

## APPENDIX 10.1 - LEGISLATION, POLICY AND GUIDANCE

This section contains information pertaining to the legislation and planning policy applicable in Wales. Information contained in the following appendix is provided for guidance only.

### Species

The objective of the EC Habitats Directive<sup>1</sup> is to conserve plants and animals which are considered to be rare across Europe. The Directive is transposed into UK law by The Conservation of Habitats and Species Regulations 2017 (as amended) (formerly The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) and The Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 (as amended).

The Wildlife and Countryside Act 1981 (as amended) implements the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and also implements the obligations set out for species protection from the Council Directive 2009/147/EC (formerly 79/409/EEC) on the Conservation of Wild Birds (EC Birds Directive) in Great Britain.

Various amendments have been made since the Wildlife & Countryside Act came into force in 1981. Further details pertaining to alterations of the Act can be found on the following website: [www.opsi.gov.uk](http://www.opsi.gov.uk). Key amendments have been made through the Countryside and Rights of Way (CRoW) Act (2000) and Nature Conservation (Scotland) Act 2004.

There are a number of other legislative Acts affording protection to species and habitats. These include:

- Countryside and Rights of Way (CRoW) Act 2000;
- Natural Environment & Rural Communities (NERC) Act 2006;
- Protection of Badgers Act 1992; and
- Wild Mammals (Protection) Act 1996.

### **Badger**

Badgers and their setts are protected under the Protection of Badgers Act (1992), which consolidated and added to the previous Badger Acts of 1973 and 1991. Under this legislation it is an offence to:

- cruelly ill-treat a badger, including use of tongs and digging in the course of killing or taking, or attempting to kill or take, a badger;
- intentionally or recklessly cause a dog to enter a badger sett;

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<sup>1</sup> Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora.

- intentionally or recklessly damage, destroy or obstruct access to a badger sett<sup>2</sup> or any part thereof;
- intentionally or recklessly disturb<sup>3</sup> a badger when it is occupying a badger sett;
- possess or control a dead badger or any part of, or anything derived from, a dead badger;
- sell or offers for sale, possesses or has under his control, a live badger;
- wilfully kill, injure, take, or attempt to kill, injure or take a badger; and
- mark or attach a marking device to a badger.

### **Bats**

Bats are protected under Schedule 5 of the Wildlife & Countryside Act 1981 (as amended). This act protects individuals from:

- intentional or reckless disturbance (at any level);
- intentional or reckless obstruction of access to any place of shelter or protection; and
- selling, offering or exposing for sale, possession or transporting for purpose of sale.

In addition, all species of bat are fully protected under The Conservation of Habitats and Species Regulations 2017 (as amended) through their inclusion on Schedule 2. Regulation 41 prohibits:

- deliberate killing, injuring or capturing of Schedule 2 species (all bats);
- deliberate disturbance of bat species as to impair their ability:
  - (i) to survive, breed, or reproduce, or to rear or nurture young; and
  - (ii) to hibernate or migrate.
- deliberate disturbance of bat species as to affect significantly the local distribution or abundance of the species;
- damage or destruction of a breeding site or resting place; and
- keeping, transporting, selling, exchanging or offering for sale whether live or dead or of any part thereof.

A European Protected Species Mitigation (EPSM) Licence issued by Natural England will be required for works liable to affect a bat roost or for operations likely to result in a level of

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<sup>2</sup> A badger sett is defined in the legislation as "any structure or place which displays signs indicating current use by a badger". This includes seasonally used setts. Natural England (2009) have issued guidance on what is likely to constitute current use of a badger sett: [www.naturalengland.org.uk/Images/WMLG17\\_tcm6-11815.pdf](http://www.naturalengland.org.uk/Images/WMLG17_tcm6-11815.pdf)

