

Hen Harrier Conservation and the Forestry Sector in Ireland

Statement on behalf of
the Environmental NGOs
to the Consultative Committee
of the Hen Harrier Threat
Response Plan

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BirdWatchIreland
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protecting birds and biodiversity

ELIG  Environmental Law
Implementation Group

 **An Taisce**
The National Trust for Ireland

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Overview

This submission is a joint statement on behalf of the eNGOs representatives on the Consultation Committee of the Hen Harrier Threat Response Plan (HHTRP), including the representatives from BirdWatch Ireland, the Irish Raptor Study Group and the Environmental Pillar representatives, supported by the An Taisce and Environmental Pillar Reps in the Environmental Law Implementation Group (hereafter referred to as 'we').

We welcome firstly the engagement of the Forestry Service on this important initiative and also welcome this opportunity to provide preliminary input and response to the submission from the FS-DAFM entitled *"Forestry and Hen Harrier: Exploring Synergies"*¹ which was itself a response to an earlier document issued by NPWS entitled *"Hen Harrier Conservation and the Forestry Sector in Ireland"*², and within our response document we also make reference to the *"Forest Sector Response to NPWS Draft Document"*³.

The primary objectives of this statement are to establish:

- (i) the requirement to deliver on our joined legal obligations, including outstanding designation obligations and reparations as well as more specific and general conservation measures, together with;
- (ii) the need for meaningful location specific conservation measures which are effective for the conservation of the Hen Harrier populations, and how these are incentivised

This statement focuses specifically on our legal obligations and Hen Harrier conservation and forestry. We propose to provide a broader document shortly on wider considerations and recommendations for the development of a fit for purpose HHTRP, building on the learning and exchanges from the stakeholder forum, the results of the 2015 national survey and to also include a response statement to the agricultural and wind energy document in due course.

1. An overview of the general legal context

We submit that the legal context has to be the fundamental starting point for developing the HHTRP, and note there is insufficient focus on this in the FS-DAFM document¹ which we substantiate below.

Also at the outset we must state that while we welcome the stakeholder forum, it is important that it does not serve to mismanage expectations about what can be conceded or delivered as the requirements in respect of Hen Harrier conservation are not discretionary – they are legally binding on Ireland. Failure to deliver on our legal obligations in this regard will be pursued in the context of an outstanding judgement from the Court of Justice of the EU (CJEU) which has already ruled against Ireland (case c-418/04), which included a number of specific failures in respect of Hen Harriers. This already open case means that the pursuit of substantial fines is the next step.

Given the obligations in respect of Hen Harrier are legally binding on Ireland - it is appropriate to set these out at the outset – albeit somewhat informally here. More specific requirements as clarified by the Court of Justice of the EU, CJEU are detailed later.

The obligations for Hen Harrier are rooted in both the Birds and Habitats Directives of the EU and purported national regulations thereof, in as much as they adequately transpose such requirements. The Birds Directive pursuant to Article 1 – provides for the conservation of all naturally occurring wild birds. Articles 2-3 provide for general obligations and context for that conservation including the requirement for measures to:

“preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds.”

However Article 4(1-2) then makes a specific requirement in respect of designation of Special Areas of Protection, SPA’s for certain bird species listed in Annex I of the Directive – of which Hen Harrier is one.

It is important to note this Article 4 designation/classification requirement is separate and additional to the general conservation obligations of Article 1-3, and indeed is more restrictive on Member States in terms of the considerations which pertain to that designation process and the sites for example in excluding economic considerations etc. These are matters well established by the CJEU in extensive jurisprudence on which we will expand later.

Article 4(4) provides for a high bar of protection – requiring that:

“4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.”

Article 5 – establishes an obligation to provide for a general system of protection. It is notable that this extends to areas inside and outside of the SPA’s and provides for *inter alia*/ amongst other things that, this general system of protection “shall” “prohibit in particular”:

“(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;”

Subsequent articles are concerned with *inter alia* measures and controls in respect of exploitation or hunting of certain listed bird species – (note these do not apply to Hen Harrier), introduction of non-native species, reporting requirements etc.

Article 13 however explicitly establishes that:

“Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1.”

With Article 14 explicitly indicating Member States can adopt stricter measures than required by the Directive.

Subsequent articles are primarily concerned with the management and implementation of the Directive.

The obligations under the Directive came into force for Ireland in 1981. However in 2007 – further to action from the EU Commission supported by Irish eNGOs, a comprehensive judgement against Ireland was delivered by the CJEU in case c-418/04 in respect of failure to meet a range of obligations under both the Birds and Habitats Directive.

These failures included *inter alia* – under the first part of the first complaint in that case a failure to provide for adequate designation of SPA sites. The Hen Harrier was one of a number of specific species dealt with in paragraph 105. A further issue with Hen Harriers was dealt with later in the 3rd complaint in respect of protection of sites which should have been classified as SPA's and we expand on this later. Other more general failures identified in respect of Habitats Directive obligations arguably also have relevance here also.

