

Proposed development at Port of Dundee

Ecological Assessment

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1 Introduction

Background to commission

- 1.1 BSG Ecology was commissioned in January 2020 by Fairhurst, acting on behalf of Port of Dundee, to complete an extended Phase 1 habitat survey of land at Port of Dundee (the Site), City of Dundee, Scotland. The Site has been identified for future development.
- 1.2 This report sets out the methods that have been used to evaluate the current ecological interest of the Site, and presents the results of the survey that has been undertaken.

Site description

- 1.3 The Site is situated to the east of the City of Dundee (see Figure 1, Section 6). The central Ordnance Survey grid reference for the Site is NO 43493085.
- 1.4 The Site is located on land at the Port of Dundee, which is operated by Port of Dundee Ltd. To the north of the application site is Stannergate Road, to the east is a rocky foreshore fronting the Firth of Tay, to the south is the Firth of Tay and operational berths associated with the use of Prince Charles Wharf and the Prince Charles Wharf Extension. To the west of the Site is further land owned and operated by the Port of Dundee. The application boundary and existing uses on-site are shown on Drawing Number 130143/8002. Vehicular access is from Stannergate Road.
- 1.5 The Port of Dundee provides services for the North Sea oil and gas industry, construction industry, paper pulp and forest products sectors, and also a wide range of general and bulk cargoes. The Port of Dundee comprises 1,600 m of quayside and currently has 6 working berths. Recently, there has been £10 million invested into various redevelopments, which have included a new quayside to support the decommissioning and offshore wind farm industry, which the Port of Dundee has a strong presence in due to its strategic location.
- 1.6 As shown on Drawing Number 130143/8002, the Site currently contains a range of buildings and land uses common to an operational port. There is an existing dredge pocket to the front of the existing quay. The existing Prince Charles Wharf and Prince Charles Wharf Extension also lie within the site.

Description of project

- 1.7 The proposed development is shown on Drawing Number 134380/8002 and consists of the following main elements:
- The widening of the existing dredged berth associated with the Prince Charles Wharf Extension from 200m x 40m to 200m x 60m. The depth of the berth will increase to -10.0mCD;
 - Slab thickening / strengthening to the existing Prince Charles Wharf, to increase quayside capacity;
 - The creation of a new suspended quay on land to the west of Prince Charles Wharf; and
 - The creation of a new 170m x 30m berth pocket to the south of the proposed suspended quay. Dredging works will be to a depth of -9.0mCD.
- 1.8 A location plan is provided in Section 6 (Figure 1).

Surveyor Experience

- 1.9 Survey was undertaken by Neil Beamsley CEcol MCIEEM who has over 15 years of experience in undertaking ecological survey. Details of his experience and qualifications can be found at <http://www.bsg-ecology.com/project/neil-beamsley/>.
- 1.10 Reporting has been completed by Hannah Norman ACIEEM who is an experienced ecologist with over 6 years' experience working on a range of sites within the north of England. Details of her experience and qualifications can be found at <http://www.bsg-ecology.com/project/hannah-norman/>.
- 1.11 The report has been reviewed by Steven Betts CEcol CEnv MCIEEM, who has over 20 years' experience working on ecological impact assessments. Details of his experience and qualifications can be found at <http://www.bsg-ecology.com/project/steve-betts/>.

