

Interactive Bat Protocol

**Correct Decision-making Process for LPAs
Determining Applications where Bats are Involved**

Consultation Draft

Vs 1 - September 2010

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On behalf of the Planning Officers' Society Wales and the Countryside Council for Wales

Disclaimer

This is a summary document only and does not purport to set out the full details of all the legislative provisions or provide legal advice. Please refer to the relevant legislation for full details and take legal advice as appropriate. Only the original legislation and subsequent amendments provide the definitive position on the legal protection afforded to the relevant species and we strongly recommend that it is referred to.

Also, while the information provided here is believed to be correct, no responsibility can be accepted by ALGE POSW or CCW or any of its partners or officers for any consequence or errors or omissions, nor responsibility for loss to any persons acting from actions as a result of this information and no claims for compensation or damage will be accepted.

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Key References And Web Links

BATS

Bat Conservation Trust (2007). *Bat Surveys: Good Practice Guidelines*. London: Bat Conservation Trust.

Howard, J. & Richardson, P. (2009) *Bats in Traditional Buildings*. National Trust, English Heritage & Natural England.

Mitchell-Jones, A.J. (2004). *Bat Mitigation Guidelines*. Peterborough: English Nature.

Mitchell-Jones, A.J. & McLeish, A.P. (2004). *Bat Workers' Manual*. Peterborough: JNCC.

Schofield, H.W. (2008). *The Lesser Horseshoe Bat Conservation Handbook*. Ledbury: The Vincent Wildlife Trust.

Williams, C. (2010) *Biodiversity for Low and Zero Carbon Buildings: A Technical Guide for New Build*. Bat Conservation Trust and RIBA Publishing.

Relevant Government Planning Policy Guidance (see Box 15 for detailed policies)

For England	PPS 9 <i>Biodiversity and Geological Conservation</i> (2005) Circular 06/2005 Biodiversity and Geological Conservation – Statutory Obligations And Their Impact Within The Planning System (ODPM and DEFRA; (2005)
For Northern Ireland	Planning Policy Statement 2 <i>Planning and Nature Conservation</i> (1997)
Scotland	Planning Advice Note PAN 60 <i>Planning for Natural Heritage</i> (2000)
For Wales	Technical Advice Note TAN 5 <i>Nature Conservation and Planning</i> (2009)

Source of Advice and Useful Web Links

Bat Conservation Trust	http://www.bats.org.uk/
Countryside Council for Wales	http://www.ccw.gov.uk/default.aspx
DoE Northern Ireland	http://www.doeni.gov.uk/
Natural England	http://www.naturalengland.org.uk/
Scottish Natural Heritage	http://www.snh.gov.uk/

Bat Conservation Measures At A Glance

A key source of advice on measures for incorporating bats into development can be found in *Bat Mitigation Guidelines* (2004) available from Natural England at:

<http://naturalengland.etraderstores.com/NaturalEnglandShop/IN136>

Also available is the Bat Workers Manual available at:

<http://www.jncc.gov.uk/page-2861>

The Bat Conservation Trust web site is also a rich source of information and guidance on good practice.

<http://www.bats.org.uk/>

The Biodiversity Toolkit provides information on how bats can be incorporated into buildings and illustrates this with a variety of interactive graphics to show the sort of features that can be easily provided.

http://www.biodiversityplanningtoolkit.com/stylesheet.asp?file=411_barn_conversions

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INTRODUCTION

This document accompanies the Interactive Bat Protocol and provides a full copy of all the written content for the pop up boxes found in the online version of the protocol's flow diagram.

Each section of text is numbered to correspond with the relevant numbered boxes in the flow diagram.

The online version of the protocol has been created to provide a user-friendly way of explaining how to ensure that bats are properly addressed at all stages of the planning application process. At first glance it gives summary information and an overview of the broad issues to be considered at each stage. However, additional pop up boxes also enable the user to find more detailed information that explains in detail what issues should be considered and appropriate courses of action to be followed.

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Box 1

VALIDATION REQUIREMENTS

Statutory Obligations

Planning authorities have a duty to consider the conservation and enhancement of biodiversity when determining a planning application. This includes species protected under the Wildlife and Countryside Act 1981, the Habitats Regulations¹ and the Badgers Act 1992.

Protected species are also a 'material consideration' in the determination of a development proposal that, if carried out, would result in harm to the species or its habitat.

Therefore to meet statutory obligations, before planning permission may be granted, the planning authority must have sufficient information on whether any protected species are using a site and whether they will be affected by the proposed development. However, government guidance states that developers should only be required to undertake surveys for protected species where there is a reasonable likelihood of them being present.

What Triggers the Need for Bats to be Considered?

The 'reasonable likelihood' of bats being found within or adjacent to a development site can be readily determined using the Validation Triggerlist produced as a template by ALGE (Association of Local Government Ecologists). The triggerlist has been generated from experience gathered by experts over many years. An amended version of this list (in relation to bats only) is provided in Box 2.

Many planning authorities have identified and published similar triggerlists as part of their *Planning Application Validation Requirements* (usually found in the planning section of their web site). Reference should be made to such local *Validation Requirements for Biodiversity* to find out whether relevant information on bats must be submitted with the application.

In the absence of the planning authority having its own *Validation Requirements for Biodiversity* refer to the ALGE Template shown in Box 2 for guidance.

What is Required?

If the proposal does trigger the need to consider bats, applicants will be required to submit with the application a *Bat Survey* and a *Report on Measures for Mitigation, Compensation and Enhancement* (see boxes 4 and 6). Together, this information should ensure that an application is valid, can be registered and will be sufficiently informed to be determined lawfully.

¹ In England and Wales – The Conservation of Habitats and Species Regulations 2010
In Scotland – The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

Box 2 Where are You Likely to Find Bats?

Trigger List (Criteria and Thresholds) for when a Protected Species Survey and Report is Required with the Application

From experience gathered nationwide by experts over many years, it is known that some *types of development* are more likely to affect bats than others. This is particularly the case when these activities occur in what are known to be *sensitive locations* where there is a *reasonable level of likelihood* that bats are using the site. These include:

(1) Conversion, modification, demolition or removal of buildings – if they are:

- agricultural buildings (e.g. farmhouses, barns and outbuildings) of traditional brick or stone construction and/or with exposed wooden beams;
- buildings with weather boarding and/or hanging tiles that are within 200m of woodland and/or water;
- pre-1960 detached buildings and structures within 200m of woodland and/or water;
- pre-1914 buildings within 400m of woodland and/or water;
- pre-1914 buildings with gable ends or slate roofs, regardless of location;
- any building located within, or immediately adjacent to woodland &/ or immediately adjacent to water

Note: The above criteria also apply to hotels, schools, hospitals, churches, commercial premises and derelict buildings.

Surveys are not required for Dutch barns, or livestock buildings with a single skin roof and board-and-gap or Yorkshire boarding. (Preliminary assessment may be required depending on location – refer to LPA guidance)

(2) Development affecting built structures:

- tunnels, mines, kilns, ice-houses, adits, military fortifications, air raid shelters, cellars and similar underground ducts and structures; unused industrial chimneys that are unlined and brick/stone construction
- bridge structures, aqueducts and viaducts (especially over water and wet ground).

(3) Floodlighting of:

- churches and listed buildings, green space (e.g. sports pitches) within 50m of woodland, water, field hedgerows or lines of trees with connectivity to woodland or water
- any building meeting the criteria listed in (1) above

(4) Felling, removal or lopping of:

- woodland
- field hedgerows and/or lines of trees with connectivity to woodland or water bodies
- old and veteran trees that are older than 100 years;
- mature trees with obvious holes, cracks or cavities or ivy covered (and also large dead trees).

(5) Proposals affecting water bodies:

- In or within 200m of rivers, streams, canals, lakes, reedbeds or other aquatic habitats

(6) Proposals located in or immediately adjacent to:

- quarries or gravel pits
- natural cliff faces and rock outcrops with crevices or caves and swallets.

(7) Proposals involving the development of wind turbines

(8) All proposals where protected species are known to be present This may include proposed development affecting any type of buildings, structures, feature or location.

The above criteria are indicative only. Users should refer to each individual local planning authority to establish if they have published their own *Validation Requirements for Biodiversity* – and whether they have identified specific criteria for where bats are likely to be encountered in their own area.

The above is based on the Bat Conservation Trusts's *Bat Surveys: Good Practice Guidelines* (2007) and the *Biodiversity Validation Requirements Triggerlist* produced as a template by the Association of Local Government Ecologists (2007).

Box 3

ECOLOGICAL INFORMATION IS NOT REQUIRED

Ecological information will not be required with the planning application in the following circumstances:

- i. If a proposal does not match any of the criteria in the Validation Requirements biodiversity trigger lists for when a protected species survey and report is required (See Box 1 and 2).
- ii. If the applicant has evidence from a *Preliminary Assessment* (See Box 5) that shows the site/location in question has a low potential to support bats. However, the preliminary assessment must contain sufficient evidence to justify why no further detailed information on bats needs to be submitted with the planning application, i.e. why the building does not have potential to support roosting bats. Otherwise, a full survey and report will be required.
- iii. If, following consultation by the applicant at the pre-application stage, the planning authority has stated in writing prior to the submission of the application, that no full surveys and reports are required. This may, for instance, be because in their judgment (even in the absence of any information) it is very clear that the development proposal will not affect any protected species and therefore only limited information needs to be submitted with the application to confirm this.

NOTES

In such circumstance, the applicant must also confirm in writing that they are aware it is a criminal offence to disturb or harm protected species, or to damage or destroy their places of rest or shelter, should they subsequently be found during the development.

The LPA can also add an informative to the planning consent setting out the applicant's responsibility with regard to protected species and the law.

Box 4 A FULL SURVEY IS REQUIRED

Box 7 provides a Template with the recommended content and format for a full survey and report.

