

EPS Mitigation Licensing: Latest developments

NATURAL
ENGLAND

March 2016

Dear Stakeholder

Welcome to the first European Protected Species (EPS) Mitigation Licensing Newsletter of 2016. It includes a number of important news items and information on consultations, new Class Licences, changes to decision making processes, reminders, advanced notices, recent updates and other useful material which will help you with submission of an EPS Licence application and keeping abreast of this evolving work area.

As always, to ensure this newsletter reaches as many people who are involved with EPS licensing as possible, we encourage you to share it with colleagues and anyone else who you feel may be interested. Previously published EPS Newsletters can be found [here](#). We aim to provide as much notice as we reasonably can prior to any changes being implemented and we also provide these updates via e-mail.

Headlines:

1. [Important information: Public consultation on new licensing policies for EPS mitigation licensing now open](#)
2. [Advanced notice: Change to current practice when issuing 'Further Information Requests'](#)
3. [Reminder: Survey requirements for great crested newt licensing](#)
4. [Important advice: eDNA and degradation control](#)
5. [Update: Great crested newt Low Impact Class Licence plans](#)

- 6. Update: Application period to apply to become Registered Consultant for the Bat Low Impact Application Class Licence**
- 7. For Awareness: Bat Low Impact Class Licence survey work**
- 8. Important information: New Class Licence for the maintenance of waterways inhabited by white-clawed crayfish**
- 9. Important information: Two new Class Licences for water voles and Annex 1: Licensing the intentional displacement of water voles in the context of Class Licences for water course management and facilitating authorised development**
- 10. Update: Woking strategic compensation pilot for great crested newt**
- 11. Notice: Do we have your current contact details?**

- 1. Important information: Public consultation on proposed new licensing policies for EPS mitigation licensing now open**

The public consultation was launched on Thursday 25 February. We are seeking views on four new policies which shift the focus away from protecting individual animals on development sites and towards improving populations in the wider local area; offer flexibility in the location of compensatory habitat provision; allow EPS access to temporary habitats that will be subsequently developed; and, allow reduced survey effort in appropriate circumstances.

The consultation presents the new policies, discusses the circumstances in which they can be used, and provides hypothetical example cases. We are seeking views on whether respondents believe they could benefit EPS and help reduce delays, costs and uncertainty for developers. We have also asked respondents to let us know about real cases where they could have an impact.

The consultation is available at the link below and is **open until 7 April**. Any queries should be sent to wildlife.consultation@naturalengland.org.uk.

<https://www.gov.uk/government/consultations/wildlife-licensing-comment-on-new-policies-for-european-protected-species-licences>

2. Advanced Notice: Change to current practice when issuing a ‘Further Information Request’

We are changing the way we assess EPS mitigation licence applications, where a Further Information Request (FIR) needs to be issued. The change applies to the assessment of all three tests. We expect to implement the new ways of working **from 29 March**.

It is current practice for Advisers to complete a full assessment of each application, even if it becomes clear that further information will be required because of major issues with one or more of the three tests.

In the year to January 2016, Natural England responded to 66% of licence applications within published service standards, against a target of 95%. In 2015 we issued 2837 decisions on EPS licence applications including 307 FIRs.

A considerable amount of Adviser time is spent assessing poor quality applications and providing applicants with detailed comments and advice on why we are unable to grant a licence. This affects the service we can give to those who submit good quality applications, and does not provide sufficient incentive for applicants to ensure their application provides all the necessary information and evidence, on first submission.

We will continue to contact the applicant and/or consultant direct to resolve minor issues, but as soon as it becomes clear that there is a major issue, then we will stop the assessment and issue a FIR to the applicant and consultant at that stage.

Our decision form which accompanies the FIR will continue to provide the applicant with a detailed explanation of:

- what the issue is
- why it is an issue
- what needs to be done, or what further information is required, to address the issue.

