

Natural England Guidance Note:

European Protected Species and the
Planning Process

Natural England's Application of the
'Three Tests' to Licence Applications

Introduction

1. Two legal decisions have recently helped to clarify the role and responsibilities of Local Planning Authorities (LPAs) in respect of European Protected Species (EPS) when they are considering development consent applications. Those cases are R (Simon Woolley) v Cheshire East Borough Council and Millennium Estates Limited¹, a High Court case, and more recently still the Supreme Court decision in R (Vivienne Morge) v Hampshire County Council² (the Morge case). These cases do not create a new obligation or requirement on LPAs but they do provide some clarification of the duties placed on LPAs by the Conservation of Habitats and Species Regulations 2010³ (the Regulations)⁴.
2. The Regulations transpose certain prohibitions against activities affecting EPS. These include prohibitions against the deliberate capturing, killing or disturbance and against the damage or destruction of a breeding site or resting place of such an animal. The Habitats Directive provides for the derogation from these prohibitions for specified reasons and providing certain conditions are met. Those derogations are transposed into the Regulations by way of a licensing regime that allows what would otherwise be an unlawful act to be carried out lawfully. Among the reasons why a licence may be granted and the reason relied upon by developers when seeking a licence to carry out operations for the purposes of development, is that there are imperative reasons of overriding public interest why the operation should be carried out.
3. Natural England is the licensing authority for the purposes of this licensing regime. In addition to satisfying itself that one of the reasons provided for by the Regulations, in this case imperative reasons of overriding public interest exists, before granting a licence Natural England must also be satisfied that there is no satisfactory alternative and that any action licensed will not be detrimental to the maintenance of the population of the species at favourable conservation status in its natural range. The reason for granting the licence together with the two conditions that must be met before a licence can be granted are what Natural England refers to as the three statutory tests. More details about these tests are outlined elsewhere in this guidance.
4. The Regulations also provide that a competent authority, including a planning authority must, in the exercise of any of their functions, have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions. It is this duty that was considered in the Morge case. In that case the Supreme Court stated that it could not see why planning permission should not ordinarily be granted unless it is concluded that the proposed development would (a) be likely to offend one of the prohibitions referred to above and (b) be unlikely to be licensed under the regime described. Following that, it is clear that there will be circumstances in which planning authorities will be required to form a view on the likelihood of a licence being granted by Natural England. It is for the planning committee to determine the planning application in light of the three tests and the Morge and Woolley cases do not alter that position. In order to assist planning authorities with this (and in response to queries from LPAs) Natural England has

¹[2009] EWHC 1227 Admin

²[2011] UKSC 2.

³Previously the Conservation (Habitats etc) Regulations 1994

⁴The Regulations transpose the requirements of the Habitats Directive (92/43/EEC) into English law

outlined in this guidance the high level principles that it applies when it is assessing licensing applications. This advice will give local authorities guidance on when Natural England is likely to view a proposed development as being licensable.

The Legislative Process

5. In determining whether or not to grant a licence Natural England must apply the requirements of Regulation 53⁵ of the Regulations and, in particular, the three tests set out in sub-paragraphs (2)(e), (9)(a) and (9)(b)⁶.
 - (1) **Regulation 53(2)(e)** states: a licence can be granted for the purposes of “preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment”.
 - (2) **Regulation 53(9)(a)** states: the appropriate authority shall not grant a licence unless they are satisfied “that there is no satisfactory alternative”.
 - (3) **Regulation 53(9)(b)** states: the appropriate authority shall not grant a licence unless they are satisfied “that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.”
6. In determining applications for licences under the Regulations Natural England is also aware of and, where appropriate, has regard to the following:-
 - **Planning Policy Statement 9**
 - **Circular 06/05** “Biodiversity and Geological Conservation – Statutory Obligations and their impact within the Planning System”
 - Circular 2/2002 New Guidance for Local Planning Authorities on European Protected Species and Changes in Licensing Procedures
 - the **EU Guidance Document** on the protection of animal species: February 2007, Managing Natura 2000, EU Guidance Document on Hunting under Council Directive 79/409/EEC on the conservation of wild birds (Chapter 3) and The Report of the Article 12 Working Group under the Habitats Committee “Contribution to the interpretation of the strict protection of species (Habitats Directive article 12)”.