A full *Bat Survey* and a *Conservation Report* (including details on necessary measures for *Mitigation, Compensation and Enhancement*) should be submitted with an application whenever proposed development is likely to affect bats (as triggered by the Validation Requirements – see Box 1 and 2). The survey and report should be completed - and details of necessary measures to protect and conserve bats should be secured through conditions and/or planning obligations - **before planning permission is given**.

Bat surveys are carried out to confirm or discount use of a feature by bats. They should be commissioned as early as possible in project planning to avoid later delays. A clear set of objectives should guide the selection of appropriate survey methods and the amount of effort required. For instance, objectives for surveying buildings might be to determine:

- If bats are, or have been present, and if so which species are involved;
- The type of roost e.g. maternity roost, day roost, feeding perch, night roost, mating roost, transitional roost, winter hibernaculum;
- How bats use the building e.g. location of roosting bats, flight paths and flight behaviour, exit and entrance points to the building;
- The intensity of use by bats e.g. number of bats, sex of bats and time and duration of use.

Selecting Appropriate Methods of Survey

The objectives, location, type of bat habitat and type of bat activity under consideration should be used to determine the most appropriate survey method(s). The Bat Conservation Trust (BCT; 2007) has published *Bat Surveys: Good Practice Guidelines*. This provides guidance on survey methods that are appropriate for various situations. <http://www.bats.org.uk/publications.php?keyword=survey&month=&year=&category=&search=Search&page=6> Surveys should be undertaken in accordance with these guidelines, unless very good reasons are provided explaining why alternative methods have been used.

Timing of Surveys is Critical

It is important that surveys are carried out at the right time of year, since bat behaviour changes through the seasons and influences where and when they may be found in different habitats. Click here to find recommended survey periods with optimal and sub-optimal timings for all types of survey methodology.

Selecting a Suitably Qualified and Experienced Bat Ecologist

A professionally qualified and experienced ecologist should undertake surveys and they should be able to provide evidence for most if not all of the following - to show:

- Understanding of bat biology, ecology and conservation
- Expertise to identify all bats likely to be encountered in a range of situations
- Experience in handling and examining bats
- Working knowledge of survey methods and site assessment
- Working knowledge of the structure and terminology of buildings design and construction
- Identifying bats using electronic detectors
- Understanding of impact assessment for all bat species likely to be encountered in development
- Working knowledge and understanding of the planning system
- Working knowledge of lawful roost destruction techniques, and methods for roost creation, restoration and enhancement
- Planning and implementing long-term habitat management, maintenance and monitoring.

The above is taken from Natural England's *Experience for bat mitigation: guidance for ecologists* http://www.naturalengland.org.uk/Images/bat-mitigation-guidance_tcm6-10534.pdf

Note: Whilst it is possible to complete some survey work without a licence to disturb bats, it is sensible for a surveyor to hold a bat survey licence so that all potential survey work can be completed. However, the possession of a survey licence is not an indication of a person's ability to undertake ecological consultancy work – which should include a great many more skills than just an aptitude for survey work (e.g. see list above).


Where can I find someone to carry out a protected species survey?

The Institute of Ecology and Environmental Management (IEEM) maintain a list of members who offer commercial consultancy services and this information is available on their website at www.ieem.org.uk (from the main page, select 'About IEEM' and then 'Directory'). In addition, the Environmental Consultants Directory website: www.endsdirectory.com offers a similar search. Before appointing an ecological consultant, it would be prudent to make enquiries about their abilities and experience.

Recommended survey periods (from *Bat Surveys: Good Practice Guidelines*; BCT 2007)

Site walkovers and scoping surveys can be carried out throughout the year

 Optimal period

 Sub-optimal period

Survey Type	J	F	M	A	M	J	J	A	S	O	N	D
Manual bat detector surveys for commuting and foraging												
Manual bat detector surveys for dusk/dawn emergence/re-entry												
Automated logger/bat detector												
Inspection of buildings and built structures for roosts												
Inspection of bird and bat boxes												
Mating roost/swarming surveys												
Winter hibernation surveys including underground sites												
Tree surveys for roosting features (by observation from the ground)												
Tree surveys for active bats (bat emergence or re-entry surveys)												
Catching surveys for active (commuting/foraging) bats												
Radio-tracking surveys												

NOTES

- 1 The months shown are optimal for maternity roosts but there are other types of summer roosts for which other months outside these may also be optimal.
- 2 Although inspections of buildings can be made year round, summer roosts are more easily found during the months May to September.
- 3 As best practice guidance the period for catching and radio-tracking bats should avoid periods of late pregnancy/early lactation or early flying juveniles, except in exceptional circumstances when the survey specifically requires it.

Box 5 PRELIMINARY ASSESSMENT

Use of a Preliminary Assessment

A 'Preliminary Assessment' is always recommended for developments that are likely to affect bats (see Trigger List in Box 2) and is essentially a 'scoping exercise' where the results can be used to identify:

- If there is any evidence that bats or other protected species are using (or have used) the respective building, structure, tree *etc.* at any time of the year.

and/or

- If there is any reasonable likelihood that bats or other protected species are using (or have used) the respective building, structure, tree *etc.* at any time of the year.

And if bats are likely to be using a particular site or location, results from the Preliminary Assessment can be used to inform future survey objectives, and the type, intensity and area to be covered by any further detailed 'Full Surveys' that may be necessary (see Box 4).

However, the Preliminary Assessment can also be used to identify when a site or location actually has a low potential to support bats. In which case, the results can be presented to the local planning authority as evidence to explain why a detailed '*Full Survey and Report on Measures for Mitigation, Compensation and Enhancement*' is not required as a part of the planning application (see Box 3). However, since it can be difficult to be certain over whether a feature has low bat potential, it is always advisable to use a combination of survey methods (manual inspection and activity surveys) to increase the reliability of the results.

Content for a Preliminary Assessment

What a Preliminary Assessment should include:

- A desk study – including consultation with local ecological records centres to access any existing data;
- A walkover survey – including an assessment of habitats adjacent to the site, particularly areas of woodland and wooded river corridors, and;
- A daytime inspection of possible roost locations.

Box 8 provides a Template for the recommended content and format for Preliminary Assessments².

Further guidance on preliminary and full survey methods *etc.* can be found in *Bat Survey: Good Practice Guidelines* (Bat Conservation Trust; 2007). This publication is available at:

<http://www.bats.org.uk/publications.php?keyword=survey&month=&year=&category=&search=Search&page=6>

² The Template for Preliminary Assessment is based on guidance prepared by Snowdonia National Park Authority after wide experience of dealing with bat surveys submitted with planning applications.

Box 6

REPORT ON CONSERVATION MEASURES (MITIGATION, COMPENSATION AND ENHANCEMENT)

A full *Bat Survey* and a *Report on Conservation Measures* (e.g. necessary measures for mitigation, compensation and enhancement) should be submitted with an application whenever proposed development is likely to affect bats (as triggered by the Validation Requirements – see Box 1 and 2). The survey and report should be completed - and details of necessary measures to protect bats should be secured through conditions / planning obligations - **before planning permission is given.**

What the Report Should Cover

Survey should establish whether bats are present and, if so, how they are using a site or feature. Once this is known, measures should be identified to ensure that bats are not affected adversely by the development. These proposals should be presented in a *Report on Necessary Mitigation, Compensation and Enhancement Measures*.

All reports submitted must provide sufficient information for the planning authority to fully consider the impacts of the proposed development and to discharge its statutory obligation under the Habitat Regulations.

Box 7 provides an outline of the recommended content and format for the survey and report. Any survey and report should be based on this recommended content, unless agreed in writing between the applicant and the planning authority prior to the submission of the planning application.

Pre-application discussions provide an opportunity to tailor and agree these requirements on a case-specific basis, so that the applicant is not required to do more than is necessary. The planning authority is likely to reject information that is inadequate, meaning an application could be judged as invalid and not registered, or planning permission could be refused on the grounds that insufficient information has been submitted.

It is important that the report demonstrates that alternative proposals have been considered, explaining why full avoidance of negative impacts is not feasible, before providing a strategy that details mitigation and compensation proposals.

Exceptions to When a Full Survey and Report are Required (See Box 3)

Worst Case Scenarios

When a bat survey or preliminary assessment has found evidence of a bat roost outside the optimal survey periods for the likely use of the site (e.g. breeding season), it is not normally possible to determine the status of the roost and therefore the required mitigation or compensation measures. In such cases, the applicant should delay the application until the necessary surveys have been completed during the optimum period for the expected use of the site. (The ecologist's report should state when these need to be undertaken).

In some circumstances it may be acceptable to submit a Survey and Report based on a worst-case scenario, i.e. based on the most likely uses of the site and species affected, with mitigation proposals in excess of the minimum required and supported by evidence from the Preliminary Assessment. The Survey and Report must include provision for further work to ascertain the actual status of the roost and species concerned.

Worst-case Bat Mitigation Proposals may be appropriate in the following circumstances:

- When a building is considered by the bat consultant to have a high potential for bats even though survey has failed to locate any signs e.g. the building has a previous record of bat occupation or unusually strong bat roost characteristics;
- When the bat surveyor's access has been significantly restricted e.g. due to safety concerns;
- When a building considered to have a high potential for bat roosts has an existing use that may have obscured signs of bat occupation;
- When there is a genuine reason why the proposed works cannot be delayed – such as emergency works.

Important: Worst-case scenario Bat Mitigation Proposals should only be used when a licensed bat consultant is satisfied that there is scope within the final development to accommodate any significant bat roosts or roosts of additional bat species that may subsequently be found. They should not be used as a substitute for taking proper account of protected species at the start of the planning process.

