NPWS
An tSeirbhís Páirceanna Náisiúnta agus Fiadhúlra
National Parks and Wildlife Service

Applications for Regulation 54 Derogations for Annex IV species

Guidance for Applicants

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Note

The information given in this document is intended as general guidance relating to strictly protected species and is not meant to be a legal interpretation.

1. Introduction

The purpose of this guidance is to provide a reference document for applicants who may be involved in preparing applications for derogations issued under Regulation 54 of the European Communities (Birds and Natural Habitats) Regulations 2011-2021 ("the 2011 Regulations"). This Supplementary Guidance constitutes official Guidelines of the Minister for the purposes of regulation 71(2) of the Regulations: "(2) The Minister may issue such guidelines and codes of practice as he or she considers appropriate for the guidance of the public in relation to these Regulations".

Applicants are advised to refer to the following publications before submitting any derogation to the National Parks & Wildlife Service (NPWS) for assessment. They provide background information and technical interpretation of terms used in this guidance.

- Guidance on the Strict Protection of Certain Animal and Plant Species under the Habitats Directive in Ireland (2021, National Parks and Wildlife Service)
    - This document provides an overview of the system of strict protection as it applies in Ireland. It specifically outlines a decision-making process for public authorities when dealing with proposed works that could affect species under strict protection.
- Mullen, E., Marnell, F. & Nelson, B. (2021) Strict Protection of Animal Species. *National Parks and Wildlife Service Guidance*, No. 1. National Parks and Wildlife Service, Department of Housing. Local Government and Heritage
    - This document describes the decision-making process for public authorities when dealing with proposed works that could affect species under strict protection. It also provides species accounts for some of the species under strict protection and two case studies to facilitate interpretation of the guidance.
- European Commission (2021) Commission notice: Guidance document on the strict protection of animal species of Community interest under the Habitats Directive. C(2021) 7301 Final.
    - This document sets out the Commission's advice in the context of the implementation of Articles 12 and 16 of the EC Habitats Directive and is an important source of guidance for applicants and decision-makers. It describes fundamental principles of the system of strict protection and the interpretation of European case law in the context of issuing derogations. Due to its overarching relevance to the tranposition of the parts of the Directive across Europe, it is frequently quoted throughout this Supplementary Guidance.
- Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters (2014, Department of Arts, Heritage and the Gaeltacht)
    - This guidance sets out to address several key potential sources of anthropogenic sound that may impact detrimentally upon marine mammals in Irish waters. It incorporates a re-examination of the Code of Practice for acoustic surveys and potential mitigation measures in this respect. An updated version of this document will be published in 2025.
- Marnell, F., Kelleher, C. & Mullen, E. (2022) Bat mitigation guidelines for Ireland v2. Irish Wildlife Manuals, No. 134. National Parks and Wildlife Service, Department of Housing, Local Government and Heritage, IrelandGuidelines for Ireland V2
    - These guidelines update and replace the Bat Mitigation Guidelines for Ireland published in 2006 (Kelleher & Marnell, 2006). They have been developed to assist those involved with land-use planning and development operations (in the widest sense) where bats are known or suspected to occur.

2. Background

I. Species subject to Strict Protection

The species referenced in Table 1 below are protected by way of a system of "strict protection" pursuant to the requirements of Articles 12, 13 and 16 of the Habitats Directive (92/43/EEC) ("Habitats Directive") and are listed in Annex IV of that Directive.

Species/species groups listed on Annex IV which occur in Ireland and are subject to that system of strict protection are set out below:

Table 1: Species/species groups listed on Annex IV that occur in Ireland

Fauna	Flora
All bat species	Killarney Fern
Otter	Marsh Saxifrage
Natterjack Toad	Slender Naiad
Kerry Slug	
All dolphin, whales and porpoise species	
All marine turtle species	

II. System of Strict Protection

The EU Habitats Directive is transposed in Ireland by the European Communities Birds and Natural Habitats Regulations 2011, as amended. The system of strict protection for animals and plants as set out in Table 1 is provided for in regulation 51 and 52 of these Regulations. Applicants should also take note of protections under the Wildlife Acts when preparing their applications.

Regulation 51 makes it a criminal offence, subject to criminal prosecution, to carry out any of the following activities unless a derogation has been granted in accordance with regulation 54 of the Regulations:

(a) Deliberately capture or kill any specimen of the relevant species in the wild
(b) Deliberately disturb these species particularly during the period of breeding, rearing, hibernation and migration
(c) Deliberately take or destroy eggs of the relevant species in the wild
(d) Damage or destroy a breeding or resting place of such an animal, or
(e) Keep, transport, sell, exchange, offer for sale or offer for exchange any specimen of the relevant species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive.

