Introduction

This guidance note provides an introduction to the subject and is not to be used as a substitute for professional, ecological or legal advice on individual cases.

This guidance note aims to inform people involved in activities on land in Scotland on which European protected species are likely to be present and about the legal protection afforded to these animals and plants. It explains procedures for licensing certain operations affecting these species.

European protected species regularly occurring in Great Britain

The Conservation (Natural Habitats, &c) Regulations 1994 (as amended) (the 1994 Regulations) implement certain requirements of the European Habitats Directive (EC Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna) in Great Britain. Animals and plants listed in Annex IV of the Habitats Directive, whose natural range includes any area in Great Britain, are also listed in Schedules 2 and 4 of the 1994 Regulations as European protected species (EPS) of animals and plants. They are species of European Community interest in need of strict protection.

<table>
<thead>
<tr>
<th>Animals</th>
<th>Plants</th>
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</thead>
<tbody>
<tr>
<td>Bats, Typical (all species)</td>
<td>Killarney Fern</td>
</tr>
<tr>
<td>Common Otter</td>
<td>Slender Naiad</td>
</tr>
<tr>
<td>Dolphins, porpoises and whales (all species)</td>
<td>Yellow Marsh Saxifrage</td>
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<tr>
<td>Great crested (or warty) newt</td>
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<td>Marine turtles</td>
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<td>Natterjack toad</td>
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<td>Sturgeon</td>
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<td>Wild cat</td>
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Table 1 – EPS species occurring in Scotland
Legal protection of European protected species

EPS are protected under the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended). In Scotland, regulations 39 and 43 make it an offence, with certain exceptions, to

1. Deliberately or recklessly:
   - Capture, injure or kill any wild animal of a European protected species;
   - Harass such an animal or group of animals;
   - Disturb such an animal while it is rearing or otherwise caring for its young;
   - Obstruct access to a breeding site or resting place, or otherwise deny the animal use of the breeding site or resting place;
   - Disturb such an animal while it is occupying a structure or place used for shelter or protection;
   - 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
   - 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.
   - Disturb such an animal whilst migrating or hibernating

2. Deliberately or recklessly to take or destroy the eggs of such an animal;

3. It is an offence to damage or destroy a breeding site or resting place (note that this applies regardless of whether or not the damage or destruction was carried out deliberately or recklessly);

4. Deliberately or recklessly disturb any dolphin, porpoise or whale;

5. Deliberately or recklessly to pick, collect, cut, uproot or destroy a wild plant of a European protected species.

6. Possess or control, transport, sell or exchange, or offer for sale or exchange, any live or dead animal or plant EPS which has been taken from the wild, or any part of, or anything derived from such an animal or plant.

These offences apply to all stages of the animal's life, and all stages of the biological cycle of the plants.

It is advisable to check as early as possible whether EPS are present on potential sites for development.
Licences

What is a licence?

Licences allow people to carry out activities which would otherwise be unlawful. Licences are granted subject to conditions and licence holders are responsible for ensuring compliance with conditions. Failure to comply with conditions is an offence.

Avoiding the need for a licence

When considering activities that could affect EPS the primary aim is to avoid any impact on them. Offences can be avoided in a number of ways, such as:

- modifying the location of a proposed action / piece of work
- timing operations to avoid times when the species is likely to be present
- retaining certain areas/structures used by the species
- modifying working practices
- looking at alternative solutions to problems

If there are no satisfactory alternatives to avoiding an offence, a licence may be necessary. If this is the case the applicant will need to clearly demonstrate the alternatives that have been considered and why they are not satisfactory (see Test 2 below).

Who issues licences and how long will it take?

SNH is responsible for the administration of most licences in relation to EPS in Scotland. The exception is for purely marine species for purposes under regulation 44(2)(e) to (f), where Marine Scotland is the licensing authority.

We aim to process applications as soon as possible but processing times vary throughout the year.

Who can be licensed?