2 Methods

Desk Study

- 2.1 Data obtained from the Government's MAGIC website (www.magic.gov.uk, accessed 31 January 2020) have been used to establish the location and nature of any statutory designated Sites of nature conservation interest located within 1 km of the centre of the Site. This includes Sites of Special Scientific Interest (SSSIs), Special Areas of Conservation (SACs), Special Protection Areas (SPAs), and Ramsar Sites. Reference has also been made to Scottish Natural Heritage's Site Link website (<https://sitelink.nature.scot/map>, accessed 31 January 2020).
- 2.2 The 'Scotland's Environment' internet based mapping database (<https://map.environment.gov.scot/sewebmap/>, assessed 31 January 2020) was also searched for any sites of nature conservation interest and to identify other important ecological features within 1 km.
- 2.3 A 1 km search area has been adopted based on guidance published by the Chartered Institute of Ecology and Environmental Management (CIEEM, 2019). This distance defines the extent of a precautionary zone of influence based on the scope and nature of the proposed development.
- 2.4 In addition, reference has been made to species and habitats of principal importance listed under Section 2(4) of the Nature Conservation (Scotland) Act 2004¹ which highlights species and habitats that are of particular conservation importance.
- 2.5 An aerial photograph of the Site and its surroundings was examined to further assist in understanding the context of the study area and to identify and assess possible habitat linkages with other habitats or sites of ecological importance within the local area (Google Earth Pro, accessed 31 January 2020)

Field survey

Habitat Survey

- 2.6 A Phase 1 Habitat Survey of the Site was undertaken on 31 January 2020 between 09:00-10:35 am by Neil Beamsley, Principal Ecologist at BSG. The vegetation and land use types present within the Site were classified in accordance with standard JNCC methods (JNCC, 2010), and a habitat map produced. During the survey the weather was 12°C, dry, with a moderate breeze. The cloud cover was 100%.
- 2.7 The survey was extended to include an assessment of the habitats present to determine their suitability to support protected species. The habitat assessment was also undertaken 31 January 2020 at the same time as the Phase 1 Habitat Survey. During the Site visit any signs of protected species that were observed were recorded. Further details are provided below of the protected species assessment methods that were adopted.
- 2.8 During the survey a record was made of any invasive species that were present, such as Japanese knotweed *Fallopia japonica*, i.e. species listed in Schedule 9 of the Wildlife and Countryside Act 1981 (as amended).

¹ The list of species and habitats is used to guide decision-makers in fulfilling their biodiversity duty under the Nature Conservation (Scotland) Act 2004. Under this Act public bodies in Scotland have a duty to further the conservation of biodiversity.

Protected Species

Badger

- 2.9 During the 'extended' Phase 1 habitat survey, the habitats present within the Site were assessed to determine their suitability to support resident, foraging and commuting badger *Meles meles*. A thorough search was undertaken for signs of badger presence, such as setts, latrines, scrapes, tracks, footprints, hairs and other signs (Harris, Cresswell & Jefferies, 1989). Any signs were recorded on a map of the Site.

Otter

- 2.10 During the 'extended' Phase 1 habitat survey, the Site and adjacent habitats, including the shore of the Forth of Tay, were assessed to determine their suitability for otter *Lutra lutra*. Any signs of otter presence, such as spraints, footprints, tracks, couches or slides, were recorded and a note made of the grid reference.

Birds

- 2.11 Breeding bird characterisation surveys could not be completed due to the timing of the Site visit, which was outside the breeding bird season. The habitats present were characterised to determine their suitability for nesting birds. The assessment also took into account the current use of the Site and existing levels of disturbance.
- 2.12 Wintering bird surveys have been completed in October, November and December 2019 and January and February 2020. These surveys covered the Firth of Tay adjacent to the Site, including intertidal habitats along the shore. Full survey details are presented in a separate report (BSG Ecology, 2020a).
- 2.13 The survey of the Port considered the potential value of the Site for roosting or loafing birds, including species that are qualifying features of nearby European sites.

Other Species

- 2.14 During the extended component of the Phase 1 habitat survey, notes were made of any other notable or protected species that were identified or could potentially be present based on the habitats that are present within the Site. For example, European hedgehog *Erinaceus europaeus*, which is a species of principal importance listed in accordance with the requirements of Section 2(4) of the Nature Conservation (Scotland) Act 2004, could potentially be present within or adjacent to the Site.