The Birds Directive pre-dates the Habitats Directive and is concerned only with Bird species and their habitats. Whereas the Habitats Directive is concerned with the conservation of species and habitats for species. While the Habitats Directive provides for a range of matters from the perspective of the Hen Harrier issue - in simple terms it the first pillar of the Directive it provides for the designation of special conservation sites and encompasses into what is referred to as the Natura 2000 network –the sites specifically protected for Birds under the Birds Directive, and these are afforded the special protections provided in the Habitats Directive. This is addressed in particular but not limited to Articles 3, Article 6 (which includes the management and appropriate assessment obligations), Articles 7 and 10 and the general conservation obligations of Article 2 and definitions in Article 1 - and this is where we see its primary effects for Hen Harriers in the Habitats Directive

Habitats Article 3 in particular highlights the obligation in respect of that Natura 2000 network in that it:

“shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.”

This obligation is significant in terms of the capacity required for the network, and of course the obligation to maintain, or where appropriate restore.

Comments made at the last plenary session of the HHTRP consultative committee appeared to question the validity of maintaining designated APA sites with declining Hen Harrier populations declined from levels at the time of designation, or if there is local extinction, using the analogy of maintaining an empty goldfish bowl. Clearly while the latter issue is not the case for designated sites this line of thought does exhibit a fundamental and worrying failure by some to fully appreciate the legal obligation on Member States to work proactively to maintain sites in a manner conducive to the ecological requirements of the

species and to also restore sites and populations, both within and outside designated sites, and the need to define key values such as Favourable Conservation Status and Favourable Reference Values for Hen Harriers at a national level, and to be able to properly integrate and consider site specific requirements for the birds in that context. It is worth possibly noting at this point these proactive obligations were considered by the CJEU in case c-127/02 – the Waddenzee case*¹. It was held at paragraph 32 that “Article 6(2) in conjunction with Article 7 - “requires Member States to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated.”

2. An overview of Irelands SPA site selection process

The Hen Harrier is listed on Annex 1 of the Birds Directive (2009/147/EEC). Under Article 4(1) of the Birds Directive Member States are required to classify “*the most suitable territories in number and size*” as Special Protected Areas (SPAs) for Annex I species, including the Hen Harrier.

Ireland was due to complete this classification process by 1981 and failure to do so resulted in a breach of obligations under Article 4(1) of the Birds Directive as per one of the key findings of the CJEU ruling against Ireland in 2007 (Case c-418/04), which stated *inter alia* that Ireland had not designated SPAs in accordance with the required standards of protection; had not taken targeted action to prevent the deterioration of habitats and had not carried out appropriate assessment of activities that might impinge on such habitats. Case c-418/04 remains open, pending the outcome of Ireland’s subsequent commitment to rectify the issues of contention and there remains the continuing and increasing possibility of imposed fines if the Member State is not seen to comply.

The legal requirements on designation as clarified by the CJEU are set out in the subsequent section and serve to clarify what member states can and cannot take into account in selecting SPAs and defining boundaries and what protection is afforded proposed sites pending final decisions on their designation.

In accordance with requirements under Article 4(1) of the Birds Directive the National Parks and Wildlife Service initiated the designation process for Hen Harrier in 2003 with the identification of the nine most suitable areas in which to establish SPAs. **The nine original candidate SPAs (ocSPAS) were: 1) Slieve Aughties; 2) Stacks to Mullaghareirks and Mount Eagle; 3) Slieve Beagh; 4) Slieve Felim to Silvermines; 5) Slieve Blooms; 6) Mullaghanish to Musheramore; 7) Ballyhouras; 8) Nagles and 9) Kilworth & Knockmealdowns.** At this time stakeholders expressed concern that designation might limit the extent and consequent profitability of farming and forestry activities in these areas. Apparently as a consequence **the number of candidate sites was reduced from nine to six** and the extent of these six sites was also reduced to exclude significant areas of improved grassland, buildings and farmyards⁴.

The three excluded ocSPAs were the Ballyhouras, the Nagles and the Kilworths & Knockmealdowns, each of which contained nationally important Hen Harrier breeding areas each holding greater than 1% of the all-Ireland population in 2005 (which is one of the SPA selection criteria for Annex I species.).

The 2005 National Survey of Hen Harriers⁵ in Ireland recorded:

- **Ballyhouras** to hold **17 to 19 pairs** of Hen Harrier, which represented **8.8% of the all-Ireland population** and 12.5% of the national population, therefore exceeding the criteria for designation. The population within the Ballyhouras in 2005 was the **third most important site** and held a greater number of pairs than four of the six sites selected for subsequent designation.
- **The Nagles** held **nine pairs** of Hen Harrier which accounted for **4.2% of the all-Ireland population** and 5.8% of the national population, which was also greater than four of the sites subsequently designated.
- **Kilworth & Knockmealdowns** contained **three to five pairs** in 2005, which represented **2.3% of the all-Ireland population**.