We will also indicate in our decision form, if there are sections of the Method Statement (Experience, Survey, Impacts, Methodology and Mitigation) that we have already determined meet our requirements. This will tell the applicant and

consultant which area we first found unsatisfactory, if there are any areas that are fine and any areas where we have not yet formed an opinion.

The applicant and their consultant will be advised to check any unassessed areas, and amend if necessary, before re-submitting. If the issue is with a section of the Method Statement, then the applicant should re-submit a fully revised Method Statement and all the maps and Work Schedule – with updated dates and references. They will be encouraged to consider our [Pre-submission Screening Service](#) to minimise the risk of a further major issue being found on a different section of the application which would lead to another FIR being issued.

The purpose of this new approach is to ensure that applicants who submit good quality applications receive a speedier service and those who submit applications with major issues to address are made aware sooner.

Prior to the launch date of 29 March, please direct any queries you have about the changes to the [Sustainable Development mailbox](#). Once the new process has launched, Area Team wildlife advisers and Technical Services team colleagues will be able to provide advice as normal.

3. Reminder: Survey requirements for great crested newt licensing

As the survey season is approaching we would like to take the opportunity to remind consultants of the information contained within the great crested newt (GCN) [Method Statement](#) on survey requirements, depending on impacts, required to support a GCN licence application and to encourage consultants to follow them. The table in the ‘Instructions’ tab explains minimum age of survey (years) and expected type of survey we require (presence / absence or population size class). However, we often receive applications with full population size class assessments being undertaken when a presence / absence survey would have sufficed; this can add additional unnecessary time and costs to a project.

Other examples include: six visits being undertaken when a large population size class was established early in the survey (so there is no added benefit of continuing with the six full visits), or when a presence / absence survey is required, and conventional techniques are used rather than eDNA, and GCN presence is established on the first, second or third survey visit yet four surveys are undertaken.

In addition to the above, where the use of eDNA sampling is used as a survey technique to establish presence or likely absence of GCN we will accept eDNA results if samples are undertaken in strict accordance with the published Defra technical advice note and they are collected by a suitably trained and experienced licensed GCN surveyor.

No GCN class survey licence is required to take water samples, however for licence applications Natural England has made it a mandatory requirement that experienced, licensed GCN surveyor/s, or their trained Accredited Agents, collect the samples and we require a declaration in an application to confirm this. Natural England has made this a requirement because eDNA is not evenly distributed in pond water and surveyors experienced in knowing where to look for GCN within a pond are more likely to be successful in sampling for eDNA. The Method Statement template also contains the following advice: 'It is only acceptable to use Accredited Agents under a GCN survey licence to collect eDNA samples if it can be demonstrated that they are adequately trained and competent in GCN ecology, conventional survey techniques, trained in the collection of eDNA samples and are experienced GCN surveyors even if they do not hold their own GCN survey licences. The Named Ecologist and applicant are responsible for ensuring that this condition is met'.

4. Important advice: eDNA and degradation control

Regarding recent queries on the degradation control and DNA extraction kit aspects of the eDNA protocol, we still require practitioners to adhere to the protocol and [Technical Advice Note](#) at this time as it is the only tested, peer reviewed methodology for this application. We are taking forward discussions with the industry regarding proficiency testing and developing a mechanism for assessing, and where appropriate accepting, advances in eDNA methods in future.

We are also aware that services are being offered earlier than the date given in the protocol. Only positive results will be accepted – these will lead to conventional surveys being carried out to establish population size class estimates. Where negative results are returned, the sites will need to be resurveyed within the protocol timings for the result to be accepted.

5. Update: Great crested newt Low Impact Class Licence plans

We launched the first application process for consultants to apply to become a Registered Consultant able to use a new GCN Class Licence for licensable temporary and low impact type works. We received over 125 applications from consultants and are currently sifting the applications. Workshops for successful applicants will be held in May and June in conjunction with external trainers. Following attendance at the workshops attendees must pass a post-course assessment before receiving their personal registration number enabling them to apply to register sites. CIEEM kindly hosted the announcement on their website ([CIEEM home page](#)). It contained a number of ‘Questions and Answers’ on the licence, process and next steps, as well as the application form.