Regulation 52 is similar to Regulation 51 but applies to flora, whereby it is an offence to:

a) Deliberately pick, collect, cut, uproot or destroy any specimen of these species in the wild, or
b) Keep, transport, sell, exchange, offer for sale or offer for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 13(1)(b) of the Habitats Directive.

This protection only applies to the species listed above in their "natural range" in Ireland.

III. Derogations from Strict Protection

Article 16 of the Habitats Directive provides for derogations to be given from the offences listed in Article 12 and 13. However, derogations can only be granted in very restricted circumstances, and can only be provided where it can be demonstrated that specific stringent tests are met.

Regulation 54 of the 2011 Regulations transposes Article 16 into Irish law.

An application for a derogation from the offences listed above may arise from circumstances whereby an applicant wishes to carry out a specific activity and cannot avoid committing one of the offences. It is important that any application for a derogation clearly states which prohibited activity/activities is/are the subject of the application. The prohibited activity/activities that is/are the subject of a derogation will also be stated on the derogation itself, if granted. A flow chart for issuing derogations under Article 16(1) of the Habitats Directive, is reproduced in Appendix 1 (taken from European Commission (2021)).

The cumulative tests that the NPWS will apply before a derogation may be granted are as follows:

- **Test 1**: the derogation is required for one or more of the specific reasons set down in regulation 54(2) (a)-(e), and
- **Test 2**: there must be no satisfactory alternative, and
- **Test 3**: the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

Each of these tests are applied in sequence. If an application for a derogation fails Test 1 then it does not have to be considered further and the application will be refused. Similarly, if it passes Test 1 but fails Test 2 then it is not considered further and the application will be refused. The derogation may only be issued if it passes all three tests.

IV. Principle of Proportionality

Whilst derogations may only be granted subject to meeting stringent requirements, the European Commission guidance advises that the principle of proportionality should be applied when determining if an application passes each Test. It states "*As a general rule, the severity of any of the conditions or 'tests' will increase with the severity of the potential impact of a derogation on a species or population.*[1]*"* This means that each application will be assessed on a case-by-case basis.

V. Precautionary Principle

As part of the environmental policy of the EU, Article 191(2) of the Treaty on the Functioning of the European Union states that the application of the policy shall be based on the precautionary principle. This principle addresses potential risks where, if it is possible that a proposal might cause harm to the environment and if there is no scientific agreement on the issue, the proposal should not be carried out. Applicants should therefore be aware of the importance of providing sufficient, detailed and up to date scientific data as part of their application.

1 European Commission (2021) Commission notice: Guidance document on the strict protection of animal species of Community interest under the Habitats Directive. C(2021) 7301 Final. p46

3. Applying for a Derogation

I. Test 1: A reason(s) listed in Regulation 54 (a)-(e) applies to the proposed activity

Test 1 involves identifying the reason(s) behind carrying out the activity requiring derogation e.g. the reason(s) for an activity may involve the necessity to improve a national road for public health and safety, thus requiring the demolition of a derelict house, the construction of new dwellings or a greenway, requiring the felling of trees. The applicant must state in their application the reason(s) for the activity that is the subject of the derogation. NPWS officials will check that the selected reason (a to e, as below) matches the description of the activity provided by the applicant. Where the reason a to e selected by the applicant does not match the description of the reason provided, then the derogation may not be granted as Test 1 cannot be passed.

Note that applicants may choose more than one reason for the activity. The reason(s) may include:

a) In the interests of protecting wild flora and fauna and conserving natural habitats
b) To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property
c) In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment
d) For the purpose of research and education, of re-populating and re-introducing these species and for the breeding operations necessary for these purposes, including artificial propagation of plants, or
e) To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species to the extent specified therein, which are referred to in the First Schedule.

In this Section, each of the possible reasons that can be considered under Test 1, are dealt with in turn and guidance is given to assist applicants in determining which reason applies to the activity described in the application, if any, and what evidence should be provided to allow Test 1 to be carried out effectively.

Reason a): In the interests of protecting wild flora and fauna and conserving natural habitats

This reason may be chosen in circumstances where the applicant wishes to carry out an action that could lead to one or more of the prohibited activities taking place, in order to protect other wild flora and fauna and/or natural habitats. The EC Guidance (2021) states that:

> *"Given the general objective of the Directive,* ***vulnerable, rare, endangered or endemic species and natural habitats*** *(for example, those listed in the annexes to the Habitats Directive) are more likely to be covered by this reason, which would effectively aim to reduce the negative impact of a given species on them. It would be unusual to prioritise the interests of a species that is common and thriving over the interests of a species that meets the criteria of Article 1(g) of the Directive." (Para 3-19).*

For this reason to be satisfied, applicants should state how the level of importance of protection and/or conservation of species/habitats outweighs the protection of the species concerned.