Natural England’s Role

7. Natural England has two legally distinct and separate roles:
 - (1) It is the Government’s statutory conservation adviser for England. In addition to our role as a statutory consultee we provide advice to planning authorities and the general public. For development that is likely to affect protected species Natural England now delivers its advice on the following matters through standing advice :

⁵Previously regulation 44 of the 1994 Habitats Regulations

⁶Also see Article 16 of the Habitats Directive.

- Applications that are submitted without the relevant protected species surveys;
- Scoping surveys or risk assessments that recommend further surveys where these have not been undertaken and submitted with the scoping reports;
- Applications containing mitigation proposals for certain species covered by the Wildlife and Countryside Act 1981 (water vole, white-clawed crayfish, common reptiles, barn owls, other breeding birds not protected by Schedule 1).
- Advice on mitigation proposals for badgers.

We will still provide individual comments on other matters affecting Natural England's interests, unless additional local arrangements are in place.

- (2) It is also the [competent authority](#)⁷ charged with determining applications for licences under the Regulations. Licence applications for a development should be regarded as the last available option where all other reasonable alternative ways of avoiding or minimising impacts on the protected species have been discounted and the action is nonetheless likely to result in an offence or offences under the species protection provisions of the Regulations.
8. Natural England has maintained functional separation of these roles to ensure that it exercises effective and transparent stewardship in both roles.
 9. Separating the role of statutory consultee and/or advisor from licence application decision maker helps ensure government and public confidence that, when acting as the decision maker, Natural England only takes account of those matters that are material considerations to the decision and which are within its statutory remit as the Government's nature conservation advisor.

Timing of Natural England's involvement

10. Natural England's functions are usually carried out in the following sequence: firstly, provision of high-level advice to planning authorities at the planning consultation stage (either through standing advice or individual comments on applications), and subsequently – if offences are likely and a licence required – a more detailed assessment of mitigation proposals at the licence determination stage.

Licensing and Planning

11. Planning and licensing are separate and distinct consent regimes. Much of the information and evidence required by Natural England in order to determine a licence application will also be required by the planning authority as the competent authority for planning in its consideration of the planning merits of the application and if necessary, the likelihood of the development activity being granted a licence. The high level advice provided by Natural England at the planning stage however, does not indicate that it has made a full assessment of the scheme against the licensing tests. The level of detail (including specific information on the timing of implementation) required for a licence application is not usually available

⁷The Local Planning Authority is the competent authority with respect to relevant planning decisions.

at the planning application stage. The level of species detail in respect of the compensation, mitigation and its delivery for any proposed development that is required at the licensing stage when Natural England will be required to satisfy itself of the three tests, will also be higher than that ordinarily required in the planning consent process. Such level of detail often may only be available at a detailed stage of the development's evolution.

12. Natural England will continue to make an independent assessment of each licence application. Where planning permission is required for a proposed development, Natural England will continue to require evidence from the applicant in order to assist in its assessment of whether the three tests are met. This may also include information used by the LPA in its consideration of the likelihood of a licence being granted.
13. In certain exceptional circumstances, Natural England can consider licence applications before full planning consent is secured. Please see Section 11.2.2. of our guidance '[How to Get a Licence](#)' for further advice on this.

Application of the Three Tests to Planning Applications

14. As stated above, where it is likely that one of the prohibitions referred to in paragraph 2 will be offended the planning committee will be required to consider the likelihood of a licence being granted and in doing so, the three tests. It would be inappropriate for Natural England to tell LPAs how to do this as LPAs are the decision-making body and must make the decision themselves and not appear to be fettering their discretion in any way. In considering the tests LPAs however should properly have regard to Government Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System⁸. If still uncertain, LPAs should seek their own independent legal advice about the tests, the circumstances in which they should consider them and how they should do so, if necessary.
15. Natural England would also encourage all planning authorities to seek advice, from an appropriately qualified independent⁹ ecologist. Such an ecologist would be able to provide support to planning authorities in considering the impact of a proposed development on European and other protected species in a local, regional and national context.

