



From: Michael Eastham
Sent: 12 April 2019 08:39
To: 'Liz Rogers'
Cc: Planning.Responses
Subject: FW: Reptile Habitat Status Misapprehension - AL/129/18/OUT – Land East of Orchard Gardens, Woodgate

Liz,

Please see the email below and the attachment from the applicant in reply to your consultation response to AL/129/18/OUT – Land East of Orchard Gardens, Woodgate.

I look forward to your reply.

Kind regards,

Michael

From: T Croucher [REDACTED]
Sent: 11 April 2019 17:44
To: Michael Eastham
Subject: Fw: Reptile Habitat Status Misapprehension

Dear Mr Eastham

The attachment is " Legislative protection for herpetofauna" prepared by Amphibian and Reptile Conservation Group ARG UK

Just a note to clarify that the species that have the protection Ms Roger's refers to are in Section A of the attachment. They and their habitats do not feature in this application. The four common or widespread reptiles which could apply to this site are in section B which explains their more limited protection.

Kind regards

David Loosley

From: T Croucher
Sent: 11 April 2019 16:44:59
To: Michael Eastham
Subject: Reptile Habitat Status Misapprehension

Dear Mr Eastham

Please find attached a independent summary of the legislation regarding the protection afforded to different UK reptiles. This demonstrates that the habitat for the 4 common reptiles is not protected. This is a distinction that should not have escaped a competent ecologist.

It appears that Ms Rogers might have been labouring under this misapprehension for some time and it has perhaps affected her view on this application, and possibly on others.

We trust that once Ms Rogers appreciates this distinction she will accept that the reptile habitat has no protection in this case.

It then follows that the site can be legally cleared to its boundaries leaving no refugia for reptiles. Alternatively it could be allowed to become completely overgrown with brambles providing no basking. Either way it would not provide suitable reptile habitat.

No planning = No provision or protection of reptile habitat on site.

Planning subject to Reptile mitigation enforced by s106 = Provision and Protection of Reptile habitat on site.

Care must still be taken to avoid intentionally killing or injuring reptiles during clearance and construction. That can be ensured by conditions requiring the involvement of a competent ecologist in preparing and implementing construction and landscape management plans.

The material consideration in relation to reptiles and biodiversity is therefore met by the grant of planning permission subject to conditions and s106. If you require any further input on this point please let me know.

Yours sincerely

David Loosley

Legislative protection for herpetofauna

Produced by ARC with input from Matt Ellis at CCW. We endeavour to keep these notes up to date but changes do occur in legislation. Please note the version date as this indicates when this information was last updated.

Version number: September 2010

LEGISLATION

Legislative protection for the UK's herpetofauna - England and Wales

Wildlife legislation in the UK is complicated, both through its steady evolution and amendment creating numerous different acts, regulations and statutory orders, etc, but also because the Environment is a devolved function for the different country administrations in the UK. Therefore different legislation (and policy) has developed in the different countries of the UK. It is also further complicated by the interaction between national, European and international legislation and jurisprudence. Different levels of protection apply to different species.

The summary below identifies the protection afforded to reptile and amphibian species in England and Wales through nature conservation legislation; we have not addressed site/habitat protection mechanisms. Some additional protection can be afforded through animal welfare legislation and through other measures, such as land use planning regimes.

Protection for herpetofauna in England and Wales

A. European Protected Species (namely the smooth snake, sand lizard, natterjack toad, pool frog and great crested newt and marine turtles) are protected via a combination of Regulation 41 of the Conservation of Habitats and Species Regulations 2010 and Sub-sections 9(4) b & c and Section 9(5) of the Wildlife & Countryside Act 1981 (as

amended). These prohibit:

(a) deliberate capturing, injuring or killing

(b) deliberate disturbance;

Disturbance of animals includes in particular any disturbance which is likely-

(i) to impair their ability to survive, to breed or reproduce or to rear or nurture their young; or

(ii) to impair the ability of hibernating or migratory species, to hibernate or migrate; or

(iii) to affect significantly the local distribution or abundance of the species to which they belong;

(c) deliberate taking or destroying the eggs of such an animal; or

(d) (i) damaging or destroying a breeding site or resting place of such an animal

and/or

(ii) intentionally or recklessly -

(a) disturbing any such animal while it is occupying a structure or place which it uses for shelter or protection; or

(b) obstructing access to any structure or place which any such animal uses for shelter or protection.