Limitations to methods

- 2.15 The Phase 1 habitat survey was completed outside the optimum period for botanical survey (which is April to September). It was therefore not possible to comprehensively identify all botanical species within the habitats present on Site. It is, however, considered that those species that were identifiable allowed the habitats within the Site to be confidently categorised using the standard Phase 1 habitat survey methodology (JNCC, 2010).
- 2.16 Due to health and safety concerns, access was not available within 3 m of the dock edge. Inspection of these areas was carried out using binoculars where possible, however, it is possible that some field signs may not have been detected. This has been taken into account within the impact and mitigation sections of this report with a precautionary approach taken where appropriate. As such this is considered to be only a minor constraint.

3 Results and Interpretation

- 3.1 In this section the results of fieldwork and desk study are brought together. Their implications are then considered.

Desk Study

Statutory designated sites

- 3.2 The closest statutory designated site to the proposed development is the Firth of Tay and Eden Estuary Special Area of Conservation (SAC), with parts of the development extending into the SAC to the south. The Outer Firth of Forth and St Andrews Bay Complex proposed Special Protection Area (SPA) is located immediately to the south-east.
- 3.3 Whilst outside of the 1 km search radius used in the desk study, additional sites of European importance are located towards the east of the Site, linked by the Firth of Tay. These designated sites include the Firth of Tay and Eden Estuary Special Protection Area (SPA) and Ramsar site, which are located approximately 3 km to the east. Barry Links SAC is located approximately 7.8 km to the east.
- 3.4 The Outer Firth of Forth and St Andrews Bay Complex pSPA is adjacent to the Site and therefore it is possible that some of the qualifying features (birds) of the European site may use the Port for roosting or loafing. Consideration has therefore been given to whether the Site is functionally linked to the pSPA. Although the nearest part of the Firth of Tay and Eden Estuary SPA and Ramsar site are located 2.9 km from the Site, it is also possible that some of the qualifying features (birds) of these European sites may use the Port for roosting or loafing.
- 3.5 A search of Scotland's Environment mapping website identified no Local Nature Reserves or other features of conservation interest within 1 km of the Site.

Field Study

Habitats

- 3.6 The majority of the Site is dominated by hard-standing, bare ground, and industrial buildings used during the activities of the operational port. Shipping containers, generators, heavy plant equipment and stored materials are present in many locations. Large areas of hard-standing are present along the southern edge of the Site, and these are used as loading spaces for docking ships (Target Note 1, Figure 2, Section 6). Vegetation within these areas is limited to occasional self-set buddleja *Buddleja* sp.
- 3.7 A large area of gravel has been laid on the dock frontage at the eastern end of the loading area. To the south of the gravelled area was a large area of shallow, standing water. (Target Note 2, Figure 2, section 6). Small areas of soft rush *Juncus effusus* and abundant moss were noted in this area, suggesting that the location is seasonally damp.
- 3.8 In the south-western corner of the Site is an area supporting a mosaic of tall ruderal vegetation, scattered scrub, and ephemeral short perennial grassland. This is located on top of what looks to be a pile of spoil, which is approximately 2 m in height. The pile is strewn with a variety of masonry, rubble and other waste items. The area is dominated by the following species : buddleia, rosebay willowherb *Chamerion angustifolium*, creeping thistle *Cirsium arvense*, bramble *Rubus fruticosus*, small patches of western gorse *Ulex gallii*, common chickweed *Stellaria media*, cock's-foot *Dactylis glomerata*, red fescue *Festuca rubra*, Yorkshire fog *Holcus lanatus*, self-set willow *Salix* sp., daisy *Bellis perennis*, creeping buttercup *Ranunculus repens* and common mouse-ear *Cerastium fontanum*. (Target Note 3, Figure 2, Section 6). Both rabbit and fox droppings were present on the mound.

