

# Changes to the Habitats Regulations

This summary has been provided by Natural England (NE) and the Countryside Council for Wales (CCW)

In order to implement the EU Habitats and Species Directive, Member States have to enact their own domestic legislation. In Great Britain, this is done through the Conservation (Natural Habitats, &c.) Regulations 1994 ('the Habs Regs'), with which you are all (we hope) familiar. The European Commission keeps a close eye on how well the Member States are implementing the Directive and has a well-defined process for taking them to task if necessary. During the past couple of years, the UK has ended up in the European Court of Justice over some of these issues, and has been obliged to make some changes to the Habs Regs. If this isn't done, the EC has the power to levy fines of perhaps millions of pounds on a daily basis.

Since the Habs Regs were originally enacted, environmental matters have largely been devolved to the four parts of the UK. Scotland changed its Habs Regs legislation earlier in the year and Northern Ireland's changes came into force on 21st August 2007. This article covers the changes that have been made in England and Wales, which also came into force on 21st August. The changes in Scotland and Northern Ireland are broadly similar to these.

The changes the UK was obliged to make cover several topics, but the ones of most interest to us are those that affect the species protection part of the legislation.

The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007, which apply in England and Wales, include the following changes to species protection legislation:

- **Surveillance.** A new regulation has been added requiring the Secretary of State (SoS) to make arrangements for the surveillance of species of Community interest, which includes all bat species. In addition, a new Regulation requires the SoS to make arrangements to monitor the incidental capture and killing of European protected species. The regulations do not specify what level of surveillance is required, but for bats we already have the Bat Conservation Trust's National Bat Monitoring Programme, which seems likely to go a long way to meeting the requirement for surveillance of species.
- **Capturing, killing, injuring or disturbing.** Injuring has been added to the list of offences against European protected species, to bring the Habs Regs into line with the offences in the Wildlife & Countryside Act (WCA). This, together with a strengthening of the penalties under the Regulations, has meant that it has been possible to remove all bats from Schedule 5 of the WCA for some offences. This welcome movement towards the goal of simplifying the legislation and having each species protected by a single law has been somewhat frustrated by the incomplete correspondence between offences under the two pieces of legislation. For the moment at least, bats remain on the WCA for the

offences of obstructing places of shelter or protection, disturbance within such places (see later) and advertising for trade. The obstruction offence is an interesting one, as this is legally separate from the offence of damaging or destroying a place of shelter or protection. It's not very clear what the difference is and for bats we will argue strongly that blocking ('obstructing') the entrance to a bat roost destroys the roost. This interpretation is backed up by the view of the European Commission, which says that the requirements of the Habitats Directive must be interpreted in terms of their impact on the species concerned.

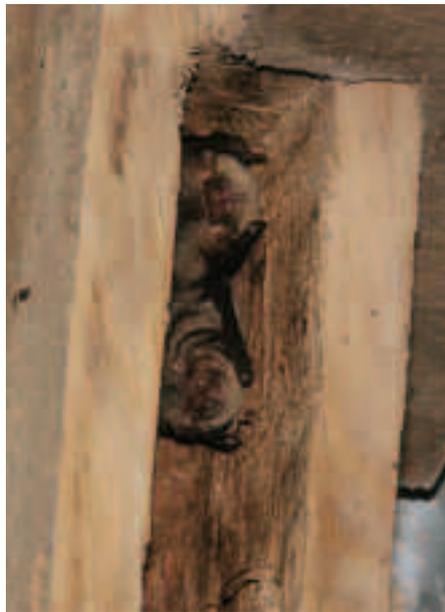
Partly because of the removal of the defences in the Habs Regs which were considered not Directive-compliant, the definition of disturbance has been changed in an attempt to make it clearer that disturbance has to have some biological impact on the species concerned, thus bringing it into line with the Commission's views. This could be helpful, as it means that 'trivial' disturbance is no longer an offence. The definition now makes it an offence to deliberately disturb a European protected species if the disturbance significantly affects either the ability of a significant group of the species concerned to survive, breed or rear their young or the local distribution or abundance of the species. This means, for example, that

disturbing an individual bat, perhaps even a small group of bats, is very unlikely to be an offence. Bear in mind, however, that bats are still covered by the intentional or reckless disturbance offence in the WCA, though of course that applies to them only in their roosts. Overall, our advice is that batworkers should still have a licence to disturb bats if they wish to enter known roosts. The Agencies are publishing some more detailed guidance on the interpretation and application of the new disturbance offence.

