

Guidance on the Amendments to the Conservation (Natural Habitats, &c.) Regulations 1994 ('The Habitats Regulations') for woodland managers and operators

Interim Guidance

Version 1

(16 August 2007)



i. Introduction

A number of amendments are about to be made to the Conservation (Natural Habitats, &c.) Regulations 1994 ('the Habitats Regulations') which transpose the EC Habitats Directive (1992) into UK legislation. The amendments will change the legal protection given to European protected species (EPS) that can be found in woodland (dormouse, great crested newt, smooth snake, sand lizard, otter and all species of bats). These changes will have implications for the way forests and woodlands are managed, as managers will now need to assess the presence of EPS and the likelihood of the impact of their operations on EPS. Managers may need to modify their operations to avoid committing an offence against EPS or apply for a licence if they cannot avoid doing so.

ii. Purpose of the document

Part 1 of this document is aimed primarily at forest managers, foresters and those with responsibility for woodland management strategies. It provides background information on the reasons behind the changes to the species protection provisions of the Habitats Regulations and also further details on the changes to the legislation. Requirements for obtaining a licence are then set out, if committing an offence cannot be avoided.

Part 2 provides information on EPS associated with woodland and describes operations that could result in an offence being committed if EPS are present. Alternatives to these forestry operations are suggested which should reduce the risk of committing an offence against an EPS. Guidance is provided on how to continue to manage woodlands if EPS are present to avoid committing offences and if this cannot be avoided, when licences would be required. Good practice recommendations are also provided which will help those that need to apply for a licence to ensure that the favourable conservation status of the populations of EPS is maintained. Part 2 is intended for those needing practical guidance to ensure forest operations remain lawful in the presence of EPS.

PART 1

1.1 Changes to legislation

The 2005 European Court of Justice (ECJ) judgment in Case C-6/04, *Commission v United Kingdom*¹, ruled that the species protection provisions in the Habitats Regulations were not compatible with the strict species protection regime required by Article 12 of the Habitats Directive. The ECJ judgment ruled that many of the defences to Regulations 39 and 43 of the Habitats Regulations (protection of EPS) did not meet the strict derogation tests set out in Article 16 of the Habitats Directive. Therefore the majority of the defences have been removed from Regulation 40 for animals and also Regulation 43 for plants. This includes the commonly used 'incidental result defence' which covers acts which are the incidental result of an otherwise lawful activity which could not reasonably have been avoided. This will now mean that anyone who, for example, "damages or destroys a breeding site or resting place" of an EPS (such as a bat roost in a tree or a dormouse nest on the woodland floor) will not have the 'incidental result' defence to rely upon and may be liable to prosecution, even if the damage or disturbance was the incidental result of a lawful activity or operation.

¹ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62004J0006:EN:HTML>

1.2 The offences

Regulation 39 sets out the offences against EPS in the amended Habitats Regulations. The full amended text is given in Annex A.

In summary it is an offence to:

- (a) *deliberately capture, injure or kill any wild animal of a European protected species;*
- (b) *deliberately disturb animals of any such species in such a way as to be likely significantly to affect:*
 - (i) *the ability of any significant group of animals of that species to survive, breed, or rear or nurture their young, or*
 - (ii) *the local distribution or abundance of that species;*
- (c) *deliberately take or destroy the eggs of such an animal; or*
- (d) *damage or destroy a breeding site or resting place of such an animal.*

The first three offences (a, b and c) require a deliberate act to be proven. For example the Regulations prohibit deliberate capture and killing of protected species. However, in this context “deliberately” has a broad meaning, having been interpreted by the ECJ to include “accepting the possibility” of such capture or killing². In other words, an offence may be committed by a person who might not intend to capture or kill an EPS specimen but nevertheless performs the action, despite being sufficiently informed and aware of the consequences that the action will most likely have, with reckless disregard of the known prohibitions leading to the capturing or killing of EPS specimens. It is likely that this broad meaning will also be taken to apply to the other offences where the term is used. A possible example of deliberate killing might occur when tree felling or extraction is carried out too close to known bat roost trees without leaving a sufficient buffer area. A felled tree may inadvertently fall onto the retained roost tree, destroying the roost and killing the bats therein.

