

Bats and wind turbines in England¹ – a legal review

There is a growing body of evidence that wind turbines present a danger to bats, with the discovery of dead bats at numerous turbine sites in recent years leading to serious concerns amongst conservationists. The number of bat fatalities documented at sites in the US and mainland Europe has run into the hundreds and even thousands, with a variety of different species (at least 27 in Europe) being affected.²

However, many gaps currently exist in our understanding of this issue, and until recently, no scientific research had been undertaken into the impacts of wind turbines on bats in the UK. We lack knowledge about the scale of mortalities across different species, and the relationship between turbine fatalities, location, surrounding habitat, time of year and weather conditions. Much is not understood about how bats behave in relation to turbines, and what the consequences of turbine related fatalities may be for the health of wider bat populations.³ Studies, including a multi-year project funded by Defra, are currently underway, and their findings will hopefully help inform decisions about turbine location, design and operation in such a way as to reduce bat deaths in the future.

Bats have been the subject of legal protection for many years. A variety of laws are in place for the purpose of ensuring their conservation. The problem of bat deaths caused by wind turbines raises important questions about the application and adequacy of this legal framework, the correct answers to which may evolve as scientific understanding of the impacts and available mitigation techniques is improved.

Before the results of the on-going scientific studies are delivered, it is necessary to review where the current law stands. This note will provide a broad overview of the legal framework and then focus on two questions in particular, aiming to summarise the provisions, status and current application of the laws that give rise to those two questions. As there is presently only one legal framework that addresses the question of bats and wind turbines specifically and directly – the “Eurobats” agreement created under the auspices of the Convention on Migratory Species – the first question is: How has Eurobats so far informed the actions and decisions of public authorities in relation to wind farm development consent? Secondly, because existing legislation at EU and UK level makes the killing and disturbance of bats a criminal offence, the next question is: How have these rules been applied in the factual scenario presented by wind turbine fatalities?

1. Overview of legal framework

Bats are covered by international laws for biodiversity protection. There are two international conventions of particular relevance: the Convention on Migratory Species⁴

¹ Some of the law discussed will also be relevant to Scotland, Wales, and Northern Ireland – e.g. Eurobats Agreement is UK wide, and the EU Habitats Directive applies to the whole of the UK. However, implementing legislation and the planning framework are different in the devolved jurisdictions.

² For a summary of studies on bat fatalities, see Phase 1 report “Determining the potential ecological impact of wind turbines on bat populations in Britain” – University of Bristol and the Bat Conservation Trust (May 2009). A recent compilation of data on wind turbine bat mortality by European country is included in Eurobats Advisory Committee document Doc.EUROBATS.AC18.6

³ University of Bristol and the Bat Conservation Trust Phase 1 report (May 2009), p 1 -3

⁴ United Nations Convention on the Conservation of Migratory Species of Wild Animals

(also known as the Bonn Convention) and the Convention on the Conservation of European Wildlife and Natural Habitats⁵ (also known as the Bern Convention). Each is concerned with biodiversity protection in a wider sense and includes bat species in its coverage. The UK is a signatory to both.

The European Union is also a signatory to the Bern and Bonn Conventions, which means that the provisions of both apply to all EU institutions and Member States and must be complied with as a matter of EU law. This is because Article 216(2) of the Treaty on the Functioning of the European Union (TFEU)⁶ makes international agreements concluded by the EU binding on all EU institutions and Member States. Settled EU case law further confirms that ‘the provisions of such an [international] agreement form an integral part of the Community legal order once the agreement has entered into force’.⁷

The Bonn Convention required its parties to endeavour to conclude further agreements on particular species considered as having unfavourable conservation status. This led, in 1994, to a specific Agreement on the Conservation of Populations of European Bats, commonly known as Eurobats. The UK was an original signatory to Eurobats.⁸ The provisions of Eurobats apply to all bat species occurring in the UK, whether migratory or not.

The fifth Meeting of the Parties to Eurobats in September 2006 passed a Resolution addressing the issue of wind turbines (Resolution 5.6 – Wind Turbines and Bat Populations).⁹ This Resolution in turn required the development (by the Eurobats Advisory Committee) of a set of generic guidelines on bats and wind turbines, which will be further discussed in section 2 below. A subsequent Resolution (number 6.11), in 2010, repealed Resolution 5.6 but maintained most of its content, including the requirement for the Advisory Committee to keep the guidelines updated, and for signatories also to implement national guidelines of their own (based on those produced by the Advisory Committee, but appropriate to their local environment).