A licence can be issued in the name of an individual or an individual on behalf of a company or partnership.

Regulation 106 makes special provision for offences by bodies corporate and partnerships and states that where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to prosecution. The same applies to partners within a partnership.

Purposes for which a licence may be granted
Licences can **only** be issued for specific purposes. Under Regulation 44(2) these are as follows:

(a) Science, research and education  
(b) Ringing, marking or examining rings or marks  
(c) Conserving wild birds, wild animals or wild plants or introducing them to particular areas  
(ca) Conserving any area of natural habitat  
(d) Protecting zoological or botanical collections  
(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; and  
(g) Preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, or any other form of property or to fisheries.

SNH may also grant licences to permit the possession or control of species listed on Annex IV to the Habitats Directive (this is a more extensive list than the list of EPS) for educational or research purposes. Otherwise we can allow the taking or keeping of limited numbers of certain specimens of EPS and plant species listed on Annex II(b) to the Directive (other than bryophytes), under strictly supervised conditions and on a selective basis and to a limited extent.

**‘The three tests’**

There are three strict legal tests which must **all** be passed before we can grant a licence;

1. That there is a licensable purpose;  
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.

**Test 1 – Licensable purpose**

Licences can only be issued for the purposes listed above. It is the responsibility of the applicant to demonstrate (and provide supporting evidence where necessary) why their proposal is necessary for that purpose.

**Test 2 – No satisfactory alternative**

Your application should explain the alternatives you have considered. For example, whether within the general area of need served by your activity or proposal could be reasonably accommodated on an alternative site with no or reduced implications for European protected species; or whether the activity or proposal could be achieved in a way that would mean no or reduced implications for European protected species. You should be able to justify why you have discounted the alternative of ‘doing nothing’. Essentially, your application should provide objective evidence of a lack of satisfactory alternative.

**Test 3 – Favourable conservation status (FCS)**
Article 1(i) of the Habitats Directive states that the conservation status of a species will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it 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, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long term basis.

When considering this test we will take into account any possible impacts of the development proposals on the maintenance or attainment of favourable conservation status for the species concerned. Applicants will need to provide detailed proposals (to be included in the 'Supporting information') of all the mitigation and compensation measures that they will undertake to ensure that impacts on the species concerned are minimised. Guidance notes on providing the supporting information give further advice about this.

Please note that completion of a licence application does not guarantee that a licence will be granted. Licences are a last resort and can only be granted if all three tests are passed. If an application is refused, SNH will inform the applicant in writing of the basis for the refusal.
**European protected species (EPS) and the planning system**

Developers need to be aware of the implications of encountering EPS on or near potential development sites or structures requiring work for public health and safety. If an activity is likely to result in any of the offences listed above, then a licence may be required. An understanding of the legislation, processes for obtaining licences and ideal procedures at the initial stages of development is likely to help ensure that the nature conservation considerations are fully addressed. Finding EPS on a site at a later stage could result in delays whilst a licence is sought, or even in offences being committed.

Once a site is identified at a potential development site, it is recommended that a survey of the site is carried out, particularly if EPS are likely to be present refer to guidance on our website). In some cases, a licence from us may be required to carry out an EPS survey. After a survey has taken place professional advice should be sought to assess the implications of any development proposal upon any EPS found on site.

In this context, ‘development’ should be interpreted broadly to include plans or projects such as the carrying out of building, engineering, mining or other operations, on, over, or under land, or the material change in use of any buildings or other land. This would also include the demolition of buildings, rebuilding, structural alterations of, or additions to, buildings and operations on structures required for public health and safety purposes. This interpretation also includes developments in the in-shore marine area (up to 12 nautical miles), although Marine Scotland is the relevant licensing authority here.