The threshold of deliberately disturbing an EPS has been raised. An offence will only be committed if the deliberate disturbance is likely to **significantly affect** a **significant group** of animals of that species’ ability to survive, breed, or rear or nurture its young or **significantly affect** the local distribution or abundance of that species. Therefore, an offence would be committed where there is an adverse effect on the ability of those animals to survive or breed or a significant adverse impact on the local distribution or abundance of the species³. For example, repeated disturbance to a colony of bats occupying a site for breeding or hibernation could cause the colony to abandon that site. If there are no alternative sites nearby for the bats to move to, the disturbance could be considered to have affected the local distribution or abundance of the population.

Any biological definition of what constitutes a significant group of animals should take into account the local abundance of the species, its behaviour and the circumstances in which the disturbance takes place. For species that are social breeders, such as bats, significant groups probably occur frequently as most of the breeding females in a population will gather in one place during the summer breeding season. Similarly, species that gather to utilise

² See paragraph 71 of ECJ case C-221/04. The European Commission has taken what appears to be a slightly wider approach in their Guidance on Article 12 of the Directive, stating that “A person who is reasonably expected to know that his action will most likely lead to an offence against a species, but intends the offence or, if not, at least accepts the results of his action, commits an offence.” (See http://circa.europa.eu/Public/irc/env/species_protection/home).

³ For more detail on disturbance of EPS see: ‘Disturbance and protected species: understanding and applying the law in England and Wales’, CCW and NE. If a prosecution is taken forward the courts will have regard to this guidance.

some limited resource, such as newt breeding ponds or bat hibernation sites, may also form significant groups on a seasonal basis. Species that tend to be solitary, such as dormice, otters or smooth snakes, probably never form significant groups of adults, but a family group with dependent young could constitute such a group, particularly if the species is rare in the area

In addition to the offences under the Habitats Regulations, there is also an offence in respect of animal EPS under the Wildlife and Countryside Act 1981 (WCA). Although amendments will be made to the WCA to remove certain offences in respect of animal EPS, the 'intentional or reckless' disturbance offence in section 9 of the Act will still apply. The WCA's 'disturbance offence' applies to activities that cause low level disturbance which is no longer an offence under the Habitats Regulations i.e. the WCA offence is below the threshold of the amended deliberate disturbance offence described above in relation to the Habitats Regulations. However, a defence covering acts which are an incidental result of a lawful operation still applies to the WCA offence. Those undertaking activities that may deliberately disturb at a low level may decide to rely on the defence or may decide to obtain a licence under the WCA.

Please see <http://www.defra.gov.uk/wildlife-countryside/index.htm> for further guidance on the amended deliberate disturbance offence.

With regard to the fourth offence (d) of damaging or destroying a breeding site or resting place, the removal of the 'incidental result defence' means that the strict liability offence will no longer be subject to a defence. Therefore if the offence was committed by accident e.g. a tree was felled that was found to support a bat roost afterwards, there will be no defence to rely upon if a prosecution was taken forward. Note that there are no qualifications, exemptions or defences for this offence apart from a licence. Any degree of damage could qualify as an offence and there is no threshold of 'significant' as for the deliberate disturbance offence. Even work to improve the habitat, such as tree surgery to safeguard a tree with a bat roost or coppicing to sustain good dormice habitat, could be deemed 'damaging'. However, the Crown Prosecution Service would consider enforcement action in accordance with the Code for Crown Prosecutors⁴, which includes an assessment of whether prosecution would be in the public interest. If an offence is committed and prosecution is taken forward the court shall have regard, on sentencing, to whether that person could reasonably have avoided the damage or destruction.

