Saving protected species

16 December 2016

A public consultation on licensing Great Crested Newts and other European protected species may result in an end to their exclusion, says Valerie Fogleman

---

On 25 February, Natural England issued a public consultation on proposed policies for licensing development activities that affect species protected under the Conservation of Habitats and Species Regulations 2010/490 , as amended (the regulations).

A key aim of the regulations, which implement the Habitats Directive in England and Wales and to a more limited extent in Scotland, is to maintain or restore European protected species (EPS) to their "favourable conservation status"; that is, to the point that their natural range, distribution and populations are stable or increasing.

The regulations protect EPS by, among other things, making it an offence to harm or kill them or to destroy their breeding sites. The protection is not absolute. Regulation 53(9)(b) provides that Natural England, Natural Resources Wales or Scottish Natural Heritage may grant a licence only if the authority is satisfied that "there is no satisfactory alternative; and [the development] will not be detrimental to the maintenance of the population of the [relevant EPS] at a favourable conservation status in [its] natural range".

Under Natural England's standard practice and procedures, the developer proposes a programme of compensation and mitigation to reduce or offset any unavoidable harm to an EPS to ensure that the development is not detrimental to the conservation status of the EPS population.

Great Crested Newts have the most stringent safeguards for any amphibian in the UK

Compensation measures include creating or improving the compensatory habitat on or near the site, while mitigation measures include maintaining "a population of equivalent status [at the compensatory habitat]". The purpose is to ensure there is "no net loss in the local population status of the [EPS], taking into account factors such as population size, viability and connectivity".

Mitigation measures generally involve the exclusion of an affected EPS from the development site including trapping any animals that access the site and relocating them to the compensatory habitat. As Natural England has commented, however, the cost of excluding an EPS may be "much greater than the investment in the provision of compensatory habitat, even though the latter may present greater opportunity for benefits to the local population in the long term".

Policy proposals

The 4 policies proposed by Natural England are:

1. to shift the focus from protecting individual animals on a development site towards improving populations in the wider local area so as to reduce the requirement for the seasonally constrained work of trapping and relocating an EPS
2. to allow flexibility in the location of the compensatory habitat, enabling it to be situated away from a development site
3. to allow an EPS access to temporary habitats on development sites, such as mineral workings and brownfield sites, provided that the operator or developer enters into an agreement with Natural England to maintain the conservation status of the local EPS population during development activities and after their completion
4. to reduce the extent of an EPS survey when the impacts on an EPS can be predicted with confidence.

All 4 policies focus on Great Crested Newts, with the 4th also including bats. The newts and bats are listed as EPS under the habitats directive due to a substantial decline in their numbers and distribution across the EU, including the UK.

Fragmentation threatens EPS with extinction due to their inability to migrate from the isolated area; the probability of isolated populations becoming extinct within 20 generations is more than 95%

The decline has been caused especially by degradation of their habitat, ponds in particular, as a result of agricultural intensification, housing and general neglect, as well as fragmentation of habitat by roads, buildings and other structures. Fragmentation threatens EPS with extinction due to their inability to migrate from the isolated area; the probability of isolated populations becoming extinct within 20 generations is more than 95%.

Great Crested Newts have the most stringent safeguards for any amphibian in the UK, being protected under Schedule 2 of the regulations and Schedule 5 of the Wildlife and Countryside Act 1981 , as amended. A clash with mineral working and development was inevitable because the newts occupy water-filled pits in parts of, or former, mineral extraction sites as well as brownfield and other disused industrial sites.

The exclusion of Great Crested Newts from a development or mineral extraction site is usually achieved by installing amphibian fencing around the site and associated ponds, maintaining this, and ensuring that any newts discovered in pitfall traps, carpet tiles or other artificial refuges on the site are relocated outside the fencing. Generally speaking, relocation may only be carried out by the consultant ecologist named in the licence or their accredited agent.

Twin benefits

Whereas brownfield sites often include piles of rubble and other debris and old walls, favoured by Great Crested Newts as habitat, development works themselves may create similar ? and new ? piles of rubble and debris. Excluding the newts from a development

site is not, therefore, necessarily to the advantage of their local population because they cannot benefit from the habitat created by it. Similarly, habitat in a mineral extraction site benefits, however temporarily, the newts' local population.

Policy 3 has obvious financial benefits for mineral extraction companies and developers, in that the need to install and maintain exclusion fencing and capture and remove Great Crested Newts would be avoided. As the consultation notes, the policy also has long-term benefits for local populations of newts. Such benefits would be increased if on-site habitats used by them are not worked or developed for long periods of time.

The problem arises in the measures that the operator or developer must take when the newts have colonised an area that is then used for mineral extraction or development. Natural England proposes that the operator or developer would not be required to carry out full compensation and mitigation measures at this stage; instead, a baseline for Great Crested Newt habitat would be agreed before the works began and the operator or developer would manage the site during its colonisation by the newts, with the result that their conservation status would be increased.

> *Whereas brownfield sites often include piles of rubble and other debris and old walls, favoured by Great Crested Newts as habitat, development works themselves may create similar ? and new ? piles of rubble and debris*

The developer could also enter into a section 106 agreement with the planning authority or a Natural Environment and Rural Communities Act 2006 agreement with Natural England. The consultation observes that conservation covenants and other options may also be available in future.

The consultation, which closed on 7 April 2016, is sparse on measures to be taken when a mineral extraction or development site that has been temporarily used as Great Crested Newt habitat is worked for minerals or developed. A hypothetical case study for policy 3 involving a quarry merely states that a "bespoke licence enables damage and destruction of temporary habitats and incidental losses of G[reat] C[rested] N[ewts] as a result of the quarry working".

More details will be essential to protect operators or developers who implement the policy from potential sanctions or the implementation of expensive measures when they work or develop sites that have been colonised by the newts and other EPS, or which have increased populations.

Brexit does not obviate the need to continue research on this policy. The habitats directive will still apply to the UK for at least 2 years before England, Wales, Scotland and Northern Ireland each decide its future in their jurisdiction according, in part, to the UK's commitments as parties to the Convention on Biological Diversity and other nature conventions.

Other countries

The research could include a similar programme in the USA where landowners have entered into "safe harbour agreements" (SHAs) for temporary habitats since the 1990s. SHAs allow the landowner to destroy any additional habitat created after entering into

an agreement, including the incidental loss of protected animals, provided the baseline condition of the site is retained. Implementation of the policy at federal and state level has resulted in the creation of additional habitat.

The Canadian province of Ontario has a similar policy, as do the Netherlands and Belgium where it is referred to as "temporary nature", and is designed to allow pioneer or early species such as natterjack toads and common terns to inhabit part of a development site.

The concept recognises that, in time, species at the developed site will need to be removed. In the meantime, however, pioneer species will have colonised the site, followed by others as the ecology develops. Although the Natural England proposals focus mainly on Great Crested Newts, a review of the programmes in North America, the Netherlands and Belgium may provide valuable insights to enable its successful introduction and implementation.

Valerie Fogleman is Consultant at Stevens & Bolton LLP and Professor of Law at Cardiff University School of Law and Politics

Further information

- Natural England's Proposed new policies for European Protected Species licensing: Public Consultation
- Related competencies include: Development appraisals , Management of the natural environment and landscape , Sustainability
- This feature was taken from the RICS *Land journal* (October/November 2016)