



Wildlife Licensing in England: Chaos, Crisis and Cure

SUMMARY

This paper, prepared for the Secretary of State for the Environment by the National Gamekeepers' Organisation, Countryside Alliance and the Moorland Association, highlights serious deficiencies in the current approach to wildlife licensing in England.

It describes the chaos that has followed the sudden revocation of three main General Licences in April 2019 and the resultant ongoing crisis for pest control and wildlife conservation.

The paper analyses the root causes of these problems and sets out what is required to repair the damage and make wildlife licensing in England fit for the future, not least now that the UK has taken back control of its own laws.

It ends by calling for an urgent Government feasibility study into bringing wildlife licensing back into central Government, where it can be more efficient, effective and cheaper.

Introduction and Background

Wildlife in the UK enjoys some of the highest levels of legal protection anywhere in the world but from time to time exceptions to the general approach of safeguarding nature must be allowed. This occurs, for example, where vulnerable species and livestock need to be safeguarded from common predators which themselves would otherwise be protected. For many decades this has been achieved through wildlife licensing under the Wildlife and Countryside Act 1981.

Initially this licensing was carried out by Government departments but in England, from 2007, the authority to issue wildlife licences has been delegated to Natural England (NE). It is a limited authority, set out in law, and it is exercised by NE on behalf of the Secretary of State for the Environment who has the power to take back control, as was done in 2019 when NE unexpectedly decided to withdraw three crucial General Licences at no notice because of the threat of a legal challenge which it decided not to oppose.

The early licences issued by the Government departments were very simple. They said, for example:

"The Minister [sometimes MAFF, sometimes the DOE, depending on the purpose of the licence], in exercise of the power conferred by Section 16(1) (j) and (k) WCA, and being satisfied there is no other satisfactory solution, hereby authorises, for the purpose of [allowable purposes were listed] any authorised person to kill or take in England the following birds [which were then listed] by shooting, cage trap, net or any other method not prohibited by Section 5 WCA."

There were then a few reasonable conditions appended to ensure, not least, that the licences were compatible with parent EU legislation but that was it. In under two sides of A4, the necessary control of pests and common predatory birds was ensured. The system worked, it was cheap, everyone was happy and there were no legal challenges. Then, in 2007, the task of issuing licences was given to NE.

Table 1: Length of English General Licences for Bird Control

Year	Length in pages	Issued by
1992	2	MAFF/DOE
1995	2	MAFF/DERA
2000	2	DEFRA
2005	2	DEFRA
2010	5	NE
2015	5	NE
2019	11*	NE

*11 pages, that is, for each and every species and licensing purpose

Table 1 shows that as soon as NE took over, the General Licences for bird control went from being 2 pages long to 5. The difference was accounted for by an increasing number of conditions, restrictions and definitions. “*Serious damage*”, for example, NE now defined as excluding ‘normal business risk.’ In the case of gamebirds, NE decided that you had to lose more than half your pheasants or partridges before you could rely on a licence. The essential job of controlling common pests and predators in England, whether for protecting livestock, controlling disease or conserving wildlife became highly complicated, much more restrictive and legally uncertain for both licensees and the issuing authority.

These differences arose not from changes in UK wildlife law, which is largely the same now as it was in 1981. There were some implications arising from the EU Habitats Directive and associated case law emerging from the European Court of Justice (ECJ). But the real cause of the change was the approach taken by NE to its licensing role, which has been highly precautionary, rather secretive, often untimely and sometimes even unlawful (eg *McMorn v Natural England*, 2015).

Thus, wildlife licensing in England had become problematic long before last year but the chaos and disaster for land management that resulted from NE’s sudden and unnecessary decision to revoke General Licences 04, 05 and 06 on 25/4/19 was without precedent. The immediate consequences were subject to widespread media comment and investigation, not least by Defra. This paper looks at what has happened since.

Licensing Since April 2019

When it revoked GLs 04,05 and 06 in April 2019, NE started to look into new General Licences to replace them. In the meantime, it introduced a system of 'emergency' Individual Licences for those in most urgent need of protecting livestock and wildlife. With no General Licences on which to rely, people applied for these in their thousands, something that surprised NE who seemed to have little idea how much use had been made of the General Licences it had revoked.

It took several weeks for these emergency licences to start coming through in quantity and when they did a most extraordinary example of NE's lack of legal drafting expertise emerged. NE's new Individual Licences not only allowed the applicants to control pest birds on the locations for which they had applied, they also allowed them to undertake the same activity anywhere else in England *and* to appoint any number of further individuals to do the same thing, effectively conferring on successful applicants the full powers of a licensing authority!

In mitigation, NE was acting in a hurry, albeit in response to a crisis of its own making, and it eventually adjusted the wording of later emergency Individual Licences to link them to specific locations and to limit them to the individuals named on the application. But the story does illustrate a serious lack of competence and legal understanding within NE's wildlife licensing department. Nor did NE notice the obvious defect itself; it had to be pointed out by stakeholder groups.

