

East Coast 400kV Overhead Line Upgrade
Environmental Impact Assessment Report
Volume 4 | Appendix 7.6

Biodiversity Legislation and Planning Policy

January 2021



Appendix 7.6 – Biodiversity Legislation and Planning Policy

1.1 Introduction

- 1.1.1 This Appendix presents biodiversity legislation and planning policy relevant to the East Coast 400 kV Overhead Line Upgrade. It should be read in conjunction with the **EIA Report** for full details of the Proposed Development.
- 1.1.2 Relevant protected species known to occur naturally in Scotland are included in **Table 7.6.1** to the rear of this Appendix. The legislation and planning policy relevant to their protection, and other natural resources in Scotland, is as follows.

1.2 Legislative Framework

Natural Heritage (Scotland) Act 1991

- 1.2.1 Establishes NatureScot (formerly Scottish Natural Heritage) as the main body responsible for securing and promoting the conservation of Scotland's natural scenery, flora and fauna.

Environment Act 1995

- 1.2.2 Under this Act, the Scottish Environmental Protection Agency (SEPA) and the Environment Agency are established as the regulatory bodies for contaminated land, control of pollution, conservation and enhancement of the environment and fisheries.

The Planning (Scotland) Act 2019

- 1.2.3 This Act sets six outcomes for planning in Scotland, one of which is securing positive effects for biodiversity.

Conservation (Natural Habitats &c.) Regulations 1994 (as amended) (Habitats Regulations)

- 1.2.4 The Habitats Regulations 1994 (as amended in Scotland) provide the protection given to European protected species of animals and plants. For European protected species, it is an offence to deliberately or recklessly:
- capture, injure or kill such an animal;
 - harass an animal or group of animals;
 - disturb an animal while it is occupying a structure or place used for shelter or protection;
 - disturb an animal while it is rearing or otherwise caring for its young;
 - obstruct access to a breeding site or resting place, or otherwise deny an animal use of a breeding site or resting place;
 - disturb an animal in a manner or in circumstances likely to significantly affect the local distribution or abundance of the species;
 - disturb an animal in a manner or in circumstances likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young;
 - disturb an animal while it is migrating or hibernating;
 - take or destroy its eggs (in Scotland, this is relevant only to the great crested newt *Triturus cristatus* and natterjack toad *Epidalea calamita*);
 - disturb any cetacean.

- 1.2.5 It is an offence of strict liability to damage or destroy a breeding site or resting place of such an animal. These sites and places are protected even when the animal isn't present.
- 1.2.6 All of the above offences apply to all stages of a wild animal's life. Animals bred and lawfully held in captivity are not protected.
- 1.2.7 Species listed on Annex II of the Habitats Regulations are attributed further protection which means that Special Areas of Conservation may be designated to internationally important sites for these species.

Wildlife and Countryside Act 1981 (as amended)

- 1.2.8 Protected birds, animals and plants are listed in Schedules 1, 5 and 8 respectively of the Wildlife and Countryside Act 1981 (as amended) (WCA).
- 1.2.9 All wild birds, their nests and eggs (with exception of species listed under Schedule 2) are protected by the WCA. It is an offence to intentionally kill, injure, or take any wild bird, or take or destroy an egg of any wild bird. It is also an offence to damage or destroy the nest of any wild bird (whilst being built, or in use). The bird breeding season can be taken to occur between March - August inclusive, although is subject to variations based on species, geographical and seasonal factors.

Schedule 1

- 1.2.10 Birds listed under Schedule 1 of the WCA are afforded additional protection. It is an offence to disturb any wild bird listed on Schedule 1, whilst it is building a nest or is in, on, or near a nest containing eggs or young, or whilst lekking. Schedule A1 protects nests all year round and Schedule 1A prevents harassment of the species all year; both of which apply in Scotland.

