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Guidance on the Strict Protection of Certain Animal and Plant Species under the Habitats Directive in Ireland

National Parks and Wildlife Service Guidance Series **1**

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on the
Strict Protection of Certain Animal
and Plant Species
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National Parks and Wildlife Service Guidance Series 1

Department of Housing, Local Government and Heritage

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Introduction

A number of plant and animal species are legally protected in Ireland. Some of these species are included in a system of Strict Protection pursuant to the requirements of Articles 12, 13 and 16 of the Habitats Directive (92/43/EEC) and are sometimes referred to as 'Annex IV species'. The list of Annex IV species which occur in Ireland and its waters is set out in Table 1 below.

Table 1: Annex IV species which occur in Ireland

Animals	Plants
All bat species	Killarney Fern
Otter	Slender Naiad
Natterjack Toad	Marsh Saxifrage
Kerry Slug	
Dolphins, Whales and Porpoises	
Marine Turtles	

This short guidance document explains how the system of Strict Protection works and its implications. More detailed guidance is provided for public authorities in *Strict Protection of Animal Species*. National Parks and Wildlife Service Guidance, No. 2 (2021).

Other Guidance on Annex IV Species

Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters¹ was published by the Department in 2014 and should be consulted in relation to strict protection of dolphins, whales and porpoises.

The European Commission Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (October 2021)² should also be consulted for further information.

¹ https://www.npws.ie/sites/default/files/general/Underwater%20sound%20guidance_Jan%202014.pdf
In 2014 the Department of Arts, Heritage and the Gaeltacht was the department with responsibility for heritage.

² https://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

The Legislative Background

The Habitats Directive aims to address the long-term decline of European biodiversity by ensuring the conservation of a wide range of natural habitats and species of wild flora and fauna in Europe. The most well-known feature of the Directive is the Natura 2000 network of protected areas, i.e. Special Areas of Conservation (SAC) and Special Protection Areas (SPA), referred to in Irish law as 'European sites'.

The Habitats Directive also contains obligations in relation to the strict protection of Annex IV species wherever they occur, which are set out in Article 12 and Article 13 of the Directive. These obligations require each Member State to establish a system of Strict Protection for the species listed in Annex IV of the Directive. Derogations from these strict protection requirements can only occur in very limited circumstances, the conditions of which are set out in Article 16 of the Directive.

The Habitats Directive is transposed into Irish law by the European Communities (Birds and Natural Habitats) Regulations, 2011-2021³. Requirements in relation to Strict Protection are set out in:

- Regulation 51 – Annex IV animals
- Regulation 52 – Annex IV plants, and
- Regulation 54 – derogation licences including Regulation 54 A when the Minister is applying for a derogation.

Why is Strict Protection Needed?

The Habitats Directive has identified a number of plant and animal species across Europe, which are rare or are threatened with extinction and which need special measures to be taken to ensure their long-term survival. Therefore the aim of the Strict Protection measures set out in Article 12 and 13 of the Directive is that the species in question will reach and remain at favourable conservation status⁴. This means that there must be enough individuals of a species in its natural habitat to breed successfully, thus ensuring that the population will survive into the future. It also means that the geographical area where the species is found (its natural range) is secure and will not reduce in size in the foreseeable future. And it means that the habitat of such species must continue to be large enough to support the species into the future.

³ Hereafter referred to as "the Regulations".

⁴ The definition of 'favourable conservation status' is set out in the Regulations.

What Strict Protection means for Animals

The system of Strict Protection for animals (see Table 1) is set out in Regulation 51 of the Regulations. It is an offence to do any of the following without first obtaining a derogation licence from the Minister in accordance with Regulation 54:

- (a)** Deliberately capture or kill any specimen of these 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 these 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 these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive⁵.

The use of the word “deliberately” in (a), (b) and (c) above must be read in light of the relevant case law of the Court of Justice of the European Union (CJEU), namely cases C-103/00 and C-221/04. The Commission’s Guidance, based on these cases, proposes the following definition and commentary:

“Deliberate actions are to be understood as actions by a person who is aware that these actions will lead to capturing or killing a species listed in Annex IV, or consciously accepts the possibility of such an offence.

In other words, the provision applies not only to a person who fully intends to capture or kill a specimen of a protected species but also to a person who is sufficiently informed and aware of the consequences his or her action will most likely have and nevertheless still performs the action, which leads to the capturing or killing of specimens (e.g. as an unwanted but accepted side effect).”⁶

This means that the carrying out of any work which has the potential to capture or kill any specimen of a Strictly Protected species, or to disturb these species, or to take or destroy eggs of such a species, and for which a derogation licence has not been granted, may constitute an offence under Regulation 51 of the Regulations.

It should also be noted that in the case of Regulation 51(d) any action resulting in damage to, or destruction of, a breeding or resting place of an animal may constitute an offence unless a derogation licence has been granted. This action does not need to be deliberate. Breeding and resting places are protected even when the animals are not using them, once there is a high probability that they will return⁷.

This places an onus of due diligence on anyone proposing to carry out an action or project that might result in such damage or destruction.

