

# 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

**Section 1 protects all wild birds.** It's an offence to intentionally or recklessly:

- Kill, injure, or take
- Take, damage or destroy or interfere with nest whilst it is in use or being built
- Obstruct access or prevent use of nest
- Take or destroy eggs
- Possession of birds, parts of birds

Some species receive greater protection

Schedule 1 protected against disturbance whilst building nest, on or near a nest containing eggs or young – e.g. Kingfisher, Peregrine

Schedule A1 – nests protected at all times – Eagles

Schedule 1A – protected against harassment – Eagles, Hen Harrier, Kite



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# Wildlife and Countryside Act 1981

## Section 13, Protection for plants

- All wild plants are protected – you need landowner permission for uprooting
- Specially protected species (Schedule 8) also protected against picking, uprooting, cutting or seed collection – search the NBN
- Some species protected against sale only e.g. bluebells



# 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 Strathclyde & 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.

**Fossorial water vole** (live in dry neutral rank grassland (holcus spp) underground burrows, large populations in east Glasgow (parks, road verges, gardens) populations extend into Seven Lochs Wetland Park and also at Frankfield Loch. Foxes, cats, tawny owls & rats are all major predators.



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## Schedule 5 species in Strathclyde & 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](http://nbn.org.uk)



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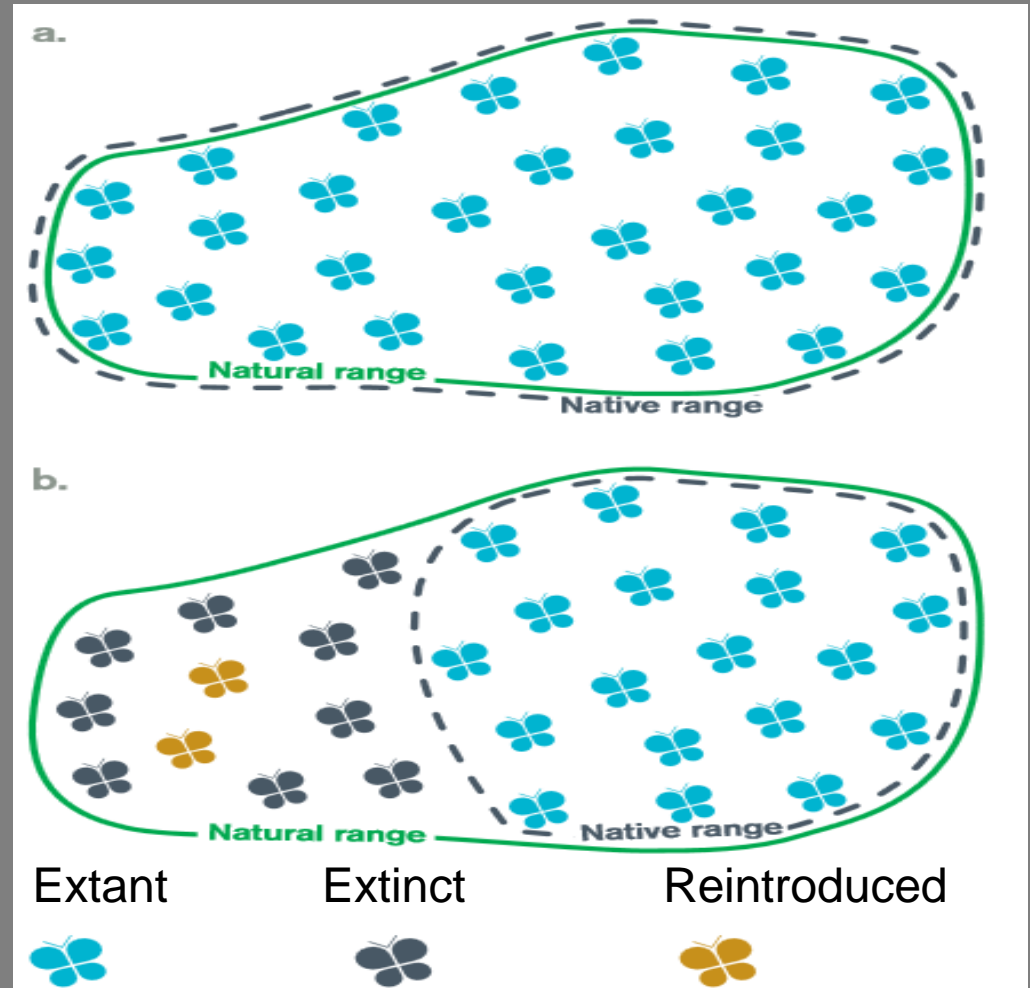
# What is native range? (as referenced in section 14P of the Wildlife & Countryside Act)

Section 14 also offers protection against the introduction of non-native species.