We will review the criteria following the sift of applications and before opening a second application period later in the year.

6. Update: Application period to apply to become Registered Consultant for the Bat Low Impact Application Class Licence

Following a review of the July 2015 Bat Low Impact Class Licence criteria to become a Registered Consultant we launched a third application process to become a Registered Consultant on 1 March 2016. The invite and application form was sent to all recipients of this EPS Newsletter and CIEEM are hosting these documents, on their website ([CIEEM homepage](#)); the announcement contains a series of Questions and Answers should you wish to know more about the Class Licence, what it entails and what it permits Registered Consultants to do. Please do forward it to anyone you believe may be interested who may not be on our mail list. The application period **closes on 28 March 2016**.

7. For Awareness: Bat Low Impact Class Licence survey work

We have heard from a number of people a misconception that a Registered Consultant for the Bat Low Impact Class Licence must undertake all survey work for each site they wish to register. The recent Announcement (see above) contains a Q&A which we believe is worth repeating here:

Is a survey required to use this licence once you are a Registered Consultant?

- Yes. The licence simply provides another licensing route (ie should offences be unavoidable) which Registered Consultants can use following a survey, in accordance with the Bat Conservation Trust’s survey guidelines, and impact

assessment. An assessment of the three tests is made on each site registration request made.

- The survey does not necessarily need to have been carried out by a Registered Consultant. Registered Consultants have discretion to register sites using survey data from non-registered consultants. The Registered Consultant is, however, the Licensee for each site registered under this Class Licence, so it is important they are confident when accepting survey work of its standard and quality and that it meets with the terms and conditions of the licence, including that the correct species and roost types are identified; it is their registration and reputation which may be at risk should issues be identified through undertaking the licensed work or through compliance checks. Not all Registered Consultants will accept surveys from non-registered consultants, some undertake their own top up surveys and some undertake full surveys before taking on a case; Natural England trusts them to make the decision which is right for them.
- 8. Important information: New Class Licence for the maintenance of waterways inhabited by white-clawed crayfish**

This new Class Licence allows the limited movement of white-clawed crayfish to safe locations away from areas where they may be injured or killed during works to maintain waterbodies, water courses and infrastructure located within waterbodies. It does not permit the removal of white-clawed crayfish from waterbodies so as to permit permanent change of habitat such as the construction of new structures. It does permit the construction of temporary structures such as those necessary to enable works, e.g. bunds, silt traps etc.

Further information, including how to register, is available here:

[https://www.gov.uk/government/publications/white-clawed-crayfish-licence-to-catch-them-to-carry-out-maintenance.](https://www.gov.uk/government/publications/white-clawed-crayfish-licence-to-catch-them-to-carry-out-maintenance)

9. Important information: Two new Class Licences for water voles

Natural England has introduced two new Class Licences for work on or near waterways where water voles are present:

1. A Class Licence to displace water voles for development purposes, and
2. A Class Licence for the Internal Drainage Board for displacement of water voles.

Further information on how to register for the above licences is available here
<https://www.gov.uk/government/collections/water-vole-licences>.

The rationale for introducing separate class licences is explained in detail in the annex at the end of this newsletter. The need to licence displacement activity is explained below:

Displacing water voles through the removal of vegetation and other measures
Exposing water vole burrows by removing the surrounding vegetation to ground level, followed possibly by additional cutting or herbicidal treatment to prevent regrowth, is a well-established technique to encourage water voles to vacate their burrows. Draining water from channels may be used in parallel with vegetation cutting and, especially where habitat is to be permanently lost, these steps may be followed by a destructive search to confirm water voles have vacated their burrows.