Application of the Tests to Licence Applications by Natural England

16. It should be recognised that each development proposal will be unique and its impacts on EPS will vary considerably, thus each licence application is assessed and determined on its own merits. This note cannot provide specific and detailed advice to account for all possible variations.
17. Natural England staff assessing licence applications use the evidence presented by the applicant to determine whether the tests have been met. They make use of a combination of their knowledge and experience (and published guidance for mitigation) and, when necessary, consult colleagues with specialist skills.

⁸Natural England is working with DCLG and Defra on the revision of Part IV of the Circular.

⁹i.e. independent of the developer.

Key Principles of Licensing

18. In general, five key principles are applied to each licence application.
 1. There is a genuine need and a 'purpose' for the proposed activity.
 2. There are no satisfactory alternatives to delivering and meeting the need in the way proposed.
 3. The licensed action will allow the need to be met.
 4. That the proposals are proportionate.
 5. That there will be no adverse effect on the conservation status of the species concerned.

The Three Tests

19. As stated above, the proposed development must meet a purpose of 'preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment'. In addition the competent authority must be satisfied that, (a) 'that there is no satisfactory alternative' and (b) 'that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range'. Natural England applies the tests on a proportionate basis; thus the justification required increases with the severity of the impact on the species or population concerned.
20. Each licence application is judged on its own merits and the Reasoned Statement section of the licence application form is designed to draw out the pertinent information required to make a licensing decision. Further information can be taken from ['How to get a licence'](#) together with worked up examples at Annex C of that document.

Imperative Reasons of Overriding Public Interest (IROPI)

21. As yet the European Court of Justice has not given a clear indication for the interpretation of this specific concept in relation to species protected under Annex IV of the Habitats Directive.
22. When considering 'imperative reasons of overriding public interest, including those of a social and economic nature' Natural England will take into account whether the activities/developments are required to meet or provide a contribution to meeting a specific need such as:
 - the requirement to maintain the nation's health, safety, education, environment (sustainable development, green energy, green transport);
 - complying with planning policies and guidance at a national, regional and local level;
 - requirements for economic or social development (Nationally Significant Infrastructure Projects, employment, regeneration, mineral extraction, housing, pipelines, .etc.).
23. In other words the development proposal must contribute to meeting an imperative public interest, and that interest must be sufficient to override the protection of, and any potential impact on, the EPS concerned.

24. Natural England will seek evidence from licence applicants that a specific need is being addressed. Natural England will also consider whether the planning authority has appropriately discharged its duties in respect of the development proposal when determining whether a specific need is being addressed.
25. To assist with the understanding of the above, illustrative examples are provided in the attached annex. The examples provided in the annex are for illustrative purposes only. They apply purely to consideration of licensing applications. They should not be read as a statement of Natural England's views on imperative reasons of overriding public interest when applied to impacts on sites designated under the Habitats Regulations

No satisfactory alternative

26. It should be recognised that there are always going to be alternatives to a proposal and, in terms of licensing decisions, it is for Natural England to determine that a reasonable level of effort has been expended in the search for alternative means of achieving the development whilst minimising the impact on the EPS. In other words, Natural England expects the applicant to demonstrate that alternatives have been considered, explain what those alternatives were, and provide a justification for their decisions to select their preferred option and discount the others as satisfactory. As part of the process we always require the applicant to have considered the 'do nothing' scenario.
27. A proportionate approach is adopted in considering the feasibility of alternative solutions relative to the degree of likely impact. The greater the impact of the proposal on the species, the more evidence Natural England would expect to see from the applicant in order to be able to satisfy itself that there is no satisfactory alternative to the one being proposed.
28. Natural England will seek evidence from licence applicants that a specific need is being addressed. Natural England will also consider whether the planning authority has appropriately discharged its duties in respect of the development proposal when determining whether a specific need is being addressed.
29. Natural England also expects the applicant to demonstrate that they have taken reasonable steps to minimise the impacts of a development on EPS. These steps or measures might include (for example) alternative timing of actions, development designs and layouts, and sites.
30. Also generally, before Natural England will issue a licence for a development proposal it expects the planning position to be fully resolved and requires all necessary consents to be obtained and all conditions relating to wildlife, that are intended to be and can be discharged, are discharged, as detailed in our published guidance '[How to get a licence](#)', **except in exceptional circumstances**. However, even in exceptional circumstances (see Section 11.2.2) where a licence is issued prior to the grant of planning permission or its equivalent, no works can be undertaken under licence until the planning permission or its equivalent have been granted and copies provided to Natural England. In such circumstances we may condition a licence to ensure that planning conditions, reserved matters and/or section 106 agreements relevant to wildlife elements of the planning consent which are intended to be and are capable of being discharged before development begins, must be resolved and consented before the licensed activities can commence.