Non-native animals - Illegal to release outwith their native range.

Non-native plants - Illegal to plant / grow outwith their native range.

Exceptions - e.g. under licence



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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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# EPS in Strathclyde & Ayrshire



Otters – Found in aquatic habitats such as rivers, lochs, ponds, ditches & wetlands. Holts are made in burrows, natural holes, caves, and under tree roots, stick piles & man-made structures. Eats fish, frogs & toads, and small mammals & birds.



Bats - Suitable roosting habitat depends on seasonality (e.g. maternity roosts in summer, hibernation roosts in winter); but can include buildings, (e.g. houses, churches, barns, castles, derelict buildings etc.) older trees, bridges, caves, mines & quarries, and culverts & lade tunnels. Prefer to be surrounded by woodland, hedgerows, water bodies and/or species-rich grasslands - which support their invertebrate prey.



Great crested newts – Need ponds for breeding with good vegetation cover and few fish, as well as adjacent species-rich grassland and woodland which supports their invertebrate prey and provides areas for hibernation.



# 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

This is really animal welfare rather than nature conservation legislation. It affords protection against:

- Wilful taking, injuring or killing badgers
- Cruelty
- Intentional or reckless interfering with a badger sett
- Selling and possession
- Marking and ringing



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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](http://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](http://www.nature.scot/professional-advice/safeguarding-protected-areas-and-species/licensing/european-protected-species-licensing)



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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 before 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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# Some Species Key Facts

## Birds

Surveys can take place all year round (March-August for breeding birds, Nov-Feb for winter birds). Cannot licence destruction of nest – no licensing purpose related to development, so works must be timed to avoid nesting – e.g. tree works, building demolition, site clearance for ground nesting birds.

## Water Vole

Survey mid May to mid September (during breeding season). Search for signs of water vole 2m from waters edge (or in rank grassland for fossorial water vole sites); look for burrows, runs, tracks, feeding stations, droppings and latrines. Avoid survey after heavy rain. Survey the application footprint + a 50m–1km radius (depending on the scale of the works concerned). Design the development to avoid burrows, maintain habitat corridors and maintain access to high ground. The displacement or relocation window by trapping lasts only from mid-March to mid-April. A Licence is required for any works within 10m of a burrow due to the risk of disturbance and burrow collapse.



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## Otters

Surveys can take place all year round but best when vegetation has died back. Avoid survey after heavy rainfall or high water as signs washed away. Systematic search required for spraints, paw prints, otter paths, slides, food remains. Holts and places used for rest/shelter are the locations that licences will be required in order for development to disturb. Survey all suitable habitat within 200m of proposed works. Camera trap any holts identified to establish whether they are being used for breeding.

Facts – otters are largely nocturnal. Females range for up to around 21km, males 48km. The greatest threat to otters is from road accidents.

Licences required for works:

- Within 30m of an active non-breeding holt or couch/lie-up/hover.
- Within up to 200m of any confirmed and in use breeding site (site and nature of development dependant)
- Within 100m of an active non-breeding holt or couch/lie-up/hover for particularly high noise/vibration activities

It takes 8-10 weeks for cubs to become fully mobile. Disturbance licences cannot be issued for holts where cubs of this age are present.



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## Great Crested Newts

If a development proposal is within 500m of a potential breeding pond the site should be properly surveyed – using both a presence/absence survey (requiring up to 4 visits) and a population size assessment (requiring up to 6 visits).

Ponds can be torch surveyed or netted from mid-March to mid-June (up to August to find larvae/tadpoles). Bottle or funnel trapping can take place from March to May. Egg searches from April to June.

eDNA analysis of ponds can be undertaken between mid April and June (to test for presence or absence).