The Bern Convention aims at conserving wild fauna and flora and natural habitats, and requires its signatories to put in place measures to ensure the protection of certain habitats and species. It contributed, in the EU, to the creation of the Habitats Directive. The Habitats Directive creates two major sets of obligations for EU Member States:

1. to designate sites within their jurisdiction as Special Areas of Conservation - these Special Areas of Conservation will be for the protection of certain habitat types (listed in Annex I to the Directive), and the habitats of certain species (listed in Annex II);
2. to put in place systems of strict protection for certain species (listed in Annex IV), whereby it becomes unlawful to commit certain acts such as to kill, injure, disturb, or trade in specimens of that species.

⁵ Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats

⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/79.

⁷ Case T-115/94 Opel Austria GmbH v Council [1997] ECR II-39 (‘Opel’), paras 49 and 101; see also Case C-181/73 Haegeman v Belgium [1974] ECR 449 (‘Haegeman’), paras 3-5; Case 12/86 Meryem Demirel v Stadt Schwabach Gmuend [1987] ECR 3719 (‘Demirel’), para 7.

⁸ The EU is not a signatory to Eurobats.

⁹ EUROBATS.MoP5.Record.Annex9.

Four bat species found in the UK are listed in Annex II and a number of Special Areas of Conservation have been designated for the purpose (inter alia) of their protection.¹⁰ All bat species are listed in Annex IV and therefore covered under the strict protection rules.

As an EU Directive, the Habitats Directive is binding on EU Member States and must be formally incorporated into provisions of national legislation. In England, it is implemented through the Conservation of Habitats and Species Regulations (2010). The requirements of the Habitats Directive added to rules for bat protection already in place in the UK, primarily contained in the Wildlife and Countryside Act 1981, which were created in response to the Bern Convention. Both the provisions of the Habitats Regulations and the Wildlife and Countryside Act have been amended on several occasions, to make sure English law is fully in line with the provisions of the Habitats Directive itself, and with EU case law. They now contain separate but similar rules for bat protection, some of which will be further examined in section 3.

The regime for planning permission is also, of course, very relevant to controlling the impacts of wind turbines, including on bats. Planning authorities are directed by the provisions of the National Planning Policy Framework as follows: *“it is essential the presence or otherwise of protected species, and the extent that they might be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations might not have been addressed in making the decision”*. Sufficient survey work must be done to permit this duty to be discharged. This, together with related duties for public authorities to consider impacts on biodiversity (e.g. under section 40 of the Natural Environment and Rural Communities Act 2006, and the Environmental Impact Assessment Regulations¹¹) has led to the incorporation of the Eurobats’ requirements and guidelines in the English planning system (as will be discussed in section 2 below).

2. Eurobats – wind farm impacts specifically addressed

The Eurobats Agreement is a legally binding international convention under which the UK government has committed to carry out a number of actions, listed under Article III, Fundamental Obligations. For example, it must:

- prohibit the deliberate killing of bats except under permit;
- identify sites within the jurisdiction important for the conservation status, including for the shelter and protection, of bats, and taking into account economic and social considerations, protect such sites;
- endeavour to identify and protect important bat feeding areas;
- take appropriate measures to promote bat conservation;
- promote public awareness of the importance of bat conservation;
- as appropriate, promote research programmes relating to the conservation and management of bats.

¹⁰ For details of the four species and the SACs in which they are found see the website of the Joint Nature Conservation Committee: http://jncc.defra.gov.uk/publications/jncc312/uk_species_list.asp

¹¹ The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 [SI 2011 No 1824].

The UK government has taken a number of steps to comply with its Eurobats obligations. As apparent from the overview of the legal framework above, a number of aspects such as prohibitions on killing bats, and identification of sites important for their conservation, are addressed in domestic laws. Awareness raising projects, conferences and research programmes have also been pursued, often in conjunction with (and in some cases by providing funding to) NGOs, particularly the Bat Conservation Trust. The UK submits an annual report to the secretariat of Eurobats detailing the current status of bats within the territory, and what implementation activities have been undertaken.

