

Forest operations and European protected species in Scottish forests - implications of legal changes from February 2007

SUMMARY

This note gives initial guidance on the implications for forestry of changes to be made under the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007. These regulations transpose the EU Habitats and Species Directive into Scots Law. The changes will affect forestry activities in the presence of European protected species (EPS) such as bats, otters, great crested newts and wildcat. They will come into force on February 15th 2007.

This interim advice is intended to alert woodland managers to the implications and guide them on where to seek further advice or apply for licences where suitable. A revised version with more complete guidance will be developed soon by Forestry Commission Scotland, Scottish Natural Heritage and the Scottish Executive's Environmental and Rural Affairs Department. It will include specific guidance for each of the EPS relevant to forestry.

Parallel regulations revisions and guidance are underway for England and Wales.

1. INTRODUCTION

The EU Habitats and Species Directive 1992 was first incorporated into UK law via the Conservation (Natural Habitats &c.) Regulations, 1994.

They established protective regimes both for European sites (SACs and SPAs) and for European protected species of animals and plants which were scheduled in the Directive (see Annex 1). It was made an offence to deliberately kill, destroy, disturb, or take EPS wherever they are found, or to damage their breeding sites or resting places, whether deliberately or not. However an important exception was allowed for land managers because an offence was not committed if the person who carried out these acts could show they were the incidental result of a lawful operation and could not reasonably have been avoided.

The Regulations were amended in 2004 to reflect changes made in the Nature Conservation (Scotland) Act, including the addition of offences of reckless acts to those of deliberate acts of disturbance etc. The exceptions defence was also changed in line with NCSA to exclude reckless acts.

The 2007 revisions to the Regulations are being made in response to a ruling of the European Court who found that the UK had not sufficiently transposed the Directive in some respects. *The key change for forestry is the removal of the exceptions clauses in the earlier versions, so that forest operations which would cause an offence will only be able to proceed under licence. Disturbance offences have also been expanded and clarified.*

This note gives initial guidance on the implications for forestry practice in Scotland. FCS will follow this guidance in our management of the national forest estate, and will expect this guidance to be followed as a condition for approval of felling licences and grant aid and forest plans for private forests. We will also promote its use in forestry-related Environmental Impact Assessments, and in Appropriate Assessments for judging impacts of forestry proposals on sites designated as SPAs and SACs under EU Directives.

[FCS Guidance Note 31](#) also gives further general advice on protected species.

2. REVISED PROTECTION FOR EUROPEAN PROTECTED SPECIES FROM FEBRUARY 2007.

Box 1 summarises the potential offences forest managers need to consider.

BOX 1. Summary of revised EPS offences relevant to forestry (see Annex 1 for species list)

1. Offences against protected Animals : Revised Regulation 39

- (a) Deliberately or recklessly to capture, injure or kill a wild animal of a European protected species;
- (b) Deliberately or recklessly–
 - (i) to harass a wild animal or group of wild animals of a European protected species;
 - (ii) to disturb such an animal while it is occupying a structure or place which it uses for shelter or protection;
 - (iii) to disturb such an animal while it is rearing or otherwise caring for its young;
 - (iv) to obstruct access to a breeding site or resting place of such an animal, or otherwise to deny the animal use of the breeding site or resting place;
 - (v) to disturb such an animal in a manner that is, or in circumstances which are, likely to significantly affect the local distribution or abundance of the species to which it belongs; or
 - (vi) to disturb such an animal in a manner that is, or in circumstances which are, likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young;
- (c) Deliberately or recklessly 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.

2. Offences against protected Plants: Revised Regulation 43

Deliberately or recklessly to pick, collect, cut, uproot or destroy a wild plant of a European protected species (at any stage of the biological cycle) .

NB. 'Deliberate' acts are readily understood and are embodied in the WACA 1981 and 1994 Regulations. 'Reckless' acts were added by the 2004 legislation. Recklessness has been defined in case law for numerous offences. A person would be acting recklessly if they could reasonably have been expected to foresee that an operation could damage or disturb a protected species but took no action to assess the risk and consider what to do about it.

3. LICENSING OF FOREST OPERATIONS AFFECTING EUROPEAN PROTECTED SPECIES

The Regulations allow licences for potentially damaging activities to proceed under specific circumstances: see Box 2. In all cases licences can only be granted where:

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- there is no satisfactory alternative
- 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

Licences will not be issued on a precautionary basis as the licensing authority will need case- specific evidence to show that a protected species is present and that these legal tests are satisfied.

Box 2. Criteria for licences for potential offences against EPS

Licences can be given for the following purposes (LICENSING AUTHORITY) :

- (a) scientific, research or educational purposes; **(SNH)**
- (b) ringing or marking, or examining any ring or mark on, wild animals **(SNH)**
- (c) conserving wild animals, including wild birds, or wild plants or introducing them to particular areas; **(SNH)**
- (ca) conserving natural habitats; (SNH)*
- (d) protecting any zoological or botanical collection; **(SNH)**
- (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; (ERAD)*
- (f) preventing the spread of disease; **(ERAD)** or
- (g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries. (ERAD)*

- The purposes that are most relevant to forestry activities are shown in italics: (e) is perhaps the most likely case.
- Ministers may also licence the taking, possession or control of EPS animals for purposes not included above, under strictly supervised conditions, to a limited extent and in limited numbers.
- Licences may be general or specific, can be granted to a class of person or a particular person, and are subject to compliance with specific conditions.

