

Forest operations and wildlife in Scottish forests

- the law and good practice

SUMMARY

This note summarises current wildlife species protection law in Scotland in relation to forestry operations and gives general guidance on best practice to minimise adverse effects on protected species. Specific detailed guidance for certain species or groups can be found in a series of separate notes provided on the [Forestry Commission Scotland website](#).

This is interim advice that will be updated in the light of experience and any relevant case law.

1. INTRODUCTION

Anyone planning, permitting or carrying out forest operations or other activities in woodlands needs to be aware of their wildlife protection responsibilities. This note sets out the main species protection requirements facing woodland managers and general good practice principles to minimise disturbance and damage. It does not cover protected habitats.

FCS will follow this guidance in our management of the national forest estate, and will expect this guidance to be followed as a condition for approval of felling licences and grant aid and forest plans for private forests. We will also promote its use in forestry-related Environmental Impact Assessments, and in Appropriate Assessments for judging impacts of forestry proposals on sites designated as SPAs and SACs under EU Directives.

2. WILDLIFE PROTECTION LAW IN SCOTLAND

The basis of the current wildlife protection system throughout the UK was developed in the 1980s and 1990s, in response to 3 international agreements on nature conservation:

- The Bern Convention, 1979 (Convention on the conservation of European wildlife and natural habitats)
- The EU Birds Directive 1979 (Directive on the conservation of wild birds)
- The EU Habitats and Species Directive 1992 (Directive on the conservation of natural habitats and of wild flora and fauna).

The first 2 were incorporated into UK legislation in the Wildlife and Countryside Act (1981) (WACA1981), and the Habitats and Species Directive was implemented by the Conservation (Natural Habitats &c.) Regulations, 1994.

Following devolution these key pieces of legislation were revised by the Nature Conservation (Scotland) Act 2004 and the Conservation (Natural Habitats &c.) Amendment (Scotland) Regulations 2004.

Further changes in the Habitats Regulations are currently being developed to enhance protection of EU protected species of animals and plants listed in the Habitats and Species Directive in response to a ruling by the European Court.

A general summary of the law aimed at the public is in the SNH publication, 'Scotland's wildlife: the law and you', which can be found at:

<http://www.snh.org.uk/publications/on-line/wildlife/law/law.asp>

Box 1 summarises the key provisions for forest managers to consider.

BOX 1. Summary of wildlife laws relevant to forest operations

The most relevant types of potential offence are:

- *killing or injuring any bird species (with some exceptions);*
- *destroying, damaging obstructing access to any birds nests while in use;*
- *disturbing specially protected birds (Schedule 1,1A,A1 of WACA1981) whilst breeding, or at lek sites, or in certain other circumstances;*
- *killing or injuring other specially protected animals (Schedule 5 WACA) or destroying, damaging or obstructing access to a structure or place used for their shelter or protection;*
- *disturbing a specially protected animal species (Schedule 5 WACA)while it is occupying a structure or place used for shelter or protection;*
- *damaging or destroying a breeding site or resting place of a European protected species of animal (Conservation Regulations Schedule 2);*
- *disturbing a European protected species of animal (Conservation Regulations Schedule 2);*
- *picking, uprooting or destroying any specially protected plant species, (Schedule 8 WACA), and European protected plant species (Conservation Regulations Schedule 4)including their seed or spore; and*
- *uprooting/destroying any other wild plants without permission from the landowner or other authorised person.*

In most cases offences relates to **intentional/deliberate** or **reckless** acts, but in the case of damaging or destroying breeding sites or resting places of European protected species of animals, such as bats, it is an offence to damage, destroy or obstruct access to breeding site or resting place of these species (eg bat roosts), whether deliberate or not.

'Intentional' and 'deliberate' acts are readily understood and are embodied in the WACA 1981 and 1994 Regulations. 'Reckless' acts were added by the 2004 legislation. Recklessness has been defined in case law for numerous offences. A person would be acting recklessly if they could reasonably have been expected to foresee that an operation could damage or disturb a protected species but took no action to assess the risk and consider what to do about it.