Breeding sites and resting places need to be identified taking into account the particular habits of the species involved. Some breeding sites are not used all year round: for example, a maternity bat roost is not used in winter. However, such sites are protected throughout the year, even when not in use. For species such as great crested newts, identifying a breeding site within a pond is almost impossible and the whole pond is likely to be deemed to be the 'breeding site'. The same principle can be applied to dormice, for which it is virtually impossible to locate all or any of their nests and resting places; therefore the whole stand or wood could be deemed to be a breeding site. This means that, where these species are present, the risk of committing the offence whilst carrying out operations would apply to the whole area of woodland or pond. This makes it much more difficult to find an alternative location to carry out operations, which would be taken into account in any licensing decision (see section below). Other species such as bats and otter may use relatively obvious breeding sites, and in these circumstances it may be easier to find alternative locations for the operations (e.g. a tree without a bat roost). In such cases a derogation licence is likely to be more difficult to obtain, unless there are compelling reasons for the operation. Bats and

⁴ http://www.cps.gov.uk/victims_witnesses/prosecution.html

otter, along with other EPS, also use inconspicuous locations as resting places, and this will also need to be taken into consideration when deciding where to undertake operations.

1.3 Forestry Operations and Licensing

There are several options to avoid or reduce the risk of committing an offence against an EPS whilst carrying out operations or performing other activities in woodland. The first is to establish whether the operation or activity is really necessary in the area used by that species. The second is to carry out operations using good practice to help avoid impacts on EPS (see the guidance on EPS in Part 2). If this is not possible, and there continues to be a risk that an offence is likely to be committed, a licence should be sought to allow the activity which will commit an offence against EPS to lawfully continue. A licence application must satisfy a number of strict tests before a licence can be granted (as set out in Regulation 44 of the Habitats Regulations). There is no guarantee that a licence will be granted. There are three tests, each of which must be satisfied:

(i) Purpose

A licence may only be granted for certain purposes listed in Regulation 44(2) (see Annex A). The primary purpose of the activity must fall into one of the permitted purposes listed in the regulation. The purposes most relevant to forestry operations are: imperative reasons of overriding public interest; public health and safety; conservation of wild animals and plants; preventing the spread of disease; or preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.

Although each licence will be considered in the individual circumstances, possible purposes for woodland operations could include:

- Forest operations funded through the FC schemes (Better Woods for Wales, English Woodland Grant Scheme) are intended to deliver country forestry strategies and will be compliant with the UK Forestry Standard. It is possible that such activities could be considered to be of overriding public interest.
- Operations aimed at improving the condition of SSSIs or conserving native woodland or priority species will contribute to delivery of the UK Biodiversity Action Plans and country biodiversity strategies. Such operations will be considered as meeting the objectives of the conservation purpose and may also be deemed to be of 'overriding public interest'.
- Work to ensure the safety of an over-mature tree in an area with public access is likely to qualify under the public health and safety purpose.
- Trees may have to be felled to prevent the spread of disease or if they threaten to damage stands of commercially valuable timber.

(ii) No satisfactory alternative.

This test requires that there is no satisfactory alternative to the forestry operation and its impact on EPS. It would have to be proved in the licence application that the activity is necessary and cannot be carried out in a way, or in a place, that would avoid an offence being committed. Relevant considerations will include what is actually proposed, the purpose of the operations and the nature of the EPS that will be affected. For example, dormice are unable to move around a woodland quickly (for instance to flee from a threat), and their breeding sites and resting places (nests) are very hard to find and are likely to be distributed throughout the woodland. Therefore, it is not possible to identify the location of all the breeding/resting sites likely to be affected by the operation and avoid them, thus removing the option of moving the

operation to another location within the woodland. In this instance, it may be that there are no other alternative locations for the operation. On the other hand, it is sometimes possible to identify individual trees used as bat roosts. Finding an alternative location for the proposed operation may be easier, so in this instance it will be more difficult to show that there is no other satisfactory solution without further justification. More details on operations that are likely to meet this test are in Part 2 of this guidance.