Favourable Conservation Status

31. The general principles set out in Natural England's mitigation guidelines for bats and Great Crested Newts are applied to all licence applications (see links below). Our assessment is based on information provided within the method statement that must be submitted with the licence application.
32. Where rarer species are subject to a licence application, our wildlife advisers will consider the known status of that species within that area and may consider it appropriate to discuss the case with national species specialists before making a decision.

[Bat mitigation guidelines](#)

[Great crested newt mitigation guidelines](#)

[Dormouse Conservation Handbook](#)

Annex

Consideration of 'Imperative Reasons of Overriding Public Interest' (IROPI) – Illustrative examples

Please note: These examples are for illustrative purposes only. They apply purely to consideration of licensing applications. They should not be read as a statement of Natural England's views on imperative reasons of overriding public interest when applied to impacts on sites designated under the Habitats Regulations. They are intended to provide a greater understanding of how Natural England applies the licensing principles detailed elsewhere in this guidance note, namely applying proportionality in terms of the scale of the impacts of a development to an EPS. Natural England generally applies the Favourable Conservation Test (FCS) at a local level and licensed mitigation will be expected to attain at least a minimum of maintaining the local population levels of the species concerned in line with our published mitigation guidelines. It is however worth reiterating again that each development proposal will be unique and its impacts on EPS will vary considerably, thus each licence application has to be assessed and determined on a case by case basis.

Example 1.

Housing A. Windfall Housing.

The owner of a detached property with a large garden in a village determined that in order to meet a financial need they would develop a portion of their property for housing. The property is located on the edge of the village and is bordered by agricultural fields and amenity land. A wildlife survey has been undertaken and a Great crested newt breeding pond has identified 100 metres from the property boundary. The consultant ecologist concluded that, although the development would impact on low quality habitat of Great crested newts, there is potential for low numbers of Great crested newts to be on the development site and a licence application would be required.

The applicant provided documents demonstrating that the majority of houses in the village are privately owned and those that came on to the market were bought as second homes or holiday let accommodation. The lack of affordable accommodation for young families in the village has been identified as a priority by the Parish Council and the Local Authority in the Local Plan and alternative ways of meeting this need were considered by the Local Authority in its consideration of the planning application. Planning permission has been granted for the erection of 5 houses of which 3 will be affordable housing. Further benefits to the local economy would be gained through the employment of local companies and tradesmen to undertake the construction works. The building would be constructed in accordance with the current specifications for energy efficiency, thus providing environmental benefits. The mitigation scheme includes measures to trap and exclude the Great crested newts from the development site together with improvements to habitat and the provision of hibernacula opportunities.

Natural England considers that this example demonstrates there is a sufficient 'need' for housing and the development will provide a contribution by addressing a specific local need and that there were no satisfactory alternatives to address the specific needs of the

village. Natural England also considers that sufficient 'evidence' has been provided which demonstrates that the proposal will contribute to the social and economic needs of a local community, and have beneficial consequences to the environment and meets the IROPI test in a licensing context.

Example 2.

Housing B. Large Scale Housing Development.

Planning permission has been obtained to redevelop a large site of currently unmanaged grassland to provide housing, including an element of affordable housing, plus associated infrastructure. Surveys have indicated that the site contains a medium population of Great crested newts and the proposals will impact upon the species with both aquatic and terrestrial habitat due to be lost.

The applicant has provided Natural England with local authority documents that demonstrates that a significant housing need was identified through its Local Plan process for the local authority area and that this development will make a significant contribution to addressing this need and that alternative sites, designs and ways of minimising the impacts on EPS had been considered by the planning authority in determining the planning application. In addition, the documents demonstrated that alternative sites, designs and ways of minimising the impacts on the EPS were considered and dismissed for specific and justified reasons that were considered reasonable by Natural England. Surveys also indicate that whilst the site remains unmanaged, the ponds will gradually deteriorate due to overhanging trees, vegetation and silting. The mitigation proposals will offer the creation of high-quality receptor habitat and ponds which includes a long term management programme, thus ensuring that the habitats are maintained.