This technique, commonly referred to as '**displacement**', is typically employed to prepare an area of ground for destructive operations, such as ditch re-profiling or construction works, which would harm water voles if they remained in their burrows. The technique is recommended in the '*Water Vole Conservation Handbook*'ⁱ and in the recently published '*The Water Vole Mitigation Handbook*'ⁱⁱ.

It is Natural England's view that where the removal of vegetation is carried out with the **express intention** of encouraging water voles to leave their burrows this constitutes unlawful disturbance of water volesⁱⁱⁱ. A licence is therefore required in order to carry out displacement legally. This applies whether or not the displacement effect is temporary or permanent. Any activity that damages or destroys any structure or place used by a water vole for shelter or protection, such as a burrow, is also likely to be unlawful if the presence of water voles is suspected^{iv}.

It is Natural England's view that the legal defence previously relied on when using the 'displacement technique', wherein the displacement of the water voles was treated as the '*incidental result of a lawful operation and could not reasonably have been avoided*'^v, does not apply in circumstances where the act of vegetation removal is undertaken with the specific intention of encouraging water voles to leave their burrows.

Routine maintenance cutting or mowing of vegetation along water courses – typically carried out to keep water ways or bankside paths clear of obstruction - may unintentionally displace water voles. In such situations any displacement that occurs is an *incidental consequence* of the activity. This being the case, it is Natural England's view that such legitimate management activities can proceed without a licence so long as reasonable steps are taken to minimise the risk of displacing or harming water voles. The recommended way to do this is for operations to follow recognised best practice. In these circumstances, if displacement does occur then it is Natural England's view that the operator would be entitled to rely on the '*incidental result of a lawful operation*' defence, and would not commit an offence.

Please note that this advice:

- Applies solely to water voles. Burrow-living species respond to vegetation clearance in different ways and the lawfulness of operations should be considered on a species-by-species basis; and
- Does not remove the responsibility of people to comply with the law and the decision whether or not to apply for a licence is a matter for the person undertaking or commissioning an activity; neither does it change the fact that interpretation of the law is ultimately a matter for the Courts.

10. Update: Woking strategic compensation pilot for great crested newt

The public consultation on the Woking strategic compensation pilot for GCN closed on 10 February, with a significant amount of constructive feedback received. Natural England and Woking Borough Council extend their thanks to all for their contributions.

The next step is the submission of the proposals for consideration to Woking Borough Council's Executive Committee meeting on 17 March. If the pilot is approved, the intention is for Natural England to issue an Organisational Licence to the Council in late March.

This licence will cover activities relating to both the development sites and the compensation areas for GCN which are to be managed over a number of years by the Council.

11. Notice: Do we have your current contact details?

Each time we send out the EPS Newsletter to our current mailshot list we receive a considerable number of ‘undeliverable’ messages. If you have recently changed your email, or are about to do so, or you know someone who is involved with EPS Licensing work and would like to receive our mailshots, please do let us know. Send you current email address to the EPS.Mitigation@naturalengland.org.uk with an email header: *Change of email address for EPS Newsletter mailshot list.*

Kind regards

Kathryn Murray

Senior Specialist – European Protected Species Mitigation Licensing

Annex 1: Licensing the intentional displacement of water voles in the context of Class Licences for water course management and facilitating authorised development

The water vole is a species of significant conservation concern in England, having disappeared from at least 90% of its former sites in the last century. As a consequence it is fully protected under the Wildlife & Countryside Act 1981 (as amended) and it is also a Section 41 priority species under the Natural Environment and Rural Communities Act (2006).

To date, the practice of 'intentional displacement' of water voles in order to move them away from harm from potentially damaging operations has been undertaken under the Wildlife & Countryside Act defence "...the incidental result of a lawful operation and could not reasonably have been avoided...". It is now the opinion of Natural England and others that this defence does not apply to intentional displacement and that without a licence the activity is unlawful. As an activity that has been used and unregulated for many years, we believe that the most proportionate means of licensing intentional displacement is through a Class Licence, requiring users to register and to provide details of action taken.