## Possession and trade

The ban on possession and trade has been extended to cover all species listed in the Habitats Directive (Annex IV) rather than just those occurring in the UK. In addition, the defence which allowed the possession of specimens that had been legally acquired (e.g. found dead) has been removed, so the only circumstances in which bat workers can now possess bat specimens (or parts of specimens)

without a licence are (a) if they are being possessed solely for tending and release when recovered, (b) if they were taken before 10th June 1994 (when the Regulations came into force), (c) if they were taken outside the EU or (d) if the possessor can show they were never wild animals. This means that many batworkers will now need a licence to possess bat specimens they use for training. Natural England (NE) and the Countryside Council for Wales (CCW) will do their best to make this additional licensing burden as light as possible, but regrettably it is an inescapable consequence of the changes. Although no licence will be required to possess live



Brown long-eared bats in between beams

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Pipistrelle roost

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bats that are being tended for release, we will take this opportunity to clarify the position of long-term disabled captives that can never be released. Licences will now be required to possess these animals and we suggest that if an injured bat has not recovered and been released within 6 months its possessor should apply for a licence to keep it. It will be a condition of such licences that the animal is kept to a high standard of welfare and we have asked BCT help us define this. Batworkers possessing live bats, dead specimens or derivatives of bats (except droppings) should have them licensed (in England, Wales and Northern Ireland) by 21st November.

### Bats in dwelling-houses

The dwelling-house defence, and the associated requirement to consult the statutory nature conservation organisation before relying on this defence, has been removed. This removes the special legal situation of private houses within the Habs Regs, with the most immediate implication of this change being that any householder wishing to exclude bats (thus destroying a roost) would need to be licensed. Confusingly, the dwelling house defence, and associated consultation requirement, remains in the WCA and so applies for the offences of intentionally or recklessly disturbing roosting bats and obstructing access to their places of shelter or protection. At NE and CCW, we have looked at how we can retain all the best parts of the existing system for providing advice to householders whilst meeting this new licensing requirement and believe we can continue to operate much as at present. Details of how the new system operates have been sent to all registered volunteers in England and CCW will continue to provide advice via staff or contractors. Despite the fact that there is no longer an obligation under the Habs Regs on householders to seek our advice before relying on a defence, we don't expect to see a drop in demand for advice, so it's important that we all continue to give good advice to householders. Another area that may be affected by the loss of the defence is the ability of householders to carry out repairs or alterations to their property. Here, we believe that much of the advice that we have always given is still applicable as most of it is designed to avoid affecting bats or

their roosts and so will avoid breaking the law. Where offences are unavoidable, a licence will be required, but we suspect this will be a minority of cases. Non-domestic situations required licences for works affecting bats/roosts before the amendments to the Habs Regs, and so the amendments did not need to change the licensing requirements in this area.

### The incidental result defence

The loss of the incidental result defence, another casualty of the ECJ case, has significant implications, particularly for farming and forestry. Damaging or destroying a bat roost is an absolute offence (with no need to show intent) and this defence provided some (but only some) protection for anyone who inadvertently damaged or destroyed a bat roost in the course of their work. Now, someone who cuts down a tree which then proves to contain a virtually undetectable bat roost has committed an offence for which there is no defence. This is an uncomfortable situation, but we believe that provided good practice guidance has been followed (as recommended by the European Commission), a prosecution for such unintentional damage is most unlikely to be in the public interest. Guidance is being developed for these areas of work.



Inspection of joints

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### Other changes

A new section has been added, making it an offence to breach the conditions of any licence. This is potentially very helpful as formerly it was impossible to enforce the provision of compensatory bat roosts once the original roost had been destroyed. As the method statement submitted with the application forms part of the licence, licence holders will be vulnerable to prosecution if they fail to deliver all their commitments, including conditions requiring monitoring the effectiveness of mitigation measures. In order to make this work better, the process in England will now follow the same system as Wales and the developer, rather than the bat consultant, will be the licence holder, though of course we would expect them to employ a specialist consultant to oversee the bat work.

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