<sup>3</sup> For guidance on what constitutes disturbance and other licensing queries, see Natural England (2007) Badgers & Development: A Guide to Best Practice and Licensing. [www.naturalengland.org.uk/Images/badgers-dev-guidance\\_tcm6-4057.pdf](http://www.naturalengland.org.uk/Images/badgers-dev-guidance_tcm6-4057.pdf), Natural England (2009) Interpretation of 'Disturbance' in relation to badgers occupying a sett [www.naturalengland.org.uk/Images/WMLG16\\_tcm6-11814.pdf](http://www.naturalengland.org.uk/Images/WMLG16_tcm6-11814.pdf), Scottish Natural Heritage (2002) Badgers & Development. [www.snh.org.uk/publications/online/wildlife/badgersanddevelopment/default.asp](http://www.snh.org.uk/publications/online/wildlife/badgersanddevelopment/default.asp) and Countryside Council for Wales (undated) Badgers: A Guide for Developers. [www.ccw.gov.uk](http://www.ccw.gov.uk).

disturbance which might impair their ability to undertake activities listed above. A licence is required to allow derogation from the relevant legislation but also to enable appropriate mitigation measures to be put in place and monitored.

### **Breeding Birds**

Under the Wildlife & Countryside Act, 1981 (as amended), a wild bird is defined as any bird of a species that is resident in or is a visitor to the European Territory of any member state in a wild state. Game birds, however, are not included in this definition (except for limited parts of the Act). They are covered by the Games Acts, which fully protect them during the closed season.

Under the Wildlife & Countryside Act, 1981 (as amended), all birds, their nests and eggs are protected under Sections 1-8 of the Act and it is an offence, with certain exceptions, to:

- intentionally (or recklessly in Scotland) kill, injure or take any wild bird;
- intentionally (or recklessly in Scotland) take, damage or destroy (or, in Scotland, otherwise interfere with) the nest of any wild bird while it is in use or being built;
- intentionally take or destroy the egg of any wild bird;
- have in one's possession or control any wild bird, dead or alive, or any part of a wild bird, which has been taken in contravention of the Act;
- have in one's possession or control any egg or part of an egg which has been taken in contravention of the Act;
- use traps or similar items to kill, injure or take wild birds;
- have in one's possession or control any bird (dead or alive) unless registered, and in most cases ringed, in accordance with the Secretary of State's regulations; and
- in Scotland only, intentionally or recklessly obstruct or prevent any wild bird from using its nest.

Certain rare species receive additional special protection under Schedule 1 of the Act and Annex 1 of the European Community Directive on the Conservation of Wild Birds (2009/147/EC). This affords them protection against:

- intentional or reckless disturbance while it is building a nest or is in, on or near a nest containing eggs or young;
- intentional or reckless disturbance of dependent young of such a bird;
- in Scotland only, intentional or reckless disturbance whilst lekking; and
- in Scotland only, intentional or reckless harassment.

The British Trust for Ornithology (BTO) has a list of birds that are Species of Conservation Concern. These birds are not legally protected but where they are found on site they should be given planning consideration. The criteria for birds listed as amber (medium conservation concern) include:

- historical population decline during 1800-1995, but recovering: population has more than doubled over last 25 years;
- moderate (25-49%) decline in UK breeding population over last 25 years;
- moderate (25-49%) contraction of UK breeding range over last 25 years;
- moderate (25-49%) decline in UK non-breeding population over last 25 years;
- species with unfavourable conservation status in Europe (Species of conservation Concern);
- five year mean of breeding pairs in the UK;
- ≥50% of UK breeding population in 10 or fewer sites;
- ≥50% of UK non-breeding population in 10 or fewer sites;
- ≥20% of European breeding population in UK; and
- ≥20% of NW European (wildfowl), East Atlantic Flyway (waders) or European (others) non breeding populations in UK.

### Hazel Dormouse

The hazel dormouse (*Muscardinus avellanarius*) is fully protected under The Conservation of Habitats and Species Regulations 2017 through its inclusion on Schedule 2. Regulation 41 prohibits:

- deliberate killing, injuring or capturing;
- deliberate disturbance as to impair its ability:
  - (i) to survive, breed, or reproduce, or to rear or nurture young; and
  - (ii) to hibernate or migrate.
- deliberate disturbance as to affect significantly the local distribution or abundance of the species;
- damage or destruction of a breeding site or resting place; and
- keeping, transporting, selling, exchanging or offering for sale whether live or dead or of any part of this species.