The rationale provided by NPWS for the exclusion of these three ocSPAs was the high level of forest cover in the sites, resulting in an insufficient area of preferred habitat for Hen Harrier⁴. However, if this were the reason for excluding the sites, it raises the question as to why these three sites were initially included as ocSPAs. The Ballyhouras and the Nagles have a current total forest cover of 46% and 48% respectively¹. Therefore despite the fact that these sites were not designated as SPAs due to the high level of forest cover, both the Ballyhouras and Nagles have a total forest cover which is currently less than five and four of the SPAs respectively⁶.

It should be noted that the **Ballyhouras** and the **Nagles** in addition to another non-designated site, the **West Clare Hills, were selected as part of the five most Important Bird Areas (IBAs) designated in the Republic of Ireland for Hen Harrier** (criteria C6: Species threatened at the European Union level; The site is one of the five most important in the European region (NUTS region) in question for a species or subspecies considered threatened in the European Union i.e. listed in Annex I of the EU Birds Directive).

Excluding areas from SPA designation for political and economic reasons, represents a clear breach of EC law as is set out below with reference to case c-44/95; c-3/96)

Further, for all nine ocSPAs (areas that have not been designated as SPAs but which should have been so designated, so including the 3 excluded sites) the Irish government is legally obliged to take appropriate steps to avoid pollution or deterioration of those habitats or any disturbances affecting the Hen Harrier in those habitats under the first sentence of Article 4(4) of the Birds Directive as is set out below with reference (C-374/98). This has not done as the integrity of the Ballyhouras in particular for Hen Harriers has been compromised by development (wind farm and recreational) and habitat degradation in recent years. And the FS-DAFM document¹ wholly fails to acknowledge properly these obligations and address these failures in a manner consistent with **c-374/98 Basses Corbières** which states in para 51 that member states shall not accrue benefit out of failure to designate

“51. As the Advocate General points out in paragraph 99 of his Opinion, a Member State cannot derive an advantage from its failure to comply with its Community obligations”

Hence commentary on delaying reparation or improvement to avail of maximum economic benefit need to be considered in the context of c-374/98 in particular.

Looking at the fundamental obligation of designation – the adequacy of designation to date in the first instance was and remains an issue as is set out above, and the FS-DAFM document¹ fails to address and properly consider its response in that context.

Given the case law from the CJEU set out later below – this is a fundamental issue as Ireland cannot benefit from failure to designate as noted above, and sites which should have been designated are in fact accorded *de facto* protection as proposed SPAs which exacerbates the extent of Ireland failures to protect these sites, and the consequential complexity arising from their mismanagement including inappropriate development, which includes afforestation.

Although Hen Harrier populations have declined in both the Ballyhouras and Nagles since 2005^{5,7,8} these sites remain nationally important and continue to meet the criteria for designation (> 1% of the all-Ireland population). In 2015 the Ballyhouras held 10 to 12 pairs representing 7.6% of the national population, and the Nagles held five pairs accounting for 3.2% of the national resource⁷.

3. The legal position

The following is intended to provide more detailed overview of certain of the relevant clarifications of the CJEU on key matters pertaining to selection and designation obligations and protections

Given the CJEU's decisions in the Lappel Bank case (C-44/95) and C-3/96, the exclusion from the SPA designation process of the three ocSPAs mentioned above arguably on political and economic grounds and with associated financial incentives for their development, and ongoing development - represents a clear breach of EC law. This is of course compounded where those funds have been EU funds used in manner which was and is in contravention of EU law, which is something which may also need to be considered by FS-DAFM and other sectors, Departments and Agencies. Relevant extracts from the two cases referenced above are briefly summarised below:

The Lappel Bank case c-44/95

In the UK the Lappel Bank case c-44/95 clarified that: in **Selecting SPAs and their boundaries, this must be done only on the basis of the ornithological criteria set out in Article 4(1) and (2) of the Birds Directive**, stating in paragraph 26:

“It is the criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs. It is clear from paragraphs 26 and 27 of Santoña Marshes that, notwithstanding the divergences between the various language versions of the last subparagraph of Article 4(1), the criteria in question are ornithological criteria.”

It also importantly clarified that Member States are not authorised to take account of:

(a) the economic requirements mentioned in Article 2 of the Birds Directive (at paragraph 27);

(b) economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive (at paragraph 31);

(c) economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive (at paragraph 42).

c-3/96 against the Netherlands

Additionally c-3/96 against the Netherlands in 1998 clarified in paragraph 61 that Member States' margin of discretion in selecting SPAs :

“does not concern the appropriateness of classifying as [SPAs] the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species in question”

A further two CJEU judgements are particularly helpful and relevant in this context these are **c-374/98**, Basses Corbières and the Santoña Marshes case c-355/90. These highlight that even while not formally designated – sites which should have been designated effectively have the protection of Art 4(4) of the Birds Directive and failures to provide for that protection are a breach of EU law. This clearly has major relevance and significance for the three excluded sites at the very least, not to mention altered boundaries on those designated and any other outstanding designation obligation.