Examples of evidence that could be[2] provided by the applicant to support the reasoning:

- The relevant flora, fauna and habitats that will be protected should be clearly identified
- Ecological survey data relating to these flora, fauna and habitats should be collected by a suitably qualified ecologist. This data should be up to date and collected within 12-18 months of your application.
- Up-to-date data describing their distribution, condition and conservation status. See CIEEM Advice Note on the lifespan of Ecological reports & Surveys https://cieem.net/wp-content/uploads/2019/04/Advice-Note.pdf
- The scale and nature of the effect of the derogation on the species concerned
- Argument as to how the interests of protection and conservation of the species/habitat concerned justify affecting another species under strict protection.

Reason b): To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property,

This reason may be chosen in circumstances where the applicant wishes to carry out an activity that could lead to one or more of the prohibited activities taking place, in order to prevent serious damage, in particular to crops, livestock, forests, fisheries, water, and other types of property.

Examples of evidence that could be[2] aboveprovided by the applicant to support the reasoning:

- The specific nature of the potential serious damage that may be caused, including a description of location, magnitude and nature of potential economic loss
- Maps should be provided to show the location of the potential serious damage at an appropriate scale
- Evidence that there is a high likelihood of serious damage occurring and a description of the link to the species (which is/are the subject of the proposed derogation)
- Evidence as to why the potential damage is considered “serious” and that this outweighs the conservation interests of the species concerned
- Evidence that the control of the species will prevent the serious damage occurring.

Reason c): In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment

This reason may be chosen in circumstances where the applicant wishes to carry out an action that could lead to one or more of the prohibited activities taking place, with the reason for doing so meeting those described above e.g. activities that are concerned with construction and demolition works associated with developments, or for works that are to make buildings or structures safe.

[2] Note that this is not a prescriptive list nor does it have any statutory basis.

It may be appropriate to choose Reason C for scenarios such as carrying out surveys to inform impact assessments of development proposals, where such surveys have the potential to commit one of the offences under Regulation 51 and 52 of the Regulations.

When considering if Reason c) is appropriate, if the applicant has indicated that the reason involved public health or public safety, it is not necessary to have to further consider "other imperative reasons of overriding public interest" ("IROPI").

When consideration of IROPI is required, the EC Guidance should be referred to during the preparation of applications as it provides a useful interpretation on how this reason may be relied upon:

> *"(3-31) Firstly, it is clear from the wording that **only public interests**, promoted either by public or private bodies, **can be balanced against the conservation aims of the Directive**. Thus, projects that are entirely in the interest of companies or individuals are not typically considered as being in the public interest.*
>
> *(3-32) Secondly, the 'overriding' nature of this public interest must be underlined. This implies that not every form of public interest of a social or economic nature is sufficient, in particular when set against the particular weight of the interests protected by the Directive. Careful balancing of interests is needed here. It is also reasonable to assume that **in most cases, the public interest is likely to be overriding only if it is a long-term interest**: short-term interests that only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation."*

Further guidance published by NatureScot[3] in Scotland on the same topic also offers advice in determining what might constitute "other imperative reasons of overriding public interest

- *"the interests of national security and defence;*
- *where there is clear and demonstrable direct environmental benefit on a national or international scale;*
- *where it is shown that there is a vital contribution to strategic economic development or regeneration;*
- *where failure to proceed would have unacceptable social and/or economic consequences*
- *where the project is of national importance, or, possibly, regional importance".*

This guidance from Scotland also goes on to state that:

> *"….. in practice, when considering species licences under IROPI, we will take into account whether an activity or development is required to meet, or contribute to meeting a specific need, such as:*

- *maintaining the health, safety, education or environment (sustainable development, renewable or green energy, green transport) of Scotland's people;*
- *complying with national planning policies;*
- *supporting economic or social development (nationally important infrastructure development projects, employment, regeneration, mineral extraction, housing etc.)"*

[3] https://www.nature.scot/doc/guidance-licensing-test-1-licensable-purpose-licence-relation-european-protected-species

Examples of evidence that could be[4] provided by applicant to support the reasoning:

- Where relevant, evidence should be provided as to the nature and scale of the specific risk to health and safety posed by the proposed activity in the absence of the derogation. Reference to any statutory requirements or obligations (local, national, international) should be provided
- Evidence that the proposed activity is necessary to achieve the overall objective
- Evidence of the nature of the public interest being served, as opposed to private interest e.g. does the objective benefit the public or private sector? Does it align with local or national objectives set down in Development Plans? Does the objective deliver or contribute to social needs at a local, regional and/or national level? e.g. employment, housing primary care, hospitals, education, transport, mineral extraction, energy, etc?
- Evidence should be provided as to how the nature and level of public interest outweighs the conservation goals for the species involved.