4. HOW CAN FOREST MANAGERS MEET REQUIREMENTS FOR SPECIES PROTECTION?

The main European protected species which are likely to be affected by forestry in Scotland are bats, (all species), great crested newt, otter and wildcat (See Annex 1). Natterjack toad and some of the plant species, such as yellow marsh saxifrage may rarely occur in woodlands or be affected by forest operations.

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In general the risks of problems should be minimised by following good planning practice as outlined in FCS Guidance Note 31. The key steps are:

- **Find out what EPS protected species might be present, to help target survey work**
 - Obtain advice from SNH and specialist bodies;
 - Download 10km square distribution data from National Biodiversity Network (NBN) or Local Record Centres (The NBN gives data on distribution of many species via the website at: www.searchnbn.net).
- **Carry out surveys within target areas/habitats to locate protected species and their breeding sites or resting places in particular**
- **Plan operations to avoid damage to breeding sites/resting places of European protected species and minimise the effects of any disturbance. Seek advice from SNH where in doubt.**
- **If you judge that damage or significant disturbance is still likely despite these steps:**
 - consider whether there is any satisfactory alternative course of action to avoid it;
 - if you still wish to proceed, seek advice from the appropriate licensing authority (ERAD or SNH) on the need for a licence;
 - identify possible habitat improvements, or exceptionally relocation, to offset any anticipated damage to the population of the protected species.
- **Look out for protected species or features during operations and take suitable action and have a contingency plan.** Stop operations and seek advice on the need for a licence if damage to breeding sites/resting places is likely or occurs.
- **Keep a record of the procedure followed where protected species are encountered;** this could be valuable in establishing that you took a reasonable approach in case of prosecution.

It is hard to be sure at this early stage, but it is likely that offences against EPS, and the need to apply for licences, should be avoidable in most cases by following these steps, in particular focussing on:

- safeguarding breeding and resting places and their immediate surroundings
- avoiding significant impact on habitats that would be sufficient to reduce survival and breeding success of individuals, (eg by taking great care in areas round breeding ponds for great crested newts and following general good practice under the UK Forestry Standard for felling and restocking of woodlands which should avoid major impacts on bat foraging areas).

The main difficulty for foresters may be to avoid damage to breeding sites or resting places of EPS in cases where they are very hard to detect, for example possible bat roosts in small

bark crevices high in trees. And unless a species is known to be present a licence cannot be applied for. However if reasonable survey efforts have been made to locate roosts etc then prosecutions for accidental damage in these cases are unlikely to be judged to be in the public interest.

5. HOW TO APPLY FOR A LICENCE

Where the licensing authority is ERAD, Scottish Executive:

Susan Turpie
Landscape and Habitats Division
Scottish Executive
1H South
Victoria Quay
Leith
Edinburgh
EH6 6QQ

Tel: 0131 244 4415

Fax: 0131 244 7163

Where the licensing authority is Scottish Natural Heritage:

Licensing information and forms can be downloaded from the SNH website at:

<http://www.snh.org.uk/licences/li-appforms.asp>

Advice can be obtained from Ben Ross, Licensing Officer, SNH, Great Glen House Inverness.

6. FURTHER SOURCES OF ADVICE

Woodland Management for Bats. Available from Forestry Commission publications service via the FC website.

Although written for England and Wales, it contains much useful information about bats, their roosts and habitat needs and survey techniques.

The Bat Conservation Trust website at is also a useful source of advice on bats.

<http://www.bats.org.uk> .

Annex 1 European protected Species

EUROPEAN PROTECTED SPECIES OF ANIMALS

Common name	Scientific name
Bats, Horseshoe (all species)	Rhinolophidae
Bats, Typical (all species)	Vespertilionidae
Butterfly, Large Blue	Maculinea arion
Cat, Wild	Felis silvestris
Dolphins, porpoises and whales (all species)	Cetacea
Dormouse	Muscardinus avellanarius
Lizard, Sand	Lacerta agilis
Newt, Great Crested (or Warty)	Triturus cristatus
Otter, Common	Lutra lutra
Snake, Smooth	Coronella austriaca
Sturgeon	Acipenser sturio
Toad, Natterjack	Bufo calamita
Turtles, Marine	Caretta caretta Chelonia mydas Lepidochelys kempii Eretmochelys imbricata Dermochelys coriacea

EUROPEAN PROTECTED SPECIES OF PLANTS

Common name	Scientific name
Dock, Shore	Rumex rupestris
Fern, Killarney	Trichomanes speciosum
Gentian, Early	Gentianella anglica
Lady's—slipper	Cypripedium calceolus
Marshwort, Creeping	Apium repens
Naiad, slender	Najas flexilis
Orchid, Fen	Liparis loeselii
Plantain, Floating—leaved water	Luronium natans
Saxifrage, Yellow Marsh	Saxifraga hirculus

Species in bold are those most relevant to woodlands in Scotland