3. LICENSING OF FOREST OPERATIONS

Licences to allow potentially damaging activities to proceed are only legally possible under limited circumstances which do not currently extend to most forest operations

- Under WACA1981/NCSA 2004 such licences can be issued by ERAD or SNH, eg for the purpose of conserving flora and fauna, preventing serious damage to growing timber, preventing the spread of diseases and for reasons of public health and safety. None of these currently include normal forest practice.
- Similar criteria apply to licences under the Conservation (Natural Habitats &c.) Amendment (Scotland) Regulations 2004 for permitting damage to European protected species, but with more stringent tests required, especially to need to demonstrate that the licensed action would not affect the conservation of the species. (ERAD can licence forest operations for over-riding reasons of public interest in relation to EPS; but this is not possible as a reason for a licence under the Wild Birds Directive).

- The Badgers Act, 1992 allows licensing by ERAD of potentially damaging forest operations near badger setts (see [Forestry Practice Guide 9, Forest Operations and Badger Setts](#) on the Forestry Commission Scotland website.)

Felling licences issued by Forestry Commission Scotland can include conservation related conditions for operations associated with the felling and replanting of trees, but felling licences cannot be used to give permission for actions that are judged to contravene wildlife protection law.

4. HOW CAN FOREST MANAGERS MEET REQUIREMENTS FOR SPECIES PROTECTION?

In most cases licensing of forest operations that might cause damage or disturbance to protected species is not currently an option (see 4 above). To avoid committing an offence, anyone *planning, carrying out or causing or permitting* an act that causes unlawful damage or disturbance etc needs to be able to show that *each* of the following conditions was met:

- a. Any damage etc was an incidental result of a lawful operation or other activity;
- b. *The person carrying out the act :*
 - i. *took reasonable precautions for the purpose of avoiding carrying out the unlawful act; or*
 - ii. *did not foresee and could not reasonably have foreseen, that the unlawful act would be an incidental result of the carrying out of the lawful operation or other activity; and*
 - iii. *that the person carrying out the unlawful act took, immediately upon the consequence of that act becoming apparent to the person, such steps as were reasonably practicable in the circumstances to minimise the damage/disturbance/obstruction in relation to which the unlawful act took place.*

There is no definitive interpretation of the ‘intentional and reckless’ offences and the measures that would be considered reasonable as a defence. This guidance aims to set out reasonable measures that should be considered by anyone planning or carrying out forest operations or organised recreational activities. Following this guidance should not only reduce the risk of damage and disturbance, but also reduce any risk of prosecution.

More detailed guidance for particular species can be found in a series of linked guidance notes provided on the [Forestry Commission Scotland website](#).

5. PRINCIPLES OF PLANNING FOR SPECIES PROTECTION

Generally, the effort to protect a species should be proportionate to:

- ***the legal protection status of the species;***
- ***the sensitivity of the species to disturbance or damage from various operations or activities;***
- ***the potential effect of any damage/disturbance on the conservation status of the protected species, locally or nationally; and***

- ***what is reasonable in terms of the practicality and cost of protective measures for lawful activities such as woodland management.***

The law aims to balance the needs of lawful land management activities like forestry with wildlife protection. The intention is to strike a balance which seeks to avoid reckless or deliberate damage or disturbance, but does not place unreasonably onerous and impractical restrictions on legitimate land management practices.

The ultimate aim of species protection measures is to help conserve viable populations, which often depend on sustained active management of woodlands to provide a long term variety of habitats.

The best way to avoid harmful impacts on protected species, while at the same time taking opportunities for enhancing biodiversity, is through good forest design and forward planning which is then carried through to management.

It is important to be able to demonstrate that all reasonable steps have been taken to avoid damage or disturbance and to comply with legislation and guidance.

6. PLANNING AND CARRYING OUT FOREST OPERATIONS: KEY STEPS

6.1 Find out what protected species might be present

- Obtain advice from SNH and specialist bodies;
- Download 10km square distribution data from NBN or Local Record Centres (NBN gives data on distribution of many species via the website at: www.searchnbn.net).

Information for many species is patchy, especially in less populous regions: absence of data cannot be taken as reliable evidence on its own.

6.2 Carry out surveys to locate protected species or features like nests, dreys

These can include:

- survey to help plan the location and timing of felling and planting operations well ahead;
- survey to locate nest sites etc shortly before operations as part of detailed planning e.g. to identify which trees to fell or leave.