It is notable that, as is often the case with international agreements, a considerable degree of leeway is built into the text of Eurobats. The UK must “endeavour” to identify and protect bat feeding areas, take “appropriate” measures to promote bat conservation, and “take such additional action as it considers necessary to safeguard populations of bats which it identifies as being subject to threat”. Thus, while nonetheless legally binding, a number of the obligations are loose, open to the exercise of discretion, or not necessarily such as to result in concrete actions.¹²

The Eurobats Resolution¹³ on wind turbines imposes further obligations. Again the language chosen results in a vague obligation – the resolution “[u]rges parties to” take various steps. Nonetheless, the UK is supposed to:

- raise awareness of the impacts of wind turbines on bats;
- raise awareness of the existence of unsuitable sites or habitats for wind turbines;
- encourage developers to adopt research;
- ensure pre-construction impact assessment and post construction monitoring are undertaken;
- develop national guidelines.

As noted in the overview, this Resolution (and its predecessor) required the publication by the Eurobats Advisory Committee of generic guidelines on bats and wind turbines. Natural England (as the authority in the UK tasked with implementation of Eurobats) has also produced a set of UK-specific guidance. The Eurobats guidelines are detailed, and cover recommendations on a variety of subjects including:

- how impact assessments should be carried out in order to identify all possible bat impacts;
- what post development monitoring schemes should cover;
- what factors should be considered in assessing site suitability;
- what planning conditions could be used to help mitigate impacts.

¹² This high-level format does of course have the advantage that Parties actually agreed to it, whereas they might not have agreed to more specific, concrete obligations. The idea is that details can be further fleshed out by the various Resolutions (though, their obligations are hardly more tightly worded). A mechanism for Eurobats to deal with infringements and failures to meet obligations is under discussion - Eurobats is currently preparing a guide to implementation of the Agreement (in accordance with Resolution 6.16, operative para no. 1, and Advisory Committee Record page 36). The guide will combine explanation with statements of expectation re the obligations on Parties through the Fundamental Obligations of Article III and the Resolutions. It is expected to be available in late 2014. Following from this will be the development of an improved system for monitoring Parties' performance in meeting obligations and dealing with shortcomings (through an Implementations Committee).

¹³ Resolution 6.11 – Wind Turbines and Bat Populations of September 2010 (EUROBATS.MoP6.Record.Annex14), replacing Resolution 5.6.

The Natural England guidance covers similar topics, but deviates from the Eurobats version in some important respects – most glaringly in the recommended minimum turbine feature distance (200m under the Eurobats version, 50m in the Natural England version). The guidance explains this difference on the grounds that the evidence in Britain is that most bat activity is in close proximity to features and declines when measured at intervals of 50m away. The Natural England guidance is also stated to be an interim version, awaiting possible revision following the results of scientific studies.

From a legal point of view, how the guidance can best be used presents a challenge. It is not legally binding per se, but via the operation of other legally binding duties on public authorities to take account of impacts on biodiversity – particularly in the planning context – they are capable of carrying weight. A review of the cases shows how it has become a point of reference in planning decisions and challenges.

- In *RES v West Devon BC (2009)*¹⁴ – both the Eurobats and Natural England guidance were considered. Aspects of the development breached the guidance (turbines were situated closer than 50m to features such as hedgerows), but the Planning Inspector considered there was other information, revealed by surveys, about low levels of bat activity and the hedgerows in question being “defunct” that essentially justified the non-application of the guidance recommendations.

The surveys that had actually been carried out in this case pre-dated both sets of guidance, and were criticised by an intervener (a local residents group). However, the Planning Inspector gave weight to the fact that the surveys were conducted in accordance with the guidance that was available at the time and considered them sufficient.

- In *Crimp Wind Power Ltd v North Cornwall DC (2008)*¹⁵ – a proposed turbine breached the Eurobats guidelines by being situated closer than the recommended 200m from woodland, but the Planning Inspector considered that the characteristics of the woodland, and low levels of bat activity documented there, meant this was not a problem. The inspector considered that the necessary ecological surveys on which to inform a decision had been carried out.
- *Coombes v Sedgemoor DC (2013)*¹⁶ considered a development against the criteria contained in the Natural England guidance (on single turbines in this case) – and found the development to be acceptable judged along these lines.
- *TCl renewables and South Norfolk DC (2012)*¹⁷ – considered the adequacy of the survey work in light of the pertinent guidelines at the time the work was undertaken (mentioning Bat Conservation Trust and Natural England guidance but not Eurobats). A quite detailed consideration was given to what the guidance recommended, again finding the plans not contrary to them. “In evidence it was accepted by the [...] witness that, whilst not of a level which he would have wished