(e) any person having in their possession or control, transporting, selling or exchanging, offering for sale or exchange, any live or dead animal or part of an animal, or anything derived from such an animal which has been taken from the wild and which is of a species or subspecies listed in Annex IV(a) to the Habitats Directive (This section also covers all other species listed on Annex IV of the Habitats Directive including those that are not native to the UK) unless

the animal from which the part or the thing in question is derived, was lawfully taken from the wild (i.e. taken from the wild in the European Union without contravention of appropriate domestic legislation and before the implementation date of the Habitats Directive (in that Country e.g. 1994 in UK) or if it was taken from elsewhere).

The above relate to 'wild animals' and apply regardless of the stage of the life of the animal in question. Unless the contrary is shown, in any proceedings for an offence under paragraph the animal in question is to be presumed to have been a wild animal. Note that different defences and licensing regimes are appropriate under the Wildlife & Countryside Act 1981 as amended (which relates only in the context of intentional & reckless damage & disturbance whilst occupying a place used for shelter & protection as described in (d) (ii) a-b above, and provision relating to sale, etc, in e. above) and the Habitats Regulations 2010.

Note: in Reg 51 of the 2010 Regulations there is a requirement on 'the appropriate authority' to make arrangements for research and monitoring to assess the impacts of incidental capture and killing to ensure no negative effect on the species. This may have wide ranging implications, e.g. impacts of road side gully pots.

The legislation & section numbers, and amendments:

Conservation of Habitats and Species Regulations 2010 is consolidated legislation replacing the 1994 Regs and subsequent amendments. Species protection (as outlined above) is covered by Regulation 41.

<http://www.legislation.gov.uk/uksi/2010/490/contents/made>

[NB: This replaces the provisions previously covered by Reg 39 of Conservation (Natural Habitats, etc) Regulations 1994

http://www.opsi.gov.uk/SI/si1994/Uksi_19942716_en_1.htm as amended by Reg 13 of The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007
http://www.opsi.gov.uk/si/si2007/ukxi_20071843_en.pdf

Only Sub-sections 9 (4) b-c and 9(5) of The Wildlife & Countryside Act 1981
<http://www.jncc.gov.uk/page-3614> (as amended)

apply to the European Protected Species of amphibian and reptile [note Section 9(4) was divided into new sections a, b & c by The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007]. These are the provisions relating to disturbance and damage to places used for shelter and protection, etc, and sale, etc. Other provisions amending application of Wildlife & Countryside Act 1981 as it applies to European Protected Species of amphibian & reptile are:-

(i) Inclusion of Marine turtles on Schedule 5 were inserted by article 2 of the Wildlife and Countryside Act 1981 (Variation of Schedules) Order 1988, S.I.1988/288.

http://www.opsi.gov.uk/si/si1988/Uksi_19880288_en_1.htm

(ii) Inclusion of Reckless disturbance via Section 9(4) of the Wildlife and Countryside Act 1981 (c.69) was amended by section 81(1) of, and paragraph 5(a) of Schedule 12 to, the Countryside and Rights of Way Act 2000 (c.37).

<http://www.opsi.gov.uk/acts/acts2000/20000037.htm>

(iii) Full amendment of Section 9(4) via Reg 7 (4) of The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007

http://www.opsi.gov.uk/si/si2007/ukxi_20071843_en.pdf

(iv) Amendment of Schedule 5 to include EPS only with regards to section 9(4)(b) and (c) and (5) only through Reg 7 (7) of The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007

http://www.opsi.gov.uk/si/si2007/ukxi_20071843_en.pdf – with effect 21 August 2007

(v) Requirement for monitoring of EPS and assessment of threats from incidental capturing and killing introduced via 2007 Amendment and made more specific in 2009 Amendment to the Habitats Regs.

(vi) the Pool Frog is listed on Annex IV of the Habitats Directive and was added to Schedule 2 of the Habitats Regulations by The Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2008

http://www.opsi.gov.uk/si/si2008/ukxi_20082172_en_1 ; there is no corresponding change as yet to the Wildlife & Countryside Act though in the fifth quinquennial review of Schedule 5, (2008) JNCC have recommended inclusion of the 'northern clade'

of pool frog for addition to Schedule 5 of Wildlife & Countryside Act 1981 to the same extent as the other EPS. <http://www.incc.gov.uk/PDF/5qr.pdf> . A consultation on this was issued in January 2010 with a closing date in April.

B. Widespread reptiles and amphibians

(i.e. reptiles (adder, grass snake, common lizard and slow worm) and amphibians (common frog, common toad, smooth newt, palmate newt)).

