



# Guidance

## Implications of Additional Protection for Hen Harrier, Red Kite and Golden Eagle under Schedules A1 & 1A of the Wildlife and Countryside Act (1981)

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## 1 Background

This document describes amendments to the Wildlife & Countryside Act 1981, specifically in relation to the Schedules A1 and 1A. These changes came into effect on 16 March 2013 under a Variation Order. This Order follows a Scottish Government consultation in 2008/09.

**The Order affords additional protection to several bird species already in Schedule 1 to the Act.** This has implications across a range of activities. This document provides guidance on how the additional protection may apply to common situations but cannot cover every situation in detail. This does not constitute legal advice, and, if you are uncertain, please seek your own legal advice.

## 2 The Legal Context

### 2.1 Wildlife & Countryside Act 1981

All wild bird species are protected under the Wildlife & Countryside Act, which makes it an offence to intentionally or recklessly;

- kill, injure or take a wild bird;
- take, damage, destroy or interfere with a nest of any wild bird whilst it is in use or being built
- obstruct or prevent any wild bird from using its nest; or,
- take or destroy an egg of any wild bird
- disturb any wild bird listed on [Schedule 1](#) whilst it is building a nest or is in, on, or near a nest containing eggs or young, or whilst lekking;
- disturb the dependent young of any wild bird listed on [Schedule 1](#)

Those species listed on **Schedules A1 and 1A** receive additional protection which makes it an offence to intentionally or recklessly:

- *at any time* take, damage, destroy or interfere with any nest habitually used by any wild bird included in **Schedule A1**; and
- *at any time* harass any wild bird included in **Schedule 1A**.

Section 1(5C) of the Act states that “*Any person who knowingly causes or permits to be done an act which is made unlawful by any of the foregoing provisions of this section*” could be committing an offence.

## 2.2 Licensing

It is possible to permit activities, under licence, that would otherwise constitute an offence. Licences can only be issued for specific purposes set out in the Act, and it is important to note that there is no licensing provision for the purpose of planning related development, some land management and recreational activities. As well as having to ensure that there is a licensable purpose, the legislation also states that licences can only be issued where there is no other satisfactory solution. Furthermore, we are obliged to ensure that any licensing decisions will not affect the conservation status of the species in question.

For further details, please refer to SNH bird licensing. <http://www.snh.gov.uk/protecting-scotlands-nature/species-licensing/bird-licensing/>.

## 2.3 Species detailed in the Schedules

The species listed on the Schedules are as follows;

Species	Schedule A1	Schedule 1A
White-tailed eagle	Yes	Yes
Golden eagle	Yes	Yes
Hen harrier	No	Yes
Red kite	No	Yes

Prior to the Order only white-tailed eagle was listed on any of the Schedules.

## 2.4 Key Definitions and Interpretations

### *Intentional or reckless*

The Nature Conservation Act (Scotland) 2004 introduced the “reckless” offence to the legislation which is a lower test than for the “intentional offence”. For example, if a person knew about the possibility that disturbance or damage would result from their actions but went ahead, regardless of its consequences, this may constitute a “reckless” offence. Even if the person did not know that the disturbance would result but any reasonable person could be expected to have foreseen the potential disturbance or damage, this may be construed as a “reckless” offence.

However, an offence is unlikely to have been “reckless” where it can be demonstrated that “reasonable precautions” and “such steps as were reasonably practicable in the circumstances” to minimise the impact of the action had been taken. Where the person has identified the likelihood of the disturbance or damage and has followed the guidance from an expert body about the method in which such action could reasonably be carried out an offence is unlikely to have been committed provided published best practice or agreed specific guidance on mitigation has been followed. However, this does not guarantee that no offence will be committed as that is for the courts to decide.

The main risk for development, land management and recreational activities will be committing a ‘reckless’ offence. This is because the offence could be committed unintentionally, but recklessly. If you are unsure of whether your actions constitute a “reckless” offence or whether you have taken “reasonable precautions”, you should seek legal advice.

### *Habitually Used Nest*

The Wildlife and Countryside Act does not define a “habitually used nest”. This has, however, been defined for white-tailed eagle, for forestry guidance purposes, as a nest that has been used at least once within the last 5 years (see Annex 1). As the species was reintroduced to Scotland, it is still a small, well-monitored population and it is therefore possible to use this definition currently. It may not be possible to do so in the future as the population increases. In defining a “habitually used nest” for golden eagle we do not recommend defining a cut-off in time due to gaps in knowledge of territory history.

### *Harassment*

The Wildlife and Countryside Act does not define “harassment”. It implies more than one disturbance event, although there may be situations, particularly with “intentional” offences, where a single incident could be deemed “harassment”. **You should seek legal advice if you are uncertain as to whether your actions may be considered harassment.** This Act does cover all “harassment” risks to the species at any time but is particularly relevant to roosting birds. Three species – hen harrier, red kite and white-tailed eagle – regularly form communal roosts, primarily, but not exclusively, in the non-breeding season. Communal roosts and individual roosting birds can be particularly vulnerable to intentional “harassment”. It is important to note that it is the birds using the roost and not the roost site itself that is protected.

