Legislation

The legislation concerned with planning and wildlife is very complex and ever changing. This section is merely a guide and does not claim to be authoritative. Legislation is achieved by a combination of the provisions of the:
- Habitat Regulations 2010
- Wildlife and Countryside Act 1981
- Countryside and Rights of Way Act 2000
- Legislation specific to particular species.
- Natural Environment and Rural Communities (NERC) Act 2006 s.(40)

The NERC Act requires that:
Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

This requirement is amplified by Section 41 (S41) of the NERC Act and applies to all Local Authorities. This requires the Secretary of State to publish a list of habitats and species which are of principal importance for the conservation of biodiversity in England. The list has been drawn up in consultation with Natural England, as required by the Act.

The S41 list is used to guide decision-makers such as public bodies, including local and regional authorities, in implementing their duty under Section 40 of the Natural Environment and Rural Communities Act 2006, to have regard to the conservation of biodiversity in England, when carrying out their normal functions.

There are 56 habitats of principal importance included on the S41 list. These are all the habitats in England that have been identified as requiring action in the UK Biodiversity Action Plan (UK BAP). Find the list from here: http://www.naturalengland.org.uk/ourwork/conservation/biodiversity/protectandmanage/habsandspeciesimportance.aspx

There are 943 species of principal importance included on the S41 list. These are the species found in England which have been identified as requiring action under the UK BAP.

The Habitat Regulations 2010
This re-enacts the 1994 Regulations and its amendments. This can be seen here: http://www.legislation.gov.uk/uksi/2010/490/contents/made

The Conservation of Habitats and Species (Amendment) Regulations 2012 (Link)
These amend the Conservation of Habitats and Species Regulations 2010. They place new duties on public bodies to take measures to preserve, maintain and re-establish habitat for wild birds.

Effect on Development Control
The Regulations define in their Schedule 2 a list of European Protected Species of Animals (EPS). Regulation 41 then defines a number of offences against EPS including killing or disturbing them or damaging or destroying a breeding site or resting place.

Disturbance means anything likely to:
(a) impair their ability (I) to survive, to breed or reproduce or to rear or nurture their young, or (ii) in the case of a hibernating or migratory species to hibernate or migrate, or
(b) to affect significantly the local distribution or abundance of the species to which they belong.

These bind upon the Local Planning Authority in the following way. When granting planning permission, where EPS offences would be likely to be committed the authority must apply the three licensing tests:
- development is needed in the interest of preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment
- that there is no satisfactory alternative
- that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range

This area of legislation has been clarified by certain court cases, notable the Wooley case and the Morge case. It is now clear that a planning officers case report should state whether an offence against an EPS is likely, and if it is then sufficient information must accompany the application to assess that impact.

If mitigation ( NOTE not compensation) is proposed by the developer such that there would be no adverse impact upon the EPS then an EPS license would not be required thus the LPA need not apply the three tests. In cases where the impact would be harmful and the three tests cannot be met then planning permission should be refused.

Advice on species most likely to be encountered in Essex can be found on the Protected Species section of this guide.

Forward Planning

The duty to conserve biodiversity under s40 of the NERC Act is very relevant here, and a DEFRA guidance document can be found at http://webarchive.nationalarchives.gov.uk/20130123162956/http://archive.defra.gov.uk/environment/biodiversity/documents/la-guid-english.pdf

which sets out relevant considerations in its section 4.

Planning Policy guidance is set out in the pages of the Planning Portal (see following page)

If the proposed plan affects a European Site then an appropriate assessment must be carried out under S21 of the Habitat Regulations 2010.
As explained in ‘Planning for the Protection of European Sites: Appropriate Assessment’, The Natura 2000 network provides ecological infrastructure for the protection of sites which are of exceptional importance in respect of rare, endangered or vulnerable natural habitats and species within the European Community. These sites which are also referred to as European sites consist of Special Areas of Conservation (SACs), Special Protection Areas (SPAs) and Offshore Marine Site (OMS).

Article 6.3 of the Habitats Directive states that, ‘Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives...the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.’

The purpose of an Appropriate Assessment (AA) of a land use plan is to ensure the European sites are protected as part of the local and regional planning process. The requirement for AA of plans of projects is outlined in Article 6(3) and (4) of the European Communities (1992) Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (‘Habitats Directive’). Planning authorities need to undertake AA on plans that will have an adverse impact on the integrity of European sites prior to their adoption in order to fulfill the requirements of the Directive in respect of the land use planning system.

The role of the planning system

The planning system has a critical role in supporting the Government’s wider environmental objectives, including biodiversity goals.

Section 40 of the Natural Environment and Rural Communities Act 2006, places a duty on all public authorities in England and Wales to have regard, in the exercise of their functions, to the purpose of conserving biodiversity. A key purpose of this duty is to embed consideration of biodiversity as an integral part of policy and decision making throughout the public sector, which should be seeking to make a significant contribution to the achievement of the commitments made by Government in its Biodiversity 2020 strategy.

The National Planning Policy Framework is clear that pursuing sustainable development includes moving from a net loss of biodiversity to achieving net gains for nature, and that a core principle for planning is that it should contribute to conserving and enhancing the natural environment and reducing pollution.

Local Development Frameworks

Local Development Framework is the term used for the portfolio of local development documents which together deliver the spatial planning strategy for the local planning authority’s area. Local Development Frameworks should include the following development plan documents – the core strategy; site specific allocations of land; and area action plans (where needed). Generic Development Control polices will be either a separate development plan document or included in the core strategy. A proposals map illustrating the spatial extent of policies will accompany all development plan documents.

Supplementary Planning Documents

Supplementary Planning Documents will form part of the local development framework. They are not part of the statutory development plan and therefore are not subject to independent examination. However, they should be subject to rigorous procedures of community involvement and Sustainability Appraisal and Strategic Environmental Assessment (if appropriate).

National Planning Guidance

National planning guidance for biodiversity is currently set out in the National Planning Policy Framework and the Planning Portal webpage on Biodiversity explains the legislation.

The Requirements of the NERC Act 2006 also places emphasis on the purpose of conserving biodiversity.

Other Biodiversity Guidance for Planners

Natural England has produced a set of online guidance pages about its Standing Advice on Protected Species for Planning Authorities. This can be found at http://www.naturalengland.org.uk/ourwork/planningdevelopment/spatialplanning/standingadvice/default.aspx

A very useful guide to which species are protected and what must be done to protect them.