(iii) No detrimental effect on favourable conservation status of the EPS.

This test requires that the operation does not adversely affect the overall objective of achieving and maintaining the EPS at favourable conservation status. The conservation status of an EPS is 'favourable' when population dynamics data indicate that the EPS is maintaining itself on a long-term basis as a viable component of its natural habitats and the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future. It will need to be shown that the operation will not be detrimental to the conservation status of the EPS, i.e. there is no net loss of EPS. An indication that good practice will be followed to achieve favourable conservation status for the EPS will significantly assist in satisfying this test in an EPS licence application. This may be provided by a woodland management plan or similar information, such as that used for grant applications. Information on good practice for each EPS is given in Part 2.

A licence application will only be considered if there is evidence that the EPS or its breeding site or resting place is present and an offence is likely to be committed. Licences can include conditions that must be met e.g. during the operation and any associated mitigation, to ensure there is no detrimental impact on the favourable conservation status of the species.

1.4 Complying with the changed legislation

Anyone carrying out woodland management risks committing an offence against EPS. This risk can be substantially reduced by assessing the presence of EPS, carrying out avoidance practices as recommended in Part 2 of the guidance (relating to specific EPS) and applying for a licence if necessary.

Anyone suspecting that an offence has been committed should report it to the local police, and it will usually be investigated by a Wildlife Crime Police Officer. Advice is likely to be sought from the Statutory Nature Conservation Organisations during this process. Based on the evidence collected by the police, the Crown Prosecution Service (CPS) will decide whether or not to take forward a prosecution. They are required to take into account whether a prosecution is in the public interest. Further details of this public interest test may be found at:

http://www.cps.gov.uk/victims_witnesses/prosecution.html

It would be wise for operators to be able to show that they have followed guidance whilst undertaking operations. Documentary evidence of the decision-making process used to establish the presence/absence of an EPS and adjustment of management plans to take account of EPS is likely to be useful should harm to a protected species or its breeding or resting places occur. If, despite good planning and operational practice, an offence is still committed (e.g. the destruction of a breeding site), the CPS may take this information into consideration.

1.5 Applying for a license

England

Applications for licences in England can be made through the Forestry Commission (FC) if the operation/s are included within a felling licence or English Woodland Grant Scheme (EWGS) application. An application form will be provided by FC. If the operation is not covered within these processes, a form should be obtained from Natural England. Further information is available from:

Forestry Commission England:

<http://www.forestry.gov.uk/forestry/infd-765csz>

General enquiries: protectedspecies@forestry.gsi.gov.uk

For telephone enquiries, contact the relevant FC regional office (contact details at: <http://www.forestry.gov.uk/England-regions>)

Natural England:

<http://www.naturalengland.org.uk/conservation/wildlife-management-licensing/licensing.htm>

For advice and further information contact:

Wildlife Management and Licensing Service

Natural England

Burghill Road

Westbury-on-Trym

BRISTOL

BS10 6NJ

Tel: 0845 6014523 (local rate)

Fax: 0845 6013438

Wales

Applications for licences in Wales can be made through the FC if the operation/s are included within a felling licence or Better Woods for Wales (BWW) application. An application form will be provided by the FC:

<http://www.forestry.gov.uk/forestry/infd-5z8jcr>

If the operation is not covered within these processes then the Assembly Government considers and determines licences for the following purposes:

- 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;
- preventing the spread of disease;
- preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.

Address:

Nature Conservation and Biodiversity Branch

Environment Conservation and Management Division

Welsh Assembly Government

Unit 9 Cefnllan Science Park

ABERYSTWYTH

Ceredigion

SY23 3AH

Tel: 01970 610216

The Countryside Council for Wales (CCW) considers and determines licences for following purposes:

- scientific or educational purposes;
- ringing or marking, examining any ring or mark on wild animals;
- conserving wild animals or wild plants or introducing them to particular areas;
- protecting any zoological or botanical collection.

