

Appendix 6.1: Planning Policy and Legislation

Environment (Wales) Act 2016

The Environment (Wales) Act 2016 passed into law in March 2016. Part 1 of the Act sets out Wales' approach to planning and managing natural resources at a national and local level with a general purpose linked to statutory 'principles of sustainable management of natural resources' defined within the Act.

Section 6 of the Act places a duty on public authorities to '*seek to maintain and enhance biodiversity*' so far as it is consistent with the proper exercise of those functions. In so doing, public authorities must also seek to '*promote the resilience of ecosystems*'. The duty replaces the section 40 duty in the Natural Environment and Rural Communities Act 2006 in relation to Wales, and applies to those authorities that fell within the previous duty.

Public authorities will be required to report on the actions they are taking to improve biodiversity and promote ecosystem resilience. This is expanded on in sub-section (2):

In complying with subsection (1), a public authority must take account of the resilience of ecosystems, in particular the following aspects—

- diversity between and within ecosystems;
- the connections between and within ecosystems;
- the scale of ecosystems;
- the condition of ecosystems (including their structure and functioning);
- the adaptability of ecosystems.

Section 7 concerns biodiversity lists and the duty to take steps to maintain and enhance biodiversity. It replaces the duty in section 42 of the NERC Act 2006. The Welsh Ministers will publish, review and revise lists of living organisms and types of habitat in Wales, which they consider are of key significance to sustain and improve biodiversity in relation to Wales.

The Welsh Ministers must also take all reasonable steps to maintain and enhance the living organisms and types of habitat included in any list published under this section, and encourage others to take such steps.

Planning Policy Wales 11

Planning Policy Wales (PPW) sets out the land use planning policies of the Welsh Government. It is periodically revised. The latest iteration is PPW version 11 (February 2021).

The primary objective of PPW is to ensure that the planning system contributes towards the delivery of sustainable development and improves the social, economic, environmental and cultural well-being of Wales, as required by the Planning (Wales) Act 2015, the Well-being of Future Generations (Wales) Act 2015 and other key legislation and resultant duties.

Biodiversity and Ecosystem Resilience

PPW sets out to outline the planning system's role in helping to reverse the decline in biodiversity and increasing the resilience of ecosystems, at various scales, by ensuring appropriate mechanisms are in place to both protect against loss and to secure enhancement. The following are key principles:

- Biodiversity and resilience considerations should be taken into account at an early stage in both development plan preparation and when proposing or considering development proposals.
- *"All reasonable steps must be taken to maintain and enhance biodiversity and promote the resilience of ecosystems and these should be balanced with the wider economic and social needs of business and local communities. Where adverse effects on the environment cannot be avoided or mitigated, it will be necessary to refuse planning permission."*

- Planning Authorities should refer to up to date ecological survey information.

The Section 6 Duty

PPW further sets out that planning authorities must demonstrate that they have sought to fulfil the duties and requirements of Section 6 of the Environment Act by taking all reasonable steps to maintain and enhance biodiversity in the exercise of their functions. PPW set out that this means development should not cause any significant loss of habitats or populations of species, locally or nationally and must provide a net benefit for biodiversity.

- In doing so planning authorities must also take account of and promote the resilience of ecosystems, in particular the following aspects:
 - diversity between and within ecosystems
 - the connections between and within ecosystems
 - the scale of ecosystems
 - the condition of ecosystems including their structure and functioning; and
 - the adaptability of ecosystems.
- In fulfilling this duty, planning authorities must have regard to:
 - the list of habitats and species of principal importance for Wales, published under Section 7 of the Environment (Wales) Act 2016;
 - the SoNaRR, published by NRW; and
 - any Area Statement that covers all or part of the area in which the authority exercises its functions.