NE then started issuing replacement General Licences, beginning with Canada Geese, Crows and Woodpigeons. These licences were not only specific to each individual species (unlike all previous General Licences, which had grouped them) but each related to just one of the several licensing purposes. Had this approach continued, there would eventually have been many dozens of General Licences in total. Moreover, each of NE's new 2019 licences was over 11 pages in length, more than twice as long as the more generic licences it had revoked.

Fortunately, at that stage the Secretary of State took back control and Defra issued three workable new General Licences that covered the lot. Fortunate not least because NE's new General Licences (which still exist, extraordinarily, and were reissued in 2020) were hopelessly drafted including, for example, a condition requiring a licence user to continue carrying out non-lethal approaches such as scaring birds, even though such approaches had to be shown not to work in order for someone to rely on the General Licences in the first place! It was a chaotic situation and licence users struggled to understand what they could and couldn't do.

European Protected Sites

One ongoing and particularly problematic aspect of the crisis concerns licensing in sites protected under EU law (SPAs, SACs and Ramsar sites). Within these, the EU Habitats Directive requires a Habitat Regulations Assessment (HRA) to rule out any likely significant (deleterious) effect before a 'project or plan' can be carried out. Spreading nitrogen on farmland is a 'project or plan' according to the European Court of Justice (ECJ) and NE and Defra believe that issuing or changing wildlife licences, General or Individual, likewise requires an HRA so far as it relates to a European protected site. It was for this reason that Defra had to exclude such European sites from the scope of its own 2019 General Licences, precisely because NE had never completed the HRAs that would allow it. This remains the unsatisfactory position in 2020, not least because these sites are the jewels in the conservation crown and the rare wildlife within them is in greatest need of licensed protection from common predators.

Indeed, these very species are often a fundamental reason underpinning the English SSSI designations on which the European protections now sit. But at the time of EU site designation, which was superimposed on many existing UK SSSIs, NE failed in its statutory duty to carry out the very HRAs it now argues are necessary to allow any consented activity (eg predator control, heather burning, agricultural practices) to continue. Had NE done what it was supposed to, in a timely manner, we would not be in this mess. Actions that had long been considered fit for SSSI consent – that were in fact essential for the management of many SSSIs - should have been backed up by HRAs confirming that they needed to continue.

Further, the current exclusion from Defra’s General Licences goes beyond the European sites themselves, extending to a 300m buffer zone around them. This is because NE advised Defra such buffer zones were necessary to prevent potential harm to habitats and species within the protected sites themselves. NE’s justification paper for these buffer zones was concealed at first but eventually released to stakeholders by Defra on 4/3/20. It was less than two sides of A4 in length.

The paper focuses on ‘sensitive’ species, exclusively birds. It concludes that noise from firearms, associated human presence, companion animals and scaring measures can have ‘impact’. *“Eliciting flight response (in birds) is the benchmark used.”*

Having accepted NE’s recommendation that birds in buffer zones must not be induced to take flight as a result of wildlife management activities without a preceding HRA, in logic and in law the Government is equally obliged to stop any other activities that involve loud noises, human presence and companion animals in these buffer zones. Indeed, the Government is equally legally obliged to stop *any* activity in a buffer zone that can cause a bird to take flight until a bespoke HRA for each ‘project or plan’ has been completed showing it has no deleterious effect.

This is clearly unworkable and it is only a matter of time before more and more necessary activities in and around European protected sites are blocked by extremist individuals and pressure groups, exploiting the HRA requirement and its very literal interpretation by the ECJ and NE.

One example of such unintended consequences occurred recently in North Yorkshire, where police were called to a Larsen trap being used within 100m of a Special Area of Conservation. The SAC in question had been designated to safeguard lampreys in a river, hardly likely to be impacted by the trapping of crows 100m away. Police time, NE’s time and that of the landowner and gamekeeper were all wasted whilst the reported ‘issue’ was sorted out.

Individual Licences Issued in 2020

NE always said that its ‘emergency’ Individual Licences of 2019 would be a stop gap and indeed its approach to individual licensing in 2020 has been very different. Unsurprisingly, in the context of this whole saga, it has also proved much more complicated, burdensome and restrictive than what went before - and such licences as have been issued have arrived with their applicants woefully late.

Over 1000 people applied for individual licences in the early part of this year, mostly farmers, estate managers and gamekeepers wishing to control common pest and predatory birds such as woodpigeons and crows, to conserve wildlife and/or to protect livestock within European protected sites and their 300m buffer zones, all currently outside the scope of the Defra General Licences.

Applicants started to get their 2020 Individual Licences from the end of April, long after predation had begun on the eggs and chicks of rare and declining species such as curlew and redshank, which

NE is of course supposed to protect. And despite the extra time that NE had taken, the licences were once again appallingly drafted and mishandled. Applicants were frequently asked to re-send information they had already submitted and some, when they eventually got a licence, found they had been sent the wrong one, NE thereby having breached the General Data Protection Regulations.