Address:

Species Protection Team
Countryside Council for Wales
Maes Y Ffynnon
Penrhosgarnedd
Bangor
Gwynedd
LL57 2DW
Tel: 01248 385653
E-mail: speciesprotection@ccw.gov.uk
<http://www.ccw.gov.uk>

PART 2

2.1 Introduction to EPS guidance

Part 2 provides specific guidance for each EPS or EPS group associated with woodland. This includes good conservation practice benefiting EPS, advice on which operations/activities might lead to offences being committed, how such activities can be modified (e.g. through timing, etc.) to reduce the risk of committing offences, and circumstances requiring a licence. If activities cannot be modified, there is guidance on how to decide if a licence is required, the sort of information needed to substantiate an application and the action that might be required to satisfy the conditions of a licence.

The specific EPS guidance are also available at: <http://www.forestry.gov.uk/forestry/inf-d-6z2le4>.

Annex A: Extracts from the Conservation (Natural Habitats, &c.) (Amendment) Regulations (2007)

- 39.—(1)** A person commits an offence if he—
- (a) deliberately* captures, injures or kills any wild animal of a European protected species;
 - (b) deliberately* disturbs animals of any such species in such a way as to be likely significantly to affect—
 - (i) the ability of any significant** group of animals of that species to survive, breed, or rear or nurture their young, or
 - (ii) the local distribution or abundance of that species;
 - (c) deliberately* takes or destroys the eggs of such an animal; or
 - (d) damages or destroys a breeding site or resting place of such an animal.
- (12) In paragraph (1)(b)(i), “significant” means significant in relation to the objectives of the Habitats Directive.
- (13) In any proceedings in which a person is charged with an offence under sub-paragraph (b) of paragraph (1) by reason of an effect mentioned in paragraph (i) of that sub-paragraph, the court shall have regard to any guidance given by the appropriate nature conservation body as to the criteria for determining whether a group is significant.
- (17) In deciding upon the sentence for a person convicted of an offence under paragraph (1)(d), the court shall in particular have regard to whether that person could reasonably have avoided the damage to or destruction of the breeding site or resting place concerned.

* “Deliberately” has a broad meaning. In the context of capture and killing, the European Court of Justice has interpreted it to include “accepting the possibility” of such capture or killing (see paragraph 71 of ECJ case C-221/04). In other words, an offence may be committed by a person who might not intend to capture or kill an EPS specimen but nevertheless performs the action, despite being sufficiently informed and aware of the consequences his action will most likely have. Whether this wide interpretation applies more generally is unclear from the judgment. However it is likely that it also applies to the other offences in regulation 39 where the term is used. Guidance on the interpretation of Article 12 requirements has recently been issued by the European Commission. Further information may be found on

http://forum.europa.eu.int/Public/irc/env/species_protection/library?l=/commission_guidance/final-completestepdf/_EN_1.0_&a=d

**“Significant” in Regulation 39(1)(b)(i) means significant in relation to the objectives of the Habitats Directive, i.e. strict protection of animal species listed in Annex IV of the Directive. In any criminal proceedings for this offence, the court will have regard to relevant guidance given by the appropriate nature conservation body when considering whether the disturbance in question was significant.

Grant of licences for certain purposes

- 44.—**(1) Regulations 39, 41 and 43 do not apply to anything done for any of the following purposes under and in accordance with the terms of a licence granted by the appropriate authority.
- (2) The purposes referred to in paragraph (1) are-
- (a) scientific or educational purposes;
 - (b) ringing or marking, or examining any ring or mark on, wild animals;
 - (c) conserving wild animals or wild plants or introducing them to particular areas;
 - (d) protecting any zoological or botanical collection;
 - (e) 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;
 - (f) preventing the spread of disease; or
 - (g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.
- (3) The appropriate authority shall not grant a licence under this regulation unless they are satisfied-
- (a) that there is no satisfactory alternative, and
 - (b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

For further details on the amendments to the Habitats Regulations please see:
<http://www.defra.gov.uk/wildlife-countryside/ewd/index.htm>