- 3.9 To the north of this area is another, slightly smaller spoil mound, also supporting a mix of tall ruderal and scattered scrub communities. Additional species recorded here include common ragwort *Senecio jacobaea*, spear thistle *Cirsium vulgare*, self-heal *Prunella vulgaris*, cow parsley *Anthriscus sylvestris* and teasel *Dipsacus fullonum*. (Target Note 4, Figure 2, Section 6).
- 3.10 Coastal defence boulders (Target Note 5, Figure 2, Section 6) are located along the southern boundary of the Site, with the exception of the quayside. These form an extensive area of sea-defence which comprises loosely placed boulders of between 0.5 m and 1.0 m width.
- 3.11 Species-poor semi-improved grassland is present along the periphery of the easternmost third of the Site (Target Note 6, Figure 2, Section 6). This has, in places, formed a mosaic with the self-set buddleja, bramble and gorse scrub. Species composition is generally similar to those located in the western part of the Site but also include the following species: prickly sow thistle *Sonchus asper*, ribwort plantain *Plantago lanceolata*, common knapweed *Sambucus nigra*, bent grasses *Agrostis* sp., black medick *Medicago lupulina*, dog rose *Rosa canina*, weld *Reseda luteola*, slender dock *Rumex stenophyllus*, and procumbent pearlwort *Sagina procumbens*. A number of fox scats (droppings) were noted in this area along with high levels of rabbit activity.
- 3.12 No species listed as invasive on Schedule 9 of the Wildlife and Countryside Act 1981 (as amended) were recorded during the survey.
- 3.13 A Phase 1 habitat map of the Site is shown in Figure 2, Section 6.

Protected Species

Otter

- 3.14 No evidence of otter was recorded during the Phase 1 survey, or during wintering bird surveys which have been ongoing at the Site over the 2019/2020 winter period.
- 3.15 Otter is known to be present along the River Tay and within the Firth of Tay, and the coastal defence boulders around the edge of the Site may provide potential suitable laying up areas for the species. It is also possible that some areas of scrub / tall ruderal vegetation may be used by otter as a place of rest or shelter; however, no evidence of otter presence has been found and no features have been identified that are suitable for the establishment of breeding holts.

Badger

- 3.16 No evidence of badger activity was recorded within the Site. Whilst the small areas of grassland and scrub would provide a limited potential foraging resource, the high levels of disturbance from the ongoing port activities will greatly reduce the likelihood of the Site being used by this species. In addition, security fencing present around the boundary of the port will restrict access to the majority of the Site. As such badger is considered unlikely to be present and is not discussed further.

Bats

- 3.17 A dedicated building assessment with regard to their potential for supporting roosting bats has not been undertaken. Observations taken during the extended Phase 1 survey, however, indicate that they are all industrial style buildings comprising of sheet metal construction, and likely to be of only very low bat roosting suitability.
- 3.18 The Site is located within an area principally dominated by urban development, with areas of mature vegetation and open greenspace generally lacking. Foraging habitats for bats is limited to residential gardens and scrub habitats present adjacent to the railway line to the north. The Site itself lacks any extensive areas of good quality foraging habitat for bats.

Breeding birds

- 3.19 Other than the small areas of scrub located within the eastern periphery of the Site, nesting habitat for passerine bird species is generally lacking within the Site. The industrial buildings may be used by nesting gull species, but all are to be retained within current proposals.

Wintering birds

- 3.20 Wintering bird surveys have been undertaken at the Site, the results of which are presented within a separate report (BSG Ecology, 2020a).
- 3.21 The Site is considered to have limited potential to support significant numbers of roosting or loafing sea birds, although the rock armour around parts of the Site may provide some roosting opportunities. No evidence of significant roosting activity was found within the Site, such as droppings, feathers etc.

Great crested newts

- 3.22 A pool of standing water was recorded during the survey of the Site. Aquatic vegetation suggests that the area is seasonally damp and not permanently wet; however, this feature is not visible on any of the aerial imagery of the Site, and this feature may have formed following recent heavy rain that preceded the survey. As such it is considered to be ephemeral in nature. No additional ponds are known from aerial imagery or Ordnance Survey mapping, within the surrounding 500m. Given the lack of suitable breeding habitat, great crested newts *Triturus cristatus* are considered likely to be absent and therefore is not discussed further.