The hazel dormouse is also currently protected under the Wildlife and Countryside Act 1981 (as amended) through its inclusion on Schedule 5. Under this Act, this species is additionally protected from:

- intentional or reckless disturbance;
- intentional or reckless obstruction of access to any place of shelter or protection; and
- selling, offering or exposing for sale, possession or transporting for purpose of sale.

A European Protected Species Mitigation (EPSM) Licence issued by Natural England will be required for works liable to affect dormouse breeding or resting places (N.B. this is usually taken to mean dormouse 'habitat') or for operations likely to result in a level of disturbance which might impair their ability to undertake those activities mentioned above. The licence

will allow derogation from the relevant legislation but will also to enable appropriate mitigation measures to be put in place and monitored.

### **Herpetofauna (Reptiles and Amphibians)**

The following species receive full protection under the Conservation of Habitats and Species Regulations 2017 (as amended) through their inclusion on Schedule 2.

- sand lizard (*Lacerta agilis*);
- smooth snake (*Coronella austriaca*);
- natterjack toad (*Epidalea calamita*);
- great crested newt (*Triturus cristatus*); and
- pool frog (*Pelophylax lessonae*).

Under this legislation, Regulation 41 prohibits:

- deliberate killing, injuring or capturing of species listed on Schedule 2;
- deliberate disturbance of any Schedule 2 species as to impair their ability:
  - (i) to survive, breed, or reproduce, or to rear or nurture young; and
  - (ii) to hibernate or migrate.
- deliberate disturbance of any Schedule 2 species as to affect significantly the local distribution or abundance of the species;
- deliberate taking or destroying of the eggs of a Schedule 2 species;
- damage or destruction of a breeding site or resting place; and
- keeping, transporting, selling, exchanging or offering for sale whether live or dead or of any part of a species.

With the exception of the pool frog, these species are also currently listed on Schedule 5 of the Wildlife and Countryside Act 1981 (as amended). Under this Act, they are additionally protected from:

- intentional or reckless disturbance (at any level);
- intentional or reckless obstruction of access to any place of shelter or protection; and
- selling, offering or exposing for sale, possession or transporting for purpose of sale.

Other native species of herpetofauna are protected solely under Schedule 5 of the Wildlife & Countryside Act 1981 (as amended). These species include:

- adder (*Vipera berus*);
- grass snake (*Natrix natrix*);
- common lizard (*Zootoca vivipara*); and
- slow-worm (*Anguis fragilis*).

Under this legislation, for these species it is prohibited under Section 9(1) & (5) to:

- intentionally (or recklessly in Scotland) kill or injure these species; or
- sell, offer or expose for sale, possess or transport for purpose of sale these species, or any part thereof.

The following species are listed in respect to Section 9(5) of Schedule 5 of the Wildlife & Countryside Act 1981 (as amended) which only affords them protection against sale, offering or exposing for sale, possession or transport for the purpose of sale:

- common frog (*Rana temporaria*);
- common toad (*Bufo bufo*);
- smooth newt (*Lissotriton vulgaris*); and
- palmate newt (*L. helveticus*).

### **Water Vole**

The water vole (*Arvicola amphibius*) (=terrestris) is fully protected under Schedule 5 of the Wildlife and Countryside Act 1981 (as amended). This makes it an offence to:

- intentionally kill, injure or take (capture) this species;
- intentionally or recklessly damage, destroy or obstruct access to any structure or place used for shelter or protection;
- intentionally or recklessly disturb water voles while they are occupying a structure or place used for shelter or protection; and
- sell, offer or expose for sale, or have in his possession or transport for the purpose of sale, any live or dead water vole or part of this species.

Where development works are liable to affect habitats known to support water voles, Natural England must be consulted. All alternative design options must have been explored and communicated to Natural England in order to demonstrate that works have tried to avoid contravening the legislation e.g. the use of alternative sites, appropriate timing of works to avoid times of the year in which water voles are most vulnerable etc. Conservation licences for the capture and translocation of water voles may be issued by Natural England for the purpose of development activities if it can be shown that the activity has been properly planned and executed and thereby contributes to the conservation of the population.