Reason d): For the purpose of research and education, of re-populating and re-introducing these species and for the breeding operations necessary for these purposes, including artificial propagation of plants,

This reason may be chosen in circumstances when the applicant wishes to carry out an action that could lead to one or more of the prohibited activities taking place, with the reason for doing so meeting those described above. Examples may include carrying out surveys to record the presence/absence of such species where such surveys could cause disturbance (e.g. surveys within bat roosts).

Or in the scenario whereby a surveyor may need to take and keep specimens of plants/animals for identification and/or voucher purposes. They may also wish to take from the wild for a re-introduction programme or as back-up cover against potential losses. In this example, choosing reason d) and reason e) may be appropriate.

However, applicants are advised that “research and education” should be the sole purpose of the activity and that surveys to inform commercial projects or applications for planning permission are not activities supported by this reason.

Examples of evidence that could be[5] provided by applicant to support the reasoning:

- Details of the proposed research or educational activity and justification as to why its value outweighs the risk to the named species
- Where repopulation or reintroduction is proposed, there may be some circumstances whereby the location of reintroduction requires the consideration of a protective designation (such as a Special Area of Conservation) by the NPWS. This information may assist officials in determining the level of importance of the proposed activity.

[4] Note that this is not a prescriptive list nor does it have any statutory basis.
[5] Note that this is not a prescriptive list nor does it have any statutory basis.

Reason e): To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species to the extent specified therein, which are referred to in the First Schedule.

This reason may be chosen in circumstances when the applicant wishes to apply to carry out an activity that does not fit any of the reasons referred to above. As suggested above, this reason may be appropriate whereby a surveyor may need to take and keep specimens of plants/animals for identification and/or voucher purposes.

Examples of evidence that could be[6] provided by applicant to support the reasoning:

- The applicant should state that the objective that will be achieved by the granting of the derogation is in keeping with the overall objectives of the Directive
- Evidence should be provided as to how the activity will be limited in extent and duration and under supervised conditions.

[6] Note that this is not a prescriptive list nor does it have any statutory basis.

II. Test 2: Absence of a satisfactory alternative

Test 2 involves determining whether there is a satisfactory alternative to the derogation i.e. whether the problem the applicant faces, or the objective of the activity, can be solved or met in a way that does not involve a derogation. When granting derogations, it must have been demonstrated to the NPWS that there is no satisfactory alternative to issuing a derogation. Applicants should provide the necessary evidence to the NPWS, in terms of setting out the comparison of alternative solutions and to set out their case in their application as to why they are not satisfactory.

The applicant should present the range of alternatives solutions, in particular taking account of the best relevant scientific and technical evidence available, in the light of the circumstances of the specific situation and in compliance with the prohibited activities laid down in the Habitats Directive.

The EC Guidance states in paragraph 3-55:

> *"Only when it is sufficiently demonstrated that potential alternatives are not satisfactory, either because they are not able to solve the specific problem or are technically unfeasible, and when the other conditions are also met, can the use of the derogation be justified.*
>
> *However,* ***if a measure is partially satisfactory even if it does not sufficiently address the problem, but it can still reduce or mitigate the problem, it should be implemented first****."*

In keeping with the Commission's Guidance, if a derogation has been shown to be the only satisfactory alternative, the derogation must be limited to only the extent necessary to resolve the specific problem or situation, and no further.

The EC Guidance states in paragraph 3-61:

> *" In addition, the solution finally selected, even if it involves a derogation, must be objectively limited to the extent necessary to resolve the specific problem or situation. This means that derogations must be limited in time, place, numbers of specimens involved, specific specimens involved, persons authorised, etc."*

The EC Guidance refers to case law in this area and states that this test involves answering three fundamental questions:

a) What is the problem or specific situation that needs to be addressed?

b) Are there any other solutions?

c) If so, will these resolve the problem or specific situation for which the derogation is sought?

Applicants are asked to provide clear answers to these questions in their application and in their supporting documentation, where it is provided.

The justification as to why a specific alternative solution is not deemed satisfactory may not rely on arguments solely based on additional cost, cause delays or other inconvenience to the applicant.

However the EC Guidance does advise that the proportionality principle can be applied (see "Principle of Proportionality" Section 2.IV:

> *"The assessment may also take into account proportionality in terms of cost. However, economic cost cannot be the sole determining factor when analysing alternative solutions. In particular, satisfactory alternative solutions cannot be rejected from the outset on the grounds that they would cost too much[7]." (para 3-56)*

Paragraph 3-59 states:

> *"The Advocate General in Case C-342/05 clarified the proportionality principle, according to which[8] a 'measure may not be implemented if its objective can be attained by less drastic means, that is to say by means of a satisfactory alternative within the meaning of Article 16(1) of the Habitats Directive'. 'An alternative is satisfactory not only if it would attain the objectives of the derogation equally well, but also if the disadvantages caused by the derogation would be disproportionate to the aims pursued and the alternative would ensure proportionality'."*

Examples of evidence that could be[9] provided by the applicant to support the reasoning:

The applicant must show that they have considered the full range of alternative solutions; reasons why such alternative solutions are not deemed satisfactory; and that the only satisfactory solution requires a derogation for it to be undertaken legally. Evidence should include objective, verifiable factors, such as the best relevant scientific and technical considerations.