Reptiles only (adder, grass snake, common lizard and slow worm) are protected via part of Section 9(1) of the Wildlife & Countryside Act 1981 (as amended) against:

(a) intentional killing and injuring (note the provision in Section 9(1) of Wildlife & Countryside Act 1981 prohibiting "taking" does not apply to reptiles)

Both reptiles (adder, grass snake, common lizard and slow worm) and amphibians (common frog, common toad, smooth newt, palmate newt) are protected via part of Section 9(5) of the Wildlife & Countryside Act 1981 (as amended) against:

(b) (i) selling, offering or exposing for sale, or having in possession or transporting for the purpose of sale,

any live or dead wild animal or any part of, or anything derived from, such an animal; or

(ii) publishing or causing to be published any advertisement likely to be understood as conveying buying

or selling, or intending to buy or sell, any of those things.

The legislation relates only to 'wild animals', but in any proceedings the animal in question shall be presumed to have been a wild animal unless the contrary is shown.

This protection is solely through the Wildlife & Countryside Act 1981 as amended and defences and licensing provisions are provided within that Act.

The legislation & section numbers, and amendments:

Section 9 (4) a-c only of The Wildlife & Countryside Act as amended:-

(i) Inclusion of common lizards, grass snakes, slow worms on Schedule 5 were inserted by article 2 of the Wildlife and Countryside Act 1981 (Variation of Schedules) Order 1988, S.I.1988/288.

http://www.opsi.gov.uk/si/si1988/Uksi_19880288_en_1.htm

(ii) Inclusion of Adder: article 2 of the Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) Order 1991 S.I. 1991/361

http://www.opsi.gov.uk/SI/si1991/Uksi_19910367_en_1.htm

C. Reptiles and amphibians of 'principle importance'

Section 40 of the Natural Environment and Rural Communities Act 2006

<http://www.legislation.gov.uk/ukpga/2006/16/content> § places a duty on every public authority, in exercising its functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity (and, in particular, to have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992).

Section 41 and 42 respectively require the Secretary of State as respects England and the National Assembly for Wales must, as respects Wales, to publish a list of the living organisms and types of habitat which in their opinion are of principal importance for the purpose of conserving biodiversity. They are required to (i) take such steps as to further the conservation of these and (ii) keep the lists under review .

The herpetofauna species on these lists (for both England and Wales unless otherwise stated) are: smooth snake (England only), adder, grass snake, sand lizard, common lizard, slow-worm, natterjack, pool frog (England only), common toad, great crested newt, leatherback turtle and logger head turtle.

D. Environmental Damage Regulations

The Environmental Damage (Prevention and Remediation) Regulations 2009

<http://www.legislation.gov.uk/uksi/2009/153/regulation/29/> made may have some implications for species protection. These Regulations apply in relation to the prevention and remediation of environmental damage; "environmental damage" includes damage to protected species or natural habitats, or a site of special scientific interest (see Reg 4(1)) and applies

both if the operator intended to cause environmental damage or was negligent as to whether environmental damage would be caused (see Reg 5(1)).

In the case of protected species or natural habitat (other than damage on a site of special scientific interest to which paragraph 4 applies) the damage must be such that it has a significant adverse effect on reaching or maintaining the favourable conservation status of the protected species or natural habitat taking into account—

- (a) the conservation status at the time of the damage;
- (b) the services provided by the amenities they produce;
- (c) their capacity for natural regeneration;
- (d) the number of individuals, their density or the area covered;
- (e) the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation and the rarity of the species or habitat assessed at the relevant level whether local, regional or Community-wide;
- (f) the capacity of the species for propagation, its viability or the capacity of the habitat for natural regeneration; and
- (g) the capacity of the species or habitat to recover within a short time of the damage being caused to a condition that leads to its state at the time of the damage or better without any intervention other than increased protection measures.

Further advice and guidance:

Habitats Directive:

JNCC: <http://www.jncc.gov.uk/page-1374> and
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML>

European Protected Species:

England:

<http://www.naturalengland.org.uk/ourwork/regulation/wildlife/species/europeanprotectedspecies.aspx>

Wales:

<http://www.forestry.gov.uk/forestry/INFD-769ERV>

Wales:

<http://wales.gov.uk/topics/environmentcountryside/consmanagement/conservationbiodiversity/wildlifelices/europrotectedspecies/?lang=en>

Wildlife & Countryside Act 1981

JNCC: <http://www.jncc.gov.uk:80/page-1377>

Biodiversity Duty:

Application in England:

<http://www.naturalengland.org.uk/ourwork/conservation/biodiversity/protectandmanage/habsandspeciesimportance.aspx>

Application in Wales:

<http://www.cow.gov.uk/landscape--wildlife/habitats--species/priority-species.aspx>

Guidance for Public Bodies:

<http://www.defra.gov.uk/environment/biodiversity/ebs/public.htm>