Box 7

FULL SURVEY AND REPORT TEMPLATE

As a guide to what constitutes sufficient information for the planning authority, any submitted survey and report should be based on the following:

1. **Executive summary** (no more than one side of A4)
 2. **Introduction**
 - a. Background to development - *justification for why the proposal is necessary*
 - b. Description of the proposed works *e.g. building conversion, new build, demolition etc.*
 - c. Summary of statutory provisions for protected species
 3. **Survey and Site Assessment**
 - a. Qualifications and experience/competence of surveyor(s) *e.g. details of EPS license number etc. and equipment used (type of bat detectors and data loggers)*
 - b. Scale plan/map and 6 or 8 figure grid reference
 - c. Desk top data trawl – *details of information sought and obtained from local records centre*
 - d. Conclusions of walkover survey or Preliminary Assessment
 - e. Objectives of the detailed survey
 - f. Field surveys - *details of internal/external inspections, emergence/re-entry surveys, transect surveys, timings (day/evening), dates, weather conditions (wind, rain, temperature tabulated for multiple survey visits), numbers of surveyors.*
 - g. Survey results – *including: text, tables, photos, maps, illustrations, plans (with raw data appended (including sonagrams)*
 - h. Site/habitat - *description of features of value to commuting, foraging and roosting bats*
 - i. Interpretation/evaluation of results – *estimate of bat numbers and status of site e.g. presence of hibernation, maternity, feeding roosts, swarming sites and their significance locally / regionally.*
 4. **Impact Assessment**
 - a. Short term disturbance impacts
 - b. Long term impacts
 - i. Roost modification
 - ii. Roost loss
 - iii. Fragmentation and isolation of habitat
 - c. Post development interference impacts *e.g. lighting / use of loft space*
 - d. Predicted scale of impacts
 - e. Land ownership and viability for any proposed compensation sites
- Note:** A submitted report must first demonstrate that alternatives have been considered and show why avoidance of negative impacts is not feasible before providing a strategy that details mitigation and compensation proposals.
5. **Conservation Measures: Mitigation, Compensation and Enhancement**
 - a. Full mitigation, compensation and enhancement plan / strategy
 - b. Works to be undertaken by an ecologist or suitably qualified person
 - i. Capture and exclusion (as an example of possible works)
 - c. Works to be undertaken by the developer /landowner
 - i. In-situ retention of bat roost
 - ii. Modification of existing roosts
 - iii. New roost creation
 - iv. Scaled maps/plans + architects technical drawings of proposed bat features in building
 6. **Compliance With Development Plan Policies And Statutory Obligations**
 - a. How biodiversity features will change with development – *a prediction of net loss or gain*
 - b. How the proposal is in accordance with the relevant policies within the development plan
 - c. Likelihood of obtaining any necessary Regulation 44 European protected species licences
 7. **Post-development site safeguard**
 - a. Habitat/site management and maintenance where necessary
 - b. Population monitoring, roost usage etc.
 - c. Mechanism for ensuring delivery – *planning conditions/obligations and/or Reg. 44 licence*
 8. **Timetable of works**
 - a. Evidence that conservation proposals are compatible with the proposed development timetable

Box 8 PRELIMINARY ASSESSMENT REPORT TEMPLATE

The preliminary assessment report can be brief (in many instances, one or two sheets of A4 text plus photograph(s) and/or sketches will be sufficient) but it should include all of the following information³:

- Date of Survey:
- Location of the survey (including 8 figure grid reference):
- Name of surveyor with details of relevant EPS license(s)
- Photograph of building(s)/structure(s)/tree(s) etc. surveyed:
- Sketch map to clarify which building(s), structure(s), tree(s) have been surveyed (e.g. if building is part of a range of farm outbuildings)
- Brief description of the building/structure/tree e.g. traditional stone building with an intact slate roof etc.
- Condition of the building(s)/structure(s)/tree(s)
- Brief description of the surrounding habitat including connectivity in the landscape
A brief description (a sentence will usually be adequate) of the proposed works e.g. building conversion, new build, demolition *etc.*
- Whether evidence of bats has been noted, together with brief description of findings including where droppings *etc.* were found and whether old or recent *etc.* and whether the evidence appears to be indicative of a maternity, summer night roost or a winter hibernacula.
- Likely species (if known).
- Whether any evidence was noted of any other protected wildlife e.g. barn owls, swallows, otters, etc.
- If no evidence of bats or other protected species are noted, the surveyor should use his/her professional judgment to make an assessment of the potential for the building/structure/tree in questions to support bats at all times of the year.

NOTE:

Bats generally hibernate between October and April. Some bat species, such as pipistrelles, may be impossible to survey during the winter months as they crawl into crevices where they are unlikely to be detected. A preliminary survey may be undertaken at any time of year, as it may still be possible to find recent or historic evidence of a summer roost or hibernacula, and/or to assess the potential of the respective building, structure, tree etc. to support bats at any time of the year.

³ The Template for Preliminary Assessment is based on guidance prepared by Snowdonia National Park Authority after wide experience of dealing with bat surveys submitted with planning applications.

WHAT CONSTITUTES MITIGATION?

Mitigation involves measures designed to ensure the **Continued Ecological Functionality (CEF)** of breeding sites and resting places

Mitigation measures aim at minimising or even cancelling out the negative impact of an activity through a range of preventive actions. However, they may go beyond this and include actions that actively improve or manage a certain breeding site/resting place so that it does not - at any time – suffer from reduced or lost functionality (EU Guidance; page 47: Section 74).

In accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Regulation 41(1)(d). There must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction. The assessment of the probability of success must be made on the basis of objective information and in the light of the characteristics and specific environmental conditions of the site concerned. In addition, the use of CEF measures has to take into account the conservation status of the species concerned. For example, in the case of rare species with an unfavourable conservation status, there must be a higher degree of certainty that the measures will work as intended than in the case of more common species with a favourable conservation status (EU Guidance; page 48: Section 76).

CEF measures are different from compensatory measures in the strict sense. Compensation measures are independent of an activity/project and aim to compensate for or offset specific negative effects on a species. By definition, compensatory measures thus imply the deterioration or destruction of a breeding site or resting place (the effect compensated for). This is not the case with CEF measures, which ensure that the continued ecological functionality of the breeding site/resting place remains fully intact (in quantitative and qualitative terms). Consequently, where there is deterioration or destruction of a breeding site or resting place, a derogation under Article 16 is always necessary (EU Guidance: page 48: Section 79).

WHAT CONSTITUTES COMPENSATION?

“Compensation measures are independent of the activity causing deterioration or destruction of a breeding site or resting place. Such measures are intended to compensate for or offset specific negative effects on the species concerned and it is recommended that they are in place and effective before the negative effect occurs.

Even though compensation measures are not mentioned in Article 16 of the Habitats Directive, and are as such not obligatory, they may be considered to provide better justification of a derogation if there is a risk that the derogation might have a detrimental effect. Compensation measures may be envisaged for derogations involving the deterioration or destruction of breeding sites and resting places. Depending on the biology, ecology and behaviour of species, such measures may work well for some species but not for others. In general terms, compensation must:

- i) offset the negative impact of the activity under the specific circumstances (at population level);*
- ii) have a good chance of success and be based on best practice;*
- iii) guarantee a species' prospects of achieving Favourable Conservation Status;*
- iv) be effective before or at least when the deterioration or destruction of a breeding site or resting place starts to take place.*

*Compensation could thus guarantee that no detrimental effect is produced at either population or biogeographic level. **However, it does not replace or marginalise any of the 3 tests.** This means that the adoption of a compensation scheme cannot avoid the need for a derogation to pass all three tests” (EU Guidance: page Sections 55, 56 and 57).*

VALIDATION AND REGISTRATION

Box 10

REQUIREMENT FOR FULL SURVEY AND CONSERVATION REPORT IS NOT TRIGGERED

Ecological information will not be required with the planning application if:

- i. a proposal does not match any of the criteria in the Validation Requirements biodiversity trigger lists for when a protected species survey and report is required (See Box 1 and 2).
- ii. the applicant has evidence from a *Preliminary Assessment* (See Box 5) that shows the site/location in question has a low potential to support bats. However, the preliminary assessment must contain sufficient evidence to justify why no further detailed information on bats needs to be submitted with the planning application. Otherwise, a full survey and report will be required.
- iii. the planning authority has stated in writing to the applicant prior to the submission of the application, that no full surveys and reports are required.

This may, for instance, be because in their judgment (even in the absence of any information) it is very clear that the development proposal will not affect any protected species and therefore only limited information needs to be submitted with the application to confirm this.

Notes

In such circumstance, the applicant must also confirm in writing that they are aware it is a criminal offence to disturb or harm protected species, or to damage or destroy their places of rest or shelter, should they subsequently be found during the development.

The LPA can also add an informative to the planning consent setting out the applicant's responsibility with regard to protected species and the law.

Box 11 REQUIREMENT FOR FULL SURVEY AND CONSERVATION REPORT IS TRIGGERED

Failure to Provide Sufficient Information

If the application triggers the need for a bat survey (see Boxes 1 and 2) but insufficient information is submitted with the application (e.g. it does not conform to the general requirements set out in the Template in Box 7) the application may be judged as invalid and may not be registered.

Is a Bat Survey and Report Triggered by the Application?

Refer to the planning authority's Validation Requirements to establish if bats are likely to be a consideration in the determination of the application (see Box 1 and 2).

In the absence of the planning authority having its own Validation Requirements refer to the illustrative criteria shown in Box 2 for guidance.

What Should be Included With the Application

If the planning proposal triggers the need to consider bats (see Box 1) applicants will be required to submit with the application:

- a **Full Bat Survey** and
- a **Conservation Report on Measures for Mitigation, Compensation and Enhancement**.

This information should be provided based on the detail explained in the good practice Template (see Box 7).

The local planning authority requires this level of information to ensure that the application is valid, can be registered and, most importantly, is sufficiently informed to be determined lawfully.

If Only a Preliminary Assessment is Submitted

If the planning authority does not receive a Full Survey and Report, and only receives a Preliminary Assessment with the application, it is very important that the latter provides adequate evidence to explain why bats are unlikely to be using the site in question – and thus why a Full Report is not required.