Schedule 5

- 1.2.11 Within Schedule 5, species can either be fully protected or be partially protected under parts of Section 9, which makes it unlawful to intentionally:
- Part 1: kill, injure or take;
 - Part 2: possess or control (live or dead animal, part or derivative);
 - Part 4 (a): damage or destruct any structure used for shelter or protection;
 - Part 4 (b): disturb them in a place of shelter or protection;
 - Part 4 (c): obstruct access to place of shelter or protection;
 - Part 5 (a): sell, offer for sale, possess or transport for the purpose of sale (live or dead animal, part or derivative);
 - Part 5 (b): advertise for buying or selling.

Schedule 8

- 1.2.12 Schedule 8 of the WCA makes it an offence (subject to exceptions) to pick, uproot, trade in, or possess (for the purposes of trade) any wild plant listed in Schedule 8, and prohibits the unauthorised intentional uprooting of such plants.

Schedule 9

- 1.2.13 Invasive species listed under Schedule 9 are prohibited from release into the wild. The WCA prohibits planting or "causing to grow" in the wild of any plant species listed in Schedule 9. In Scotland, legislation pertaining to species listed under Schedule 9 has been amended by the Wildlife And Natural Environment (Scotland) Act (2011); see below.

The Protection of Badgers Act (1992)

1.2.14 Offences under the Act include:

- wilfully taking, injuring or killing a badger *Meles meles*;
- cruelty to a badger;
- intentional or reckless interference with a badger sett;
- sale or possession of a badger;
- marking or ringing of a badger.

1.2.15 Interfering with a badger sett includes:

- damaging or destroying a sett or any part of it;
- obstructing access to a sett;
- disturbing a badger while it is in a sett;
- causing or allowing a dog to enter a badger sett.

1.2.16 The Act defines a badger sett as 'any structure or place, which displays signs indicating the current use by a badger' and NatureScot takes this definition to include, '*the presence of field signs such as bedding, fresh spoil heaps, signs of recent digging, hair, latrines, or footprints in or around the potential sett or evidence of badgers entering or exiting the structure or place in question would indicate current use of the structure/ place by a badger*'¹. In Scotland the Wildlife And Natural Environment (Scotland) Act (2011) has made amendments to the Act; see below.

Wildlife And Natural Environment (Scotland) Act (2011)

1.2.17 In Scotland, the Wildlife and Natural Environment (Scotland) Act (2011) (WANE) makes amendments to previous legislation including;

- The Protection of Badgers Act (1992).
 - "*Knowingly causes or permits*" are added to further sections of the Protection of Badgers Act 1992 to cover offences relating to taking, injuring, killing, cruelty, sale, possession, marking and ringing.
 - The 2011 Act also amends the available penalties for offences in the 1992 Act. Currently offences relating to digging for a badger can be dealt with by summary procedure or on indictment. The 2011 Act allows for other offences relating to taking, injuring, killing and possession to be dealt with by summary.
- Non-native species listed under Schedule 9 of the WCA 1981 (as amended)
 - The Act adopts the internationally recognised approach to dealing with invasive non-native species. New offences are based on a general 'no-release' approach.
 - It is an offence to release, allow to escape, or cause any animal to be outwith its native range.
 - It is an offence to plant or cause to grow in the wild any plant outwith its native range.
 - Scottish Ministers can also specify native animals that will be subject to these offences.
 - Other offences relate to the keeping, notification and sale of invasive animals and plants.
 - The Non-native Species: Code of Practice² is guidance on non-native species which came into effect on 2 July 2012

¹ Scottish Natural Heritage (undated). Licensing Guidance. What is a badger sett? [online]. Available at: https://www.nature.scot/sites/default/files/2018-10/Guidance%20-%20Licensing%20-%20Badgers%20-%20What%20is%20a%20Badger%20sett_.pdf

² Scottish Government (2012). Non-native species: code of practice [online]. Available at: <https://www.gov.scot/publications/non-native-species-code-practice/>

1.2.18 The WANE Act also provides a mechanism for licensing activities which would otherwise be an offence under the WCA, for the purposes of development.