⁵ i.e. species of animal taken legally before the Habitats Directive was implemented on 21 May 1992

⁶ Paragraph 2-34

⁷ Case C-477/19

What Strict Protection means for Plants

Regulation 52 of the Regulations, in relation to Annex IV plant species (see Table 1), means that 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 Directive⁸.

unless a derogation licence has first been obtained from the Minister in accordance with Regulation 54.

This protection exists for all stages of the plant's life cycle. The plants on this list often have long life cycles, are slow growing and do not spread easily. Picking them can mean losing that species from that location. It can also have more indirect, negative, long-term effects on species populations.

⁸ i.e. species of animal taken legally before the Habitats Directive was implemented on 21 May 1992

What Strict Protection means for Public Authorities

A particular concern arises in relation to actions, works and projects carried out on or on behalf of public authorities, including local authorities, some of which involves maintenance or repair works. Examples include:

- the removal of vegetation, including trees and hedgerows, as part of road maintenance or during the repair or provision of other infrastructure (e.g. sewerage, water, utilities);
- activities or works affecting watercourses and river or stream-banks, including in relation to drainage or surface water;
- repair works to bridges, walls and other structures where, for example, bats are likely to roost.

Ensuring compliance with the requirements of the Regulations means avoiding impacts to Annex IV species.

It may be necessary to change the planned activity to ensure that there are no impacts to strictly protected species. This may mean:

- choosing a different location for an activity, event or project
- undertaking works at a time of year when a species of concern is not present
- changing the design of a building, wall or other structure to retain areas used by species such as bats
- altering the way in which activities or works are undertaken or using different methods or machinery in order to avoid impacts.

Attention must be focussed in the early stages of planning for activities or works on finding alternative solutions so that there will be no impact on the Annex IV species. It is important to look closely at all possible alternative solutions.

A Decision Making Process for Public Authorities

It is important that public authorities make decisions about their own proposed activities, works or projects which might possibly impact on Annex IV species in a structured manner and that all such decisions are documented. The outcome of these decision-making processes will determine if the public authority is compliant with the requirements of Regulations 51 and 52 of the Regulations.

A four stage process is set out here to assist public authorities in these decisions. It is important to remember that the first obligation for the strict protection of these species is to design activities, works or projects so that they avoid any impacts on the plants or animals in question.

Making an application to the Minister for a derogation licence must only be considered in cases where there is no satisfactory alternative having gone through the process set out below. It should never be assumed that the Minister will be in a position to grant a derogation licence, having regard to the strict parameters which apply to the granting of such licences.

A summary of the four stages is presented here. Public authorities are advised to consult the NPWS guidance document **Strict Protection of Animal Species** (2021) for further information.

Stage 1 Using Existing Information To Determine the Probability of the Protected Species Being Present In the Area Affected By the Works

This is an information gathering stage about the likely presence or absence of an Annex IV species at the location of the works. Some sources of information are:

- The National Biodiversity Data Centre mapping system www.biodiversity.ie
- The National Parks and Wildlife Service www.npws.ie
- Bat Conservation Ireland www.batconservationireland.org
- County Biodiversity Plans and Biodiversity Maps
- Heritage and Biodiversity Officers

If it is highly unlikely that an Annex IV species could be present or affected by the works, then the works will be compliant with Regulations 51 and 52 and may proceed.

If, on the other hand, this information shows that an Annex IV species is present, or may be present, decision-making must move to Stage 2. The Precautionary Principle must be applied in relation to this matter at this stage.

Stage 2 Ecological Survey

Stage 2 requires an ecological survey carried out by an ecologist who is competent in relation to the species to be surveyed. The survey must use suitable methods for the species being investigated, be of an adequate duration and must take place at an appropriate time of year. For example, a survey for commuting bats should not take place during the winter because bats hibernate at this time of year.

Public authorities are advised to be mindful of the time required to commission and complete ecological survey work when planning schedules of works. Sufficient time must be available to undertake the necessary ecological surveys. In addition, mitigation measures arising from Stage 3 may involve time constraints.

Survey work may find that an Annex IV species is not present. This means that the works are compliant with Regulations 51 and 52 and may be undertaken (once any other required consent is in place).

If an Annex IV species is found to be present, or there is a breeding or resting place to which the animals are likely to return, the decision-making process moves to Stage 3.

Stage 3 Examination of Impacts and Satisfactory Alternatives

If ecological survey work has found that an Annex IV species is present, the likely impacts of the works need to be examined to see if those impacts can be avoided, through the design of the works. If avoidance is not possible the public authority must determine if there are any satisfactory alternatives to the works so that works will not occur in a place where they might impact on the Annex IV species.

A satisfactory solution is one which addresses the situation faced by the project proponent while protecting the species at the same time. This may involve a change to the scale or design of the proposal, moving the proposal to a different location or using different processes or methods to carry out the proposal. It should be noted that an alternative solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience or greater cost, or because it requires a change in approach by the project proponent.

If a suitable alternative is found which ensures that the local population does not suffer loss and that there is no deterioration to the breeding or resting places, then the works are compliant with Regulation 51 and 52.