The species listed have differing ecology and behaviour so generic guidance can only cover some basic issues. Ruddock & Whitfield’s (2007) ‘A Review of Disturbance Distances in Selected Bird Species’ ([www.snh.gov.uk/docs/B313999.pdf](http://www.snh.gov.uk/docs/B313999.pdf)) gives general guidance on the likelihood of disturbance impacts as species vary in their sensitivity; note, however, that the distances quoted refer primarily to breeding or territorial birds. Additional species-specific information is given in the Annexes to this document. Case specific advice will also be required. Visibility, duration, timing, frequency, noise levels of activities and levels of habituation to existing activities can all influence levels of potential impacts.

## **3 Implications of Changes**

The additional protection provided to the species above must be taken into account in development proposals, land management and recreational activities but it is not intended to unnecessarily restrict otherwise lawful activities.

### **3.1 Development Proposals**

The protection afforded to species contained in the Schedules will need to be considered across all aspects of development proposals including planning applications. Development includes aquaculture and new forestry creation and all developments requiring an environmental impact assessment. This will include planning of survey methods and timings, assessing potential impacts and, importantly, mitigation. These should be set out in species protection plans which propose to minimise risks to the birds during construction and/or operation. This protection may have to extend beyond the breeding season.

### **3.2 Land Management Activities**

Land management activities may be required to revise working practices in order to minimise the risk of committing “reckless” offences. For example, deer control, or siting of legal traps for predator control, which require daily checks close to roosts and nests should ensure recommended safe working distances are followed.

Muirburn should follow the Muirburn Code (<http://scotland.gov.uk/Publications/2011/08/09125203/0>) and published best practice guidance: ‘Prescribed Burning on Moorland, A Supplement to the Muirburn Code: A Guide to Best Practice’ ([www.scotland.gov.uk/Resource/Doc/355571/0120116.pdf](http://www.scotland.gov.uk/Resource/Doc/355571/0120116.pdf)). The protection of raptors is detailed on page 13.

Forestry management such as thinning and agricultural vegetation cutting such as rush-topping, for example, can be carried out at roost sites provided that suitable measures have been taken to minimise risks to roosting birds, or the roost is not currently in use.

Such activities could alter the suitability of a roost site for future use but are not an offence as the roost site itself is not protected. We would, however, advise that the activity should not take place where a regularly used, long standing and/or important roost (see species Annexes) will potentially be adversely affected.

### **3.3 Recreational Activities and Events**

SNH should be consulted early in the process when large scale or organised recreational activities and/or events are being planned as location, timing and routes need to be selected in order to minimise risks. Any restrictions that need to be applied should be managed and practised in accordance with Part 1 of the Land Reform (Scotland) Act 2003. ([www.outdooraccess-scotland.com](http://www.outdooraccess-scotland.com)).

### **3.4 Surveys and monitoring**

Field surveyors should be suitably licensed to survey Schedule 1 birds in the breeding season. Survey work should not normally involve activities that would constitute offences in relation to the additional protection afforded by inclusion on Schedules 1A and A1, although there are exceptions such as collection of prey

remains from nests or use of nest cameras for diet studies. As with Schedule 1 such activities can be licensed under conservation or research purposes.

If surveyors find they are regularly disturbing one of these species in the course of their work, e.g. en route to Vantage Point survey locations for wind farm proposals, they should either change the location of the survey point, or change their access route. Whilst it may not always be considered an offence, such disturbance is not best practice and could influence the survey results.

#### **4 Scaring and Dissuading**

Scaring and dissuading the use of certain areas by the listed species does occur. The repeated use of such methods may risk committing an offence. The risk is higher if the activities take place close to a roost or nest site. Novel methods should be assessed on a case by case basis.

The protection of livestock, primarily lambs, can involve repeated scaring of birds. Other scaring methods such as kites or scarecrows at lambing parks have also been used. Unless occurring very close to a roost or nest site, these techniques are generally considered benign activities designed to dissuade birds from using a very specific area. They are unlikely to affect the birds. Use of firearms to scare off birds is not recommended.

Some development proposals include habitat management or scaring as a mitigation measure to reduce the risk of birds using certain areas, e.g. wind farm applications where this is used to reduce the risk of birds being killed via collisions with turbines. Dissuading the birds from using such areas with a high collision risk is considered unlikely to constitute an offence, but it is recommended that you seek legal advice if you have any uncertainties.

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## **Annex 1 – White-tailed Eagle**

White-tailed eagles show a preference for tree nests where trees are available but many nest on crags and cliffs. Most white-tailed eagle nests are at relatively low altitudes (below 150m) and are often adjacent to the sea or freshwater bodies.

White-tailed eagles form communal roosts either in trees or on crags and cliffs. These roosts are considered important for social interaction and pair formation. They are mainly composed of immature and non-breeding birds. In Scotland currently they can hold 10-15 birds. Adult birds from nearby nesting pairs sometimes join such roosts but they often roost on or close to nests throughout the year. Over time nest sites can sometimes become established at or near roost sites.