¹⁴ [2010] P.A.D. 14

¹⁵ [2008] P.A.D. 73

¹⁶ [2013] P.A.D. 26

¹⁷ [2013] P.A.D. 4

for, the survey work could be interpreted as being within these guidelines. I consider that adequate evidence has been provided to demonstrate that the degree of risk to bats, which are a protected species, would be negligible. Thus I do not find conflict with the advice of the Framework on this matter.”¹⁸

It is clear that in bat/wind turbine cases, planning authorities will and in fact should pay attention to the most up to date guidance available, and that developers should be aware they will be judged against it. This applies both to procedural aspects - how surveys establishing bat presence and impacts are carried out – and recommendations for the characteristics of the development itself. However, it is equally clear that both Planning Inspectors and the courts are happy to accept deviations from the guidelines’ recommendations where there appear to be good reasons for this.

Question for future discussion – would bat conservation in wind turbine cases be improved if the current guidelines were legally binding? It may be argued that better outcomes would be delivered if the recommendations were enforceable. At present, given the existence of different sets of non-binding guidance, there is little consistency but flexibility. A disadvantage of reinforcing their legal status may be pressure for the binding version to contain the lowest version of standards possible.

Eurobats itself currently relies on soft enforcement – encouraging Parties to follow others’ good practice. The new Implementation Committee is currently upcoming – how can that be made most effective?

3. Unlawful to kill or disturb bats – will this apply to wind turbine fatalities?

EU and UK law prohibit the killing of bats, the disturbance of their behaviours such as hibernation and migration, and the destruction of their places of shelter and protection. The law is summarised in the following paragraphs.

It is a criminal offence under the Habitats Regulations deliberately to injure, kill or disturb a bat.¹⁹ Disturbing includes (but is not limited to) any disturbance that is likely to impair their ability to survive, breed, nurture young, hibernate or migrate; or, which is likely to affect significantly their local distribution or abundance.²⁰ It is also an offence under the Habitats Regulations to damage or destroy a bat’s breeding site or resting place.²¹ There is no qualification requiring this to have been done deliberately in order to constitute an offence.

It is an offence under the Wildlife and Countryside Act intentionally or recklessly to damage or destroy a place a bat uses for shelter or protection, disturb a bat while it is occupying such a place, or obstruct access by the bat to such a place.²²

¹⁸ Ibid, paragraph 82

¹⁹ Regulation 41(1) Conservation of Habitats and Species Regulations 2010.

²⁰ Ibid, Regulation 41(2).

²¹ Ibid, Regulation 41(1).

²² s9(4) Wildlife and Countryside Act 1981 (as amended).

In respect of the Habitats Regulations offences, it is possible to obtain a licence that makes the otherwise offences lawful. A licence may be granted if there is an imperative reason of overriding public interest for going ahead with the act, and there is no satisfactory alternative, and no detriment to the favourable conservation status of the species in its natural range.²³ No licence is available to make the actions prohibited under the Wildlife and Countryside Act lawful. There is an exception to the offences, however, for cases where the act was the incidental result of a lawful operation and could not reasonably have been avoided. In the specific case of bats, it is only possible to rely on this exception if notification has been made in advance to Natural England, giving them a reasonable time in which to advise if it should be carried out and if so, by what method.²⁴

There is also a concept in the Habitats Regulations of incidental killing, requiring a system to be put in place to monitor this and protect against it. The appropriate nature conservation body must identify the risks of incidental killing and the activities which give rise to those risks, maintain a record of incidental killing and a record of the monitoring that is being carried out. In the light of the monitoring, the government must make arrangements for further research or, ensure conservation measures are taken for the purpose of ensuring that the incidental killing does not have a *significant negative impact* on the species.²⁵

There has been much debate, including before planning inquiries and the courts, as to whether wind turbine bat fatalities would constitute “deliberate killing” and as such, an offence under the Habitats Regulations. This possibility stemmed from European Court case law²⁶ giving a wide interpretation to the term deliberate. This jurisprudence finds “deliberate” to mean not only pure intention but also something similar to recklessness under English law, namely a knowledge that an act may result in the death of a protected species, but accepting the risk and proceeding with the act anyway. EU Guidance on the Habitats Directive repeats this interpretation, but also indicates that wind turbine deaths are an example of “incidental killing”.²⁷