If the Preliminary Assessment Report indicates that bats are likely to be present and that further surveys are required, this should be taken as evidence that insufficient information has been submitted with the application and it should not be registered.

DECISION MAKING (AND CONSULTATION)

Box 12

APPLICATION CAN BE DETERMINED WITHOUT REGARD TO THE HABITAT REGULATIONS

If the application does not trigger the need for a bat survey (see Box 3), it can be determined without further regard to the Habitat Regulations.

However, all parties must remain aware that occasionally evidence may come to light after registration to show that bats may be affected by the application. If so, ecological information must be submitted before the application can be determined so that the planning authority can consider it having had due regard to the strict requirements of the Habitat Regulations.

Also, while no bats or other protected species may be using the site at present, the applicant and planning authority may consider ways in which the development offers the opportunity to provide new features and enhancements that may benefit wildlife. In the absence of any adverse effects, such positive measures would represent a 'net gain' for biodiversity.

Consultation Draft

Box 13

WELL INFORMED DECISION MAKING

Ecological Information A full bat survey and conservation report (including measures on mitigation, compensation and enhancement) (see Box 7) must be submitted whenever proposed development is likely to affect bats.

Consultation and Planning Policies The LPA may consult the relevant statutory nature conservation organisation (see box 14) and it will need to refer to relevant planning policies for biodiversity that may apply to the application (see box 15).

Statutory Obligations Also, when dealing with cases where a European Protected Species may be affected, a planning authority has a statutory duty under the Habitat Regulations⁵, to have regard to the requirements of the Habitats Directive in the exercise of its functions.

The Judicial Review case *R (on the application of Simon Woolley) v Cheshire East Borough Council* (2009), clarifies for the first time the legal duty of a local planning authority when determining a planning application for a development which will impact on European Protected Species. The judgment makes it clear that, notwithstanding the licensing regime, the LPA must address its mind to the three licensing (derogation) tests when deciding whether to grant planning permission for a development which would give rise to any criminal offence against an EPS.

The Judge also noted that the LPA is required to fulfil its duty to engage with the Habitats Directive even if receives no comments from the relevant statutory nature conservation organisation.

The Woolley judgement also states that where planning applications are determined by planning committee, planning officers have a key role in identifying the relevant legal duty and should specifically highlight this in their reports so that the planning committee can seek to discharge it.

⁵ In England and Wales – Regulation 9
In Scotland and Northern Ireland – Regulation 3(4)

Box 14 CONSULTATION

The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat.

In such circumstances, planning authorities may seek appropriate advice from the relevant statutory nature conservation organisation (e.g. Countryside Council for Wales, Natural England⁶, Scottish Natural Heritage or the Northern Ireland Environment Agency) before determining planning permission.

NOTES

Further Guidance on Consultation From Case Law

R vs SoS for Social Services ex parte Association of Metropolitan Authorities (1986)

“Sufficient information must be supplied to the consulted party to enable it to tender helpful advice. i.e. sufficiently informed and considered information about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal”.

The crucial element of consultation is that LPAs (and applicants) must provide sufficient information to the statutory consultee to enable it to give a substantive reply.

In practice, this means that consultation should not include requests for help over basic functions such as deciding whether a protected species survey is required or not. This decision is the responsibility of the local planning authority and is aided by the use of Validation Requirements for Biodiversity (see Box 1 and 2) and/or by referring to any relevant Standing Advice issued by a Statutory Nature Conservation Organisations.

Consultation is more appropriate where the planning authority is seeking technical advice from the consultee over the merits of the scheme (e.g. potential impacts and adequacy of proposed mitigation, compensation or enhancement).

In the Judicial Review case of R (on application of Simon Woolley) vs Cheshire East Borough Council (see Box 21) the court made it clear a local planning authority can fulfill its duty even if the statutory nature conservation organisation (e.g. in the above case: Natural England) fails to provide its view.

⁶ In England, when any local planning authority receives a planning application which requires consultation with Natural England they should first check whether any up-to-date Standing Advice exists which is relevant to the development. Where issued, such Standing Advice should be considered as a material consideration.

Box 15 PLANNING POLICIES

POLICY OVERVIEW

The Habitats Directive recognises that a range of government functions influence the status of European protected species – such as bats. In UK law, this is implemented primarily by the Habitat Regulations, which obliges competent authorities (e.g. a local planning authority) to have regard to the Directive in exercising their duties.

However, other laws, policies and initiatives complement the Habitat Regulations in delivering effective European protected species conservation. Planning guidance and advice requires sound consideration of protected species and the UK Biodiversity Action Plan contains a range of proactive conservation measures that benefit European Protected Species.

The net result of the legislation, government policy guidance and advice, and other biodiversity initiatives is a broader approach to the conservation of European Protected Species than is stipulated in the Habitat Regulations alone. This means that a planning authority must have regard to more than just the Habitat Regulations when determining such applications.

A review of key planning policy and advice is provided for each of the four countries – click on the appropriate tab for more information.

FURTHER GUIDANCE FROM CASE LAW: *Woolley vs Cheshire East Borough Council*

The Legal Context for Applying Policy

The judgement in the above court case emphasises that the policy implications should be fully considered. In summary the judge stated:

Section 70 of the Town and Country Planning Act 1990 requires the planning authority to have regard to the development plan so far as is material to the application and to any other material consideration. Section 38(6) of the Planning and Compulsory Purchase Act 1994 states that if regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

A planning officer has a duty therefore to provide sufficient information and guidance to the planning committee to enable it to reach a decision applying the relevant statutory criteria – such as the LPA's duty as a *competent authority* under Regulation 3(4) and demonstrating its regard to the *three licensing tests* under the Habitat Regulations.

Where a proposal is non-compliant or otherwise with relevant development plan policies, such as those relating to European protected species, this should be brought to the attention of the planning committee, so that the Council has a clear view of the legal framework within which they are to make a decision given the terms of S38(6).

Policy for
England

Policy for
Wales

Policy for
Northern Ireland

Policy for
Scotland

PLANNING POLICIES

WALES

The following is a summary of Welsh Assembly Government policy and advice that applies to all protected species - see TAN 5 (2009).

- The presence of a protected species is a material consideration, when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat (see TAN 5: 6.2.1).
- The issues of whether development could give rise to a breach of the Regulations, and whether there may be a potential need for a licence to avoid such a breach, are therefore a material consideration in a relevant planning decision, and where a licence may be needed, the three licensing 'tests' required by the Directive should be considered by the local planning authority (TAN 5; 6.3.6)
- An LPA should consider attaching appropriate planning conditions or entering into planning obligations under which the developer would take steps to secure the long-term protection of the species (TAN 5; 6.2.1.)
- Local authorities should consult CCW before granting planning permission (TAN 5; 6.2.1)
- The LPA should also advise developers that they must comply with any statutory species' protection provisions affecting the site concerned (TAN 5; 6.2.1)
- It is essential that the presence or otherwise of protected species, and the extent to which they may be affected by the proposal, is established before the planning permission is granted. (TAN 5; 6.2.2).
- It is considered good practice that a survey is carried out before planning permission is submitted (TAN 5; 6.2.2).
- Planning permission should not normally be granted subject to a condition that protected species surveys are undertaken, and mitigation reports prepared, after planning permission has been given (TAN 5; 6.2.2).
- Bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of them being present (TAN 5; 6.2.2).
- The level of likelihood that should trigger surveys can be quite low where European protected species might be present (TAN 5; 6.2.2).
- Where a survey is required, it should be completed and any necessary measures to protect species should be in place, through conditions and/or planning obligations, before the permission is given (TAN 5; 6.2.2)
- Where European protected species may be affected, such as bats, the permission may impose a condition preventing the development from proceeding without the prior acquisition of a Regulation 44 licence (TAN 5: 6.2.2)
- The provisions of the Habitats Directive/Habitat Regulations is clearly relevant in reaching planning decisions, and these should be made in a manner that takes them fully into account (TAN 6.3.6).
- Planning authorities should give due weight to the presence of European protected species on a development site to reflect their statutory obligations, and this may potentially justify refusal of planning permission (TAN 5; 6.3.6).
- Central government encourages pre-application discussions between applicants and planning authorities, and where relevant conservation bodies, in developments where biodiversity may be affected (See Planning Policy Wales 5.5.4)

PLANNING POLICIES

ENGLAND

The following is a summary of government policy and advice for England that applies to protected species (see PPS 9 and accompanying Circular):

- Planning authorities should ensure that protected and UK BAP species are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse permission where harm to the species or their habitats would result unless the need for, and benefits of, the development clearly outweigh that harm (see PPS 9; paragraph 16).
- Planning decisions should be based on adequate and up to date information about the potential effects of development on nature conservation (see PPS 9 key principle).
- The presence of a protected species is a material consideration, when a planning authority is considering a development proposal that, if carried out, would be likely to result in harm to the species or its habitat (see PPS 9; paragraph 98).
- An LPA should consider attaching appropriate planning conditions or entering into planning obligations under which the developer would take steps to secure the long-term protection of the species (see paragraph 98).
- Local authorities should consult the advice provided by Natural England before granting planning permission (see paragraph 98).
- The LPA should also advise developers that they must comply with any statutory species' protection provisions affecting the site concerned (see PPS 9 paragraph 98).
- It is essential that the presence or otherwise of protected species, and the extent to which they may be affected by the proposal, is established before the planning permission is granted. (see PPS 9 paragraph 99).
- It is considered good practice that a survey is carried out before planning permission is submitted (see PPS 9 paragraph 99).
- Planning permission should not normally be granted subject to a condition that protected species surveys are undertaken, and mitigation reports prepared, after planning permission has been given (see PPS 9 paragraph 33).
- Bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of them being present (see PPS 9 paragraph 99).
- Where a survey is required, it should be completed and any necessary measures to protect species should be in place, through conditions and/or planning obligations, before the permission is given.
- Where European protected species are present, such as bats, the permission may impose a condition preventing the development from proceeding without the prior acquisition of a EPS Licence.
- The provisions of the Habitats Directive/Habitat Regulations is clearly relevant in reaching planning decisions, and these should be made in a manner that takes them fully into account (see paragraph 116).
- Planning authorities should give due weight to the presence of European protected species on a development site to reflect their statutory obligations, and this may potentially justify refusal of planning permission (see PPS 9 paragraph 116).
- Central government encourages pre-application discussions between applicants and planning authorities, and where relevant conservation bodies, in developments where biodiversity may be affected.