So far as is known, no-one who has applied this year to NE for an Individual Licence to control rooks, jays or jackdaws has been granted one, although these species have always been licenced by NE in the past. Refused applicants have no right of appeal and NE's explanation that these refusals are linked to concern for the conservation of the birds in question has been met with incredulity.

The UK jackdaw population, for example, has almost trebled in the last 16 years and now stands at 1,550,000 birds. There are, in comparison, just 58,500 breeding pairs of curlew and 41,500 pairs of golden plover, the majority attempting to breed in the very European protected sites where these licences have been refused. In any case, if it is wrong, as NE claims, for it to issue jackdaw, jay and rook licences this year, has NE been acting wrongly by doing so every year since 2007?

The format of the licences issued is extraordinarily inept too. Long and detailed lists of conditions are included, only to be excluded again by 'additional conditions' further down. Yet these are supposed to be bespoke *individual* licences, pertinent to the person and property for which they have been granted. (There are no bullfinches or 'Essex brent geese' on grouse moors, for example, but the licences granted to some grouse moor owners include paragraphs about both, albeit these are then cancelled by subsequent clauses). However, in some granted licences only the original 'generic' conditions appear, without the later 'cancellations', thus requiring, for example, the applicant to remove all birds from every cage trap every night – including decoys birds (Condition 14. c), and to cover the trap with a cloth for some unknown reason whenever something is caught (Condition 14. d). Wholly impractical and unworkable requirements yet the legal consequence of poor drafting.

Most of the granted licences list specified numbers of birds that can be killed by each method (shooting, trapping, 'by hand', etc). Thus, for example, NE has allowed one particular applicant who had asked to be able to kill 100 crows, to in fact kill 100 by shooting, 100 by trapping, 100 by hand, etc, a total of several hundred crows for this one licence and a woefully basic drafting error.

The licences include extensive and onerous 'notes' and then 'additional notes' and also 'general advice', although the status of all these in law is unclear. There are frequent mistakes pertaining to names and places, whilst the grammar and typos in all the licences seen by the stakeholder bodies would disgrace a schoolchild.

At least one individual licence issued in recent weeks even appears to allow disturbance of Schedule 1 birds, although no application was made to do so. Other estates have found, via NE's online portal, that their licence has been granted but no paperwork has yet been sent to them, so they do not know what it is they have been licensed to do or by what conditions they must abide.

Estates, farmers and gamekeepers normally ramp up their control of crows, rooks, jackdaws, jays and magpies from about February so as to have reduced their numbers by the time other birds are starting to nest and young livestock are born. When such actions were covered by the General Licences, as was the case from 1992 until NE revoked them in April last year, licence users could start control when and where they needed to.

This year, within the European protected sites and their 300m buffer zones, land managers have been forced to apply for Individual Licences and then wait for months.

Nests of curlew, redshank, golden plover and many of the other rare and declining species have been devastated – and this in their most important breeding sites supposedly protected under the auspices of NE. Gamekeepers have been close to tears watching their grouse and precious waders trashed. Farmers have lost lambs, birthing ewes and infirm stock to carrion crows. It's a disgrace.

The above shortcomings all relate, of course, to Individual Licences which *have* now been granted. As we write this in the last week of May, however, hundred have not been granted, nor have they apparently been refused. They remain stuck in NE's system whilst the nesting season for vulnerable birds and young livestock is at its peak. The resultant damage is catastrophic.

When asked by applicants where their licences have got to, NE has said there is a backlog due to high workloads. It suggests that if applicants have serious and immediate problems they can take unlicensed action and rely on the defence provided by Section 4 of the Wildlife and Countryside Act 1981. This does in theory provide a defence to the killing of a protected bird for the prevention of serious damage to livestock but it reverses the burden of proof, there is no supportive case law and lawyers have consistently advised that it is a very risky Section on which to rely.

Section 4 does not provide any defence for someone, a gamekeeper for example, needing to take urgent unlicensed action for the purpose of conserving wildlife, yet until its error was pointed out, NE was even advising such people they could kill protected birds and rely on Section 4, another alarming example of NE's failure to understand the 1981 Act, despite its being the basis of much of its work, and a mistake that could have ended up with well-intentioned people going to prison.

There may perhaps have been some excuse for the failings in the 'emergency' Individual Licences that NE produced in a hurry during the 2019 crisis but the dreadful errors, inconsistencies and illiteracy of the long-awaited 2020 licences are frankly inexcusable.

Gull Licensing

Until a few years ago, several of the larger predatory gull species were included on the General Licences for conservation and livestock protection and could be controlled for those purposes in unlimited numbers. Gradually over the years they have been taken off, the last species, Lesser Black-backed Gull, being removed from the General Licences on 1/1/19. In England, predatory gulls can now only be controlled under Individual Licences granted by NE.