The types of alternative solutions that must be presented by the applicant must include the option of "do-nothing". The "do-nothing" option involves not carrying out the proposed activity, to not address the proposed objective or to not try to solve the problem being faced. Other alternative solutions must also be presented and compared, unless there are exceptional circumstances that limits the range of solutions that can be considered. There is no limitation as to the number or types of alternative solutions that may be considered. Each application is considered on its own merits and just because an option may be satisfactory in one case, does not mean that it is to be automatically regarded as satisfactory in a similar case.

Applicants might provide a range of different types of alternative solutions, which may include, but are not limited to the following:

a) Alternative scale e.g.:
   - reducing the number or height of lighting columns near bat roosts to avoid disturbance of roost sites or commuting routes that support such roosts
   - reducing the width of a proposed greenway in specific areas so that habitats containing protected plants can be preserved.

b) Alternative design of an activity e.g.:

7 Also See for the principle of proportionality in the context of Article 6 Commission Notice C(2018) 7621 final, Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, p.55. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1548663172672&uri=CELEX:52019 XC0125(07)

8 See paragraphs 24 - 27of the Advocate General's Opinion in Case C-342/05.

9 Note that this is not a prescriptive list nor does it have any statutory basis.

- meeting the overall requirement for number of housing units within a site boundary using different layout/orientation of units and open space, so as to avoid removing treelines containing bat roosts habitat used by Kerry slug.
- re-orientation of access routes required for construction of a wind energy development that would otherwise have necessitated works to bridges known to host bats.
- Alternative routing for marine cables that would cause otherwise damage or disturbance to cetaceans during their breeding period.

c) Alternative location for the whole activity e.g.:
- alternative location for outdoor concert to areas that would not cause disturbance to protected plants, natterjack toads and otter holts.
- Alternative location for dumping dredged materials at sea that would not cause disturbance to cetaceans or marine turtles, particularly during period of breeding.

d) Alternative timing of the proposed activity e.g.:
- alternative times for undertaking temporary works to a dwelling house to avoid the time when bats are present and hence avoid disturbance (assuming that bats can still return to the roost unhindered after works have been completed).
- alternative timing for pile driving activities associated with pier construction to avoid disturbance to breeding porpoises/dolphins.

III. Test 3: Impact of a derogation on conservation status

This final test involves the determination as to whether granting a derogation would be detrimental to the maintenance of the populations of the species in question at a favourable conservation status in their natural range (Regulation 54(2)). The rationale behind this test is that strictly protected species must be maintained at such a status, or restored to favourable status if this is not the case at present.

The net result on the species' conservation status from the granting of a derogation must be, at worst, neutral or, at best, positive for the species in question. If a derogation is likely to have a significant negative effect on the population concerned (or the future prospects for this population) or is likely to have a significant negative effect at the national or biogeographical level, then a derogation cannot be considered.

The EC Guidance, in paragraph 3-71, notes that given the potential need for best scientific data available to be used to support the applicant's case that the precautionary principle should apply particularly to this test:

> *"When data are not sufficiently robust and reliable to prove that the conservation status is favourable and/or to ensure the derogation does not adversely affect the conservation status, the precautionary principle (requiring that the conservation objectives should prevail where there is uncertainty) should be applied and no derogations should be granted. As stated by the CJEU in Case C-674/17, 'it must also be noted that, in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation'"*.

Examples of evidence that could be[10] provided by applicant to support the reasoning:

Applicants must include detailed, up-to-date information[11] on the local population of the species in question, the proposal and its impacts taking into account all the mitigation and/or compensation measures that are to be undertaken. All survey data should be collected within 12-18 months of your application.

- Evidence should include an objective description of the population of the species at the local, national or biogeographical scale[12] and the extent of the impact on this population:
    - For example, is a portion of a breeding population being removed from a site, or the whole population?
    - Data on populations in the "local" area (e.g. townland, County).
    - Data on populations at the national scale.

[10] Note that this is not a prescriptive list nor does it have any statutory basis.
[11] See CIEEM Advice Note on the lifespan of Ecological reports & Surveys https://cieem.net/wp-content/uploads/2019/04/Advice-Note.pdf
[12] Or beyond Ireland to other Member States territories, where the species natural range extends to these areas. For example where impacts on marine mammals or marine turtles may be predicted to occur.