Designated Sites

PPW states that planning authorities must have regard to the relative significance of international, national and local designations in considering the weight to be attached to nature conservation interests. PPW sets out:

- Statutory designation of a site does not necessarily prohibit development, but proposals must be carefully assessed to ensure that effect on those nature conservation interests which the designation is intended to protect are clearly understood; development should be refused where there are adverse impacts on the features for which a site has been designated.
- Statutorily designated sites must be protected from damage and deterioration, with their important features conserved and enhanced by appropriate management. The contribution of the designated site to a wider network of resilient ecosystems should be recognised and captured as part of policy and decision making.
- Before authorising development or adopting a land use plan which is likely to have a significant effect on a Special Area of Conservation (SAC) or Special Protection Area (SPA) (including where outside the boundary of the SAC or SPA), planning authorities must carry out an appropriate assessment of the implications for the designated features, consult NRW and have regard to NRW's representations. The development can normally only be authorised or the plan adopted, if the planning authority ascertains that it will not adversely affect the integrity of the site, if necessary taking into account any additional measures, planning conditions or obligations.
- There is a presumption against development likely to damage a Site of Special Scientific Interest (SSSI) and this presumption should be appropriately reflected in development plans and development management decisions.
- Non-statutory designated sites should be given adequate protection in development plans and the development management process. Before authorising development likely to damage a local wildlife designation, planning authorities should give notice of the proposed operation to the County Ecologist and third sector environmental organisations. Policies for non-statutory sites should make it clear that such designations do not preclude appropriate developments, where there are no adverse impacts on the features for which a site is designated.

Maintaining and Enhancing Biodiversity

PPW states that planning authorities must follow a stepwise approach to maintain and enhance biodiversity and build resilient ecological networks by ensuring that any adverse environmental effects are firstly avoided, then minimized, mitigated, and as a last resort compensated for; enhancement must be secured wherever possible. Where the adverse effect of development on the environment clearly outweighs other material considerations, the development should be refused.

The following principles apply:

- Damage to biodiversity and ecosystem functioning should be avoided and alternatives considered.
- Planning authorities should ensure that features and elements of biodiversity or green infrastructure value are retained on site, and enhanced or created (wherever possible), by adopting best practice site design and green infrastructure principles.
- Planning authorities should take care to ensure that any conditions necessary to implement this policy are, relevant to planning, relevant to the development to be permitted, enforceable, precise, and reasonable in all other respects.
- When all other options have been exhausted, and where modifications, alternative sites, conditions or obligations are not sufficient to secure biodiversity outcomes, offsite compensation for unavoidable damage must be sought.
- This should normally take the form of habitat creation, or the provision of long-term management arrangements to enhance existing habitats and deliver a net benefit for biodiversity. It should also be informed by a full ecological assessment before habitat creation or restoration starts.
- Where possible, a landscape-scale approach, focusing on promoting wider ecosystem resilience, should help guide locations for compensation. This exercise will determine whether locations for habitat compensation should be placed close to the development site, or whether new habitat or additional management located further away from the site would best support biodiversity and ecosystem resilience at a wider scale.
- Where compensation for specific species is being sought, the focus should be on maintaining or enhancing the population of the species within its natural range. It should also be accompanied by a long term management plan of agreed and appropriate mitigation and compensation measures.

Protected Species

With regard to protected species PPW states:

- A species protected under European or UK legislation, or under Section 7 of the Environment (Wales) Act 2016 is a material consideration when a planning authority is considering a development proposal which, if carried out, would be likely to result in disturbance or harm to the species or its habitat and to ensure that the range and population of the species is sustained.
- Planning authorities should advise anyone submitting a planning application that they must conform with any statutory species protection provisions affecting the site, and potentially the surrounding area, concerned.
- An ecological survey to confirm whether a protected species is present and an assessment of the likely impact of the development on a protected species may be required in order to inform the development management process. It is considered best practice that screening to determine the presence of protected species should be carried out by a competent ecologist on the basis of data provided by the relevant Local Environmental Record Centre.

Developments are always subject to the legislation covering European protected species. Proposals for which development works would contravene the protection afforded to European protected species require derogations from the provisions of the Habitats Directive. A derogation may only be authorised if there is no satisfactory alternative and if the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range.