NE says it had to take the gulls off the General Licences because of adverse changes in their conservation status. It is certainly the case that there have been dramatic changes in gull distributions in England but it is far from clear that they have declined. According to the British Trust for Ornithology, for example, gull colonies have increased markedly in urban areas in recent decades. The UK wintering population of Lesser Black-Backed Gulls is currently around 130,000, whereas in 1953 in the whole of England and Wales it was 165. (*'Analysis of LBBG data to inform meta-population studies', BTO 654, by VH Ross-Smith*).

NE has continued its clampdown on gull control nonetheless. It contacted stakeholders out of the blue on 29/1/20 and told them that the following day a change to the licensing of Herring Gulls and Lesser Black-Backed Gulls would be announced. Henceforth there would be caps such that the total annual number of Herring Gulls for which Individual Licences would be granted in rural England would be 600 and for Lesser Black-Backed Gulls, 900; tiny proportions of their national populations and far fewer than have typically been culled in former years. (In 2019, for example, NE issued licences for

the killing of 6,050 adult gulls of these two species and for the destruction of 40,000 eggs; before that, under General Licences, the numbers controllable were unlimited).

The 2020 applications were to be screened and the cap split between them on merit. NE expected as a result that, “not all applications would be granted.” This new approach, on which there had been no public consultation, also prioritized applications for the purpose of air safety and other critical public health issues. Such licences would also be granted from the total cap, so applicants for other purposes such as protection of livestock and conservation would have to make do with a share of what remained thereafter.

Perhaps inevitably, what has happened since is that all of the very small caps have been taken up by prioritized health and safety applications. Although hundreds of gamekeepers, estates and farmers applied for gull licences this year, stakeholders are unaware that a single licence has been granted for gull control throughout rural England. This is a disaster for wildlife conservation and for farming.

Gulls have always been controlled in the countryside. It's hard work but essential and people don't go about it casually. On grouse moors in particular, gulls feed on eggs and chicks almost in a frenzy when they find them, attracting in other gulls and potentially clearing an area of all its nests in short order – whether of grouse, curlew, hen harriers, merlin or other ground nesting birds. Many of the species on which Lesser Black-Backed and Herring Gulls predate are red-listed.

Stakeholders were therefore appalled when told of the decision to cap rural gull control and the NGO asked on 4/2/20 to see the HRA necessary to implement such a radically new approach to licensing within and around the European protected sites, which include most grouse moors. NE refused and so the NGO asked again, this time under Freedom of Information rules. It was then told (on 3/3/20) that the HRA would be published ‘once it was finished’. By this time, however, the new gull licensing policy had already been agreed and published on Gov.UK.

After much chasing and a further FOI request, the HRA was finally published on 5/5/20. It included a table of drafting dates showing that Version 1 was completed on 16/1/20, with the final version signed off on 29/4/20. These dates are very significant because NE has now informed that NGO (and Defra have confirmed), that the Secretary of State “*provided support for the hierarchy approach*” to gull licensing on 10/1/20 (ie before even Version 1 of the HRA was complete) and the new policy was announced, launched and being implemented long before the HRA was finally signed off on 29/4/20. This, remember, when in law no ‘project or plan’ may be undertaken affecting any European protected site *before* an HRA has been carried out which shows no ‘likely significant [deleterious] effect’. Was NE's disastrous decision to cap rural gull licences even legal?

Turning to NE's HRA itself, this is a 36-page document of Byzantine complexity. In essence, however, it argues that no significant amount of gull control can be allowed anywhere in *rural* England because doing so might potentially have a ‘likely significant [deleterious] effect’ on the number of gulls in the handful of European protected sites for which Herring and Lesser Black-Backed Gulls are qualifying species. In other words, the well-proven and certain deleterious impact that gull predation has on the red and amber listed species which underpin most upland SPA designations in the SSSI citations, is now allowed to occur unimpeded (because all the available cap has been used up) on the remote off-chance that killing a few gulls on a grouse moor in Yorkshire, for example, might impact gull numbers on the SPA near Barrow-in-Furness where Herring and Lesser Black-Backed gulls are qualifying species.

The gull species in question are indeed of uncertain conservation status but they are still very numerous. Gulls rarely breed before their third year and so there are always many non-breeders in

the population. Gulls nest in known favoured locations, especially in the few SPA's for which they are qualifying species. By definition, therefore, the gulls causing predation problems in spring on the Yorkshire grouse moor in the above example are not breeding birds. Removing some of them under licence could not significantly impact breeding numbers on the gull SPA's far away but it would undoubtedly help the much rarer, vulnerable ground nesting birds for which the Yorkshire moors are designated.