If there is no satisfactory alternative, then the works cannot proceed unless the decision-making process moves to Stage 4. If an application is being made to the Minister for a derogation licence the documentation setting out the consideration of alternatives should be made available to the Minister, in the application documentation.

Stage 4 Application for Regulation 54 Derogation Licence

If the decision-making process has reached Stage 4 and there is no satisfactory alternative to proceeding with the works, the public authority can consider whether to apply to the Minister for a derogation licence under Regulation 54 of the Regulations.

The Minister is empowered, within strict parameters, to grant a licence for derogation from complying with the requirements of Regulations 51 and 52 of the Regulations. The scope of the Minister's powers in this regard is set out in Regulation 54 and requires that a number of tests are applied before a derogation can be granted (see "Consideration by the Minister" below).

The Minister will either decide to grant a derogation licence or refuse to do so, and provide reasons for the decision. In cases where the Minister decides to grant a derogation licence; conditions, restrictions, limitations or requirements may be applied as considered appropriate. In these cases works may proceed in accordance with the requirements of the licence. If a licence is refused the works cannot proceed as they are not compliant with the Regulations. A public authority may review the reasons for refusal and reapply if the proposed works can be altered in a suitable fashion.

Applicants must include detailed information about the proposal and why they consider that it meets the pre-conditions for a derogation licence (see below). The application should describe any likely impacts on the local population of the species in question. It should include the documentation regarding the decisions made about the alternative solutions examined. This information will be used to assess the application in light of the three tests described in the next section.

Consideration by the Minister of Applications for a Derogation Licence

Article 16 of the Habitats Directive sets out three pre-conditions, all of which must be met before a derogation from the requirements of Article 12 or Article 13 of the Directive can be granted. These preconditions are also set out in Regulation 54 of the Regulations. The preconditions are:

1. A reason(s) listed in Regulation 54 (a)-(e) applies (see below)
2. No satisfactory alternatives exist
3. Derogation would not be detrimental to the maintenance of a population(s) at a favourable conservation status.

It should be noted that before the second and third preconditions are examined, precondition 1 must be met.

When assessing an application for derogation under Regulation 54 the Minister will apply three tests which are designed to ensure that the pre-conditions set out above can be met. If these tests indicate that any of the pre-conditions cannot be met the Minister is precluded from issuing a derogation licence. The Minister will state the reasons for issuing or refusing to issue a derogation licence.

It is important that applicants for a derogation licence, including public authorities and others, provide sufficient information to enable the tests set out below to be applied. The four stage process set out in the body of this Guidance is designed, among other things, to ensure that much of the required information is available. Sufficient information which addresses the pre-conditions set out above must be included in any application to the Minister for a derogation licence. Failure to provide sufficient information as part of an application for a derogation licence means that the Minister will not be in a position to grant a licence.

Test 1 Reasons for Seeking Derogation

Has one of the reasons set out in Regulation 54(2) (a)–(e) been clearly demonstrated to apply? Regulation 54(2) (a)–(e) states that a derogation licence may be granted for any of the following reasons:

- (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.

If it cannot be clearly demonstrated that one or more of the reasons set out above apply, a derogation licence cannot be granted by the Minister.

Test 2 There Is No Satisfactory Alternative

Derogation from the Strict Protection provisions of the Directive must be seen as the last resort in any situation. It must therefore be clear that there is no other satisfactory solution to the situation presented by the proposal or project in question

Applicants for a derogation licence should include full details of the alternatives examined and should set out objective reasons demonstrating why these alternatives are not satisfactory. If there is a satisfactory alternative then the application has failed the second test and a derogation licence cannot be issued.

Test 3 Favourable Conservation Status

In each case, consideration must be given to whether granting a derogation licence 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)).

Annex IV species must be maintained at Favourable Conservation Status or restored to favourable status if this is not the case at present. The net result of granting a derogation licence must be neutral or positive for the species in question.

If a derogation licence is likely to have a significant negative effect on the population concerned (or the prospects of this population) or is likely to have a significant negative effect at the biogeographical level within Ireland, then a derogation licence cannot be considered.

If a derogation is issued it may have conditions, restrictions, limitations or requirements attached. All derogation licences are also subject to the Animal Health and Welfare Act 2013.

At the completion of the process the Minister will state reasons for issuing (or refusing to issue) the licence. This statement will include the reasons it was decided there was an absence of suitable alternatives and refer to any relevant technical, legal and scientific reports used in making the decision.

Note

The information in this document is intended as general guidance relating to Annex IV species and their strict protection and is not a legal interpretation of the relevant legislation. Please consult the full texts of the legislation and obtain legal advice if necessary.

Legislation Referred To In the Text

European Communities (Birds and Natural Habitats) Regulations 2011 S.I 477 of 2011

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (The Habitats Directive)

Further Reading

www.npws.ie for general information on protected species and application processes and for the NPWS documents listed below:

EEC (October 2021) *Guidance document on the strict protection of species of Community interest under the Habitats Directive 92/43/EEC*

http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf

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NPWS (January 2014) *Guidance to Manage the Risk to Marine Mammals from Man-made Sound Sources in Irish Waters*.

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