Nature Conservation (Scotland) Act 2004

1.2.19 Certain habitats have protection under the Nature Conservation (Scotland) Act 2004. Under section 1 of the Act it is:

1.2.20 'the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions'

1.2.21 The Act requires Scottish Ministers to produce a Scottish Biodiversity Strategy, including providing a published list of habitats considered to be of principal importance for the conservation of biodiversity (referred to as the Scottish Biodiversity List). This list is to be used to assist public bodies to meet section 1 of the Act.

Environmental Liability (Scotland) Regulations 2009

1.2.22 Brings into force rules to force polluters to prevent and repair damage to water systems, land quality, species and their habitats and protected sites. The Regulations apply in relation to:

- damage to protected species and natural habitats if:
 - it has significant adverse effects on reaching or maintaining the favourable conservation status of the protected species or natural habitat; and
 - it is caused by an activity listed in Schedule 1 or by the fault or negligence of an operator whilst carrying on any other activity;
- water damage, caused by an activity listed in Schedule 1, which is any damage that significantly adversely affects any or all of the:
 - ecological status;
 - chemical status;
 - quantitative status;
 - ecological potential, of the waters concerned with the exception of adverse effects where Article 4(7) of Directive 2000/60/EC applies;
- land damage, caused by an activity listed in Schedule 1, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, on, or under land of substances, preparations, organisms or micro-organisms.

1.2.23 The significance of any damage must be assessed by reference to certain criteria set out in the Regulations and the significance of any effects has to be assessed with reference to the baseline condition with significant adverse changes thereto being determined by means of measurable data; in accordance with criteria set out in the Regulations.

The Alien and Locally Absent Species in Aquaculture (Scotland) Regulations 2015

1.2.24 These Regulations safeguard against the potential for adverse environmental effects associated with the introduction and movement of alien and locally absent species in aquaculture. The Regulations primarily consist of mitigation measures to provide these safeguards. Aquaculture operators must apply for permission, as required by the Regulations, if they intend to undertake the introduction of alien species or the translocation of a locally absent species.

Deer (Scotland) Act 1996

1.2.25 This Act sets out NatureScot's role to further the conservation of deer native to Scotland, and perform functions as set out by the Act. It makes provisions for the conservation, control and sustainable management of deer; details what constitutes an offence in relation to deer; sets out details of enforcement of the Act, and miscellaneous provisions of the Act. It consolidates legislation in respect of deer in Scotland.

Protection of Wild Mammals (Scotland) Act 2002

1.2.26 The Act makes it an offence for a person to deliberately hunt a wild mammal with a dog. Certain exceptions apply.

1.3 Planning Policy

National Planning Policy

1.3.1 The applicable National Planning Policies are:

- Scottish National Planning Framework 3 (NPF3); and
- Scottish Planning Policy 2014.

1.3.2 The NPF3 states that at an overview level the '*The 2020 Challenge for Scotland's Biodiversity aims to promote and enhance Scotland's nature, and to better connect people with the natural world. Maintaining our natural capacity to provide services makes economic sense - to help achieve this, biodiversity in Scotland needs to be viewed at a landscape scale.*

1.3.3 Scottish National Planning Framework 4 is anticipated to be published in 2021 and meet outcomes set by The Planning (Scotland) Act 2019, including securing positive effects for biodiversity.

Scottish Biodiversity Strategy

1.3.4 The strategy was originally published in 2004 ('Scotland's Biodiversity: It's in Your Hands'³); and supplemented by an update in 2013 ('2020 Challenge for Scotland's Biodiversity'⁴). Together the two documents form Scotland's biodiversity strategy in response to the Aichi targets.

1.3.5 Aims of the 2020 challenge are to:

- Protect and restore biodiversity on land and in our seas, and to support healthy ecosystems;
- Connect people with the natural world, for their health and well-being, and to involve them more in decision making; and
- Maximise the benefits for Scotland of a diverse natural environment and the services it provides, contributing to sustainable economic growth.

1.3.6 NatureScot is tasked by the Scottish Government with leading the delivery of 'Scotland's Biodiversity: A Route Map to 2020' and the Scottish Biodiversity Strategy working groups. Each working group is entrusted with a specific aspect of biodiversity conservation.

