

Is important bat foraging and commuting habitat legally protected?



Decline and deterioration of foraging habitat and its fragmentation due to agricultural intensification and development, is probably the principal cause of the decline of bat populations over the last hundred years. Although the strong legal protection afforded to bat roosts in England and Wales under the *The Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007* (Habitats Regulations (HR)) and the *Wildlife and Countryside Act 1981* (WCA) is to be welcomed, bat conservation and legislation cannot be effective by concentrating on the protection of roost sites alone, whilst neglecting foraging habitat and the corridors that connect these sites.

Although the *Bat Mitigation Guidelines* state that bat 'foraging areas and commuting routes are not legally protected', we argue in this article that there is an existing legal basis for the protection of these features. Although we concentrate on bats, many of the points raised also apply to other species afforded protection under European and UK legislation. For brevity this article focuses primarily on legislation/policy in England although many of the points raised apply equally in Wales, Scotland and Northern Ireland.

What is important bat foraging and commuting habitat?

What constitutes important bat foraging and commuting habitat in relation to new development has to be assessed on a case by case basis. One possible example might be where only one hedgerow connects a roost of Daubenton's bats to their feeding grounds. This hedgerow would probably be considered an *essential attribute of the roost* as its removal might have a major impact on the viability of the roost. However, one out of seven similar hedgerows connecting a Daubenton's roost with surrounding foraging habitat would perhaps not be judged important or essential for bats, at least not in terms of the legislation we discuss below. A similar example might also apply for important foraging habitat. It is assumed in both scenarios that the important habitat should relate to key roost sites, i.e. those used for breeding, maternity or hibernation, rather than summer roosts used by only a few males (although larger male roosts may be given more prominence). The importance of the foraging and commuting habitat would also vary with the conservation status of the species in question.

Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI) designated bat roosts

Even if a proposed development is some distance away, the integrity of an SAC designated bat roost (designated under the HR for Annex II bat species –

barbastelle, Bechstein's, greater horseshoe and lesser horseshoe bats) can be adversely and unlawfully affected. For example, a development that severs an important commuting route of bats from such an SAC could prevent them readily accessing an important foraging area and possibly result in the abandonment or long term decline of the colony/roost, thereby causing an unlawful adverse effect on the site's integrity. Although the level of protection is less stringent, a similar duty also applies under the WCA regarding SSSI designated bat roosts.

The conservation of important bat habitats, unrelated to SAC and SSSI protected sites, is also a conservation priority and it is on this that the rest of this article focuses.

Protection for Annex IV species

The HR state 'A person commits an offence if he – (b) deliberately disturbs animals of any such species [those listed in Annex IV of the Habitats Directive including all UK bat species] in such a way as to be likely significantly to affect –

- (i) the ability of any significant group of animals of that species to survive, breed, or rear or nurture their young, or
- (ii) the local distribution or abundance of that species'



There is no specific reference in the HR to the location of disturbance and so it is not only an offence to disturb bats at their roosts but also in other circumstances e.g. while foraging or commuting. On this basis, bat commuting and foraging habitat appears to be indirectly protected by the HR. However, it needs to be demonstrated that disturbance to the foraging area or commuting route significantly affects a group of bats' ability to 'survive, breed etc...'. Disturbance must also be shown to be direct and

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Above: Brown long-eared bat
Photo by: Sue Searle

Bat foraging routes in the landscape

Photo by: Sue Searle

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explicit, i.e. caused by the action and occurring at the same time and place. This would in most cases require a considerable amount of survey data and perhaps this is why it seems to be overlooked.

This law should, for example, be applied in the following situation. If a group of bats are dependent on a particular corridor throughout the active flying season and their movement along this becomes significantly inhibited by a new brightly lit development (e.g. from a flood-lit sports pitch, usually first illuminated during the early evening when many bat species are becoming active), this would compromise the ability of the group of bats to survive and so constitute direct and thus unlawful disturbance. Although a Natural England development licence should be obtained in relation to all potential offences listed under R.39 of the HR, we understand that no licence applications have ever been submitted *specifically* for direct disturbance to bat foraging/commuting habitat.

Natural Environment and Rural Communities Act

The NERC Act 2006* states that *'every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity'*, otherwise known as the Biodiversity Duty. In terms of species, biodiversity is considered by the Act to be those listed in S.74 of the CROW Act, which includes the four Annex II species and the common and soprano pipistrelle bats (the revised S.74 list may replace the pipistrelle species with noctule and brown long-eared bat). If a development would result in significant harm to important foraging/commuting habitat of a S.74 bat species, then the local planning authority must take this into consideration (*'have regard'*) when assessing the planning application. If local planning authorities must exercise the Biodiversity Duty when assessing planning applications, then by implication so must developers if their proposals are to be viewed favourably.

Planning Policy Statement 9

The extent to which local planning authorities, and thus developers, must have regard for biodiversity is not defined in NERC. How the Biodiversity Duty should be implemented, however, was established in England prior to NERC by *Planning Policy Statement 9: Biodiversity and Geological Conservation* (PPS9), relating to the similar duty required under the CROW Act 2000. In accordance with PPS9, developers must be able to demonstrate that they have considered alternative options to prevent *'significant harm'* to *'biodiversity interests'*. In terms of PPS9 *'biodiversity*

interests' not only include bat species listed on S.74 but also our other eleven native species. PPS9 goes further, recommending where *'significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission should be refused'*.

What constitutes significant harm might include, as discussed earlier, the loss of the only commuting route connecting a key bat roost to its foraging habitat. **In keeping with both the Biodiversity Duty and PPS9, therefore, such habitat should be protected or else, should other considerations be given greater prominence (e.g. those of an economic or social nature), be mitigated or compensated for.** However, one out of a number of similar commuting routes connecting a bat roost with surrounding foraging habitat would probably not be afforded the same level of protection, at least not with respect to bats.

International treaties

Within the Bonn Convention the UK Government is also a signatory to the *Agreement on the Conservation of Bats in Europe (EUROBATS) 1991*, which requires each state to *'endeavour to identify and protect important feeding areas for bats from damage or disturbance'*. Although the legal status of such treaties cannot be relied upon in the British courts, the Government is bound by these agreements in international law.

Conclusions

Although the Bat Mitigation Guidelines from 2004 advise that the foraging habitat and commuting routes of bats are not legally protected, we have suggested a reinterpretation of the legislation that pre-dates these guidelines could challenge this statement. Certainly we contend that nature conservation legislation and planning policy subsequent to these guidelines, i.e. NERC and PPS9, while not providing explicit protection for important bat habitat, if properly applied can and should be used to provide a strong case for either the legal protection of such features or else for a sufficient level of mitigation and/or compensation.

It has been argued that effective nature conservation can best be achieved by looking after the habitat and letting the species take care of themselves. While the strong protection afforded to bat roosts is welcomed, adopting a landscape approach to nature conservation, which places greater emphasis on ecological processes and the wider countryside, is essential if we are to protect bats and other species of conservation concern.

A full version of this article is can be found on the Bat Conservation Trust website: http://www.bats.org.uk/biodiversity/biodiversity_under_her_bat_biodiversity.asp – under Lobbying and legislation.