Marine mammals

- 3.23 Harbour seal *Phoca vitulina* is a qualifying feature of the Firth of Tay and Eden Estuary SAC whilst grey seal *Halichoerus grypus* is a qualifying feature of the Isle of May SAC, located approximately 33 km to the south-east of the Site. A number of known seal haul-outs are located further upstream of the Site associated with the Tay Bridge and bars to the west of the bridge that are exposed at low tide. Small numbers of harbour seals (less than 5) were observed using both these haul-out locations during the wintering bird survey of the Site in November 2019. In addition 4 harbour seal were also observed swimming within the Tay Estuary during the December bird survey, over 1 km from the Site. No seals were observed on any other occasions.
- 3.24 Bottlenose dolphin *Tursiops truncatus* is known to be an occasional visitor to the Firth of Tay, and these may be linked to the population that is resident in the Moray Firth. Bottlenose dolphin is listed as a qualifying feature of the Moray Firth SAC, located approximately 140 km to the north. No bottlenose dolphins were seen during the wintering bird surveys.

Other species

- 3.25 It is possible that hedgehog, a national priority species, may forage within the Site on occasion. The small areas of scrub may present some refuge opportunities; however, these are limited in distribution and extent: the high levels of disturbance within the Site, and dominance of hard-standing habitats, may limit the value of the Site to this species, and use other than for occasional foraging is considered unlikely.

4 Potential Impacts and Recommendations

- 4.1 A brief summary the legislation, policy and related guidance that are relevant to this assessment are provided in Appendix 1.

Impacts on Statutory Designated Sites

- 4.2 The Site lies within or in close proximity to a number of statutory designated sites of European Importance. Proposals have the potential to result in both direct and indirect impacts to these sites and their qualifying features. A Habitat Regulations Assessment has been undertaken with regard to the Site and is the subject of a separate report (BSG Ecology, 2020b). This report includes an assessment of potential impacts on European sites and their qualifying features.

Impacts on Non-Statutory Designated Sites

- 4.3 No impacts on any non-statutory designated sites are anticipated as a result of the proposals.

Impacts on Habitats

- 4.4 Habitats within the Site are considered to be of low conservation value, being dominated by hard standing and built development. None conform to any of the priority habitat descriptions (Ant Maddock [Ed], 2008).
- 4.5 Development proposals do, however; have the potential to result in impacts on the adjacent estuarine habitats through, for example, pollution events. A Habitat Regulations Assessment has been undertaken with regard to the Site and is the subject of a separate report (BSG Ecology, 2020b). This report includes an assessment of potential impacts on European sites and their qualifying features.

Impacts on Species

Otter

- 4.6 No evidence of otter activity has been recorded within the Site or adjacent habitats. Habitats around the periphery of the Site may provide potential laying up areas for otter, and therefore works have the potential to result in disturbance to this species should it be present at the time of the works. A pre-works commencement check for this species should be undertaken one month prior to the start of works. If evidence is found to indicate that resident otter is present, the requirement for a licence will be discussed with SNH.

Nesting birds

- 4.7 All works involving the disturbance or destruction of any habitats capable of supporting breeding birds should take place outside of the breeding season, which generally extends from mid-March to August. However, it should be noted that some species can commence breeding earlier or continue breeding efforts beyond this period.
- 4.8 Activities taking place during the bird breeding season should not commence until the area has been checked for nesting birds by a suitably qualified ecologist. If nesting birds are detected then a suitable stand-off should be marked out around the area and work in that area should be delayed until the birds and their young have dispersed.

Wintering birds

- 4.9 No impacts on wintering birds are anticipated as a result of the proposals as no evidence of significant roosts has been found. No mitigation measures are considered to be necessary for wintering birds.

Bats

- 4.10 No impacts on roosting bats are anticipated as a result of the proposals.
- 4.11 The Site is considered likely to be of no more than low value to foraging bats. Should additional lighting be proposed it is possible that this could deter bats from using commuting routes and feeding areas. As such, any additional external lighting should be designed to mitigate impacts on bats by minimising light spill (BCT & ILP, 2018). This is likely to also be of benefit to other nocturnal species.