Trees, Woodland and Hedgerow

PPW sets out:

- Planning authorities should consider the importance of native woodland and valued trees, and should have regard, where appropriate, to local authority tree strategies or SPG.
- Permanent removal of woodland should only be permitted where it would achieve significant and clearly defined public benefits. Where woodland or trees are removed as part of a proposed scheme, developers will be expected to provide compensatory planting.
- Ancient woodland and semi-natural woodlands and individual ancient, veteran and heritage trees are irreplaceable natural resources, and have significant landscape, biodiversity and cultural value. Such trees and woodlands should be afforded protection from development which would result in their loss or deterioration unless there are significant and clearly defined public benefits; this protection should prevent potentially damaging operations and their unnecessary loss.
- In the case of a site recorded on the Ancient Woodland Inventory, authorities should consider the advice of NRW.

TAN 5 Nature Conservation and Planning

Technical Advice Note (TAN) 5 supplements Planning Policy Wales and provides advice about how the land use planning system in Wales ‘should contribute to protecting and enhancing biodiversity and geological conservation.’

The TAN provides guidance to local planning authorities on: ‘the key principles of positive planning for nature conservation; nature conservation and Local Development Plans; nature conservation in development management procedures; development affecting protected internationally and nationally designated sites and habitats; and, development affecting protected and priority habitats and species.’

In section 2.4 when deciding planning applications that may affect nature conservation, ‘local authorities should:

- contribute to the protection and improvement of the environment...seeking to avoid irreversible harmful effects on the natural environment;
- ensure that appropriate weight is attached to designated sites of international, national and local importance;
- protect wildlife and natural features in the wider environment, with appropriate weight attached to priority habitats and species in Biodiversity Action Plans;
- ensure that all material considerations are taken into account and decisions are informed by adequate information about the potential effects of a development on nature conservation;
- ensure that the range and population of protected species is sustained;
- adopt a stepwise approach to avoid harm to nature conservation, minimise unavoidable harm by mitigation measures, offset residual harm by compensation measures and look for new opportunities to enhance nature conservation; where there may be significant harmful effects local planning authorities will need to be satisfied that any reasonable alternative sites that would result in less or no harm have been fully considered.’

At section 3.3.2 regarding Local Development Plans policies the guidance states that a policy should be included in respect of the application of the precautionary principle.

Section 4 includes specific and detailed guidance, expanding on the principles set out in 2.4, in respect of the development control process including pre-application discussions, preparing planning applications, requests for further information and ecology in respect of Environmental Impact Assessment (EIA). The broad principles of development control requirements are set out as follows:

- ‘adopting the five-point approach to decision-making - information, avoidance, mitigation, compensation and new benefits;
- ensuring that planning applications are submitted with adequate information, using early negotiation, checklists, requiring ecological surveys and appropriate consultation;
- securing necessary measures to protect, enhance, mitigate and compensate through planning conditions and obligation;
- carrying out effective planning enforcement; and
- identifying ways to build nature conservation into the design of new development.’

Greater Gwent Nature Recovery Action Plan (GGNRAP)

The GGNRAP covers the county boroughs of Caerphilly, Torfaen, Blaenau Gwent, Newport, Monmouthshire and part of the Brecon Beacons National Park Authority’s administrative area. It aims to address the main drivers of biodiversity loss, build ecosystem resilience for the region, and facilitate nature recovery at the landscape and regional scales. Objectives are to:

- Engage and support participation and understanding to embed biodiversity throughout decision making at all levels.
- Safeguard species and habitats of principal importance and improve their management.
- Increase the resilience of our natural environment by restoring degrading habitats and habitat creation.
- Tackle key pressures on species and habitats
- Improve our evidence, understanding and monitoring of species and habitats to inform nature recovery actions
- Put in place a framework of governance and support for delivery of nature recovery

Actions, outcomes and suggested mechanisms for delivery of these are included in the Plan.