Additionally as noted earlier – a Member State cannot benefit from its failures.

Again relevant extracts are briefly highlighted below:

c-374/98 Basses Corbières

Given the CJEU's decision in **c-374/98**, referred to as Basses Corbières in light of the name of the area in question in the case, sites which should have been classified are afforded the full protection of Article 4(4) of the Birds Directive, arguably an older and stricter regime than that provided for under the Habitats Directive, stating in para 47:

“It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive.”

It also stated :

“51. As the Advocate General points out in paragraph 99 of his Opinion, a Member State cannot derive an advantage from its failure to comply with its Community obligations”

c-355/90 Santoña Marshes

Also, in this earlier *Santoña Marshes* case c-355/90, the CJEU clarified that a Member State cannot avoid its Article 4(4) Birds Directive obligations simply by not classifying an area as an SPA. Thus, notwithstanding the fact that the Spanish government had not actually classified the area in question as an SPA in that case, it was nevertheless found in breach of Article 4(4) for permitting various damaging activities to take place in the marshes which included: road-building, establishment of industrial facilities, aquaculture, and the discharge of waste water.

c-418/04 *Commission v Ireland*

In fact this issue of failure to provide for Birds Directive Art 4(4) protection has already been aired in front of the CJEU – and specifically in the context of the Hen Harrier. The relevant paragraphs are included below given the relevance: **(emphasis added)**

“The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs”

Arguments of the parties

169 The Commission argues that, since 1981, Ireland has failed to ensure the Application of the first sentence of Article 4(4) of the Birds Directive as regards sites which should have been classified as SPAs under that directive, but have not been. It considers that, given the extent of the inadequacy of the classification of SPAs by the Irish authorities, that omission has potentially important implications for the conservation of the bird species concerned.

170 In its view, although there is Irish legislation of relevance to the protection of habitats other than classified SPAs, that legislation lacks the ornithological specificity required by the first sentence of Article 4(4) of the Birds Directive. In particular, the Irish legislation fails to impose any specific duties in respect of the habitats of the wild bird species which should benefit from the protection conferred on SPAs in areas not covered by Ireland's existing SPA network. **The Commission cites the specific example of the difficulties faced by the hen harrier and adds that unclassified areas requiring classification do not enjoy in Ireland the protection required by the first sentence of Article 4(4) of the Birds Directive, even in respect of the actions of public authorities.**

171 Ireland replies, essentially, that important hen harrier survey work is nearing completion and that draft guidelines in relation to the development of wind energy are soon to be concluded.

Findings of the Court

172 As already noted in paragraph 84 of this judgment, the protection objectives of the Birds Directive, as expressed in the ninth recital in the preamble thereto, cannot be achieved if Member States are required to comply with their obligations under Article 4(4) thereof only where an area has been previously classified as an SPA.

173 As is also clear from the Courts case-law, the text of Article 7 of the Habitats

Directive states that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a Member State under the Birds Directive, where the latter date is later. It is clear, therefore, that areas which have not been classified as SPAs but which should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive (Case C-374/98 Commission v France, paragraphs 46 and 47).

174 In the present case, however, Ireland has not even asserted that it ensured the application of the first sentence of Article 4(4) of the Birds Directive to areas requiring classification as SPAs under that directive.

175 Consequently, and without its being necessary to consider the specific examples provided by the Commission, the Court finds that the third complaint is well-founded.”

4. Implications for Ireland’s failure to designate adequately

Therefore the manner in which these sites which should have been designated have been developed in the intervening period since the time they should have been designated in 1981 is a significant issue – and one from which Ireland certainly cannot continue to benefit from at the expense of the Hen Harrier in light of the CJEU’s rulings on other similar cases.

In short none of the implications of this designation issue is properly considered in the FS-DAFM submission, nor does it adequately inform its proposals in relation to future management of these sites, nor is it being addressed within the TRP consultative committee to date.

Finally, in addition to the historic and arguable evident failure to designate those three sites, the overall adequacy of Ireland’s actual and proposed designation remains to be proven and demonstrated clearly and properly as meeting Ireland’s legal obligation, noting this is not a matter for political manipulation or economic consideration; and that Ministerial discretion on such considerations has simply no place in the matter as has been abundantly clarified by the CJEU as noted above. We would add that the HHTRP provisions in the Habitats Regulations need to be properly considered in the light of those EU requirements also. This broader context of designation also needs to inform forestry proposals in respect of Hen Harrier, as it does in fairness for all sectors.

However in particular response to the FS-DAFM paper¹ – we submit that it clearly needs to be revisited and substantially reworked or at the very least its proposals evaluated in the proper and real context of the legal situation pertaining in respect of the implications of outstanding designation, to this extent a number of specific points as outlined within the FS-DAFM document¹ and including the Forest Sector document³ are highlighted below. In addition we have identified shared objectives and detailed specific recommendations for Hen Harrier conservation measures in relation to forestry and within the remit of FS-DAFM.

