?

Habitats Regulations 1994 (for European Protected Species)

Test 1 – Does the application relate to a Licensable Purpose?

- Preventing serious damage, or
- 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.

Guidance available on the SNH website

www.nature.scot/professional-advice/safeguarding-protected-areas-and-species/licensing/european-protected-species-licensing



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* Licensing purposes?

Habitats Regulations 1994 (For European Protected Species)

Test 2 – Is there No Satisfactory Alternative?

- Are there alternatives that would not require the granting of a licence?, or
- Can the work be done differently to avoid committing an offence and therefore requiring a licence?

Note – It is expected that a degree of proportionality will be applied to the consideration of these Licensing Tests (see next slide).

Guidance available on the SNH website

www.nature.scot/professional-advice/safeguarding-protected-areas-and-species/licensing/european-protected-species-licensing



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* Licensing purposes?

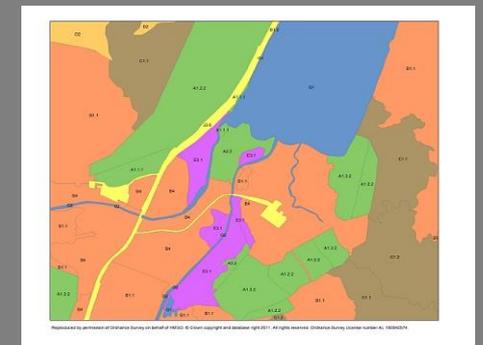
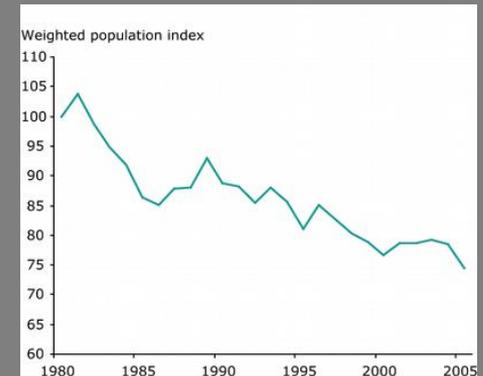
Habitats Regulations 1994 (For European Protected Species)

Test 3 – Will the impacts on Favourable Conservation Status be acceptable for the species concerned

In terms of –

- population dynamics,
- range, and
- the availability of suitable habitat.

Note – these considerations are generally what the issue of ‘proportionality’ hinges on.



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Habitat Regulations 1994 (European Protected Species)

Proportionality

The European Court of Justice has stated that –

“As a general rule, the severity of any of the conditions or “tests” will increase with the severity of the impact of a derogation on a species/population.”

This means that the rarer the European Protected Species concerned or the bigger the impact granting the licence will have upon it, the more stringently applied these tests must be.

This could influence SNH’s consideration of:

- The degree of damage to a species
- The imperative nature of work to be licensed
- The overriding nature of any public interest
- What constitutes a ‘satisfactory’ alternative



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EPS, Licensing & Development Management

SNH Area Operations Team, SNH Licensing, Planning Authority and Applicant

- Constructive engagement to avoid conflict or ‘nasty surprises’.
- Planning consent must come after EPS development licensing...
- BUT! Suspensive Conditions MUST be avoided – the need for EPS licensing and the likelihood of any necessary licenses being issued HAS TO be established PRIOR to the determination of any planning consent – EVEN IN OUTLINE – as per Scottish Govt. Planning Guidance.



So for any given development application – Are protected species present?

- Legally speaking, establishing this is primarily the responsibility of developer FOR the LPA.
- Developers or their consultants should initially refer to the web (National Biodiversity Network Atlas, Local Record Centres) and to the results of their initial field surveys to establish which protected species may be present.
- In some cases there may be the potential for limited and INFORMAL input from SNH Area Operations Teams.



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Are protected species present?

Role of the Planning Officer

Regulation 3(3) of the Habitats Directive states that –

“...a competent authority, in exercising their functions (in this case the Planning Authority considering a planning application), must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions”.

Planning Officers therefore need to consider –

- **Are European Protected Species present on the site?** (Supported by information submitted by the applicant.)
- **If so, how will they be affected?** (Supported by information submitted by the applicant)
- **Can an offence be avoided?** (In consultation with SNH in accordance with our Service Level Agreement for Development Management)
- **If not will licensing tests be met?** (In consultation with SNH in accordance with our Service Level Agreement for Development Management)



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So... Planning Application - Key Questions

Are protected species present?



If so how do they use the site?



What will the impacts be?



Can impacts be minimised/avoided such that an offence / the need for licensing will not occur?



Can planning permission / species licence be granted?



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Are protected species present? How do they use the site?

