



Scottish Natural Heritage Dualchas Nàdair na h-Alba

All of nature for all of Scotland
Nàdar air fad airson Alba air fad

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European Protected Species Licensing

Test 1 – Licensable Purpose

Interpreting the legal purpose at Regulation 44(2)(e) of the Conservation (Natural Habitats, &c.) Regulations 1994 (“the Habitats Regulations”)

Note: This Guidance contains a summary of certain legal provisions relevant to the licensing regime, current at time of writing, for European Protected Species and is intended to assist parties contemplating a licence application. However, Scottish Natural Heritage has no legal responsibility for the contents and interested parties should in that respect seek independent legal advice.

1 Introduction

- 1.1 Under Regulation 44 of the Habitats Regulations certain activities which would normally constitute an offence against European Protected Species (EPS) can be carried out legally under a licence. Further information on EPS and background legislation can be found in Annex 1.
- 1.2 Any decisions made by SNH as the licensing authority must be fully compliant with the requirements of the Habitats Regulations and the underlying European legislation. This means that before any licence can be issued there are three strict tests which must all be satisfied. These are as follows;
 - (1) That the activity proposed must fall within one of the licensable purposes listed in Regulation 44,
 - (2) That there is no satisfactory alternative; and,
 - (3) 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.
- 1.3 With regard to the first test there are several different purposes for which licences can be granted including, under Regulation 44(2)(e), for;

‘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’
- 1.4 This paper sets out our general interpretation of this purpose when we consider licence applications and the type of information we would expect applicants applying for licences under this purpose to provide.
- 1.5 Guidance on test 2 can be found [here](#).
- 1.6 The principle of *‘imperative reasons of overriding public interest’* is common to both species and sites covered by the Habitats Directive. As such, in this paper we have drawn upon published guidance from the Scottish Government and the European Commission covering both protected sites and protected species (including under

Articles 6, 12 and 16 of the Habitats Directive). This approach is supported within European Commission Guidance¹, which draws upon European case law.

2 What may constitute ‘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’?

2.1 Preserving Public Health or Public safety

2.2 To meet this purpose, we consider a licensing applicant would need to demonstrate that action is required to deal with a clear threat to the health or safety of the general public.

2.3 Imperative Reasons of Overriding Public Interest (IROPI)

2.4 If there are no public health or public safety grounds involved we will consider whether another IROPI can be demonstrated.

2.5 The IROPI concept features in Articles 6(4) and 16 of the Directive and is considered in Commission guidance on Natura site protection², and species protection³. Key points raised in this guidance are that:

- only **public interests**, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive – projects that lie entirely in the interests of companies or individuals are generally not covered.
- the public interest must be **overriding**. Not every kind of public interest of a social or economic nature is sufficient. Short-term interests producing short-term benefits are unlikely to outweigh the long-term interest of species conservation.⁴ The public interest in most cases is only likely to be overriding if it is a **long-term interest**.

2.6 Scottish Government guidance on IROPI and Natura sites⁵ outlines several objectives which it considers are relevant to the assessment of IROPI. We consider these are also useful in the assessment of IROPI for EPS licensing. These principles are:

- the interests of national security and defence;
- where there is clear and demonstrable direct environmental benefit on a national or international scale;
- where it is shown that there is a vital contribution to strategic economic development or regeneration;
- where failure to proceed would have unacceptable social and/or economic consequences

¹ European Commission (2007) *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*.

² European Commission (2000) *Managing Natura 2000 sites – the provisions of Article 6 of the Habitats Directive 92/43/EEC*. Section 5.3.2

³ European Commission (2007) *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*

⁴ Ibid, para. III.2.1(c)(24)

⁵ Scottish Executive (2000). *Revised guidance updating Scottish Office Circular No. 6/1995*, page 4, paras. 14-15

- where the project is of national importance, or, possibly, regional importance.

2.7 Following from this, in practice, when considering species licences under IROPI, we will take into account whether an activity or development is required to meet, or contribute to meeting a specific need, such as:

- maintaining the health, safety, education or environment (sustainable development, renewable or green energy, green transport) of Scotland's people;
- complying with national planning policies;
- supporting economic or social development (nationally important infrastructure development projects, employment, regeneration, mineral extraction, housing etc.)

3 Proportionality and cumulative impacts

3.1 According to European Court of Justice case law, derogations from the Habitats Directive must be interpreted and implemented restrictively to avoid undermining the conservation aims of the Directive⁶.

3.2 However, some proportionality is permitted in assessing a licence application according to guidance issued by the European Commission⁷, and which states:

3.3 ***'Applying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can adapt their application in the light of the overall objective of the Directive. 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.'***

3.4 The guidance also states, in summary, that *'The type and weight of the reason [for which a licence is sought] must also be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation'*⁸. In other words, when applying proportionality to the licensing tests, we will require greater justification for proposals as the severity of the impact on the species concerned rises.

3.5 We will also consider the cumulative impacts of licensing decisions on the species concerned as part of the assessment process. This approach will ensure that 'the derogations in their *totality* do not produce effects that go against the objectives of Article 12 and the Directive as a whole.'⁹

4 What type of information would we require from a licence applicant?

4.1 It is the responsibility of the applicant to demonstrate that the proposal for which they are seeking a licence meets this licensing purpose. The applicant must clearly demonstrate and provide objective evidence of the imperative and overriding need, showing that the importance of the activity proceeding in the public interest overrides the impact on the European protected species. The greater the impact, the greater the public interest must be to override it.

⁶ Commission V UK (C-6/04) [2005] ECR 1-9017, para. 111

⁷ European Commission (2007) *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, page 53, para. III.1.2 (11)

⁸ *Ibid*, page 58, para. III. 2.1

⁹ *Ibid*, page 53, para. III.1.2.(12)

4.2 SNH will consider the evidence provided by the applicant against the criteria described in this document and in the relevant European Commission Guidance. We cannot grant a licence unless we are satisfied that all of the three tests (including, in this case, the licensable purpose) have been satisfied. If a licence is refused we will offer clear reasons for refusal.

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Annex 1

European Protected Species and the law in Scotland

The Habitats Directive (Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) lists certain species of animals and plants on Annex IV(a) and (b) respectively, that require strict protection. The Habitats Regulations transpose the requirements of the Directive. The Regulations term those Annex IV species occurring naturally in Britain 'European protected species' (EPS). These species are listed in Schedules 2 and 4 of those Regulations. Those that occur in Scotland are listed below;

(a) European Protected Species of animal

Common name	Scientific name
Bats, typical (all species)	Vespertilionidae
Wild cat	<i>Felis silvestris</i>
Otter	<i>Lutra lutra</i>
Dolphins, porpoises & whales (all species)	Cetacea
Loggerhead turtle	<i>Caretta caretta</i>
Green turtle	<i>Chelonia mydas</i>
Kemp's ridley turtle	<i>Lepidochelys kempii</i>
Hawksbill turtle	<i>Eretmochelys imbricata</i>
Leatherback turtle	<i>Dermochelys coriacea</i>
Natterjack toad	<i>Bufo calamita</i>
Great crested newt	<i>Triturus cristatus</i>
Sturgeon	<i>Acipenser sturio</i>

(b) European Protected Species of plant

Killarney fern	<i>Trichomanes speciosum</i>
Slender naiad	<i>Najas flexilis</i>
Yellow marsh saxifrage	<i>Saxifraga hirculus</i>