5. Hen Harrier Conservation and Forestry

5.1 General comments on the FS-DAFM and the Forest Sector submissions

The importance of the forest sector to the Irish economy, its role in job creation and the provision of ecosystem services such as timber products and recreation as outlined in both the FS-DAFM¹ and Forest Sector² documents are fully acknowledged. As is the potential for afforestation to deliver biodiversity benefits where planted forest is appropriately sited (such as improved pasture)⁹. Currently Ireland has one of the lowest proportions of forest cover in Europe at just below 11%, however afforestation in Ireland is progressing at one of the fastest rates in Europe, with ambitious targets to increase forest cover to 18% by 2046^{10, 11}. With the recent and rapid land use changes associated with afforestation there is the potential for significant consequences for various elements of the environment such as biodiversity and water and can be both positive and negative and forest policy needs to be equally cognisant of the far-reaching environmental implications alongside the social and economic benefits.

The Forest Service detailed comprehensive cost estimates for the removal of forest within the SPA network and also outlined the difficulties of reverting these areas to their preceding land use. In the FS-DAFM document¹ within Appendix A *'Economic and Social Analysis of Proposed Restrictions'* the Forest Service describes the scenario if total forest cover within the SPA network is brought below the 40% maximum threshold, stating *'the loss of future timber revenue resulting from the clearfell and non-replanting of 23,901ha is estimated to be €71m. Using the multiplier effect of 1.78 for expenditure in the forestry sector, this value increases to €126 million'*. These figures should serve to highlight the importance of appropriate policy and planning for afforestation, specifically in relation to important areas for Hen Harrier based on:

- 1) current levels of forest cover within the SPA network;
- 2) scientific evidence of the impacts of afforestation on Hen Harrier populations in Ireland;
- 3) recent population declines of Hen Harrier in Ireland and specifically within the SPA network and
- 4) projections of the forest age profile and the declining availability of suitable habitat for Hen Harrier up to 2035 within the SPA network.
- 5) the legal obligations pertaining and reparations needed

Aside from the legal implications as outlined in this document, further afforestation within the SPA network would necessitate mitigation leading to economic burden down the line while also further degrading the environmental integrity of some of our most important sites for biodiversity.

The role of forestry in the sequestering of carbon is highlighted in both FS-DAFM and Forest Sector documents which is also acknowledged. However this should not be used as rationale to support further afforestation in key Hen Harrier areas. Much of the land within the Hen Harrier SPAs and important non-designated sites are of high carbon content. Pristine undrained peatlands can sequester an estimated 200 kg per hectare per year of carbon and draining deep peats for forestry will release more carbon than can ever be sequestered by them¹². If properly acknowledged and managed this sequestered carbon could also yield important income in terms of agri-climate environmental measures under the Rural Development Plan Regulations¹³. In the UK, the recommended approach to sustainable soil carbon sequestration is to include the management and protection of carbon stocks in existing highly organic soils such as those found in the uplands, peatlands, grasslands and native forests. Any further planting in already heavily forested areas within Hen Harrier breeding sites in Ireland would cause additional loss and degradation of existing habitat for the Hen Harrier which will have significant negative consequences

for this species and for other priority upland breeding birds and biodiversity. Such measures are contrary to obligations under the Birds Directive and commitments under the Draft National Peatland Strategy¹⁴ and EU Biodiversity Strategy¹⁵.

In short, further afforestation cannot be permitted within the Hen Harrier SPA network or within other important non-designated sites. This must be a core element of the HHTRP plan and for the purposes of the effective progression of the TRP this issue should be immediately dealt with.

5.2 Appropriate Assessment Procedures

Within the Forest Sector submission document 'Hen Harrier Conservation and the Forest Sector in Ireland' it is proposed *'that the ban on afforestation should be removed immediately and replaced with an assessment process, which would be designed to assess the impacts of any new planting on Hen Harrier conservation and habitat availability in the area. The assessment, operated by the Department within an agreed framework and an agreed set of measures, could deliver a reasonable level of afforestation proportionate to any risks identified to the species'*.

Within the FS-DAFM document proposals made in Section 5 particularly in respect of screening for Appropriate Assessment (Step 3) are somewhat vague and the high bar for screening decisions described in the Advocate General's opinion in the Waddenzee case c-127/02 needs to be closely considered in any attempts to expedite the obligations of Appropriate Assessment required under Articles 6(3) and (4) of the Habitats Directive. While the idea of a habitat map has some merit its value will be its accuracy, and its maintenance, and of course in terms of the adequacy of the provision if makes for habitat requirement. The bar indicated in the FS-DAFM document is one of maintaining *"minimum foraging threshold"*. Clearly in the context of the ongoing declining numbers within the SPA network – the requirement is to proactively improve the habitat for Hen Harriers and it would be necessary for any such *"minimum"* to be informed and revisited to ensure it is sufficiently positive and proactively structured. However – of course – consideration for habitat loss is but one factor which needs to be considered in a screening exercise for Appropriate Assessment – and the model as proposed seems very naïve or incomplete in that regard, and indeed impacts on conservation objectives and the ecological integrity and coherence of the site *inter alia* all need to be considered also – which are not considered properly in the FS-DAFM proposal on this

Also in the context of Appropriate Assessment obligations, the conflicting role of the Forestry Service as an incentive provider for Forestry and at the same time the emanation of the State in ensuring that Forestry proposals do not have an adverse impact on the integrity of designated sites – is arguably not an ideal situation, nor is such conflicting roles unique. Independence and separation of such functions is arguably something which provides for greater trust and transparency, and would facilitate potentially a greater role for a consolidated expertise on Appropriate Assessment which could serve across multiple Departments – if appropriately resourced and trained.