Other Species

- 4.12 No evidence of hedgehog presence was found within the Site, and the habitats present are considered to be of low suitability for this species. No mitigation measures are considered to be necessary for this species.

5 References

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6 Figures

Figure 1: Site Location.

Figure 2: Phase 1 Habitat Map.



Legend

 Site Boundary



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PROJECT TITLE
Port of Dundee

DRAWING TITLE
Location Plan

DATE: 14.02.2020
DRAWN: HN
SCALE: 1:24,000
STATUS: DRAFT

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Sources: BSG Ecology survey data



- Legend
- Target note
 - Fence
 - Scrub - scattered
 - Poor semi-improved grassland
 - Tall ruderal
 - Intertidal - rocks
 - Scree
 - Limestone pavement
 - Ephemeral/short perennial vegetation
 - Buildings
 - Bare ground
 - Hard Standing
 - Site Boundary

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PROJECT TITLE
Port of Dundee

DRAWING TITLE
Phase 1 Habitat Map

DATE: 14.02.2020
DRAWN: HN
SCALE: 1:3170
STATUS: DRAFT

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Appendix 1: Summaries of Relevant Policy, Legislation and Other Instruments

This section briefly summarises the legislation, policy and related issues that are relevant to the main text of the report. The following text does not constitute legal or planning advice.

Scottish Planning Policy

- 6.1 The revised and updated Scottish Planning Policy (SPP) was adopted by the Scottish Government in 2014. The SPP sets out planning policies including those that relate to the protection of biodiversity. A summary of key policies within the SPP that relate to biodiversity are set out below.
- 6.2 The Scottish Planning Policy introduces a presumption in favour of development that contributes to sustainable development. This means that policies and decisions should be guided by a number of principles that are set out within the SPP, and these include the need to protect, enhance and promote access to natural heritage, including green infrastructure, landscape and the wider environment (summarised in Paragraphs 28 and 29).
- 6.3 In Paragraph 195, the SPP notes that planning authorities, and all public bodies, have a duty under the Nature Conservation (Scotland) Act 2004 to further the conservation of biodiversity. This duty must be reflected in development plans and development management decisions. They also have a duty under the Water Environment and Water Services (Scotland) Act 2003 to protect and improve Scotland's water environment.
- 6.4 International, national and locally designated areas and sites as outlined in the SPP (Paragraph 196) should be identified and afforded the appropriate level of protection in development plans.
- 6.5 Paragraph 200 relates to the sensitivity of wild land and states that plans should identify and safeguard the character of areas of wild land as identified on the 2014 SNH map of wild land areas. Paragraph 215 states that development may be appropriate in wild land in some circumstances; significant effects would need to be substantially overcome by siting, design or other mitigation.
- 6.6 Development management decisions should take account of potential effects on landscapes, the natural and water environment, including cumulative effects (Paragraph 202). Developers should seek to minimise adverse impacts through careful planning and design, considering the services which the natural environment is providing and maximising the potential for enhancement.
- 6.7 Planning permission should be refused where the nature or scale of proposed development would have an unacceptable impact on the natural environment. Direct or indirect effects on statutorily protected sites will be an important consideration, but designation does not impose an automatic prohibition on development (Paragraph 203).
- 6.8 Paragraph 207 and the need for "appropriate assessment" for any development plan or proposal likely to have a significant effect on Natura 2000 sites (Special Areas of Conservation (SACs) and Special Protection Areas (SPAs)).
- 6.9 The presence (or potential presence) of a legally protected species is an important consideration in decisions on planning applications (Paragraph 214). The level of protection afforded by legislation must be factored into the planning and design of development and any impacts must be fully considered prior to the determination of an application.
- 6.10 Ancient semi-natural woodland is an irreplaceable resource and, along with other woodlands, hedgerows and individual trees, should be protected from adverse impacts resulting from development (Paragraph 216).