The position has recently been clarified by the English High Court, in the case of *Eaton v Natural England*.²⁸ This concerned objections to a wind farm in Essex, against the development of which the claimant sought an injunction on the grounds that the bat deaths that might result constituted an offence of deliberate killing of a protected species. The judge rejected the possibility that the scenario in question could constitute a deliberate killing. A key part of the reasoning concerned the existence in the law of the incidental killing concept, which the judge considered was meant to incorporate “more than only a one-off accident”, on the basis that the government’s duty to take action in relation to incidental killing is triggered when impacts to the species as a whole become a possibility. This leads to the conclusion that there exists a spectrum of scenarios from deliberate at one end, to incidental killing at the other, and the facts of this case were such that incidental killing rather than deliberate was the correct classification. It was important that survey evidence

²³ Regulations 53(2) and (9) Conservation of Habitats and Species Regulations 2010.

²⁴ ss10(3)(c) and (9) Wildlife and Countryside Act 1981 (as amended).

²⁵ Regulations 50 and 51 Conservation of Habitats and Species Regulations 2010.

²⁶ *Commission v Greece* (C-103/00) and *Commission v Spain* (C-221/04).

²⁷ European Commission Guidance (2007) “Guidance document on the strict protection of animal species of Community Interest under the Habitats Directive”.

²⁸ [2012] EWHC 2401 (Admin).

had indicated a low or negligible (though not non-existent) threat to bats arising from this particular development.

What may be really important about Eaton is that while it places limits on the scope of the deliberate killing concept, it does not conclude that a wind farm will never fall foul of that offence. Rather, it is a question of fact and degree. The judge said: “There will come a point where the level of risk in terms of probabilities and numbers affected could, if known, lay the foundation for criminal liability”. Numbers are not the only important thing – the degree of certainty is important too. The judge clarified that in the “paradigm case” of deliberate-ness, an act which led to the death of a single protected animal would trigger the offence.

This could be where the results of on-going research projects become vital – improved advice on where impacts are probable, and how severe they will be, will potentially allow stronger arguments to be made that Habitats Regulations offences are triggered. Similarly, if possible mitigation options are identified, but not taken up – this would again on the reasoning in Eaton militate in favour of putting the development in the “deliberate” end of the spectrum.

It is notable that Eaton has recently been considered in the Court of Appeal. The subject of the appeal concerned costs, and there was no challenge to the High Court’s findings on other issues. However, the Court of Appeal commented on the substantive findings anyway, saying: “The underlying proposition, that there is a likelihood of the commission of a criminal offence or offences, namely the deliberate killing of protected birds or species, is hopeless. On any commonsense approach to the Commission’s guidance, as endorsed in the case of Morge [2011] Env LR 8, there is simply no realistic prospect and never was a realistic prospect of securing a conviction for a criminal offence in these circumstances **against the background evidence that the judge considered...**” (emphasis added. On different facts, using the same interpretation of the law, a different conclusion could be reached).

Where a deliberate offence is not possible to make out, it seems clear that the law on incidental killing is applicable to bats and wind turbines. In this scenario, as described above, a further set of legal obligations apply and need to be enforced. Specifically Natural England is obliged to monitor incidental killings, and where the monitoring indicates it is necessary, further conservation measures must be taken. It is the potential for incidental killings to produce a “significant negative impact on the species” that triggers the duty for the government to take further conservation measures. A critical question here is therefore how to judge when individual fatalities amount to a significant negative impact on the *species* – and again, this can hopefully be informed by the scientific research results.

Finally, it should be noted that different considerations will apply if a wind turbine development will damage or destroy a bat breeding site or resting place (roost). The Habitats Regulations contain no qualification that this damage or destruction must be deliberate in order to qualify as an offence. Instead, this offence is one of “strict liability” – meaning that if the act is done even by accident, the offence is committed. To proceed legally with a turbine development that would entail damaging or destroying a roost, a licence would need to be obtained under Part 5 of the Habitats Regulations.²⁹

²⁹ E.g. for an imperative reason of overriding public interest.

Question for future discussion – can the science (when further research conclusions become available) be used to extend the application of the deliberate offence? It could be possible to produce a briefing drawing on the scientific findings and setting out in what types of circumstances, given knowledge of the size and dynamics of bat populations, categorization as a “deliberate” killing would be the correct legal interpretation.

Can the scientific study results also be mobilized to prompt more to be done in response to incidental killings – in support of calls for better implementation of government obligations in this respect?