PLANNING POLICIES

SCOTLAND

Planning policy for Scotland will be added shortly.

Consultation Draft

PANNING POLICIES

NORTHERN IRELAND

Planning policy for Northern Ireland will be added shortly.

Consultation Draft

Box 16

THE LAW AND PROTECTED SPECIES

Under the Habitat Regulations⁷, where a European protected species may be affected by a planning proposal, planning decisions must be reached in a manner that takes account of, and is consistent with the strict statutory requirements of the Regulations.

FOR PLANNING AUTHORITIES

Planning authorities have a statutory duty⁸ to have regard to conserving biodiversity (which includes restoration and enhancement of biodiversity) in the exercise of their planning functions; this includes having due regard to and safeguarding such species as bats – specifically protected under:

- The Wildlife and Countryside Act 1981 (as amended)
- The Habitat Regulations (see footnote)

European Protected Species - Bats:

Planning authorities are a *competent authority* under the Habitat Regulations⁹, and as a result they must have regard to the requirements of the Habitats Directive. The Directive includes a strict system of protection for certain European Protected Species including bats. These requirements have been implemented by Part 3 of the Habitats Regulations so planning authorities must have regard to the contents of Part 3 prior to granting planning permission where European protected species may be affected.

Designated Sites For Bats:

Some major bat roosts and bat habitats also carry statutory site protection; in such cases planning authorities will have further obligations under the above statute for any *Sites of Special Scientific Interest (SSSIs)* and/or *Special Areas of Conservation (SACs)* designated for their bat interest. For applications affecting the latter, planning authorities must not grant consent unless they have determined via a *Habitat Regulations Assessment (HRA)* that there will be no significant adverse affect on the special features for which the site is designated.

FOR APPLICANTS AND DEVELOPERS

All bat species and their roosting and breeding sites are legally protected in the UK. Therefore, any person who through his or her activities is reasonably likely to commit one or more of the criminal offences listed under the Habitat Regulations must either:

- (i) Demonstrate with a high degree of certainty that they can avoid or reduce to a very low level the risk of committing an offence, or;
- (ii) Obtain a European protected species licence issued under Regulation 53 of the Habitat Regulations⁷ in England and Wales (Regulation 44 in Scotland and Regulation 39 in Northern Ireland) in order for them to carry out works, that in the absence of the licence, would constitute an offence.

⁷ In England and Wales – The Conservation of Habitats and Species Regulations 2010
In Scotland – The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

⁸ In England and Wales this duty falls under Section 40 of the Natural Environment and Rural Communities Act 2006
In Scotland the duty is contained within Part 1 Section 1 of The Nature Conservation (Scotland) Act 2004

⁹ In England and Wales – Regulation 9
In Scotland and Northern Ireland – Regulation 3(4)

Box 17

IS ANY CRIMINAL OFFENCE UNDER THE REGULATIONS LIKELY TO ARISE FROM THE PROPOSED DEVELOPMENT?

Both the applicant and the local planning authority must consider whether any activities/aspects of the proposed development are reasonably likely to trigger one or more criminal offences under the Habitat Regulations¹⁰; that is: whether there may be actions that lead to:

- Deliberate disturbance of bats
- Deliberate killing, injury or capture of bats
- Damage or destruction of a breeding site or resting place (action need not be deliberate)

(For full information on the offences see Boxes 18, 19 and 20)

Consultation Draft

¹⁰ In England and Wales – Under Section 41 of The Conservation of Habitats and Species Regulations 2010
In Scotland – Under Section 39 The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – Under Section 39 The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

Box 18 DELIBERATE DISTURBANCE

A person commits an offence if he:

“Deliberately disturbs wild animals of any European protected species”

In particular this includes any disturbance which is likely:

- (a) to impair their ability –
 - (i) to survive, to breed or reproduce, or to rear or nurture their young; or
 - (ii) to hibernate or migrate
- (b) to affect *significantly* the local distribution or abundance of the species to which they belong

However, the Regulations do allow for disturbance to occur in additional circumstances, since the above are not the only situations that may be considered – just that the emphasis is *particularly* on these forms of disturbance

NOTES

Deliberate Actions

The EU Guidance states:

“deliberate actions are to be understood as actions by a person who knows, in the light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable consequences of his actions” (See EU Guidance page 36 and 40).

So ‘deliberate action’, following the EU Guidance, appears to be wider than we would usually understand to be ‘intentional’ action under English and Welsh law. It seems more akin to what we would usually consider to be recklessness on the basis that a person is aware that an action may have potentially adverse consequences, but goes ahead anyway.

What Constitutes Disturbance - Factors To Consider

Negative Impact For disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved – such as reducing survival chances, breeding success or reproductive ability.

Rarity and Conservation Status The significance of disturbance, in terms of impact on local populations, depends on the conservation status of the particular species concerned. Individuals of a rare species, or of species that form small maternity colonies, are more important to the local population than individuals of more abundant species. Similarly, disturbance to individual bats from species that are declining in numbers is likely to be more harmful than disturbance to individual bats from species that are increasing in numbers.

Species by Species Approach The EU Guidance emphasises that a species by species approach needs to be taken as different species will react differently to potentially disturbing activities and the significance of such an effect will depend on the conservation status of the species in question.

Timing Bats are particularly vulnerable at certain times of year, such as during hibernation and during the breeding season.

Nature of Disturbance During the maternity period, colonies of bats tend to be most sensitive to disturbance since they have dependent young.

In addition, some forms of disturbance (e.g. noise, vibration, change in micro-climate, sources of light) do not necessarily have to directly affect the physical integrity of a species but can also have an indirect negative effect on the species. Bats, for example when disturbed during hibernation, heat up as a consequence and may take flight, so are less likely to survive the winter due to high loss of energy resources.

Number of Disturbances While a single disturbance is unlikely to affect local distribution and abundance of a species, repeated/multiple disturbance may cause the abandonment of traditional breeding or hibernation roosts.

Numbers of Bats Disturbed In most cases it is not expected that an action which disturbs a single animal or a small number of animals would have sufficient impact to be caught by Regulations. However, if any European protected species is particularly rare (e.g. Annex II species), disturbing very few animals could potentially have serious effects.

Consultation Draft

Box 19 DELIBERATE KILLING, INJURY OR CAPTURE

A person commits an offence if he:

“Deliberately captures, injures or kills any wild animal of a European protected species;”

NOTES

Deliberate Actions

The EU Guidance states:

“deliberate actions are to be understood as actions by a person who knows, in the light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable consequences of his actions” (see EU Guidance page 36 and 40).

So ‘deliberate action’, following the EU Guidance, appears to be wider than we would usually understand to be ‘intentional’ action under English and Welsh law. It seems more akin to what we would usually consider to be recklessness on the basis that a person is aware that an action may have potentially adverse consequences, but goes ahead anyway.

Consultation Draft

Box 20 DAMAGE OR DESTRUCTION OF A ROOST

A person commits an offence if he:

“Damages or destroys a breeding site or resting place of any European protected species”

NOTES

1. The Importance Of Breeding Sites And Resting Places

Breeding sites and resting places require strict protection because they are crucial to the life cycle of animals and are very important parts of a species' entire habitat, needed to ensure its survival.

The protection is directly connected with safeguarding the **ecological functionality** of breeding sites and resting places (see Box 24) so that they continue to provide all that is required for a specific animal to rest or to breed successfully.

2. Harm Does Not Have To Be Deliberate

Such sites and places enjoy a particularly high degree of protection as the offence is triggered by any damage or destruction irrespective of whether or not the act is done deliberately or intentionally. This means any act – even if unintentional – resulting in damage or destruction of, for example a roost, could potentially result in an offence. The prosecutor does not have to show that the action was deliberate, only that it took place. Remember bats tend to return to the same breeding and resting places every year, so that bat roosts are protected even if there are no bats present at the time of inspection or works.

3. Damage And Destruction (Deterioration)

The strict protection measures called for in the Habitats Directive prohibit the deterioration or destruction of breeding sites and resting places. The use of the word '**deteriorate**' is transposed in the English version of the Regulations to 'damage'.

The EU Guidance¹¹ states that:

*“Deterioration can be defined as physical degradation affecting a breeding site or resting place. In contrast to destruction, such degradation may occur slowly and **gradually reduce the functionality** of the site or place. Deterioration may therefore not immediately lead to the loss of functionality of a site or place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss (EU Guidance; page 46: Section 67).*

When trying to identify and avoid the causes that lead to the deterioration or even loss of breeding/resting functionality, it is important to establish a clear cause-effect relationship between one or more human-induced activities and the deterioration/destruction of a breeding site or resting place. Obviously, the causes for deterioration can be located inside or outside, or possibly even at some distance from, the breeding site or resting place under consideration (EU Guidance page 46: Section 68).

This specific protection against deterioration or destruction of breeding sites and resting places is self-evidently linked to the essential function of these sites, which must continue to provide all of the elements required by the specific animal (or group of animals) to breed or rest (EU Guidance page 46: Section 70).

If it is possible to establish a clear cause-effect relationship between one or more human-induced activities and the deterioration of a breeding site or resting place, then an offence is likely under the regulations”.

¹¹ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC. Final version, February 2007. http://forum.europa.eu.int/Public/irc/env/species_protection/home
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Box 21

WHAT ARE THE IMPLICATIONS OF NON-COMPLIANCE?