Scottish wildlife legislation

6.11 In Scotland wildlife is afforded protection via a range of legal instruments. The key Acts and Regulations, which have been taken into account throughout this assessment, are as follows:

- Conservation (Natural Habitats, &c.) Regulations 1994 (as amended)
- The Conservation of Habitats and Species Regulations 2017 (as amended)²
- Wildlife and Countryside Act 1981 (as amended)
- Nature Conservation (Scotland) Act 2004 (as amended)
- The Protection of Badgers Act 1992

European protected species

6.12 The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended in Scotland) transpose the EC Habitats Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Council Directive 92/43/EEC) into national law.

6.13 “European protected species” (EPS) are those which are present on Schedule 2 of the Regulations. They are subject to the provisions of Regulation 39. In summary, this legislation makes it an offence to:

- capture, injure or kill a wild animal EPS
- to disturb such an animal while it is occupying a structure or place it uses for shelter or protection
- to disturb such an animal while it is rearing or otherwise caring for its young
- to obstruct access to a breeding site or resting place of such an animal or to otherwise deny the animal use of the breeding site or resting place
- to disturb such an animal in a manner that is, or in circumstances which are, likely to significantly affect the local distribution or abundance of the species to which it belongs
- to disturb such an animal in a manner that is, or in circumstances which are, likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young.

6.14 Although the law provides strict protection to these species, it also allows this protection to be set aside (derogation) through the issuing of licences. The licences in Scotland are currently determined by Scottish Natural Heritage (SNH) for development works. In accordance with the requirements of the Regulations, a licence can only be issued where the following requirements are satisfied:

- that there is no satisfactory alternative, and
- that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

Protected species - Wildlife and Countryside Act 1981 (as amended in Scotland).

6.15 Protected animals are listed on Schedule 5 of the Wildlife and Countryside Act 1981 (as amended in Scotland), (all EPS are also protected under the 1981 Act). In summary, this legislation makes it an offence to intentionally or recklessly:

- Kill, injure or take any wild animal listed on Schedule 5
- Damage, destroy or obstruct access to any structure or place which such an animal uses for shelter or protection or to disturb such an animal when it is occupying a structure or place for that purpose.

² In so far as they apply to Scotland, see Regulation 2 of 2017 Regulations for provisions relevant to Scotland.

- 6.16 All nesting birds are protected under the Wildlife and Countryside Act 1981 (as amended in Scotland) which makes it an offence to intentionally kill, injure or take any wild bird or take, damage or destroy its nest whilst in use or being built, or take or destroy its eggs. In addition, it is an offence to disturb any wild bird listed on Schedule 1 of the act whilst it is building a nest or is in, on, or near a nest containing eggs or young, or whilst lekking; or to disturb the dependent young of any wild bird listed on Schedule 1.

Species and habitats of principal importance

- 6.17 Section 1 of the Nature Conservation (Scotland) Act 2004 states that 'It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions'. To assist with this objective Section 2(4) of the Act sets out the requirement to publish a list of flora and fauna considered to be of principal importance in Scotland.
- 6.18 The list required under Section 2(4) of the Act has now been published and includes a diverse range of habitats and species³. The measures required to protect these species and habitats are set out in the document 'Scotland's Biodiversity: It's in Your Hands - A strategy for the conservation and enhancement of biodiversity in Scotland' (Scottish Executive, 2004). Biodiversity Targets are outlined in the 'Strategic Plan for Biodiversity 2011-2020' (Scottish Government, 2013). The two documents together comprise the Scottish Biodiversity Strategy.

Protection of Badgers Act 1992 (as amended)

- 6.19 The 1992 Act protects badgers and their setts. It has been amended by the Nature Conservation (Scotland) Act 2004 under Schedule 6 (26). In summary, offences under this legislation are:
- Wilfully taking, injuring or killing badgers
 - Cruelty; selling and possession; marking and ringing
 - Intentionally or recklessly interfering with a badger sett (interfering with a badger sett includes damaging or destroying a badger sett or any part of it, obstructing access to a sett, disturbing a badger whilst it is in a sett, or causing or allowing a dog to enter a badger sett).