NE's HRA in fact accepts (on page 17) that, *"The absence of adequate gull control could have knock-on effects in situations where this action is necessary to maintain certain features. For example, where gull control is necessary to reduce predation of a breeding tern colony."* But it makes no assessment whatsoever of the potential level of damage caused by restricting licensing, thereby allowing such predation to continue unchecked. Instead, NE's very next sentence reads, *"In 2020, the 'project' enters a period with different circumstances than those that influenced the licensing of these two gull species up to and including 2019. One outcome is that more stringent technical assessment criteria will be used to determine the justification of licence applications submitted under the 'conservation' purposes; and another is that licensing criteria will be more strictly applied to in order to maintain a sustainable licensing regime that avoids deterioration in the conservation status of these two gull species."*

The 'different circumstances' are of course the legal challenges of Wild Justice but instead of assessing the impact of stopping gull control in rural areas and finding a workable way forward, NE has instated stopped gull control forthwith by imposing a miniscule cap and then using it all up elsewhere. Where are NE's assessments of the impact of stopping gull control on England's wildlife and agriculture, not least in the European protected sites where they are a legal requirement? NE says it cannot possibly allow such control without an HRA, yet it cheerfully stops longstanding control on a whim without undertaking any assessment of the damage that will do.

Oddly, NE decided that its gull capping policy need not apply in urban areas such as seaside resorts, where of course gulls can be a well-known and much publicized menace. The HRA does not explain why it is safe to licence an uncapped amount of gull control in urban England but necessary to cap all such control in rural areas. Why is a small amount of gull control on a Yorkshire grouse moor being stopped when an unlimited amount of gull control at Skegness is allowed to carry on? The Government's own nature conservation agency has prioritized the protection of seaside chips over upland wader chicks and the rural community is at a loss to understand.

The impact of not being able to control any gulls at all on grouse moors and other rural sites for which applications were made this year is proving highly significant and very damaging not just to the gamebirds breeding in such sites but also to a wide range of ground nesting waders, nearly all of them red-listed and in real trouble. NE's HRA takes no account of this inevitable impact and so a disastrous decision has been taken which is now trashing vulnerable wildlife across the uplands.

Did the Secretary of State know this would be the near-inevitable outcome when he gave *"support for the hierarchy approach"* on 10/1/20? Will that support now be published? Does he stand by that support now and does he endorse NE's disastrous approach to gull licensing since?

POSTSCRIPT

On the day this paper was completed, we learned of a rural gull licence which HAD just been granted. It was for an upland SPA designated as a Hen Harrier breeding site. NE has thus apparently

bent its own capping policy to save raptor eggs and chicks but will not do so to save rare waders. Even this unique licence is risible. It says that gulls which are merely flying over the site must not be shot; that shooting must only be used in conjunction with and to reinforce shooting-to-scare and gas bangers; and that, “Head shots should be avoided due to the risk of causing non-lethal injuries”.

So, if a female HH rose off her brood to get food and gulls were merely flying over, the licensee could not shoot them. He would presumably have to wait until a gull had already spotted the chicks and was diving down before attempting a non-head shot from a ludicrous distance of 750m, the closest to a Hen Harrier nest that the licence says anyone should go. And that shot could only be taken if he had already shot-to-scare AND had a gas banger going (which may of course have deterred the Hen Harrier from nesting in the first place).

Stoat Trapping Licences

In 2018, Defra concluded, following a public consultation, that the “*least burdensome*” approach to implementing the requirements of the Agreement on International Humane Trapping Standards (AIHTS) in the UK would be to protect the stoat from trapping (by amending to the Wildlife and Countryside Act 1981) and then to allow stoat trapping once more under licence but only using traps approved to AIHTS standards.

The first half of this plan was achieved via the Humane Trapping Standards Regulations 2019; the second half – producing the necessary General Licences – fell to Natural England (and its equivalents for the Devolved Authorities, which had agreed to follow the same overall approach). The date for implementation, stated in the 2018 consultation and enacted in the 2019 regulations, was 1 April 2020.

NE thus had over two years to consider, write and issue the necessary General Licences. In the event, and despite repeated prodding throughout 2019 by the stakeholders who represent stoat trappers, drafting of the licences did not start until there were just a few weeks to go.

NE did not consult with stakeholders before writing its licences. It only sought policy guidance from Defra in early March. It then showed stakeholders, just days before the legal deadline, draft licences which were wholly inadequate and would have prevented the majority of essential stoat trapping from taking place. People who had invested hundreds of thousands of pounds in testing and procurement of new AIHTS compliant traps were within days of losing the ability to use them.

Gamekeepers, in particular, were on the verge of disaster and the NGO therefore made urgent representations made to the Secretary of State. Following these, NE went back to Defra who in turn reconfirmed and clarified their guidance to NE. Finally, the licences (GL38 and GL39) were issued, just a day before coming into force and still inadequate in many ways. User group stakeholders were livid about the wholly unnecessary delay and last-minute rush.

Worse was to follow, however, when the detail of the Defra policy guidance given to NE was revealed. It had to be sought by the NGO under Freedom of Information rules because NE refused to publish it or to share it when asked. Table 2 compares the final Defra policy guidance, given to Natural England in a letter dated 30/3/20, with the content of the two General Licences which NE issued the following day.