Where Development Does Not Avoid Harm or Meet the 3 Tests

In the absence of sufficient information, the planning authority will be justified in refusing planning permission where:

- (i) the applicant is unable to demonstrate, with a *high degree of certainty*, that European protected species (including their breeding sites or resting places) will not be harmed;
or
- (ii) where the 'Three Tests' for a licence (a derogation) are unlikely to be satisfied.

Development that does not avoid harm to European protected species and/or does not satisfy the three tests will be in conflict with the Regulations. Planning authorities must demonstrate their regard to these issues, and where they fail to do so, any planning consent granted for such a project may be in breach of the duty placed on planning authorities by the Habitat Regulations.

Such consents may then be open to legal challenge through Judicial Review in the courts – where the original planning permission could be quashed. There is also the risk that the developer of the site would be unable to make practical use of the planning permission granted, because no appropriate licence would be forthcoming.

Relevant Case Law (Judicial Review Decisions)

The following court judgments (see online bat protocol to download a pdf of each court judgement) have helped to clarify the role of local planning authorities when determining planning applications where European protected species are involved:

High Court Judgements:

Simon Woolley v Cheshire East Council May 2009

Vivienne Morge v Hampshire County Council November 2009

Court of Appeal Judgements:

Vivienne Morge v Hampshire County Council June 2010

R (on the application of Simon Woolley) vs Cheshire East Borough Council 2009

The judgement clarifies for the first time the legal duty of a Local Planning Authority (LPA) when determining a planning application for a development which may have an impact on European protected species (EPS), such as bats, great crested newts, red squirrels, dormice and otters.

The court judgement makes it clear that, notwithstanding the licensing regime, the LPA must also address its mind to the three tests set out in the Habitat Regulations when deciding to grant planning permission for a development which could harm an EPS. A LPA failing to do so would be in breach of Regulations which require all public bodies to have regard to the requirements of the Habitats Directive in the exercise of their functions.

This means that if it is clear or very likely that the requirements (the three tests) cannot be met then the LPA should act upon that, and refuse planning permission. Furthermore, the court held that a LPA cannot discharge its duty simply by adding a condition to the grant of planning permission which requires a licence to be obtained from the appropriate licensing authority. Similarly, mere reference at the end of planning permission to the existence of Regulations and the need for a licence cannot discharge the LPA's duty.

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Box 22

CAN A CRIMINAL OFFENCE BE AVOIDED OR REDUCED TO A VERY LOW LEVEL OF LIKELIHOOD?

Where bats may be harmed by a development proposal (e.g. such that one or more criminal offences is reasonably likely to be committed), the local planning authority, as a competent authority, must have regard to the strict requirements of the Habitats Directive ¹².

Consequently, for all planning authorities, the following are important material considerations:

1. Firstly, **is the proposal likely to lead to a criminal offence being committed** e.g. is an applicant when implementing the proposed development reasonably likely to commit an offence under the provisions of Part 3 of the Regulations – such as causing harm to bats?
2. And if so:
 - a. **Can any such criminal offence be avoided** by appropriate measures which:
 - (i) avoid the prohibited act or
 - (ii) reduce risk of the prohibited act to a very low level so that it cannot be judged as deliberate.

(Such measures must be secured through planning conditions or obligation)

Or if an offence cannot be avoided:
 - b. **Can all three tests for a derogation licence be satisfied** e.g. is the applicant likely to be issued with a licence under the Regulations so that works can be carried out that would otherwise, in the absence of a licence, constitute an offence?

The planning authority should not grant consent where they believe harm to a European protected species may occur (and therefore a criminal offence may be committed), and where either (a) such harm cannot be avoided, and/or (b) where the three licensing tests are unlikely to be satisfied.

¹² Regulation 9(5) in England and Wales under the Conservation of Habitats and Species Regulations 2010
Regulation 3(4) in Scotland under the Habitat Regulations 1994 as amended.

Box 23

MEASURES TO AVOID OR REDUCE TO A VERY LOW LEVEL THE LIKELIHOOD OF DELIBERATE DISTURBANCE OR DELIBERATE KILLING, INJURY OR CAPTURE

The importance of professional advice **sub heading**

Bat ecology and behaviour is complex and varies greatly between different species of bats. It is therefore important for applicants that their detailed measures to avoid damage or destruction of roosts are prepared by professionally qualified and experienced ecologists (see Box 4 for sources of advice). Such ecologists will be able to draw on published guidance (see *key references* on the home page), as well as their knowledge of good practice, in order to identify appropriate measures to ensure that bats and their breeding sites and resting places (roosts) are not harmed.

It is equally important that local planning authorities also have access to ecological expertise. To satisfy the requirements of the Habitats Directive, the LPA must have a *high degree of confidence in the effectiveness of the measures* and be sure that there is a *high degree of certainty that the measures will work* (EU Guidance page 48; section 76).

The significance of disturbance **sub heading**

Bats are particularly vulnerable to disturbance at certain times of year (see Box 18) when any disturbing event may impair their ability to survive, breed, hibernate or migrate, or when it may affect the local distribution or abundance of the species.

What this means in practice **sub heading**

In order for works to avoid or reduce the likelihood of an offence to a very low level, the local planning authority must have a high degree of certainty that works will not:

- Affect the ability of the species to survive, to breed or reproduce, or to rear or nurture their young, and/or hibernate or migrate (e.g. the roosts, and/or surrounding habitats upon which they are dependent at critical times of year for foraging and commuting, will not be affected);
- Harm bats directly (e.g. through killing, injury or capture).

Also, there should be an even higher degree of certainty that the measures will work as intended where rarer species and those with unfavourable conservation status are involved. This is because the significance of disturbance, in terms of impact on local populations, depends on the conservation status of the particular species concerned. Individuals of a rare species, or of species that form small maternity colonies, are more important to the local population than individuals of more abundant species. Similarly, disturbance to individual bats from species that are declining in numbers is likely to be more harmful than disturbance to individual bats from species that are increasing in numbers.

Examples of how this may be put into practice are provided in the Best Practice Note below.

BEST PRACTICE NOTE 1

Examples of Measures to Avoid / Minimise Disturbance or Killing, Injury or Capture

Necessary works within or near bat roosts should be timed to avoid the periods when large numbers of bats may be present and where the impact of disturbance would be high. In particular, for works on buildings any potentially disturbing activities should be carried out before the bats have formed nursery colonies in the spring, or after the colonies have dispersed in the late summer or autumn. Also, since there can be great variability from one year to the next and between sites and species, it is important to leave as much of a margin at either end of the optimum period as possible. This is where a professionally qualified and experienced ecologist should advise.

Many larger developments may also involve the risk of disturbing or harming bats, including disturbance of wider areas of habitat used by bats away from the roost where there may be loss or disruption of flight paths and foraging areas. Examples include severance or removal of hedgerows used as flight corridors, introduction of lighting into areas that were previously dark, introduction of hazards (such as wind turbines) into areas frequented by commuting or foraging bats or change in or loss of important feeding areas (such as around maternity colonies).

Examples of appropriate avoidance/mitigation measures include:

- Undertaking works at times of year to avoid sensitive periods so that the bats are absent from the site;
- Employing working methods during construction that have been prepared to avoid sensitive locations and that minimise the risk of harm to bats;
- Designing the layout of development to retain key flight corridors and foraging areas where bats can continue to commute and feed safely and undisturbed;
- Designing the operation of the completed development in a manner that avoids/minimises the risk of harm to bats;

For more detailed information on appropriate measures see:

Bat Mitigation Guidelines (2004)

<http://naturalengland.etraderstores.com/NaturalEnglandShop/IN136>

The Bat Workers Manual (2004)

<http://www.jncc.gov.uk/page-2861>

Bat Surveys: Good Practice Guidelines (2007)

<http://www.bats.org.uk/publications.php?keyword=survey&month=&year=&category=&search=Search&page=6>

Box 24

MEASURES TO AVOID DAMAGE OR DESTRUCTION OF A ROOST

The Importance of Professional Advice **sub heading**

Bat ecology and behaviour is complex and varies greatly between different species of bats. It is therefore important for applicants that their detailed measures to avoid damage or destruction of roosts are prepared by professionally qualified and experienced ecologists (see Box 4 for sources of advice). Such ecologists will be able to draw on published guidance (see *key references* on the home page), as well as their knowledge of good practice, in order to identify appropriate measures to ensure that bats and their breeding sites and resting places (roosts) are not harmed.

It is equally important that local planning authorities also have access to ecological expertise. To satisfy the requirements of the Habitats Directive, the LPA must have a *high degree of confidence in the effectiveness of the measures* and be sure that there is a *high degree of certainty that the measures will work* (EU Guidance page 48; section 76).

Why are Breeding Sites and Resting Places so Important? **sub heading**

Breeding sites and resting places (e.g. roosts) are afforded strict protection because they are crucial to the life cycle of animals and are very important parts of a species' entire habitat needed to ensure its survival. The strict requirements of the Habitats Directive **aim to safeguard the *continued ecological functionality (CEF)*** of breeding sites and resting places. This protection ensures that such sites and places are not damaged or destroyed by human activities so that they can continue to provide all of the ecological conditions required for a specific animal to rest or to breed successfully (See EU Guidance; page 41: Section 53).

Measures to Ensure Continued Ecological Functionality (CEF) of Roosts **sub heading**

In summary – maintaining CEF means ensuring that the roost will still provide the same features and characteristics following any works so that bats will continue to use it.

- Key features include: roost type and location, aspect, size, shape and position of roost entrances and internal spaces;
- Key characteristics include: temperature, humidity, light levels and with suitable gaps and crevices.

To achieve CEF, in accordance with the Habitats Directive and the EU Guidance, it is important to understand the distinction between 'mitigation' and 'compensation'.

Mitigation vs Compensation **sub heading**

Mitigation: Mitigation applies when there are no changes to the main characteristics and features of the roost – either during and/or after works.

If it can be shown that CEF can be maintained (so that an offence is avoided) then a licence will not be required. However, the planning authority must agree and secure all necessary measures to maintain CEF through a planning condition / obligation.