³ Scottish Government (2004). Scotland's biodiversity: it's in your hands [online]. Available at: <https://www.gov.scot/publications/scotlands-biodiversity---its-in-your-hands/>

⁴ Scottish Government (2013). 2020 Challenge for Scotland's Biodiversity [online]. Available at: <https://www.cbd.int/doc/world/gb/gb-nbsap-v3-p2-en.pdf>

Scottish Biodiversity Strategy

- 1.3.7 The Scottish Biodiversity List (SBL) is a list of flora, fauna and habitats considered of principal importance for the conservation of biodiversity, developed by members of the Scottish Biodiversity Forum⁵.

Local Planning Policy

Tayside Local Biodiversity Action Plan 2016-2026

- 1.3.8 The Tayside Local Biodiversity Action Plan (LBAP) 2016-2026⁶ incorporates the local authority areas of Angus, and Perth and Kinross.
- 1.3.9 The LBAP includes a revised Tayside Species List, which includes the following mammals confirmed to be or potentially associated with the Proposed Development: otter *Lutra lutra*, common pipistrelle *Pipistrellus pipistrellus*, brown long-eared bat *Plecotus auritus*, Natterer's bat *Myotis nattereri*, Daubenton's bat *Myotis daubentoni*, water vole *Arvicola terrestris*, badger, red squirrel *Sciurus vulgaris*, pine marten *Martes martes*, hedgehog *Erinaceus europeus*, and roe deer *Capreolus capreolus* (amongst others). The Tayside Species List also includes 84 birds, nine fish including Atlantic salmon *Salmo salar* and lamprey, five amphibians, three reptiles, 49 invertebrates including freshwater pearl mussel *Margaritifera margaritifera*, and numerous plants, fungi and lichen; and can be viewed online in full⁷.
- 1.3.10 Action for Key Species under the LBAP and of relevance to the Proposed Development include actions for butterflies and moths, wood ants, amphibians and reptiles, Scottish wildcat *Felis silvestris*, and Atlantic salmon.

North East Scotland Biodiversity Partnership

- 1.3.11 The Aberdeenshire Local Development Plan 2017 identifies a number of Local Nature Conservation Sites (LNCS) with species and habitats of local importance. These are listed in Appendix 5 of Supplementary Guidance⁸.
- 1.3.12 North East Scotland Biodiversity Partnership identifies species which are not afforded legal protection, but which are specifically safeguarded through planning. This includes water shrew, and a list of plants and fungi⁹.

⁵ Available: <https://www.gov.scot/Topics/Environment/Wildlife-Habitats/16118/Biodiversitylist/SBL>

⁶ Tayside Biodiversity Partnership (2016). Tayside Local Biodiversity Action Plan, 2nd Edition 2016-2026. Available: <https://www.taysidebiodiversity.co.uk/action-plan/action-plan-new-lbap-2015/>

⁷ Tayside Biodiversity Partnership (2016). Tayside Species List. Available: https://www.taysidebiodiversity.co.uk/wp-content/uploads/2016/08/Species-List-Amalgamated_2.pdf

⁸ Aberdeenshire Local Development Plan (2017). Available: <https://www.aberdeenshire.gov.uk/planning/plans-and-policies/aberdeenshire-local-development-plan-2017/>

⁹ Available: <https://www.nesbiodiversity.org.uk/biodiversity-information-for-developers/important-local-species/>

Table 7.6.1 – Relevant protected species known to occur naturally in Scotland and their protection¹⁰