European protected species (Animals)

- 6.20 The Conservation of Habitats and Species Regulations 2017 (as amended) consolidates various amendments that have been made to the original (1994) Regulations which transposed the EC Habitats Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Council Directive 92/43/EEC) into national law.
- 6.21 "European protected species" (EPS) of animal are those which are shown on Schedule 2 of the Conservation of Habitats and Species Regulations 2017 (as amended). They are subject to the provisions of Regulation 43 of those Regulations. All EPS are also protected under the Wildlife and Countryside Act 1981 (as amended). Taken together, these pieces of legislation make it an offence to:
- a. Intentionally or deliberately capture, injure or kill any wild animal included amongst these species
 - b. Possess or control any live or dead specimens or any part of, or anything derived from a these species
 - c. deliberately disturb wild animals of any such species
 - d. deliberately take or destroy the eggs of such an animal, or
 - e. intentionally, deliberately or recklessly damage or destroy a breeding site or resting place of such an animal, or obstruct access to such a place

³ The list is published at: <http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/16118/Biodiversitylist/SBL>

- 6.22 For the purposes of paragraph (c), disturbance of animals includes in particular any disturbance which is likely—
- a. to impair their ability—
 - i. to survive, to breed or reproduce, or to rear or nurture their young, or
 - ii. in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
 - b. to affect significantly the local distribution or abundance of the species to which they belong.
- 6.23 Although the law provides strict protection to these species, it also allows this protection to be set aside (derogated) through the issuing of licences. The licences in England are currently determined by Natural England (NE) for development works and by Natural Resources Wales in Wales. In accordance with the requirements of the Regulations (2017, as amended), a licence can only be issued where the following requirements are satisfied:
- a. The proposal is necessary 'to preserve public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment'
 - b. 'There is no satisfactory alternative'
 - c. The proposals 'will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.'

Definition of breeding sites and resting places

- 6.24 Guidance for all European Protected Species of animal, including bats and great crested newt, regarding the definition of breeding and of breeding and resting places is provided by The European Council (EC) which has prepared specific guidance in respect of the interpretation of various Articles of the EC Habitats Directive.⁴ Section II.3.4.b) provides definitions and examples of both breeding and resting places at paragraphs 57 and 59 respectively. This guidance states that 'The provision in Article 12(1)(d) [of the EC Habitats Directive] should therefore be understood as aiming to safeguard the ecological functionality of breeding sites and resting places.' Further the guidance states: 'It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.'

Badger

- 6.25 Badger is protected under the Protection of Badgers Act 1992. It is not permitted to wilfully kill, injure, take, possess or cruelly ill-treat a badger, or to attempt to do so; or to intentionally or recklessly interfere with a sett. Sett interference includes disturbing badgers whilst they are occupying a sett, as well as damaging or destroying a sett or obstructing access to it. A badger sett is defined in the legislation as "a structure or place, which displays signs indicating current use by a badger".
- 6.26 ODPM Circular 06/2005⁵ provides further guidance on statutory obligations towards badger within the planning system. Of particular note is paragraph 124, which states that "The likelihood of disturbing a badger sett, or adversely affecting badgers' foraging territory, or links between them, or significantly increasing the likelihood of road or rail casualties amongst badger populations, are capable of being material considerations in planning decisions."

⁴ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC. (February 2007), EC.

⁵ ODPM Circular 06/2005. *Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impacts within the Planning System* (2005). HMSO Norwich.

- 6.27 Natural England provides Standing Advice⁶, which is capable of being a material consideration in planning decisions. Natural England recommends mitigation to avoid impacts on badger setts, which includes maintaining or creating new foraging areas and maintaining or creating access (commuting routes) between setts and foraging/watering areas.

⁶ <http://www.naturalengland.org.uk/ourwork/planningdevelopment/spatialplanning/standingadvice/specieslinks.aspx>