Table 2: Comparison of Defra Policy and NE’s General Licences for Trapping Stoats

Defra Policy	NE GL38 (conservation) and GL39 (livestock)	Comment
<p>[Quoted verbatim from Defra’s letter to NE dated 30/3/20]</p> <p>“The purpose of the 2019 Regulations is solely to regulate the use of traps for stoat to ensure that only those which comply with AIHTS can be used. The Regulations do not introduce a general prohibition on killing or taking stoat. Their purpose is not to conserve stoats, which are common in England, or to otherwise reduce the number of stoats that are trapped. Individuals will continue to be able to control stoats via other legal methods without a licence after 1 April 2020.</p> <p>“Therefore, when considering a general licence for trapping stoats the context is fundamentally different to licences for species, such as birds, which are protected for wider reasons. A licence for trapping stoats should not curtail the trapping of this species; nor should it place new burdens on the licence user other than to restrict the types of traps which can be used.”</p>	<p>GL38 Condition 3 reads; “This licence can only be used to conserve “wild birds” which are members of a species satisfying the following criteria:</p> <ul style="list-style-type: none"> • are predated by Eurasian stoat and • belong to one of the following categories of birds: <ul style="list-style-type: none"> o Game birds when they are vulnerable to stoat predation o Waders and other ground nesting birds native to the UK. <p>GL39 Condition 3 reads: “This licence can only be used to prevent serious damage to the following types of livestock when they are vulnerable to stoat predation:</p> <ul style="list-style-type: none"> • domestic poultry and waterfowl • gamebirds and wildfowl while they are held captive within a fenced pen, and • rabbits farmed for the provision of food.” <p>Condition 7 of GL38 [and GL39] reads: “Any person using this licence must be able to show, if asked by an officer of Natural England or the Police what wild bird(s) [livestock] any action under this licence is protecting. Licence users are advised to keep a record or log of predation.”</p> <p>Advice note (b) in GL38 and GL 39 reads: “Defra policy guidance states that licences should not place new burdens on the licence user other than to restrict the types of traps which may be used.” In GL 38 it continues,</p> 	<p>Defra’s policy said the licences should not curtail stoat trapping, yet NE’s licence restricted trapping to actions for the conservation of just a small subset of wild birds, excluding, all birds that nest off the ground. Stoats are avid predators of eggs and nestlings of hedgerow and tree-nesting birds.</p> <p>Until now the trapping of stoats has been without restriction and no reasons for adding restrictions have been specified in law or been shown to be required. Defra’s policy is that a licence should not curtail the trapping of the species, yet GL39 limits trapping to protecting only certain livestock. What about protecting other species, especially their young, or indeed pets?</p> <p>Defra’s policy says there should be no new burdens on the licence user. These are new burdens. The implication is that to ‘show’ what wild birds [livestock] are being protected, the licence user must have a log of predation. Gathering such evidence is another new burden and a very onerous one.</p> <p>How are all the new burdens in the licences (see above and below) compatible with the Defra policy and with what NE has stated in its own advice note (b) in the two General Licences?</p>

	“Therefore, the licence does not require users of the licence to be actively engaged in efforts to conserve the wild bird(s).”	
	Condition 8 (b) (i) in both GL38 and GL39 reads: “Every live capture trap used pursuant to this licence must be physically inspected by a suitably authorized person at least every 25 hours.”	Another new burden, when Defra’s policy (and NE’s own advice note) states that there should be none.
	Advice note (I) in both GL38 and GL39 reads: “Persons acting under this licence should take account of published good practice guidance, and other relevant consideration, such as prevailing weather conditions and presence of non-target species, which may influence when and where traps are set.”	Just one further example of a new burden (and there are plenty of others) which the ‘advice’ sections of GL38 and GL39 impose on the licence user. These advice sections have very uncertain legal status. They should not be part of either General Licence.
	Annex 1 to GL 39 sets out, “What amounts to ‘serious damage’ for the purpose of the livestock covered by this licence.” It acknowledges that, “There may be other cases of ‘serious damage’, that is to say is damage to an economic interest, which livestock represents, that exceeds mere nuisance, minor damage or normal business risk, for which a licence may be granted if an application for it is made.”	GL39 is for the purpose of ‘preventing’ serious damage and the High Court has found this does not require serious damage already to have occurred (McMorn v NE CO/4133/2014, paragraph 14). Why does annex 1 set out thresholds for necessary levels of damage for the GL39 to be applicable? Why should people have to apply for individual licences for lesser levels of damage? Why does annex 1 depart from Defra’s policy?

It is quite clear from the table that NE did not follow all Defra’s policy guidance and its two General Licences (5 and 6 pages in length respectively) were certainly not the “*least burdensome approach*” to implementing AIHTS, first promised to stakeholders by Defra back in 2017.