Torfaen Local Development Plan (LDP)

Policy S7 of the adopted Torfaen LDP (2013) states:

“Development proposals should seek to ensure the conservation and enhancement of the Natural, Built & Historic Environment of Torfaen, in particular:

- a. Biodiversity resources;
- b. Geodiversity resources;
- c. Water environment;
- d. Landscape setting;
- e. Character of the built environment; and
- f. Historic assets

The LDP indicates that Policy BW1 should be referred to when assessing impacts on European designated sites, policies BW1 and BG1 when assessing impacts on SINCs and Local Nature Reserves, and policy BW1 when considering impacts on ecological networks.

Policy BW1 (Part B) states:

All development proposals will be considered favourably providing they comply with the following criteria where they are applicable

- a. The proposal does not result in unacceptable adverse effects in respect of land contamination, instability or subsidence; air, heat, noise or light pollution; landfill gas; water pollution; or flooding, from or to the proposal;
- b. The proposal does not result in significant adverse effects on the integrity of a European designated site or its designated features in the context of the site's conservation objectives;
- c. The proposal does not result in a significant adverse effect on a nationally designated site
- d. The proposal contributes to the conservation and/ or enhancement of the strategic biodiversity network of Torfaen and does not result in a significant adverse effect on the network
- e. The proposal does not result in the unacceptable loss or harm to features of landscape importance including trees and woodland that have natural heritage or amenity value; and
- f. The proposal does not have an unacceptable adverse impact upon the water environment or pose an unacceptable risk to the quality and quantity of controlled waters (including groundwater and surface water), and where practicable and reasonable improves water quality.

Supplementary Planning Guidance issued by Torfaen County Borough Council on Biodiversity, Ecosystem Resilience and Development (2023)

The guidance sets out that financial contributions may be levied from development proposals by the LPA. The scale of these will depend on the development type and characteristics and its potential impact on ecology and biodiversity. The guidance further states that there is no standard threshold or trigger for such payments, and as such, discussion with the Council as to the likelihood of such a contribution should be initiated at the earliest opportunity.

Caerphilly County Borough Local Development Plan (2010)

There are a number of policies concerning biodiversity within the Local Development Plan. These are:

- Policy SP10, which states, *“The Council will protect, conserve, enhance and manage the natural heritage of the County Borough in the consideration of all development proposals within both the rural and built environment.”*
- Policy CW4, which states, *“Development proposals that affect locally designated natural heritage features, will only be permitted:*
 - A Where they conserve and where appropriate enhance the distinctive or characteristic features of the Special 2 49 Landscape Area (SLA) or Visually Important Local Landscape (VILL).
 - B Within, or in close proximity to sites designated as Sites of Importance for Nature Conservation (SINC), Local Nature Reserves (LNR), Regionally Important Geological Sites (RIGS), Green Corridors, or Local Priority Habitats and Species, where proposals either:
 - i Conserve and where appropriate enhance the ecological or geological importance of the designation, or
 - ii Are such that the need for the development outweighs the ecological importance of the site, and where harm is minimised by mitigation measures and offset as far as practicable by compensation measures designed to ensure that there is no reduction in the overall value of the area or feature.”
- Policy CW5 concerns protection of the water environment and states, *“Development proposals will only be permitted where:*
 - A They do not have an unacceptable adverse impact upon the water environment, and
 - B Where they would not pose an unacceptable risk to the quality of controlled waters (including groundwater and surface water)”

- Policy CW6 Concerns trees, woodland and hedgerow protection, and states, “Development proposals on sites containing trees, woodlands and hedgerows, or which are bordered by one of more such trees or hedgerows, will only be permitted provided that:
 - A Where arboricultural surveys are required, they are submitted and approved, including any mitigation, compensation or management requirements, as part of the planning application.
 - B Root systems will be retained and adequately protected for the duration of all development activity on site.
 - C Development proposals have made all reasonable efforts to retain, protect and integrate trees, woodlands or hedgerows within the development site.
 - D Where trees, woodlands or hedgerows are removed, suitable replacements are provided where appropriate.

Caerphilly and Torfaen Biodiversity Action Plans (BAPs)

The BAPs provide a framework for nature conservation within Caerphilly and Torfaen. Both the Torfaen and Caerphilly BAPs are dated (2003).