In relation to Section 5 of the FS-DAFM document it is stated that there *"is scope for afforestation within Hen Harrier SPAs, and advocates the setting of reasonable annual limits for afforestation within each SPA"*. Wilson et al (2012) found that Hen Harrier breeding success can decrease noticeably when the percentage of second rotation pre-thicket forest in the surrounding landscape is greater than 10%¹⁶. On this point Irwin et al. (2012) sets out that *'In a forest landscape with a well-balanced age-structure, approximately one quarter of the forest estate will be in pre-thicket stage at any one time. A maximum threshold of 40% for total forest cover in the landscape would therefore ensure that the percentage of pre-thicket forest did not regularly exceed 10%¹⁷.'* Therefore there is existing scientific evidence for

maximum threshold of total forest cover and using this reference would mean that *'reasonable annual limits for afforestation'* would equate to no further afforestation within the SPA network and would warrant deforestation in five of the six SPAs.

In addition it should be noted that the Forestry Programme states that afforestation on Annex I habitats, or the habitat of Annex I birds or Annex II species should be avoided, and afforestation on intermediate value habitats should favour sites which result in improved biodiversity compared to the previous habitat¹⁸. The Forestry and Water Quality Guidelines also state that 'Planting is not permitted in SACs or SPAs'¹⁹. Further afforestation within the SPA network would be contrary to the environmentally appropriate, socially beneficial and economically viable forest management expected by the Forest Stewardship Council (FSC) to achieve Forestry Management Certification.

5.3 Research on Hen Harriers in forested environments in Ireland

Within both the FS-DAFM and Forest Sector documents, of serious concern is that existing peer-reviewed scientific evidence on Hen Harrier ecology and specifically the relationship with planted forests is discarded. The Forest Sector and the Forest Service clearly does not accept the research findings in relation to the maximum threshold of 40% forest cover, however no rationale is offered as to why this is the case^{1,3, 16, 17}.

It is accepted that there remain gaps in information on Hen Harrier ecology and that a holistic approach is required for their effective conservation which will address all the potential factors which may impact the species including over-winter survival rates, habitat suitability and change, predation, persecution, reduction in food supply, development and various disturbance issues. However where there is peer-reviewed scientific evidence available then this must be taken into consideration in key decision-making. Where there are knowledge gaps with respect to certain factors, research should be prioritised and until such time as these gaps are addressed, the Precautionary Approach must be applied.

Failures to implement the broader obligations of Article 6(2) are already we understand the basis of new infringement proceeding against Ireland by the EU Commission. Article 6(2) requires proactive management of sites to avoid deterioration of habitats for species and disturbance of species in designated sites. EU Environmental law governing this area – such as the Birds and Habitats Directive and the EIA Directive and Water Framework Directive – all are underpinned by the Treaty of the Functioning of the EU (TFEU). Article 191 of that provides for the Precautionary Approach which is required to inform action and decisions in environmental matters. Consequently where there is uncertainty – the obligation is to take the cautious route – unless scientific evidence can provide certainty there are no impacts.

Clearly c-127/02 is most helpful on the Precautionary principle of Article 191 of the treaty of the Functioning of the EU, TFEU Some clarifications from the CJEU and Irish High Court are included below:

Artegodan a.o. v Commission[2002] ECR II-4945, it was held that:

“... the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific

potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.”

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C-127/02 was also cited in support of the foregoing submission. In it, the court held:

“It follows that the first sentence of Art 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.”

And in c-127/02:

61. In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the I - 7471 JUDGMENT OF 7. 9. 2004 — CASE C-127/02 aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

The effect of forestry, including second-rotation and pre-thicket conditions all need to be considered in this context. We submit that the FS-DAFM document does not appear to have accepted the issues identified with forestry development for Hen Harriers, and indeed in places in its document appears to challenge that which was detailed in the NPWS's "Hen Harrier Conservation and the Forestry Sector in Ireland, 2015" document in respect of the ecological trap of second-rotation and pre-thicket forest in the face of the ongoing encroachment of Forestry and other pressures on Hen Harrier habitat²⁰.