This has resulted in highly restrictive and burdensome General Licences that go far beyond just specifying the types of trap that can be used for catching stoats, as had been the Government’s intention and instruction to NE.

Nor can NE argue that it failed to receive or to understand Defra’s policy guidance; it actually quotes the most relevant paragraphs of it, about not restricting stoat trapping beyond the need to use humane traps and not increasing the regulatory burden on licence users, in its own stoat trapping

licences! Whether NE has acted unlawfully in this remains to be established but it has quite clearly gold plated what the Government intended and made the job of stoat trapping in England much more complex and legally uncertain.

It is pertinent to note that the approach taken in Wales to stoat trapping licences has been markedly different, although the legislative framework is identical. Wales, as part of the UK is also signed up to AIHTS and needed to implement it. The Welsh Government agreed with Defra's overall approach and supported amendment of the Wildlife and Countryside Act to ban all trapping of stoats in Wales after 1/4/20. It fell to Natural Resources Wales (NRW) to issue the necessary Welsh General Licences to allow trapping to continue after that date, using AIHTS-approved traps only.

NRW issued two stoat licences, one for livestock protection (GEN:WCA:019:2020), the other for the purpose of conserving wild birds (GEN:WCA:020:2020). Each was just two pages long, a third of the length of NE's equivalents. The former was, "*to prevent serious damage to livestock*", with no restriction as to what livestock could be protected. The latter was, "*for conserving wild birds*," with none of the exemptions or problematic conditions imposed by NE and shown in Table 2. If NRW could produce a licence that was short, understandable and fit for purpose, why couldn't NE?

In regard to English stoat licensing, it is essential as a minimum that at the earliest opportunity the additional burdens and uncertainties are removed from GLs 38 and 39. This process should be done with proper involvement of stakeholder representatives, as well as Defra, to ensure that the replacement licences are correct, short and easy to understand.

Analysis

The problems exemplified in this paper concerning wildlife licensing in England over the past year have common origins and themes:

- Some stem from European wildlife law, particularly the Habitats Directive and the very protectionary interpretations made of it in recent years by the ECJ.
- Others arise from a lack of clear policy direction from Defra, which tends to give rather imprecise advice to NE on wildlife licensing policy, leaving it to decide on the detail, make the decisions and face the music when stakeholders - on all sides - rise against them.
- But NE has ignored much of the policy advice it has been given on stoat trapping.
- NE invariably takes the most precautionary approach when interpreting EU law. This has resulted in the constantly increasing length, complexity and restrictiveness of all licences issued since NE took over. Other EU countries take a much more relaxed approach to the same legislation. Even the other home nations produce simpler, more practical licences.
- These tendencies have been compounded in recent years by legal challenges or the threat of them, which have also caused knee-jerk responses - such as NE's General Licence revocations of April 2019 - and then rushed attempts at fixes and replacements.
- Although designed to head-off further legal challenges, this hurried 'patching' has not achieved that but it has, crucially, made many licences unfit for practical purposes and the job of predator control by gamekeepers, farmers and others much harder - in some instances impossible - with serious resultant damage to endangered wildlife.
- The increasingly legalistic background has also made NE more secretive about what it is doing. There has been a lack of meaningful public consultation and liaison with affected

stakeholders, often leading to poorly drafted licences which could easily have been rapidly improved had stakeholders been involved and listened to.

- Transparency has been lacking. Documents such as the underlying HRA's and Defra policy guidance, which should have been made public, have been hidden away and only revealed in response to FOI requests, building an atmosphere of mutual suspicion which is not conducive to teamwork and cooperation.
- **The increased workload in all this has resulted in spiraling costs and led to licences being issued far too late. It has put strain on hard pressed staff within NE and Defra, to say nothing of stakeholders, and without significant change in the direction of travel these pressures and indeed all the above shortcomings look destined to continue indefinitely, leaving us with a licensing system that is permanently broken and neither delivering the protection of wildlife required by the 1981 Act, nor the practical, exceptional control of it under licences that legislators envisaged.**

It is important to remember that the UK legislation on wildlife licensing has remained largely unchanged since the 1981 Act became law. (A few additional licensing purposes have been added but that is about it). The simple licences that used to be issued directly on behalf of their Secretaries of State by the Government Departments for the Environment and Agriculture would be no less valid today *under UK law* than they were back in the 1990's and early 2000s. During that time they worked very well from everyone's perspective and were never challenged.

It is the more recent EU legislation and associated ECJ case law in particular that has forced the UK into doing things differently, for example by requiring HRAs for European protected sites that prevent any project or plan that could possibly have a deleterious effect; "likely" having been interpreted by the ECJ as meaning its exact opposite.

This legal need for HRA's has been compounded by NE's own protectionist approach, for example the defining of 'impact' in buffer zones as anything which might cause a bird to take flight; an interpretation which - rolled out to its logical conclusion - would quite literally mean that a person couldn't sneeze in or around a European protected site without a preceding HRA and which, more seriously, would make agriculture, industry and life in general in such places frankly impossible.