Compensation: In contrast, if the main characteristics and features are to be altered during and/or after works then these will require *compensation*. Such measures always require a licence.

This is because, by definition, compensation measures are compensating for a residual negative impact (e.g. the detrimental effect or harm CANNOT be avoided) and therefore where – in the absence of a licence - an offence would be committed.

BAT PROTOCL BEST PRACTICE NOTE 2

Examples Of What Constitutes Mitigation And Compensation For Damage Or Destruction Of A Roost

Background

Mitigation should involve measures designed to ensure the **Continued Ecological Functionality (CEF)** of breeding sites and resting places.

Mitigation - Measures that seek to maintain CEF must have the character of mitigation. Mitigation measures aim at minimising or even cancelling out the negative impact of an activity through a range of preventive actions. However, they may go beyond this and include actions that actively improve or manage a certain breeding site/resting place so that it does not - at any time – suffer from reduced or lost functionality (EU Guidance; page 47: Section 74).

Measures must ensure that the roost continues to provide all of the essential elements required by the bats to breed or rest (for more information see Note 3 in Box 20). Then, if harm can be avoided such that no offence is committed, the scheme does not need to be subject to the three tests and does not require a licence.

However, mitigation measures can be used only in situations where the planning authority (as competent authority) are able to assess whether the measures proposed are sufficient to avoid an offence (EU Guidance: page 48; Section 77). It will then be necessary to secure such measures through the imposition of planning conditions or obligations.

There must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction of the roost.

Compensation - In contrast, *compensation measures* will always require a licence. This is because, by definition, such measures are compensating for a residual negative impact (e.g. the detrimental effect or harm CANNOT be avoided) and therefore where – in the absence of a licence - an offence would be committed. So, while *compensation measures* may be used to ensure that there is no eventual harm to the European protected species, **compensation does not replace or marginalise any of the 3 tests**. This means that the adoption of a compensation scheme cannot avoid the need to pass all three tests" (EU Guidance: page 63: Sections 55, 56 and 57).

How the above applies to the re-roofing and extension of a building

Mitigation applies when there are no changes to the main characteristics and features of the roost – either during and/or after works.

For example:

Re-roofing:

- Works are proposed when the roost is vacant outside of the active bat season
- All of the access points will be retained or re-instated in exactly the same locations
- The roof void will not be altered

Works for the two-storey extension will:

- be on the elevation of the house where no bats have been recorded
- not alter any of the roof void.
- avoid the bat breeding season (June-July).
- be supervised by a suitably qualified and experienced bat worker
- will not require a bat licence

Note: If bats are discovered all work will stop and professional advice sought immediately.

In summary:

- Surveys and proposed works have been completed by a suitably qualified and experienced bat worker
- Works will not alter the key features and characteristics of the roosting space
- The level of disturbance is avoided or reduced to a very low level so that an offence is very unlikely to occur.

Compensation applies when the main characteristics and features are to be altered during and/or after works.

For example:

Re-roofing:

- Works are still proposed when the roost is vacant outside of the active bat season BUT
- Some existing access points will be lost and new ones created in different locations
- The roof characteristics will be altered by use of replacement roof timbers and installation of new roofing materials.

Works for the two-storey extension will:

- be on the southern elevation where bats have been recorded accessing the roost
- enlarge the roof space changing its shape, volume and temperature.
- have to provide an alternative and suitable roost as compensation.
- require a bat licence before works can commence.

In summary:

- Surveys and proposed works have been completed by a suitably qualified and experienced bat worker
- Compensation is required because detrimental effects or harm CANNOT be avoided (e.g. some of the key features and characteristics of the roost will change)
- In the absence of a licence - an offence would be committed.

Box 25

HIGH DEGREE OF CERTAINTY

The EU Guidance notes that in accordance with the precautionary principle, there should be a *high degree of confidence in the effectiveness of the measures* and that there must be a *high degree of certainty that the measures will work* (EU Guidance page 48; section 76).

Consequently, where an applicant intends to avoid or reduce to a very low level of likelihood the risk of committing an offence, they must provide the planning authority with a high degree of certainty that their proposed measures will be effective. In addition, such measures should be capable of being secured through planning conditions in order to achieve certainty that they will also be implemented as proposed.

Also, there should be an even higher degree of certainty that the measures will work as intended where rarer species and those with unfavourable conservation status are involved.

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Box 26

IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (IROPI)

It should be noted that the Habitats Directive does not define the term '*imperative reasons of overriding public interest*', and as yet the European Court has not given a clear indication for the interpretation of this specific concept. However, the EU Guidance states that "it is reasonable to consider that the 'imperative reasons of overriding public interest, including those of a social and economic nature', refer to situations where plans or projects envisaged prove to be indispensable:

- within the framework of actions or policies aiming to protect fundamental values for citizens' lives (health, safety, environment);
- within the framework of fundamental policies for the State and society;
- within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service".

Imperative reasons of overriding public interest may include a range of public interests, served not only by publicly funded or sponsored developments but also by private developments; for example the provision of housing in areas of clearly identified need or creation of employment in areas in need of economic regeneration. However, only public interests will meet the test and projects that are entirely in the interest of companies or individuals would generally not be considered justification for a derogation.

There are two elements to the imperative overriding public interest test;

- (i) does the development/proposal contribute, to any degree, to meeting an imperative public interest, and
- (ii) if so, is the degree to which the individual development/proposal serves or contributes to that interest sufficient to override the protection of, and any potential impact on, the European protected species concerned?

Also for clarification with regards to (ii) above, the greater the importance of a particular bat feature affected by a proposal, the greater must be the level of public interest necessary to override the protection for bats. For example, a roost of a single bat of a more common species (e.g. a Pipistrelle bat) does not have the same status as a breeding site used by many females with young of a rarer species (e.g. Greater Horseshoe bats). So any imperative public interest would have to be of higher importance to override the interest of bats in the second example than the first.

The planning authority should be aware of the first element of the test in providing evidence to the relevant licensing body to help it reach its decision. Large-scale projects, for example, that address a recognised priority, such as increased housing needs, would be likely to be seen as meeting an imperative public interest. However, smaller developments can also contribute to meeting an imperative public interest, both, for example, by addressing a specific local need or by their cumulative effect on a wider scale.

Severity of the Three Tests Increase with Severity of Impacts

As a general rule, the severity of any of the 'tests' will increase with the severity of the impact of a derogation on a species/population (EU Guidance; page 53: Section 11).

In some cases a derogation that might impact on the affected European protected species may be justified, although in practice this should be mitigated against or compensate for. In other cases, where the impact on the protected species is minor or neutral, a derogation may be justified even if the contribution to the public interest is relatively small.

Box 27

NO SATISFACTORY ALTERNATIVE

Alternative solutions to be considered may include alternative locations for a proposed development or alternative designs or ways of achieving the same objective with less or no effect on the species concerned. The scale at which alternative locations should be judged will depend on the nature and scale of the proposed development. In the case of major developments, for example of regional significance, alternatives are likely to have been considered by the planning authority at these scales. However, where local needs are specifically identified, alternatives should be considered at the appropriate local scale. In all cases, the alternatives that should be considered are those which would potentially meet the same need, not simply those currently available, for example, to the same developer.

The '*no satisfactory alternative*' test should be applied in a realistic manner, taking account of reasonable and practical, as opposed to hypothetical, alternatives. In addition, a proportionate approach should be adopted in considering the feasibility of alternative solutions relative to the degree of likely impact, such that, the greater the impact of the proposal on the species, the greater the scope for alternative solutions to be regarded as satisfactory. Before issuing a consent / licence, the relevant body should be satisfied that the "no satisfactory alternative" test has been properly applied and, on the basis of the information available to it, that it is reasonable to conclude that there is no satisfactory alternative to the action as proposed.

Severity of the Three Tests Increase with Severity of Impacts

As a general rule, the severity of any of the 'tests' will increase with the severity of the impact of a derogation on a species/population (EU Guidance; page 53: Section 11).

In some cases a derogation that might impact on the affected European protected species may be justified, although in practice this should be mitigated against or compensate for. In other cases, where the impact on the protected species is minor or neutral, a derogation may be justified even if the contribution to the public interest is relatively small.

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Box 28

FAVOURABLE CONSERVATION STATUS

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”.

In the context of specific derogations, the assessment of the potential impact on favourable conservation status should most usefully be made at the local species population level. However, the scale at which the test is applied will depend on the nature and characteristics of the species concerned and on its current conservation status. Since individual derogations must address a specific proposal and its effects, consideration of impacts on immediate local populations is unavoidable but should also be placed in a context of an appropriate scale, e.g. at a regional or meta-population level. Overall, favourable conservation status, or progress towards it, must be not be jeopardised.

Severity of the Three Tests Increase with Severity of Impacts

As a general rule, the severity of any of the ‘tests’ will increase with the severity of the impact of a derogation on a species/population (EU Guidance; page 53: Section 11).

In some cases a derogation that might impact on the affected European protected species may be justified, although in practice this should be mitigated against or compensate for. In other cases, where the impact on the protected species is minor or neutral, a derogation may be justified even if the contribution to the public interest is relatively small.

DETERMINATION

Box 29

GOOD PRACTICE

Informing Applicants on the Implications of Species Protection

The planning authority may wish to bring to the attention of the applicant the legal protection afforded to some species, such as bats; this might be done through an Advisory Note/Informative. This may be especially useful in situations where the site or location meets the criteria for when they are reasonably likely to be present (see Boxes 1 and 2), and where none were found during site survey (see Boxes 4 and 5), but where it would be wise to remain watchful for their presence prior to or during the implementation of works.

Biodiversity Enhancements

There are a number of ways that enhancement measures may be included in development that will be of benefit to bat species (see Bat Mitigation Guidelines – in Key References). Planning authorities may wish to secure such enhancement measures through appropriate planning conditions.