Terrestrial pitfall traps can be used to survey for great crested newts during the months of March, April, May and September. Refuge searches can take place from April to September.

Habitat within 50m of ponds is of most importance to great crested newts. The wider Conservation Status of GCN is currently unknown - therefore a licence will only be issued if it can be shown that the population concerned will be maintained at current level or enhanced.



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## Badger

Surveys can be carried out all year but February to April are optimal. The survey extent should extend 1km from the periphery of the development site. A systematic search should be undertaken for sett entrances, footprints, hair, snuffle holes, latrines. Where a development proposal could impact one or more social groups bait marking may be used to establish their relative distributions/extents. Surveys for the site at ROF Bishopton discovered TWELVE distinct badger clans in this manner.

Facts – A badger clan's territory is typically 70-120 ha. They are largely nocturnal.

A Licence is required for any works:

- within 30m of entrance of badger sett,
- for a sett within 100m of pile driving and blasting activities.

Licences are unlikely to be granted during the badger breeding season (01 December to 30 June) as it is hard to ascertain whether breeding is taking place within a sett.

If compensation/mitigation for a development requires the installation of artificial setts these must be located less than 100m from the original sett.



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## Bats

Roost surveys must be undertaken from May to September, with at least one Dusk/Dawn survey between May and August.

Internal & external search of buildings should be undertaken (searching for bats, droppings scratch marks, feeding remains etc.). Dusk and dawn emergence surveys should use bat detectors and recording devices to establish roost sites and types, the species present and their numbers. Tree climbing surveys may also be necessary to detect small roosts.

Good survey coverage to appropriate methods is needed to fully establish the presence of bats, and this should be carried out by licenced and experienced surveyors. Surveys should not be undertaken during heavy rain and/or strong winds.

SNH cannot licence works which are deemed to be likely to affect bat breeding (the season for which is 15 April to the end of September).

Where required, like for like compensation is preferred in terms of habitats etc., as this has been shown to be more successful.



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## Red Squirrels

Surveys can be carried out all year round, but are easier in winter when leaves have fallen. Drey trees are usually 15 years or older, and can be of conifer or broadleaf species.

Will the development proposal significantly reduce the population viability in the local area? Surveyors should estimate squirrel numbers present in woodland areas to be destroyed (area of trees in hectares x squirrel density it has been established is supported) and then look at surrounding habitat and the available links to it. If the proposal will isolate an area of woodland habitat which can support less than 125 squirrels the population is very likely to go extinct.

The full breeding season for red squirrels is February to September, but February to July is the most important time. If works are essential during this time, survey is required to establish if breeding is actually taking place – usually requiring survey over 3 mornings.

Licences are required for:

- works within 50m of drey trees during breeding season (February to September inclusive),
- works within 5m, or one tree's distance, of a potential drey location (whichever is the lesser) outwith the breeding season,
- works within 100m of drey trees for any high noise or vibration activities at any time.



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## Pine Marten

Surveys can be undertaken all year round, but are best carried out between May and September when scats are abundant. The breeding season is from March to August. Surveys should be undertaken for den sites and signs covering all areas within 250m of the development site. Surveys should also be required if a development proposal is adjacent to suitable forest habitat, within known pine marten range and which includes either felling works / loss of forest habitat or the loss of associated areas of rough grassland that could be used for foraging.

A licence required for:

- works within 100m of a den site during the breeding season,
- works within 30m of den site outwith the breeding season.

Erection of breeding boxes to replace natural den sites as compensation is often required.

Dwellinghouse defence – it is not an offence to disturb pine marten in a den and to obstruct / damage or destroy a den if it has been established within a dwellinghouse. However even in such circumstances a licence IS needed in order to “take” pine marten kits if an exclusion is required from a dwellinghouse.



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**Thank you**



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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](http://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, 3<sup>rd</sup> Edition

2016 (Bat Conservation Trust)

[www.bats.org.uk/pages/batsurveyguide.html](http://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](http://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.docx](http://sciencesearch.defra.gov.uk/Document.aspx?Document=12287_WC1067_Appendix_5_TechnicalAdviceNoteUpdatedSept2014.docx)The

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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