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European Protected Species Licensing

Test 2 - No satisfactory alternative

Interpreting Regulation 44(3)(a) of the Conservation (Natural Habitats, &c.) Regulations 1994 ("the Habitats Regulations)

Note: This Guidance contains a summary of certain legal provisions relevant to the licensing regime, current at time of writing, for European Protected Species and is intended to assist parties contemplating a licence application. However, Scottish Natural Heritage has no legal responsibility for the contents and interested parties should in that respect seek independent legal advice.

1 Introduction

- 1.1 Under Regulation 44 of the Habitats Regulations certain activities which would normally constitute an offence against European Protected Species (EPS) can be carried out legally under a licence. Further information on EPS and background legislation can be found in Annex 1.
- 1.2 Any decisions made by SNH as the licensing authority must be fully compliant with the requirements of the Habitats Regulations and the underlying European legislation. This means that before any licence can be issued there are three strict tests which must all be satisfied. These are as follows;
 - (1) That the activity proposed must fall within one of the licensable purposes listed in Regulation 44,
 - (2) That there is no satisfactory alternative; and,
 - (3) That the action authorised will not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.
- 1.3 This paper sets out our general interpretation of the second test (under Regulation 44(3)(a)), of 'no satisfactory alternative' to the granting of a licence and sets out the type of information we would expect from applicants to demonstrate that this test is passed.
- 1.4 Guidance on test 1 can be found here.

2 Interpretation of No Satisfactory Alternative

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2.1 'No satisfactory alternative' is not defined in the Habitats Directive and there is no interpretation of the concept in the Habitats Regulations.

- 2.2 European Commission (EC) guidance on protected species¹ suggests an analytical approach to establishing whether there is 'no satisfactory alternative'. The approach stems from a ruling from the European Court of Justice (ECJ) (case C-10/96) concerning the derogation procedure under Article 9 of the Birds Directive.² This procedure has close parallels with the Article 16 derogation requirements of the Habitats Directive. The suggested approach is to ask:
 - 1. What is the problem or specific situation that needs to be addressed?
 - 2. Are there any other solutions?
 - 3. If so, will these resolve the problem or specific situation for which the derogation is sought?
- 2.3 This methodology is also referred to in other EC guidance on sustainable hunting under the Birds Directive³, which concludes that 'where another solution exists, any argument that is it not "satisfactory" will need to be strong and robust'.⁴
- 2.4 Guidance from the European Commission and Scottish Government in relation to 'no satisfactory alternative' (and the equivalent test in Article 9 of the Birds Directive) includes the following key points, which will be considered in relation to any licence application;
 - The issue of a licence can only be justified on the basis of an 'objective demonstration' that there is no other satisfactory solution⁵.
 - Alternatives might involve alternative locations/routes, different development scales or designs, adjusting the timings of development works happening on site or delaying a proposal, or alternative activities, processes or methods.
 - The appraisal of whether an alternative is satisfactory or not must be founded on objectively verifiable factors, such as scientific and technical considerations⁶.
 - Another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of a licence.
 - Licences must only be issued as a last resort⁷.
 - The solution/alternative finally selected, even if it involves a licence, must be
 objectively limited to the extent necessary to resolve the specific problem or
 situation ('need')⁸.
- 2.5 In summary, for the 'no satisfactory alternative' test to be passed, SNH as licensing authority must be satisfied that no other option presented or possible can meet the identified and proven 'need' for which a licence is sought. Further, even if a

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¹ European Commission (2007) Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

² The test under Article 9 is that there is 'no other satisfactory solution'.

³ European Commission (2008) *Guidance document on Hunting under the Birds Directive*, page 45 ⁴ *Ibid*, section 3.4.10, page 47

⁵ European Commission (2007) Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, page 59, para. III.2.2 (39)

⁶ European Commission (2008) *Guidance document on Hunting under the Birds Directive*, page 47, para 3.4.12

⁷ European Commission (2007) *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, page 59 para. III.2.2 (38) ⁸ Ibid. page 59 para. III2.2 (40)

'satisfactory alternative' requires the granting of a licence, the impact on that species should be minimised.