- Description of impact of the proposed activity on the conservation status at the relevant scale – before and after any mitigation is applied.
- Mitigation measures including sufficient detail to demonstrate to the NPWS that the measures will be undertaken according to best practice standards and, wherever possible, have been undertaken in similar circumstances with positive results. Reference to evidence for success such as the Conservation Evidence database may help to provide such evidence.
- The effect of mitigation on the impact of the activity on the conservation status of the species. Note that if the conservation status of the concerned species is not favourable[13], this Test can only be met if it is justified as being under exceptional circumstances and only if the conservation status will not deteriorate and its restoration at a favourable status is not prevented by undertaking the activity.
- Clear explanation as to how the proposed mitigation will lead to neutral or net positive effects on the populations of the species concerned.
- Compensation for impacts that are predicted to occur are a legitimate means to ensure that the favourable conservation status will not be affected. For example, compensating for loss of an otter holt by provision of one or more artificial holt sites. However, this should not be confused with reference to "compensation" in the context of Article 6(4) of the Habitats Directive, which relates to conditions under which plans and projects may be permitted.

[13] The 2019 report published under Article 17 of the Habitats Directive states that all species except Slender Naiad, natterjack toads and lesser horseshoe bat are in favourable conservation status.

4. Monitoring of effects of the Derogation

Article 16(3)(e) of the Habitats Directive and Regulation 54(7) of the Regulations require the Minister to report to the European Commission on the measures applied to ensure the strict protection of these species and on the results of applying these measures.

Derogations require the submission of a report to the NPWS on the activity carried out and details of numbers and species affected. In addition, a derogation may include conditions that require post-completion monitoring of the species concerned and for a report to be provided including the results of such surveys. In all cases, an EU Returns Form and a derogation report must be completed by the applicant and returned to Wildlife Licencing Unit of the NPWS at wildlifelicence@npws.gov.ie.

EU Returns Form and Derogation Report

An EU Returns Form is included in all issued derogations with the unique derogation number. This form provides crucial data to be submitted to the European Commission under Article 16 of the Habitats Directive. This form must be submitted in a timely manner.

A separate narrative report, which must detail the activities undertaken, must also be submitted. In the case of derogations for cetaceans a Marine Mammal Observer (MMO) report must be submitted.

Applicants are advised to include the following information in their post-completion monitoring report:

- Clearly specify the mitigation measures that have been applied, using plans and photographs where appropriate
- Show results of surveys of the target species, using methods comparable to those undertaken when establishing the baseline population e.g. camera monitoring of otter activity pre- and post-completion of mitigation measures should be undertaken at similar locations and for similar duration.
- Identify any corrective measures that have been undertaken to address unforeseen failure to maintain the species populations at the relevant (e.g. local, national) scale.

5. Timing of Application for Derogation

In July 2023, the Court of Justice of the European Union High Court issued a judgment[14] relating to the relationship between the systems of development consent and the provision of derogations regarding the strict protection of species under the EU Habitats Directive. On the basis of this judgment, it is the Department's opinion that where a proposed activity requires consent from another statutory authority, and it appears that such an activity, if permitted, by that appropriate public authority, will also require a derogation from the Minister, then it is necessary that the derogation should be granted before the approval of the consent to the proposed activity.

The benefit to this sequencing is that if a derogation cannot be given, then this gives the applicant an opportunity to change the design, type or location of the proposal prior to making an application for consent and/or receiving the consent from the other public authority.

Under regulation 27 of the 2011 Regulations, all public authorities are obliged to exercise their statutory functions in compliance with and, as appropriate, so as to secure compliance with, the requirements of the Habitats Directive. It is the Department's opinion that the Court's views on the sequencing of derogations and development consents are considered to also apply to activities that are not required to undergo Environmental Impact Assessment (EIA) as well as activities that do not necessarily require development consent but may require permission from another public authority (e.g. industrial emissions licensing).

Public authorities are advised that, when considering applications for development consent, they should ensure that such applications include copies of the derogation(s) that the applicant has considered it is necessary to acquire. The responsibility of avoiding disturbance or damage to Annex IV species, or of obtaining an appropriate derogation, rests with the applicant.