The Government needs to re-examine the HRA issue urgently. Fortuitously, it can now do so with a free hand in light of the UK having left the EU. The current HRA requirement needs to be replaced by pragmatic measures to protect the habitats and species in our most sensitive sites but in ways that allow necessary activities such as pest and predator control to carry on.

Rural England is largely in private hands and is managed and maintained by the efforts and at the cost of its landowners. This includes many of the European protected sites and most SSSIs. The fact that these places are special and have important biodiversity is invariably because of long-lasting stewardship by landowners, not in spite of it. In this context, what is needed is a wildlife licensing system that helps landowners rather than hindering them at every turn, as happens now.

An effective licensing authority would therefore start not by asking itself, "How can we interpret law and policy in ways that stop anyone killing any wildlife?" but by asking landowners, "What is the management issue you are facing and how can we help?" "What tools do you need to deliver goals and ambitions in the 25-year Environment Plan?"

That co-operative approach would also be much cheaper. Simpler licensing systems need far less administration. The cost of those few two-page General Licences back in the 1990's would have been a fraction of a single civil servant's salary. We now have an entire wildlife licensing department

in NE and even that appears to be overwhelmed by the unnecessary workload it has made for itself. It is incapable of getting its own procedures right or completed on time and it has lost all credibility.

Maybe NE's excessively complex, precautionary and restrictive approach stems from its scientific background and core vision of protecting wildlife, whereas the greater practicality and simplicity of those earlier Departmental licences arose from civil servants who were tasked with running the countryside as a whole, working *with* farmers and rural land managers to make their jobs effective and their industries productive.

Perhaps it is time, therefore, that wildlife licensing returned to central Government, where Parliament envisaged it should sit when passing the Wildlife and Countryside Act in 1981.

What is Required Now

This paper is factual but frank. Its intention is to provoke further thought, swiftly followed by decisive action. We all need a wildlife licensing system that works for licence users, works for licence-makers and, most importantly, works for wildlife. Currently, the system fails miserably on all three counts. It must be changed. Not patched or botched up yet again: fundamentally changed.

Fortuitously, the UK's departure from the EU means that the problems specified above which have arisen from the Habitats Directive and related ECJ judgements can be sidestepped. If the Government's cry of "*taking back control of our laws*" means anything, then surely it must mean that an approach in EU law which hasn't worked for our country can be ditched, returning to UK statutes which worked well in the past and can work again after the Transition Period is over.

Many of the other underlying problems listed above and exemplified in this paper stem from NE's approach to wildlife licensing and its modus operandi. It cannot be coincidence that wildlife licensing in England only became so much more complicated and problematic when NE took the task over from central Government in 2007.

It is also noteworthy that the Government's solution to last year's crisis was to take back control of General Licensing on a temporary (though currently continuing) basis and to issue simpler, pragmatic licences which - although not perfect - have at least worked for most practical purposes, the European protected sites being the major exception.

Defra has changed greatly since 2007 of course and has recently made clear that it currently does not have the resources to manage wildlife licensing on a permanent basis once more but this paper urges that possibility to be seriously considered. A feasibility study is called for to examine the potential for reallocating responsibilities, staff and resources between NE and Defra such that licensing, which is in law answerable to the Secretary of State, is indeed carried out by his Department, just as Parliament originally envisaged.

Back within Defra once more, licensing would sit alongside other aspects of land management responsibility; a little further from the worlds of idealism and academia and a little closer to the realities of the working countryside. It would also benefit from greater civil service understanding of effective legal draftsmanship. There would be one further major benefit:

Incompetence in administration should always be held to account and there has, as this paper shows, undoubtedly been serious incompetence on the part of NE. Currently, there is no way of holding NE to account. There isn't even an appeal process for applicants against a decision taken by

NE, even though its decisions on wildlife licences have the force of law. No-one in NE is responsible to the electorate. No-one in NE has felt the need to resign over the appalling mistakes made in the licence revocation crisis last year, or the ongoing debacle of Individual Licensing in 2020.

Defra, on the other hand, is part of Government and accountable through its Ministers and Parliament to the people. It is bound by Cabinet Office rules on, for example, the need for public consultation. NE is not, yet its decisions on licensing have the effect of changing the law. Licence users, their stakeholder bodies and even Wild Justice, come to that, have no way of exercising democratic influence over what NE does. Decision-making by NE can only be challenged via the courts and judicial review is limited to striking down decisions that are actually unlawful. It cannot be used as a vehicle for correcting decisions that are just downright poor. Democracy can.

So please, for everyone's sake, sanity and the wellbeing of wildlife and countryside management in England, lets have an immediate Government feasibility study of the issues raised in this paper and the suggestions made.

29 May 2020

National Gamekeepers' Organisation
www.nationalgamekeepers.org.uk

Countryside Alliance
www.countryside-alliance.org

Moorland Association
www.moorlandassociation.org