3.0 Proportionality and cumulative impacts

- 3.1 According to ECJ case law, derogations from the Habitats Directive must be interpreted and implemented restrictively to avoid undermining the conservation aims of the Directive⁹.
- 3.2 However, some proportionality is permitted in assessing a licence application according to guidance issued by the European Commission 10, and which states:
- 3.3 'Applying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can <u>adapt</u> their application in the light of the overall objective of the Directive. As a general rule, the severity of any of the conditions or "tests" will increase with the severity of the impact of a derogation on a species/population.'
- 3.4 The guidance also states, in summary, that 'the type and weight of the reason [for which a licence is sought] must also be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation'11. In other words, when applying proportionality to the licensing tests, we will require greater justification for proposals as the severity of the impact on the species concerned rises.
- 3.5 We will also consider the cumulative impacts of licensing decisions on the species concerned as part of the assessment process. This approach will ensure that 'the derogations in their *totality* do not produce effects that go against the objectives of Article 12 and the Directive as a whole.'12

4. What type of information would we require from a licence applicant?

- 4.1 It is ultimately the responsibility of the licensing authority to assess whether or not there is a satisfactory alternative to solve the identified problem or address the need for which a licence is sought. However, in doing so we will require objective and robust evidence, provided by the applicant to demonstrate the range of alternatives considered, and why they are not considered to be 'satisfactory'.
- 4.2 This responsibility is neatly summarised in Paragraph 23 of the Scottish Government's guidance to local authorities on licensing arrangements (2001) which states that:
 - 'The implication of [test 2]... is that the applicant must be able to show that the full range of possible alternative courses of action have been properly examined and that evaluation of these alternatives clearly demonstrates that the only satisfactory means of proceeding requires the carrying out of activities which, legally, may only be conducted under licence.'
- 4.3 It is the responsibility of the applicant to provide us with sufficient evidence on the satisfactory nature of the chosen way forward. The full range of alternatives should be explored and robust arguments and evidence presented to identify why these are

¹² *Ibid*, page 53, para. III.1.2.(12)

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⁹ Commission V UK (C-6/04) [2005] ECR 1-9017, para. 111

¹⁰ European Commission (2007) *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, page 53, para. III.1.2 (11)

¹¹ *Ibid,* page 58, para. III. 2.1

- inadequate. Supporting paperwork should be submitted with all licence applications. These documents might include plans and statements from appropriate scientific or technical experts.
- 4.4 SNH will consider the evidence provided by the applicant against the criteria described in this document and in the relevant European Commission Guidance. We cannot grant a licence unless we are satisfied that <u>all</u> of the three tests (including, in this case, the licensable purpose) have been satisfied. If a licence is refused we will offer clear reasons for refusal.

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Annex 1

European Protected Species and the law in Scotland

The Habitats Directive (Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) lists certain species of animals and plants on Annex IV(a) and (b) respectively, that require strict protection. The Habitats Regulations transpose the requirements of the Directive. The Regulations term those Annex IV species occurring naturally in Britain 'European protected species' (EPS). These species are listed in iSchedules 2 and 4 of those Regulations. Those that occur in Scotland are listed below;

(a) European Protected Species of animal

Common name	Scientific name
Bats, typical (all species)	Vespertilionidae
Wild cat	Felis silvestris
Otter	Lutra lutra
Dolphins, porpoises & whales (all species)	Cetacea
Loggerhead turtle	Caretta caretta
Green turtle	Chelonia mydas
Kemp's ridley turtle	Lepidochelys kempii
Hawksbill turtle	Eretmochelys imbricata
Leatherback turtle	Dermochelys coriacea
Natterjack toad	Bufo calamita
Great crested newt	Triturus cristatus
Sturgeon	Acipenser sturio

(b) European Protected Species of plant

Killarney fern	Trichomanes speciosum
Slender naiad	Najas flexilis
Yellow marsh saxifrage	Saxifraga hirculus