Taxon	Current taxon name	Common name	Legislation giving protection	Schedule or Annex listing
Amphibian	<i>Rana temporaria</i>	Common frog	WCA 1981	Schedule 5 ⁴
Amphibian	<i>Bufo bufo</i>	Common toad	WCA 1981	Schedule 5 ⁴
Amphibian	<i>Triturus cristatus</i>	Great crested newt	HR 1994	Schedule 2: European protected species
Amphibian	<i>Triturus helveticus</i>	Palmate newt	WCA 1981	Schedule 5 ⁴
Amphibian	<i>Triturus vulgaris</i>	Smooth newt	WCA 1981	Schedule 5 ⁴
Bird	<i>Tyto alba</i>	Barn owl	WCA 1981	Schedule 1 (Part I); Schedule 3 (Part I)
Bird	<i>Accipiter gentilis</i>	Goshawk	WCA 1981	Schedule 1 (Part I); Schedule 4
Bird	<i>Anser anser</i>	Greylag goose	WCA 1981	Schedule 1 (Part I in Outer Hebrides, Caithness & Sutherland and Wester Ross only); Schedule 1 (Part II in Outer Hebrides, Caithness & Sutherland and Wester Ross only); Schedule 2
Bird	<i>Circus cyaneus</i>	Hen harrier	WCA 1981	Schedule 1 (Part I); Schedule 1A
Bird	<i>Alcedo atthis</i>	Kingfisher	WCA 1981	Schedule 1 (Part I)
Bird	<i>Circus aeruginosus</i>	Marsh harrier	WCA 1981	Schedule 1 (Part I); Schedule 4
Bird	<i>Falco columbarius</i>	Merlin	WCA 1981	Schedule 1 (Part I); Schedule 4
Bird	<i>Pandion haliaetus</i>	Osprey	WCA 1981	Schedule 1 (Part I); Schedule 4
Bird	<i>Falco peregrinus</i>	Peregrine falcon	WCA 1981	Schedule 1 (Part I); Schedule 4
Bird	<i>Anser brachyrhynchus</i>	Pink-footed goose	WCA 1981	Schedule 2
Bird	<i>Milvus milvus</i>	Red kite	WCA 1981	Schedule 1 (Part I); Schedule 1A
Bird	<i>Haliaeetus albicilla</i>	White-tailed eagle	WCA 1981	Schedule 1 (Part I); Schedule 1A; Schedule 4; Schedule A1
Bird	<i>Cygnus cygnus</i>	Whooper swan	WCA 1981	Schedule 1 (Part I)
Butterfly	<i>Carterocephalus palaemon</i>	Chequered skipper	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Hamearis lucina</i>	Duke of Burgundy fritillary	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Coenonympha tullia</i>	Large heath	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Euphydryas aurinia</i>	Marsh fritillary	WCA 1981	Schedule 5
Butterfly	<i>Erebia epiphron</i>	Mountain ringlet	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Aricia artaxerxes</i>	Northern brown argus	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Boloria euphrosyne</i>	Pearl-bordered fritillary	WCA 1981	Schedule 5 ⁴
Butterfly	<i>Cupido minimus</i>	Small blue	WCA 1981	Schedule 5 ⁴
Fish	<i>Salmo salar</i> (only in fresh water)	Atlantic salmon	HR 1994	Schedule 3
Fish	<i>Lampetra fluviatilis</i>	River lamprey	HR 1994	Schedule 3
Mammal	<i>Meles meles</i>	Badger	PBA 1992	not applicable
Mammal	<i>Meles meles</i>	Badger	WCA 1981	Schedule 6
Mammal	<i>Plecotus auritus</i>	Bat - Brown long-eared	HR 1994	Schedule 2: European protected species

¹⁰ NatureScot (2020). Table of all Scotland's Protected Species. Available: <https://www.nature.scot/table-all-scotlands-protected-species>