Species Survey Reports in support of planning applications – What to look for:

- Evidence that best practice guidance has been followed in terms of survey extent, survey effort, time of year, weather conditions etc. (E.g. reference to Bat Conservation Trust *Bat Survey Guidelines*).
- Experience of ecologists – are they stated to hold licenses for the species they are surveying for?
- Clearly and unambiguous conclusions re. which protected species are present, their numbers, how they use site (breeding etc.), and an honest appraisal of how they will be affected by the proposed development.
- Survey shelf life – Species surveys undertaken more than 18 months ago will not be accepted for SNH licence applications. Therefore they are of no use in determining whether protected species will be required or granted to facilitate a development proposal.

If you have a SPECIFIC query about the adequacy of any species survey report SNH ARE happy to provide advice.



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What will the impacts be on protected species?

The impacts of Site Plans, timetabling, schedule (phasing) of works, method statements etc. on protected species should be clearly detailed by applicants.

- **Short term impacts** - (site preparation / during construction) habitat destruction and fragmentation, usually resulting in the highest impacts on protected species, often occurs at this stage.
- **Long term impacts** - increased disturbance (noise, light) higher numbers of predators & loss of prey, increased pollution and rubbish.

How have plans been adapted to avoid or minimise impacts, or compensate for anything that will be lost? Consideration of options in the following order -

Avoidance  Mitigation  Compensation

If even after all this there will be residual impacts, will they be licensable or not?



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Can impacts be minimised/avoided? Offences? Species Protection Plans (SPPs)

Adequate and appropriate avoidance/mitigation/compensation

Avoidance – micro-siting, retention of key habitat, features and corridors.

Mitigation - protection zones around shelters, timing works outside of breeding seasons or during daylight hours etc., temporary exclusions, displacement and relocation of species, site personnel made aware (toolbox talks), safe working procedures on site, built features to avoid harm post construction, Ecological Clerk of Works on site throughout works.

Compensation - for anything that will be lost – artificial holts / setts / nest boxes, new habitat creation.



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- All site operatives need to be clear about their own and other's responsibilities and about all relevant species licensing issues/constraints.

SNH Area responses to LPA

Where Planners require advice at the planning stage

As per our Service Level Agreement, SNH Area staff can give advice when on species surveys and Species Protection Plans to clarify:

- The adequacy of survey/SPP – in relation to specific issues
- The Licensing requirements
- Whether any necessary licences are likely to be granted

SNH local Area staff should liaise with SNH national Licensing staff to ensure consistent licensing advice.



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LPA make planning decision

Consider Licensing tests

(usually - though not necessarily – supported by SNH advice)



Grant planning consent

Refuse planning consent



Licence application.....



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Licence application to SNH by developer

- Follows planning consent;
- Hopefully a foregone conclusion as all issues have been fully explored during the planning consultation process;
- SNH reconsider tests;
 - Any changes?
 - Time delay since surveys?
 - Timings of proposed works?



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BLIMP – New Bat Low Impact Licensing Approach

New lighter touch licensing approach for development works affecting low numbers of non-breeding soprano and common pipistrelle bats.

- Will enable low-impact development activities to go ahead without specific licence applications.
- To gain a BLIMP licence ecologists will need to hold a current bat survey licence which is valid for Scotland, and will have a proven track record of expert experience and good practice.
- Bat surveys must still be undertaken in accordance with [BCT Good Practice Guidelines](#) and a species protection plan will be produced for each site incorporating mitigation and compensation to safeguard bats.



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Further Information

www.nature.scot/professional-advice/planning-and-development/natural-heritage-advice-planners-and-developers/planning-and-development-protected-animals

Bat Surveys for Professional Ecologists, Good Practice Guidelines, 3rd Edition

2016 (Bat Conservation Trust)

www.bats.org.uk/pages/batsurveyguide.html

Bat mitigation guidelines (English Nature, January 2004) A.J. Mitchell-Jones www.warksbats.co.uk/pdf/Batmitigationguide.pdf (Page 39, Figure 4.) Guidelines for proportionate mitigation. The definition of common, rare and rarest species requires regional interpretation



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Further Information

Great crested newt mitigation guidelines (English Nature, 2001)

<http://webarchive.nationalarchives.gov.uk/20140605121141/http://publications.naturalengland.org.uk/publication/810429?category=30014>

SNH Weblink: <https://www.nature.scot/sites/default/files/2018-09/Species%20Planning%20Advice%20-20great%20crested%20newt.pdf>

GCN eDNA techniques – use mid April to late-June

http://sciencesearch.defra.gov.uk/Document.aspx?Document=12287_WC1067_Appendix_5_TechnicalAdviceNoteUpdatedSept2014.docxThe

Water Vole Mitigation Handbook (Mammal Society, 2016)

<http://www.mammal.org.uk/2016/05/the-mammal-society-water-vole-mitigation-handbook-is-now-available-to-purchase>

SNH is currently working on mitigation/management advice specific to fossorial water voles.



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