Many EPS licence applications relate to developments which are subject to planning permission. Guidance on the consideration that local planning authorities should give to nature conservation interests is contained in ‘European Protected Species, Development sites and the Planning System: Interim guidance for local authorities on licensing arrangements’ (The Scottish Government, October 2001) (the Interim Guidance) [see http://www.scotland.gov.uk/Resource/Doc/158490/0042962.pdf ]

This dated advice was reinforced by a letter from the Scottish Government Planning Division to Planning Authorities in May 2006. The Interim Guidance supplements Scottish Office Circular 6/1995 (updated in June 2000) on the implementation in Scotland of the Habitats and Birds Directives. Scottish Planning Policy gives general guidance on the protection of species and habitats, stating at paragraph 214 ‘The presence (or potential presence) of a legally protected species is an important consideration in decisions on planning applications. If there is evidence to suggest that a protected species is present on site or may be affected by a proposed development, steps must be taken to establish their presence. The level of protection afforded by legislation must be factored into the planning and design of the development and any impacts must be fully considered prior to the determination of the application.’

Mitigation plans can be important considerations when assessing the impact of planning applications upon EPS. Mitigation (aiming to minimise impacts of the proposed works) and compensation measures (provision of replacement resources) should be developed to promote good practice and ensure the favourable conservation status of the species concerned is maintained or restored. It is the developer’s responsibility to produce a mitigation plan for consideration, normally through an experienced environmental consultant. SNH can advise Local Planning
Authorities of the suitability of mitigation plans and give general advice to developers, but it is not the role of SNH to produce mitigation plans on behalf of developers.

Activities that require planning permission

Regulation 3(3) of the Habitats Regulations 1994 (as amended) requires “every competent authority in the exercise of their functions to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions”.

According to the Interim Guidance, it is essential that planning permission is not granted without the planning authority having satisfied itself that the proposed development either will not impact adversely on any EPS on the site, or that, in its opinion, all three tests necessary for the eventual grant of a regulation 44 licence are likely to be satisfied.

Where a licence application relates to a development that requires planning permission it is necessary for SNH to consider information from the planning authority which granted planning permission in order to help assess whether the first two tests mentioned above are met.

Before a licence application can be considered it is essential that the planning position resulting in any impact on EPS has been resolved. Until full planning permission has been granted (or approval of reserved matters granted for a site with outline permission) a developer cannot implement a development proposal and so should not commence work on site. It should be noted that if conditions or reserved matters relevant to the EPS remain to be resolved, then a licence cannot be determined until those conditions or reserved matters have been approved.

Activities that do not require planning permission

If specific planning permission is not required for the activity then the licence will be determined on the basis of the information supplied by the applicant. In these circumstances, SNH requests that the applicant provides detailed information on the proposed activity, the purpose of the development and the legal basis under which it may take place (e.g. the development or associated activity may result from a statutory requirement under other legislation or be permitted under a Permitted Development Order, or may be work required for reasons of public health and safety).

Is a licence required?

A licence is required if your proposed activity may result in the committing of any of the EPS offences set out above. You might be able to obtain advice about this risk from a consultant ecologist. Offences under regulations 39(1)(a), (b) and (c), 39(2) and 43(1) require reckless or deliberate conduct. However, the damage or destruction of a breeding site or resting place of an EPS is an offence of strict liability (regulation 39(1)(d)).

Site visits and compliance checks

It is possible that SNH may undertake a site visit prior to issuing a licence. The majority of site visits will be arranged several days in advance and will be conducted...
in the presence of the licensee (or applicant). However there may be occasions when a site visit will be made at short notice.

Licensees should be aware that they may receive a request for a site visit by a member of SNH staff or a person authorised by SNH, to assess site conditions against the conditions of the licence. It is essential that if any of the agreed mitigation measures contained in the Method Statement are changed for any reason, SNH licensing is informed as soon as possible.

Licensing staff will monitor compliance with licences they issue according to the information included in licence returns.

Where to seek further information

For further information or advice please contact your local SNH office or contact the licensing team by emailing licensing@nature.scot or telephoning 01463 725 364.