Taxon	Current taxon name	Common name	Legislation giving protection	Schedule or Annex listing
Mammal	<i>Pipistrellus pipistrellus</i>	Bat - Common pipistrelle	HR 1994	Schedule 2: European protected species
Mammal	<i>Myotis daubentonii</i>	Bat - Daubenton's	HR 1994	Schedule 2: European protected species
Mammal	<i>Nyctalus leisleri</i>	Bat - Leisler's	HR 1994	Schedule 2: European protected species
Mammal	<i>Pipistrellus nathusii</i>	Bat - Nathsius' pipistrelle	HR 1994	Schedule 2: European protected species
Mammal	<i>Myotis nattereri</i>	Bat - Natterer's	HR 1994	Schedule 2: European protected species
Mammal	<i>Nyctalus noctula</i>	Bat - Noctule	HR 1994	Schedule 2: European protected species
Mammal	<i>Pipistrellus pygmaeus</i>	Bat - Soprano pipistrelle	HR 1994	Schedule 2: European protected species
Mammal	<i>Myotis mystacinus</i>	Bat - Whiskered	HR 1994	Schedule 2: European protected species
Mammal	<i>Castor fiber</i>	European beaver	HR 1994	Schedule 2
Mammal	<i>Erinaceus europaeus</i>	Hedgehog	WCA 1981	Schedule 6
Mammal	<i>Lutra lutra</i>	Otter	HR 1994	Schedule 2: European protected species
Mammal	<i>Martes martes</i>	Pine marten	HR 1994	Schedule 3
Mammal	<i>Martes martes</i>	Pine marten	WCA 1981	Schedule 5
Mammal	<i>Mustela putorius</i> (otherwise known as <i>Putorius putorius</i>)	Polecat	HR 1994	Schedule 3
Mammal	<i>Sciurus vulgaris</i>	Red squirrel	WCA 1981	Schedule 5; Schedule 6
Mammal	<i>Sorex spp</i>	Shrews (all species)	WCA 1981	Schedule 6
Mammal	<i>Arvicola amphibius</i>	Water vole	WCA 1981	Schedule 5 ³
Mammal	<i>Felis silvestris</i>	Wildcat	HR 1994	Schedule 2: European protected species
Mollusc	<i>Margaritifera margaritifera</i>	Freshwater pearl mussel	WCA 1981	Schedule 5
Moss	<i>Hamatocaulis</i> (<i>Drepanocladus</i>) <i>vernicosus</i>	Slender green feather-moss	WCA 1981	Schedule 8
Reptile	<i>Vipera berus</i>	Adder	WCA 1981	Schedule 5 ^{1,4}
Reptile	<i>Anguis fragilis</i>	Slow worm	WCA 1981	Schedule 5 ^{1,4}
Reptile	<i>Zootoca vivipara</i>	Common lizard	WCA 1981	Schedule 5 ^{1,4}
Vascular Plant	<i>Hyacinthoides non-scripta</i>	Bluebell	WCA 1981	Schedule 8 ⁴

Key

WCA 1981 Wildlife & Countryside Act 1981 (as amended in Scotland)

Schedule 1 (Part I) Birds protected by special penalties

Schedule 1 (Part II) Birds protected by special penalties during the closed season

Schedule 1A Birds that may not be intentionally or recklessly harassed at any time

Schedule A1 Birds whose habitually used nests may not be intentionally or recklessly taken, damaged, destroyed or otherwise interfered with when not in use

Schedule 2 Birds which may be killed or taken outside the closed season

Schedule 3 (Part I) Birds which may be sold at all times if ringed and kept in captivity

Schedule 3 (Part II) Birds that may be sold dead at all times

Schedule 3 (Part III) Birds that may be sold dead from 1 September to 28 February

Schedule 4 Birds that must be registered and ringed if kept in captivity

Schedule 5 Protected animals

Schedule 6 Animals protected from prohibited methods of capture

Schedule 8 Protected plants

Taxon	Current taxon name	Common name	Legislation giving protection	Schedule or Annex listing
HR 1994	<i>Habitats Regulations 1994 (as amended in Scotland)</i>			
PBA 1992	<i>Protection of Badgers Act 1992</i>			
¹	<i>Protected against intentional killing and injuring</i>			
²	<i>Protected against intentional or reckless taking</i>			
³	<i>Protected against intentional or reckless damage to, destruction of, obstruction of access to any structure or place used for shelter or protection and disturbance to animal whilst occupying such structures</i>			
^{3a}	<i>Protected against intentional or reckless damage to, destruction of, obstruction of access to any structure or place used for shelter or protection</i>			
⁴	<i>Protected against selling, offering or advertising for sale, possessing or transporting for the purpose of sale</i>			
⁵	<i>Protected against possession or control (live or dead animal, part or derivative)</i>			
#	<i>Protected in England & Wales only (a species believed to have been introduced to Scotland)</i>			