When people apply to Natural England for a licence to carry out an activity impacting a protected species we consider the impact that the activity will have on the species and the risk it poses to its conservation status. We also consider the purpose and importance of the activity. These factors will influence the likelihood that a licence is issued and the terms and conditions of that licence.

The impacts and risks to water voles as a result of development and water course management are not the same; which is why the Class Licences for these activities differ.

Development activities normally result in a permanent loss of water vole habitat; the long-term impacts of which can include fragmentation of populations or the loss of a viable population from the affected area. Indirect effects of development may include increased disturbance and predation by animals such as domestic cats and dogs. Until evidence is available to the contrary, the timing of intentional displacement and the distance over which it takes place should be limited in accordance with recognised best practice in order to minimise these impacts on water voles.

The terms and conditions of the Class Licence to permit authorised development therefore closely reflect the best practice guidance in the 2016 revision to the Water Vole Conservation Handbook (2011), which focuses on mitigation for development activities. This guidance is based on the available evidence and is widely regarded as representing an ‘industry standard’ for activities impacting water voles. As the Wildlife & Countryside Act has no licensing purpose for development, displacement in order to facilitate development is licensed under the ‘conserving wild animals’ purpose on the grounds that displacing the water voles is ‘saving’ them from the development. In order to comply with this purpose, there must be a conservation gain for water voles. This is most likely to be achieved by working in accordance with published best practice.

- By contrast, the impacts of most water course maintenance works are temporary; water vole habitat is neither permanently lost nor fragmented, and there is no fundamental or permanent change in the character of the location. Evidence exists that these works result in long-term improved habitat for water voles that supports healthy populations.

The Class Licence terms and conditions for water course maintenance are therefore less restrictive than those for development and reflect practices that water course management bodies such as the Internal Drainage Boards (IDBs) and the Environment Agency (EA) have been undertaking for many years. Natural England is satisfied that these activities do not have a long-term negative impact on water voles and they may in fact create conditions that enhance the conservation status of local water vole populations. The increased flexibility in licensing for water course maintenance is further justified on the basis of practical constraints faced by the IDBs and EA together with the importance of carrying out water course and flood management in order to preserve public health and safety and prevent damage to land and property. In order to verify this flexibility, users of this Class Licence are required to monitor the impacts on water voles for up to three years following licensed action.

If evidence becomes available that demonstrates that we can safely adopt a less restrictive approach to development (or any other activity) then we will consider revising the terms and conditions in the Class Licence. Similarly if, through monitoring, evidence becomes available that demonstrates that the licensed activities of IDBs and EA are not having the neutral or positive effect on water voles that had previously been understood, we will consider amending the terms and conditions of these licences.

As Class Licences are generic they are necessarily designed to be applicable to a potentially wide range of circumstances. In situations where more flexibility is required, an application for an individual licence can be made which will be considered on its individual merits. Justification as to why it is necessary to deviate from best practice will be required as part of any such application.

ⁱ Strachan, R, Moorhouse, T and Gelling, M. (2016) Water Vole Conservation Handbook. 3rd edition; Wildlife Conservation and Research Unit, Oxford. ISBN-13: 9780954637651

ⁱⁱ Dean, M, Strachan R, Gow, D and Andrews, R (2016) The Water Vole Mitigation Handbook (The Mammal Society Mitigation Guidance Series). Eds Fiona Mathews and Paul Chapin. The Mammal Society, London

ⁱⁱⁱ See [section 9\(4\)\(c\)](#) of the Wildlife and Countryside Act 1981 (as amended; the '1981 Act')

^{iv} See [section 9\(4\)\(a\)](#) of the 1981 Act

^v For full details of the defence see [section 10\(3\)\(c\)](#) of the 1981 Act