5.4 Hen Harrier SPAs and forestry in the UK

On several occasions to date within the consultative committee discussions and also specifically within the Forest Sector document reference is made to the situation in the United Kingdom in relation to Hen Harrier SPAs and forestry; *'The Forest Sector has examined the conservation measures that exist both in Northern Ireland and in Scotland for Hen Harrier conservation, and note that no bans are in place on afforestation and that neither jurisdiction operates a system of red zones which appears unique to Ireland'*.

On this point it should be noted, that due to uncertainties in relation to the long-term suitability of planted forest for breeding Hen Harriers, the United Kingdom has excluded planted forest from their SPAs. **Therefore it stands to reason that a red zone approach is simply not required in their jurisdiction.**

Furthermore what happens in the UK is not indicative of Ireland's legal obligations, while good conservation practices on the other hand may serve to assist.

5.5 Areas of Biodiversity Enhancement

The proposal for the creation of suitable open spaces as part of the Areas of Biodiversity Enhancement (ABEs) as outlined by the Forest Service within Section 3 'Open Spaces' is largely welcomed. In particular the requirement for an ABE component of between 15 - 20% within reforested sites within the SPA network could provide conservation benefits for Hen Harrier populations if implemented appropriately¹. Retro-fitting of suitable open spaces into young plantations as part of the first thinning operation would also be a positive step in habitat restoration for Hen Harrier populations.

For both aspects it is clear that site specific management plans would best inform the most effective implementation of ABEs in collaboration with the Forest Service and to this end it is recommended that **management plans for the SPA network as well as important non-designated sites should be a priority deliverable of the HHTRP.**

It is envisaged that the definition of 'open spaces' for Hen Harrier conservation also includes features to facilitate appropriate forest management which would not provide benefits for Hen Harrier and it is recommended that the proportion of **open spaces targeted specifically for Hen Harrier conservation at an individual site should reach the aforementioned 15 – 20%** in addition to other open spaces required for forest management operations which would not be used by Hen Harrier. In this regard a review of the ABE protocol and initial assessment of the habitat suitability, availability and potential benefits through the ABEs within Hen Harrier SPAs would be beneficial to inform best practice, and BirdWatch Ireland and the Irish Raptor Study Group and An Taisce would welcome an opportunity to input into such a process.

Based on the importance of the non-designated sites for the national Hen Harrier population (holding up to 57% of the national population in 2015) it is **recommended that the ABEs are incorporated within the seven identified important non-designated sites as standard.**

In relation to the requirement for **ABEs within afforested sites** within the SPA network, as previously outlined **we view any further afforestation within the SPA network as unacceptable.** Even in this scenario, should 20% of a newly afforested site comprise of open spaces this would still constitute 80% of that site being planted forest in an environment which is already too heavily forested (based on the fact that the SPA network has a forest cover of over 52%).

5.6 Red Area Procedure

The 'Red Area' approach is currently confined to the six SPAs and therefore reducing the risks of forestry related disturbance to Hen Harriers breeding in non-designated areas is currently dependent upon a much less robust and *ad hoc* approach. The meet legal obligations this needs to be rectified as a matter of course.

We submit that Section 4 "Red Area Procedures" and Section 8 "Non-SPA Breeding areas" within the FS-DAFM document require substantial revisiting in any further drafts or consequential documents or consideration of these proposals - particularly in light of the obligations of Article 5 of the Birds Directive.

Article 5, as indicated earlier, requires Member states to provide a general system of protection which "shall" "**prohibit** in particular" : (emphasis added) : "(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;"

By way of example, a statement in the FS-DAFM document opposing the NPWS proposals to extend afforestation restrictions and Red Area Procedures to non-SPA breeding areas – states:

"The NPWS recommends the possible extension of afforestation restrictions and the Red Area Procedure to these areas. While noting the legal protection afforded to Hen Harrier outside of SPAs, the FS-DAFM does not accept these recommendation, for the following reasons:

- *Such restrictions would represent a de facto designation of these areas and would place a severe restriction on forest activity in situations where the burden of proof that an impact would occur is far higher and where the effectiveness of the restrictions is still largely assumed but not yet proven".*

This evidences a failure to appreciate the obligations on prohibition and the requirement of a general system of protection as required by Article 5 in non-designated areas in respect of that which constitutes a "*deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive.*"

With the **proportion of breeding Hen Harriers occurring outside the SPA network increasing from 39% in 2005 to 55% in 2010 and 57% in 2015** there is an increasing risk that more Hen Harrier nests may be impacted by forestry related activities if proper steps to mitigate such disturbance are not implemented, whether this be through an extension of the current Red Area procedures or alternative protocol.