It can be difficult to carry out reliable surveys for many protected species. For example red squirrels dreys are hard to tell apart from dreys of grey squirrels or some type of birds nests. The survey effort that is reasonable to expect should be decided based on the general principles in section 6.

6.3 Zone or time operations to reduce risks of incidental damage to protected species and features

- avoid some areas completely;
- where practical, avoid sensitive periods of the year e.g. the breeding season;

- mark locations of protected species and ensure they are protected in forest operations like thinning;
- use sensitive methods of management, e.g. to avoid soil disturbance;
- be prepared to alter plans as new information comes to light.

6.4 If you judge that damage or disturbance is still likely despite these steps, consider:

- whether you can reasonably alter or suspend plans;
- the potential for after the event mitigation such as repair of damaged sites;
- whether to seek advice from SNH;
- possible habitat improvements, or exceptionally relocation, to offset any anticipated damage to the population of the protected species.

6.5 Look out for protected species or features during operations and take suitable action and have a contingency plan:

- advise operators of what to look out for and what to do.

6.6 Keep a record of the procedure followed where protected species are encountered:

- this could be valuable in establishing that you took a reasonable approach in case of prosecution.

7. MINIMISING IMPACTS ON PROTECTED SPECIES FROM RECREATION AND ACCESS IN WOODLANDS

Forest recreation activities can sometimes damage or disturb protected species, for example noisy, large-scale events. Particular care is required in planning the location and timing of forest-based leisure events, such as music concerts, mountain bike and orienteering competitions, clay shooting days and car rallies. These irregular events can cause sudden changes in disturbance levels.

Forest owners, managers and event organisers as well as participants need to be aware of potential impacts and the possible offences of causing, permitting or carrying out acts of damage or disturbance.

It is important to be able to demonstrate that disturbance issues have been considered before the events take place – both by forest managers and event organisers, so that they do not ‘cause or permit’ an offence to occur. The planning steps in section 7 should help to do this.

Informal visitors and recreational users may be in forests at any time throughout the year, and may cause disturbance to protected species, although if they could not be expected to know the risks an offence is unlikely. The Scottish Outdoor Access Code (SOAC) sets out access rights and responsibilities (Box 2), and should be promoted by managers to encourage responsible behaviour by forest users and visitors and reduce risks to protected species.

In case participants disturb a protected species during an event, organisers should make provision for any reasonable steps to reduce the damage or disturbance at the time it occurs, and for reporting back to the organisers. If there is any doubt about likely negative impacts on protected species the contact the local area office of Scottish Natural Heritage.

Box 2. The Scottish Outdoor Access Code (SOAC)

Part 1 of the Land Reform (Scotland) Act 2003 gives everyone statutory access rights to most land and inland water, including forests. People only have these rights if they exercise them responsibly, and land managers have a duty to manage their land and water responsibly in relation to access rights. SOAC provides guidance on responsible behaviour and on land management issues.

Recreational event organisers or educational groups have particular responsibilities when exercising their access rights, and SOAC provides guidance on the extra care they should take. They should contact land managers beforehand to check on precautions, and if the event is likely to affect the environment to an unreasonable extent, permission should be obtained. People running commercial activities or organising surveys should also inform the land manager and discuss concerns if there is likely to be environmental impact or intensive survey work. This is relevant to surveys or tourism activity that might affect rare or sensitive species. It is the responsibility of forest users, and of forest managers when consulted, to ensure that disturbance issues are considered fully in planning organised or intensive events or activities.

Forest managers can also take steps to help in avoiding disturbance through the cumulative effects of general, low-key access. Forest paths and tracks can be planned, located and managed subtly to encourage people to take access in preferred areas and away from sensitive areas. Path sign posting, and path promotion in leaflets and displays, can be planned so as to minimise disturbance to key areas. Short-term measures could be used at key periods like bird nesting times, for instance through appropriate adjustments to sign posting for those weeks. There is generally no need for site signs reminding users of general access responsibilities, as covered by SOAC, but some messages (such as keeping dogs under proper control) could be included in interpretation at arrival points or in leaflets.

SOAC is wide-ranging and fuller details and guidance can be obtained at www.outdooraccess-scotland.com. Further advice is available by contacting the access officer at the local authority or national park, or at the SNH local office.