As a result of detailed monitoring of the population we currently have very good knowledge of white-tailed eagle territories and many of the regular roosts. However, as the reintroduced population grows territories will change over time so we will not necessarily know every nest location or its history of use in future.

Detailed guidance in relation to forestry management and associated activities, e.g. recreational events, has been developed by Forestry Commission Scotland in conjunction with SNH, RSPB and the forestry industry. See 'Managing Forests for White-tailed Eagles' [www.forestry.gov.uk/pdf/fcpn101.pdf/\\$file/fcpn101.pdf](http://www.forestry.gov.uk/pdf/fcpn101.pdf/$file/fcpn101.pdf)

One situation that has arisen is application of the guidance to short-term or transient roosts away from nest sites. In these types of cases, e.g. one or two birds roosting near forestry works for a few days due to a temporary food source being available, works need not necessarily be suspended or restricted but advice should be sought from SNH.

The SNH Sea Eagle Management Scheme ([www.snh.gov.uk/docs/B869194.pdf](http://www.snh.gov.uk/docs/B869194.pdf)) provides information on measures that can be taken to minimise risk of livestock predation (mainly lambs but occasionally domestic wildfowl and poultry). Concerns about predation often occur when birds appear in new areas. These situations can be transient when it involves wandering immature birds or longer term if it is a new adult pair setting up a territory. Under the Special Measures prescription of the Scheme 'reactive' measures, including financial support for scaring equipment (e.g. scarecrows, kites, stock shelters, and fencing/netting), can be undertaken.

#### **4.1 Annex 2 – Golden Eagle**

Most golden eagles nest on crags and cliffs although some nest in trees (approximately 5% of pairs across Scotland ranging from about 1% in the west Highlands to about 10% in the east Highlands: the variation is probably a result of lower availability of suitable cliffs or crags). Particularly in the west Highlands and Inner and Outer Hebrides there are a number of coastal or sea cliff nests.

Golden eagles do not roost communally. Territorial pairs generally roost close to or on nest sites. Immature birds roost individually on crags or in trees and as these birds wander widely many roost sites are transient. Some regular roost sites can become nest sites over time. This can also be the case with vacant territories which are being reoccupied by new birds.

We have a good knowledge of territories in parts, but not all, of Scotland (around 50% of the population is monitored annually), thus we don't know all nest sites and their history.

Tree nests and forest management constitute the greatest risk of "reckless" offences under Schedule A1. However, given the small proportion of tree nests in Scotland it should be less of an issue than with white-tailed eagle. Assessment should be made on a case by case basis.

Risk of "harassment" of roosting birds can be minimised by avoiding activity overnight and within two hours of dusk (two hours before official sunset time) and dawn (two hours after official sunrise time)

In most circumstances using a buffer of 1km as a safe operating distance based on Ruddock & Whitfield (2007) should be adequate to minimise risks. If in doubt, contact SNH for advice.

### **Annex 3 – Red Kite**

Red kites nest and roost in trees. Roost sites are often in smaller woods, but can also occur in gaps within or on the edges of larger blocks of woodland.. They form communal roosts mainly composed of immature and non-breeding birds, which again are important for the same reasons as for white-tailed eagles. In Scotland currently these roosts often hold 10-80 birds and exceptionally up to 130. Adult birds from nearby nesting pairs sometimes join such roosts but more often they roost on or close to nests throughout the year.

The reintroduced red kite population is currently very closely monitored but it has reached the point where the population is outgrowing monitoring effort, so in future we won't necessarily know all nest and roost sites. Nearly all important roosts are currently known in Scotland and most are in privately owned broadleaved woodland. Kites rarely use commercial conifer forestry for nesting or roosting.

Risk of "harassment" of roosting birds can be minimised by avoiding activity overnight and within two hours of dusk (two hours before official sunset time) and dawn (two hours after official sunrise time).

In most circumstances using a buffer of 300m as a safe operating distance based on Ruddock & Whitfield (2007) should be adequate to minimise risks. If in doubt, contact SNH for advice.

#### **Annex 4 – Hen Harrier**

Hen harriers nest and roost on the ground. Roosts on the ground are in long vegetation (heather, rushes, reeds, etc.) and are often communal. The population is dispersive and partly migratory and winter roosts are often well away from breeding areas often in lowland habitats near the coast or wetlands, although they can be near breeding areas. Some communal roost sites are 'traditional' with long-term use but others are more transient. Communal roosts are composed of both adult and immature birds and important roosts can hold double figures of birds. They can also roost individually sometimes using old nest sites in the immediate pre- (February - April) and post- (August - September) breeding period. There can also be communal roosts at or near breeding sites in the pre- and post- breeding period too.

Risk of "harassment" of roosting birds can be minimised by avoiding activity overnight and within two hours of dusk (two hours before official sunset time) and dawn (two hours after official sunrise time).

In most circumstances using a buffer of 500 - 750m as a safe operating distance based on Ruddock & Whitfield (2007) should be adequate to minimise risks. If in doubt, contact SNH for advice.