In theory, we would support a review of the Red Area procedure to "improve its effectiveness and to reduce the burden on forest owners" as stated in Section 4 "Red Area Procedure" in the FS-DAFM document. Similar to the ABEs we believe that Red Area procedures could be best developed and implemented through site specific management plans as there is variation in local conditions as well as the frequency and efficiency of monitoring between Hen Harrier sites (for example there is a higher level of annual monitoring carried out in the Slieve Blooms compared to other areas). We submit that the following stipulations as a minimum would need to be incorporated into any updated Red Area procedure:

- (i) minimising disturbance to breeding Hen Harriers is the first priority above and beyond reducing the burden to forest owners, however both can be compatible
- (ii) the same procedures are implemented in the seven important non-designated areas as within the SPA network

- (iii) appropriate start and end dates for forest operations are set which are based on Hen Harrier breeding ecology, however room for flexibility should be incorporated in circumstances of particularly late breeding
- (iv) monitoring activities should be carried out to completion of breeding to determine breeding outcome
- (v) only suitably qualified ornithologists carry out monitoring work
- (vi) additional key species vulnerable to disturbance from forest operations are incorporated within the procedure (such as Merlin)
- (vii) monitoring is transparent and data arising from monitoring activities is made available for research and conservation purposes

BirdWatch Ireland and the Irish Raptor Study Group would welcome the opportunity to engage with the relevant stakeholders to provide input should a review of the current Red Area procedure be undertaken.

6. Conclusion

The judgement against Ireland in 2007 in c-418/04 is nearly ten years ago, and while arguably some progress has been made – there are areas of significant issue remaining and indeed recent developments have heightened alarms particularly in respect of wider countryside measures will need to be escalated.

While some progress on the Hen Harrier obligations has been made over this ten year period – significant further work needs to be done in our view in order to specify a meaningful plan which addresses threats to Hen Harriers and provides adequately for their conservation in line with Ireland’s legal obligations, and to address significant outstanding deficits.

As a complementary and necessary part of this – we submit that further work needs to be done on considering relevant and appropriate incentives for land-owners on sites important for Hen Harriers. As this is likely to set a precedent – it needs to be fair, feasible and appropriate. The HHTRP initiative could set a positive example in this regard – if it is not compromised by short-term political agendas or any large lobby interests – particularly in the lead up to a General election.

Put simply and at a high level - there are two main “wings” as it were to our proposal which we proposed to expand on further.

1. Do the Maths and get location specific
2. Get the legal obligations right and in place

“1. Do the Maths and get location specific”

Dealing with the challenge presented by the discrepancy between the length of Forestry incentives and the typical period of Rural Development Plan infrastructural Investment schemes is key. We submit that Art 28(5) of the RDP regulation²¹ - clearly provides that schemes can be extended beyond the normal 5-7 years in stating:

“Commitments under this measure shall be undertaken for a period of five to seven years. However, where necessary in order to achieve or maintain the environmental benefits sought, Member States may determine a longer period in their rural development

programmes for particular types of commitments, including by means of providing for their annual extension after the termination of the initial period”

Given the nature of the scheme – we submit this presents no real risk to the Irish Government, and on the contrary serves to address exposure to the very real risk and associated costs of further litigation on this matter both at home and abroad.

There is in short a requirement to “do the maths” on the various payments and incomes for the land holdings in question both within and outside of designated sites.

This will require a process which is capable of leveraging existing data and filling gaps as necessary so we can get down to specifics which are meaningful on the ground, based on a number of factors including:

- The nature of land on the holdings and the storage capacity of high carbon soils and the carbon sequestration capacity of active peatlands. These lands if left alone could warrant extended longer-term payments under agri-climate measures in the RDP Regulation Art 28(5)
- The nature of operations on the land and the associated payment incomes available
- Engagement locally at a site level to determine what will create relevant incentives for necessary land management requirements and to explore other opportunities such as eco-tourism and what supports can be provided to stimulate that.
- Proper and feasible consideration of any issue or discrepancy arising in income.
- Consideration of additional conservation payments;
- Development of an appropriate package which is configured for the needs of the bird and the relevant locations, informed by EU principles such as the polluter pays and the precautionary approach and leveraging EU and National funds as appropriate.
- Ongoing monitoring and adjustment

“2. Get the legal obligations right and in place”

This of course also needs to be informed by and complemented with an enhanced and accurate view of the overall designation and conservation requirement, and the consequential requirement for those locations both designated and un-designated and key linkage areas.

This will involve a number of steps including:

- Proper consideration of the adequacy of the designation in the first instance, including sites which should have been designated, the requirement for protection of wintering habitats, and the overall adequacy of the designation
- Reparation and restoration in respect of outstanding designation and completion of designation actions
- Specification on the ecological needs of the species and further research on this
- Consideration of Favourable reference values and Favourable Conservation Status
- Development of site specific Conservation Objectives and management plans with proper data collation oversight and response mechanisms,
- Further Consideration on Birds Directive Article 5 obligations and management of non-designated sites;

- Further research particularly in respect of wintering habitat and predation, complemented by interim precautionary measures
- Adherence with other EU Directives including Land Use and Land Use Change and Forestry

All of this needs to be informed by the precautionary approach and is likely to require iteration and ongoing management and monitoring to be delivered successfully.

With respect we submit that the FS-DAFM document is currently not sufficiently realistic in relation to the legal context and realities, and we look forward to continuing to work together constructively in the interests of the Hen Harrier, Ireland's legal obligations and appropriate sectoral and stakeholder interests.

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