The aim of the LBAPs is to focus on conserving habitats in order to maintain and enhance biodiversity. The documents provide action plans for habitats of national and/or international importance, those that support Section 7 species, are of local importance (habitats that are rare, in decline and/or under threat) species of national and/or international importance, Section 7 species and species listed in the Birds of Conservation Concern/IUCN red lists) or of particular local importance.

European protected species (Animals)

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.

“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:

- g. Intentionally or deliberately capture, injure or kill any wild animal included amongst these species
- h. Possess or control any live or dead specimens or any part of, or anything derived from a these species
- i. deliberately disturb wild animals of any such species
- j. deliberately take or destroy the eggs of such an animal, or
- k. intentionally, deliberately or recklessly damage or destroy a breeding site or resting place of such an animal, or obstruct access to such a place

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.

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:

- c. 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’
- d. ‘There is no satisfactory alternative’
- e. 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

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.¹ 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

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”.

ODPM Circular 06/2005² 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.”

Natural England provides Standing Advice³, 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.

Birds

All nesting birds are protected under Section 1 of the Wildlife and Countryside Act 1981 (as amended) 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 to this, for some rarer species (listed on Schedule 1 of the Act), it is an offence to disturb them whilst they are nest building or at or near a nest with eggs or young, or to disturb the dependent young of such a bird.

¹ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC. (February 2007), EC.

² ODPM Circular 06/2005. *Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their Impacts within the Planning System* (2005). HMSO Norwich.

³ <http://www.naturalengland.org.uk/ourwork/planningdevelopment/spatialplanning/standingadvice/specieslinks.aspx>

The Conservation of Habitats and Species Regulations 2017 (as amended) places duties on competent authorities (including Local Authorities and National Park Authorities) in relation to wild bird habitat. These provisions relate back to Articles 1, 2 and 3 of the EC Directive on the conservation of wild birds (2009/147/EC, 'Birds Directive') (Regulation 10 (3)) requires that the objective is the 'preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive...' Regulation 10 (7) states: 'In considering which measures may be appropriate for the purpose of security or contributing to the objective in [Regulation 10 (3)] Paragraph 3, appropriate account must be taken of economic and recreational requirements'.

In relation to the duties placed on competent authorities under the 2017 Regulations, Regulation 10 (8) states: 'So far as lies within their powers, a competent authority in exercising any function [including in relation to town and country planning] in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the area to which the new Wild Birds Directive applies).'

Reptiles

All native reptile species receive legal protection in Great Britain under Schedule 5 of the Wildlife and Countryside Act 1981 (as amended). Viviparous lizard, slow-worm, grass snake and adder are protected against killing, injuring and unlicensed trade only. Sand lizard and smooth snake receive additional protection as "European Protected species" under the provisions of the Conservation of Habitats and Species Regulations 2017 (as amended) and are fully protected under the Wildlife and Countryside Act 1981 (as amended).

All six native species of reptile are included as 'species of principal importance' for the purpose of conserving biodiversity under Section 41 (England) of the NERC Act 2006 and Section 7 of the Environment (Wales) Act 2016.

Current Natural England Guidelines for Developers⁴ states that 'where it is predictable that reptiles are likely to be killed or injured by activities such as site clearance, this could legally constitute intentional killing or injuring.' Further the guidance states: 'Normally prohibited activities may not be illegal if 'the act was the incidental result of a lawful operation and could not reasonably have been avoided'. Natural England 'would expect reasonable avoidance to include measures such as altering development layouts to avoid key areas, as well as capture and exclusion of reptiles.'

The Natural England Guidelines for Developers state that 'planning must incorporate two aims where reptiles are present:

- To protect reptiles from any harm that might arise during development work;
- To ensure that sufficient quality, quantity and connectivity of habitat is provided to accommodate the reptile population, either on-site or at an alternative site, with no net loss of local reptile conservation status.'

⁴ English Nature, 2004. *Reptiles: guidelines for developers*. English Nature, Peterborough.
<https://webarchive.nationalarchives.gov.uk/20150303064706/http://publications.naturalengland.org.uk/publication/76006>