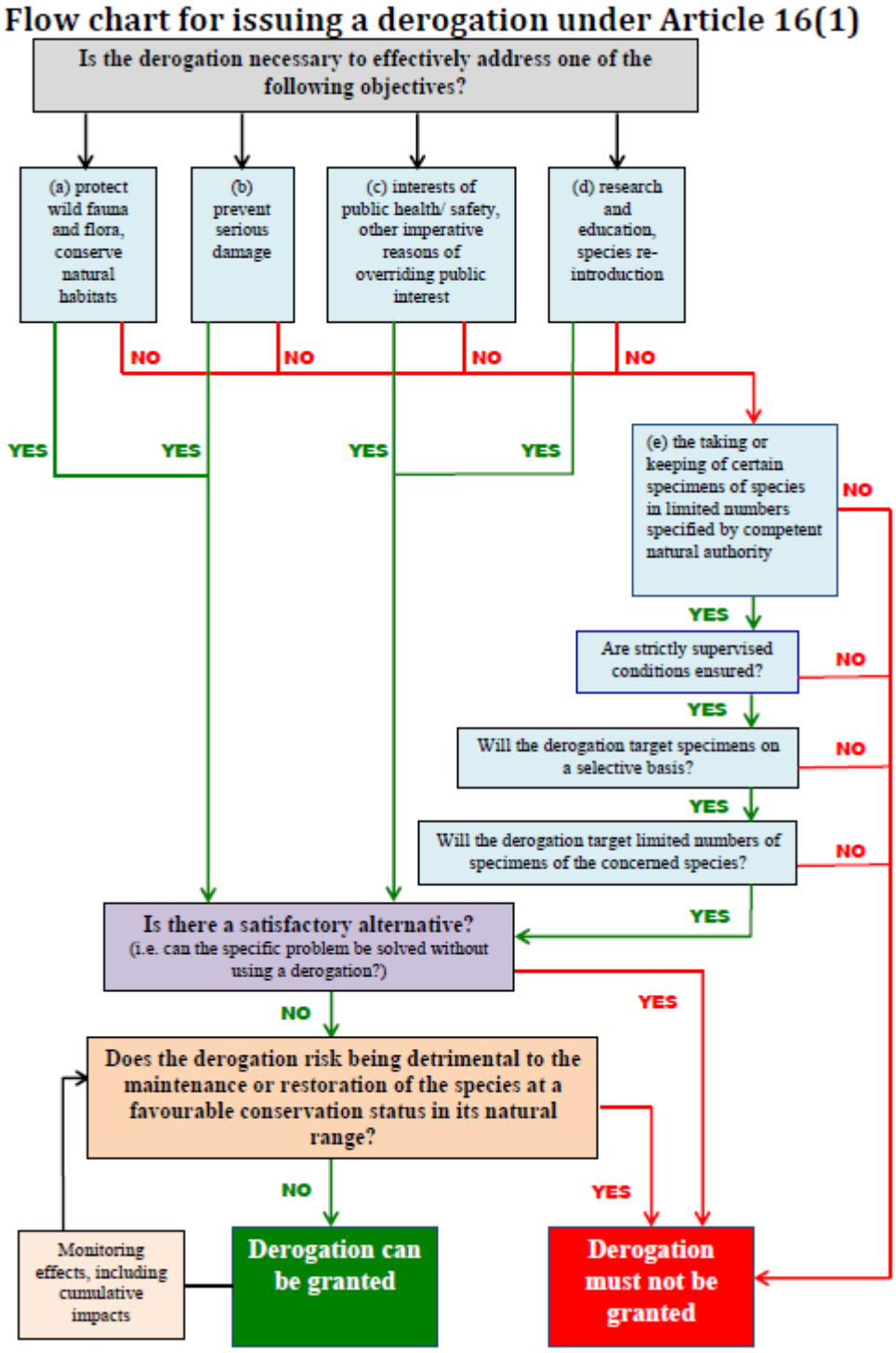
This advice also applies to local authority's own functions, whereby any approval that is made to undertake such development or carry out other relevant functions, has ensured that a derogation has been issued, where appropriate.

It is acknowledged that there may be certain scenarios whereby there is a delay between receiving a derogation and commencement of the relevant activity and a derogation may require revision. In some cases, there may be a likelihood of changes in species presence or distribution e.g. usage of trees by bats or otters moving into an area. It may be appropriate to ensure, by means of a condition to a consent, that the applicant acquires a revised derogation prior to the commencement of the relevant works, if such time has elapsed.

Derogation applications received will be processed in a timely manner by the NPWS. To assist the prompt processing of applications, applicants are requested to submit a fully completed application form and include all relevant information in their supporting documentation as requested. Incomplete applications will be returned to the applicant.

[14] Case 166/22 Hellfire Massy Residents Association.

6. Appendix I – Flowchart for Issuing a Derogation (Taken from EC Guidance, 2011, p49)



7. Appendix II – Example 1: Repairs to Unsafe Bridge Structure

Test 1: Derogation Reason: Regulation 54(2)(c) - In the Interest of Public Health and Safety

A bridge that links a commuter town to a major city was in urgent need of repair works. Structural inspections confirmed that the existing bridge exhibited progressive deterioration resulting in loss of structural integrity. The application for the derogation was accompanied by a structural engineer's report that verified the poor state of the bridge and justified the need for repairs. Failure to undertake remedial works would result in either closure of the route or continued exposure of the public to an unacceptable safety hazard. The objective of the proposed activity was therefore to eliminate a clear and immediate public safety risk by repairing the bridge.

Baseline ecological surveys confirmed the presence of a day roost used by bats (no. 2 Myotis spp). The roost is located in a crevice under the bridge and the proposed works would result in temporary disturbance and the loss of this single roost feature.