Natural England is satisfied that this example provides clear social and economic benefits to the public and beneficial consequences to the environment and therefore meets the IROPI test in a licensing context and with appropriately licensed mitigation the Great crested newt population is secured by long term safeguards.

Example 3.

Barn Conversion to Holiday Let Accommodation.

A farmer identified a derelict barn/outhouse on their property for conversion to holiday let accommodation that would generate income for the farm and supplement the local 'green' and 'sustainable' tourist economy by providing opportunities for access to the countryside for walkers and cyclists. Further benefits to the local economy would be gained through the employment of local companies and tradesmen to undertake the construction and renovation works. The building was also to be renovated in accordance with the current specifications for energy efficiency, thus providing environmental benefits.

Following surveys, the structure was identified as a roost for low numbers of several common species of bats. The proposed scheme for the conversion of the barn incorporated sympathetic measures to retain the bat interest within a specially designated and heated 'bat loft' that does not compromise the living accommodation and which was designed with restricted access to minimise incidental disturbance to the bats. Without redevelopment, it is likely that the

buildings would remain unused and fall into further disrepair, with potential loss of the bat roost.

Natural England considered that the evidence produced in this example met the overriding reasons of public interest test in a licensing context. The applicant had clearly demonstrated sufficient 'need' and 'evidence' for the proposal to contribute to a social and economic need of a local community and have beneficial consequences to the environment and that there were no satisfactory alternatives to meeting this specific need.

Example 4.

Sewerage Pipeline Scheme.

A water authority identified a need to upgrade a sewer drainage pipeline serving a small village, comprising 30 houses and commercial properties. The existing pipeline had been the subject of emergency repairs in recent years due to its age. The water authority had determined that the pipeline needed to be replaced but with modifications to the pipeline corridor to increase the efficient carriage of waste. The proposal involved excavations across fields for the new pipeline route and excavations for the removal of the existing pipeline.

A consultant ecologist had undertaken surveys and identified a medium population of Great Crested Newts (GCN) using the ponds nearby and it was concluded that the works would have an adverse impact on GCN habitat. It was adjudged that there was a specific need to address the problem to ensure the long term health and social well-being of the local community and that the works and impacts, potentially affecting a medium population of GCN, would be temporary and time limited in nature.

Natural England was satisfied by the evidence produced that this case passed the overriding reasons on public interest test in a licensing context. Appropriate licensed mitigation measures also ensured the welfare and exclusion of GCN from the pipeline corridor and that alternative routes and ways of working to minimising the impacts on the EPS were considered and dismissed for specific and justified reasons.

Example 5.

Mixed Use Development.

Planning permission had been obtained to redevelop a large brownfield site to include an industrial estate, retail park plus associated infrastructure with good road and rail links. It was estimated that this development would create approximately 1,500 jobs for the local economy. Surveys indicated that the site contained a significant population of GCN and the proposals would have a major impact upon the species with both aquatic and terrestrial habitat due to be lost.

The applicant provided Natural England with local authority documents that demonstrated that the area had high unemployment figures and an identified shortage of employment opportunities and that the proposed development offered a significant contribution to meeting this need and alternative ways of meeting this need were considered by the Local Authority in its consideration of the planning application. Surveys also indicated that the whilst the site

remained unmanaged, the GCN habitat would gradually deteriorate with instances of vandalism and dumping refuse in and near the newt ponds. The mitigation proposals offered the creation of high-quality receptor habitat which included a long term management programme which would ensure that the habitats are maintained.

Natural England was satisfied that the evidence produced identified clear social and economic benefits to the public and beneficial consequences to the environment from this development and therefore meets the IROPI test in a licensing context. The licence that was issued included mitigation to ensure long term safeguards for the GCN population and that alternative site designs and ways of minimising the impacts on the EPS were considered and dismissed for specific and justified reasons.



Natural England is here to conserve and enhance the natural environment, for its intrinsic value, the wellbeing and enjoyment of people and the economic prosperity that it brings.

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