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DETERMINATION

Box 30

PLANNING CONDITIONS AND OBLIGATIONS TO BE USED WHEN AN EPS LICENCE IS NOT REQUIRED

Justification for Conditions

The Judicial Review case *R (on the application of Simon Woolley) v Cheshire East Borough Council* (2009), clarifies for the first time the legal duty of a local planning authority when determining a planning application for a development which will impact on European Protected Species.

The Judgement noted that a local planning authority may (as part of discharging its duty under the Habitat Regulations) impose planning conditions or secure commitments under a planning obligation that have the effect of preventing a criminal offence from being committed. Where this is possible, the Licensing (derogation) tests would not then need to be considered.

What Conditions May Cover

Such planning conditions or obligations may, for instance, secure measures that address one or more of the following:

- To secure detailed design proposals that are specifically for the protection of bats
- Timetable of works to ensure bats and their habitats are not harmed
- Constraints on potentially damaging construction activities
- Details and location(s) of proposed measures for mitigation, compensation and enhancement
- Constraints on potentially damaging operational activities
- Constraints over occupancy

Box 31 KEY ISSUES FOR LPAs AT DETERMINATION

At the determination stage, local planning authorities should demonstrate that they have had regard to the requirements of the Habitats Directive. They may also consider the use of a planning condition to ensure the applicant obtains an EPS licence where one is necessary.

Taking Account of the Habitats Directive at the Determination Stage

As explained in Boxes 13 and 16, when dealing with cases where a European Protected Species may be affected, a planning authority has a statutory duty under the Habitat Regulations to have regard to the requirements of the Habitats Directive in the exercise of its functions. This is emphasised in the case of *R (Woolley) vs Cheshire East Borough Council* where the court ruled:

- The provisions of the Habitats Directive are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account.
- Planning officers should specifically raise this rather specialised duty upon the Council in their reports so that Planning Committees can then seek to discharge it.
- The LPA can make a decision even if it does not receive any response to consultation with the statutory nature conservation organisation¹³
- Planning officers have a duty to provide sufficient information and guidance to the planning committee to enable it to reach a decision applying the relevant statutory criteria. In the Woolley case, the LPA was found to have acted unlawfully for failing to report all of the policy implications (e.g. relating to protected species) to the planning committee.

Demonstrating Due Regard At the determination stage the LPA should therefore be able to provide:

- Information relevant to whether they have judged that an offence is likely or can be avoided (see Box 22), and consequently whether the three tests (see Boxes 26, 27 and 28) need to be met;
- In cases where an offence and the requirement to apply the three tests can be avoided, information should show how the planning authority has secured all necessary measures to ensure *with a high degree of certainty* that possible offences *will be* avoided (e.g. through use of planning conditions);
- In cases where an offence is likely, information should show whether the three tests (see Boxes 26, 27 and 28) are likely to be met for the case in question – including conclusions over how the application is able to demonstrate *imperative reasons of public interest* sufficient to override the strict protection afforded European protected species such as bats;
- A copy of the report to the Planning Committee on the planning application;
- A copy of the minutes of the Planning Committee where the application was decided (or the equivalent papers if the application is decided by an officer);
- Information on any modification to the planning application to take account of the presence of European protected species;
- A copy of any conditions attached to the planning permission to take account of the presence of a European protected species.

NOTE: The above is based on a similar list published in Defra Circular 2/2002 - which the Court in the Woolley case judged to be relevant (see paragraph 25 of the Judgement).

¹³ Natural England, the Countryside Council for Wales, Scottish Natural Heritage or the Northern Ireland Environment Agency

Using Planning Conditions When An EPS Licence Is Required

In situations where planning permission is granted and a licence is required, the planning authority is able to impose a planning condition preventing the development from proceeding without the prior acquisition of a licence. This has been established through case law¹⁴ and is also recommended in government planning advice (see TAN 5; Section 6.2.2 for Wales and Circular 06/2005; Paragraph 99 for England).

The Welsh Assembly Government have provided an example of such a condition in a letter to local planning authorities (13/07/04):

“Where any species listed under Schedules 2 or 4 of Habitat Regulations [...insert reference to the full Regulations relevant to the country¹⁵...] is present on the site (or other identified part) in respect of which this permission is hereby granted, no works of site clearance, demolition or construction shall take place in pursuance of this permission unless a licence to affect any such species has been granted in accordance with the aforementioned Regulations and a copy thereof has been produced to the local planning authority”.

Reason

The species concerned [is/are] European protected species within the meaning of the above Regulations. These Regulations require Local Planning Authorities to have regard to the provisions of the Habitats Directive as transposed in these regulations in the discharge of their functions.

Where local populations of European protected species may be affected in a development, a licence must be obtained from the relevant licensing body in accordance with the above Regulations. The licensing body requires that the LPA must be satisfied that a derogation from the Habitats Directive is justified prior to issuing such a licence.

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¹⁴ In the Judicial Review judgement for the Duke of Westminster vs WAG (Case No: CO/1872/03; the ‘Halkyn’ Case 2004), paragraph 114 states: “The planning authority can, in an appropriate case, impose a condition that the developer may not proceed without a regulation EPS licence”.

¹⁵ In England and Wales – The Conservation of Habitats and Species Regulations 2010
In Scotland – The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

Box 32 BAT LICENCES

Inevitably, circumstances arise in development where proposed activities may be in conflict with the law protecting bats.

Therefore, under the Habitats Regulations¹⁶, a person whose activities are reasonably likely to trigger one or more criminal offences (see boxes 18, 19 and 20) must apply for a European protected species licence. Work carried out in accordance with such a licence allows certain actions, that would otherwise be illegal, to be undertaken legitimately. For this reason a professional ecologist should always be employed to advise on and/or to carry out activities required under a licence.

Such licensed activities may be necessary to enable, for example, the conversion, modification, demolition or re-roofing of buildings, or the removal of old or hollow trees, or filling in or blocking of underground features, such as tunnels, culverts or mines etc.

European protected species (EPS) Licences are not normally granted before the grant of planning permission. However, the Pre-application stage provides an ideal opportunity to first consider whether such a licence will be required in order to implement the works for which planning permission is sought.

The Three Tests:

The circumstances in which licences may be granted are narrowly defined, and require that three tests be satisfied (see Box 26, 27 and 28).

Discharge of Planning Conditions

A licence will not normally be issued until planning conditions relating to wildlife, which are intended to be and are capable of being discharged before development begins, have been discharged (see Box 31).

Where to Apply for Licences

You can find information on what is involved and how to apply for EPS licence by following the links below:

In England

Natural England

<http://www.naturalengland.org.uk/ourwork/regulation/wildlife/licences/>

In Northern Ireland

Northern Ireland Environment Agency

http://www.ni-environment.gov.uk/biodiversity/wildlife_management_and_licensing.htm

In Scotland

The Scottish Government

<http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/16330>

In Wales

The Welsh Assembly Government

<http://new.wales.gov.uk/topics/environmentcountryside/consmanagement/conservationbiodiversity/wildlifelicences/europrotectedspecies/?lang=en>

¹⁶ In England and Wales – The Conservation of Habitats and Species Regulations 2010
In Scotland – The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

Box 33

REFUSAL OF PLANNING PERMISSION WHERE EPS MAY BE AFFECTED

Planning permission may be refused if it is not possible to show compliance with the provisions of the Habitat Regulations¹⁷ and the strict requirements of the Habitats Directive.

An example of what may be cited by a local planning authority as 'Grounds for Refusal' is provided below.

Grounds for Refusal

Judged against published guidance, bats are likely to be using the application site and/or its environs and therefore a detailed survey and report is required. This is needed to establish if the proposal would have an impact on the species concerned, or its habitat, during and/or following development. No such detailed report has been submitted with the application or received subsequently, leaving reasonable grounds for refusal on the basis of one or more of the following:

- There is insufficient evidence of any reasons of public interest sufficient to over-ride the protection afforded to bats (see box 26);
- There may be alternatives – not explored in the application – that may have no or less impact on bats (see box 27);
- The application, as proposed, does not demonstrate with the required high levels of certainty* that the population of the species concerned can be maintained at favourable conservation status in their natural range (see box 28).

NOTE

*** Uncertainty Over Proposed Measures to Prevent Harm to European Protected Species**

If the applicant fails to provide adequate details of necessary mitigation and/or compensation with the application, and leaves uncertainty over whether or not harm to European protected species can be avoided, the application should be refused.

¹⁷ In England and Wales – Regulation 9 of The Conservation of Habitats and Species Regulations 2010
In Scotland – Regulation 3(4) of The Conservation (Natural Habitats etc) Regulations 1994 (as amended)
In Northern Ireland – Regulation 3(4) of The Conservation (Natural Habitats etc) Regulations 1995 (as amended)

IMPLEMENTATION AND CONSTRUCTION

Box 34

GOOD PRACTICE

Unexpected Discovery Of Protected Species During Development

The presence of European protected species, such as bats, is a material consideration in the planning process, and the potential impacts that a proposed development may have on them should be considered at all stages of the process.

Occasionally European protected species, such as bats, can be found during the course of development even when the site appears unlikely to support them OR after an ecological survey has found no previous evidence of them. In the event that this occurs, it is advised that the developer stops work immediately and seeks the advice of the local authority ecologist and/or the relevant statutory nature conservation organisation (e.g. the Countryside Council for Wales, Natural England, DoE Northern Ireland or Scottish Natural Heritage).

Developers should note that it is a criminal offence to deliberately kill, injure or capture bats, or to deliberately disturb them or to damage or destroy their breeding sites and resting places (roosts). Further works may require a licence to proceed and failure to stop may result in prosecution.

Biodiversity Enhancements

There are a number of ways that enhancement measures may be included in development that will be of benefit to bat species (see Bat mitigation measures at a glance on the Bat Protocol's home page). Planning authorities may secure such enhancement measures through appropriate planning conditions; all works should then be carried out in accordance with such conditions by the developer.

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