The proposed activity was deemed to be necessary in accordance with Regulation 54(1)(c) of the European Communities (Birds and Natural Habitats) Regulations 2011, as amended, corresponding to Article 16(1)(c) of the Habitats Directive, on the grounds of public health and public safety. On this basis the application passed Test 1.

Test 2: no satisfactory alternative exists

In accordance with the requirements of Article 16, alternative solutions were fully considered. The following options were presented in the application:

- A "do-nothing" option (continued use of the bridge whilst it continued to deteriorate) was examined and rejected as it would result in increased risk to the public and also ultimately lead to loss of the roost if the structure collapsed. This option would not resolve the situation as ultimately the roost would be lost due to the eventual collapse of the bridge.
- Relocation of the crossing or construction of an alternative route was also considered; however, these options would require substantially greater land-take, cause increased habitat loss/disturbance, and disproportionate cost, while failing to remove the safety risk in a timely manner. This option would not resolve the situation as ultimately the roost would be lost due to the eventual collapse of the bridge.

It was considered that the applicant had considered all available satisfactory alternatives and that at the time no other alternative solutions were apparent. It was therefore concluded that no satisfactory alternative existed that would achieve the objective of the works without disturbing the bats. Having weighed the possible solutions to solve the applicant's problem against the effects of a derogation on the species concerned, it was concluded that the application passed Test 2.

Test 3: Impact on Conservation Status

The bat population concerned formed part of a wider, well-connected local population as indicated by other records of roosts for this species nearby. The species was assessed as having favourable conservation status at both regional and national levels. The application included proposals for appropriate mitigation measures, including pre-works surveys, exclusion of bats from the roost prior to works beginning, a temporary roost structure to be provided while works are ongoing and a replacement roost for use by bats when the works had been completed as well as ecological supervision, and post-works monitoring. This will result in a temporary loss of a roost and no bats will be injured or killed. On this basis the application passed Test 3 and a derogation with associated conditions was issued.

8. Appendix III – Example 2: Construction of Housing Development

Test 1: Derogation Reason: Regulation 54(2)(c) - Imperative Reasons of Overriding Public Interest

A residential development of 420 residential units, including a substantial proportion of social and affordable housing, was proposed for lands zoned for residential development under the relevant County Development Plan. The proposed development formed part of an adopted local and regional housing strategy that was aimed at addressing a housing shortfall that was causing significant social and economic consequences. The scale, location, and nature of the development was necessary to meet these objectives and contribute to the effective functioning of the housing system. Baseline ecological surveys confirmed the presence of a bat roost of soprano pipistrelle bats (no.6 Pipistrellus pygmaeus) within the development footprint. This roost was discovered in an old shed, which is to be demolished for works to take place. The proposed activity was deemed to be justified under Regulation 54(2)(c) of the European Communities (Birds and Natural Habitats) Regulations 2011, as amended, corresponding to Article 16(1)(c) of the Habitats Directive, on the grounds of imperative reasons of overriding public interest, specifically the provision of housing to meet identified and urgent societal needs. On this basis the application passed Test 1.

Test 2: no satisfactory alternative exists

In accordance with the requirements of Article 16, alternative solutions were fully considered. The following options were presented in the application:

- A range of alternative sites were considered during the plan-making and site-selection process, including smaller or less-constrained parcels of land. These alternatives were discounted as they were either unavailable, insufficient in scale to meet housing delivery targets, or constrained by infrastructure capacity, flood risk, or other environmental considerations. These options would not resolve the situation.
- Re-design of the proposed development to entirely avoid impacts on bats was also considered. However, further reduction in footprint would render the scheme unviable and would not deliver the housing outputs required to address the housing shortfall. Also the position of the old shed did not lend itself to remaining within a design suitable for housing as it would be a long term health & safety issue itself. This option would not resolve the situation.

It was considered that the applicant had considered all available satisfactory alternatives and that at the time no other alternative solutions were apparent. It was therefore concluded that no satisfactory alternative exists that would achieve the objective of the proposed works while avoiding impacts on the species. Having weighed the possible solutions to solve the applicant's problem against the effects of a derogation on the species concerned, it was concluded that the application passed Test 2.

Test 3: Impact on Conservation Status

The impacts on bats arising from the development were deemed to be limited in extent and localised in nature. The bat species concerned was widely distributed in the surrounding landscape and was assessed as being at favourable conservation status at a national level. The application outlined comprehensive mitigation and compensation proposals including the retention and enhancement of key habitat features, creation of permanent alternative breeding and resting sites in advance of construction and phased works under ecological supervision. A long-term monitoring programme was proposed to assess the effectiveness of the mitigation proposals. On this basis the application passed Test 3 and a derogation with associated conditions was issued.