### **Otter**

Otters (*Lutra lutra*) are fully protected under The Conservation of Habitats and Species Regulations 2017 through their inclusion on Schedule 2. Regulation 41 prohibits:

- deliberate killing, injuring or capturing of otters;
- deliberate disturbance as to impair their ability:
  - (i) to survive, breed, or reproduce, or to rear or nurture young; and
  - (ii) to hibernate or migrate.

- deliberate disturbance as to affect significantly the local distribution or abundance of the species;
- damage or destruction of a breeding site or resting place; and
- keeping, transporting, selling, exchanging or offering for sale whether live or dead or of any part of this species.

Otters also receive protection under the Wildlife and Countryside Act 1981 (as amended) through their inclusion on Schedule 5. Under this Act, they are additionally protected from:

- intentional or reckless disturbance (at any level);
- intentional or reckless obstruction of access to any place of shelter or protection; and
- selling, offering or exposing for sale, possession or transporting for purpose of sale.

A European Protected Species Mitigation (EPSM) Licence issued by Natural England will be required for works liable to affect breeding or resting places or for activities likely to result in a level of disturbance which might impair their ability to undertake those activities mentioned above. The licence is to allow derogation from the relevant legislation but also to enable appropriate mitigation measures to be put in place and monitored.

### **Wild Mammals**

All wild mammals are protected against intentional acts of cruelty under the Wild Mammals (Protection) Act 1996. Under this legislation it is an offence to:

- mutilate, kick, beat, nail or otherwise impale, stab, burn, stone, crush, drown, drag or asphyxiate any wild mammal with intent to inflict unnecessary suffering.

To avoid possible contravention of this legislation, due care and attention should be taken when carrying out works that have the potential to impact any wild mammal as described above.

### **Plants**

Wild plants are protected under the Wildlife and Countryside Act 1981 (as amended) which makes it an offence for an 'unauthorised' person to intentionally (or recklessly in Scotland) uproot wild plants. An authorised person can be the owner of the land on which the action is taken, or anybody authorised by them.

Some rare plant species also receive full protection under Schedule 8 of the Wildlife and Countryside Act 1981 (as amended). This prohibits:

- intentionally (or recklessly in Scotland) picking, uprooting or destruction of any wild Schedule 8 species (or seed or spore attached to any such wild plant in Scotland only); and
- selling, offering or exposing for sale, or possessing or transporting for the purpose of sale, any wild live or dead Schedule 8 plant species or parts.

In addition to the legislation outlined above, several plant species are fully protected under Schedule 5 of The Conservation of Habitats and Species Regulations 2017. Regulation 45 makes it an offence to:

- deliberately pick, collect or destroy a wild Schedule 5 species; and
- be in possession of, or control, transport, sell or exchange any wild live or dead Schedule 5 species or anything derived from it.

A European Protected Species Mitigation (EPSM) Licence issued by Natural England will be required for works liable to affect species of plant listed under The Conservation of Habitat and Species Regulations 2017.

### **Invasive Plant Species**

Certain plants are listed on Part II of Schedule 9 of the Wildlife and Countryside Act 1981 (as amended) in respect to Section 14(2). Species include:

- Japanese knotweed (*Reynoutria japonica*);
- giant hogweed (*Heracleum mantegazzianum*);
- Himalayan balsam (*Impatiens glandulifera*);
- certain species of rhododendron (*Rhododendron* sp.); and
- certain species of cotoneaster (*Cotoneaster* sp.).

Species listed are non-natives whose establishment or spread in the wild may be detrimental to native wildlife. Inclusion on Part II of Schedule 9 therefore makes it an offence to:

- plant or otherwise cause these species to grow in the wild.

This legislation makes it is an offence to cause species listed to grow in the wild. Therefore, if they are present on site and development activities have the potential to cause the further spread of these species to new areas, it will be necessary to ensure appropriate measures are in place to prevent this.