



Date: 14th February 2022

Subject: Appeal FAC 840/2020 regarding Licence TFL00150218

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above Licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14A (1) of the Agriculture Appeals Act, 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TFL00150218 for felling of 19.14 hectares in Toorlougher, Co. Limerick was approved by the Department of Agriculture, Food and the Marine (DAFM) on 20 October 2020.

Hearing

An Oral Hearing of appeal FAC 840/2020 of which all parties were notified, was held by a division of the FAC on 17 and 18 November 2021.

In attendance

FAC Members: Mr. Des Johnson (Chairperson), Mr. Seamus Neely, Mr. John Evans and Mr. Donal Maguire

Secretary to the FAC:

Ms. Ruth Kinehan
Mr. Michael Ryan

Ornithologist: Dr. Alan Fielding

DAFM: Mr. Kevin Collins, Mr. Anthony Dunbar and Ms. Eilish Kehoe



Applicant 1: Representative –

Introduction

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by the DAFM, the written grounds of appeal, submissions made at the Oral Hearing and all submissions/observations, and the consultant ornithologist's report, before deciding, on the 14th February 2022, to vary the decision to grant the Licence (TFL 00150218).

Proposal and site description

The proposal is for the clearfelling and/or thinning of a stated site area of 19.14ha and the restocking of a stated site area of 15.87ha at Toorlougher, Co. Limerick. The site is in 6 plots and the proposal for clearfelling on plots 1,2, 3, 5 and 6 and thinning on plot 4, and restocking in each of the plots clearfelled as is indicated in the table below. Felling year is stated to be 2020, and thinning is proposed in 2020, 2023 and 2026. It is stated that, following restocking, biodiversity areas will comprise 10-15% of the overall area.

Plot	Area (Ha)	Felling	Restocking
1	1.03	100% SS	100% SS
2	3.73	100% SS	90/10 SS, ADB
3	0.33	100% SS	100% SS
4	3.27	Thinning SS/JL	Thinning SS/JL
5	2.35	100% SS	90/10 SS, ADB
6	8.43	100% SS	100% SS

The project lands are located in a rural landscape and amongst large areas of mature and recently restocked conifer forestry. Plots 3, 4 and 5 are to the rear of a grouping of single story and dormer dwellings which front on to a narrow public road. Plot 2 is the most northern plot and adjoins the narrow public road to the west. Plot 1 adjoins and is to the east of Plot 2 and the two plots are adjacent to a dwelling which is wedged between the two plots. Plot 6 is the largest and is further to the south-east of the grouping of dwellings. Toorlougher Stream (Order 1) flows from east to west through Plot 4 before turning northwards and flowing roughly parallel to the public road to join with the Annagh (Tipperary) (Order 4). Existing forestry in the area is interspersed with smaller unplanted areas and unplanted road and housing setbacks. The wider landscape to the west is predominantly agricultural in use, characterised by small, irregular shaped enclosed fields. The settlement pattern in the wider area is sparse and dispersed.



Referrals

The DAFM referred the application to the County Council, Inland Fisheries Ireland (IFI), and the National Parks and Wildlife Service (NPWS), but no responses were received.

DAFM processing of application

The application was submitted date stamped 26.04.2018 and there are 6 Inspector Certifications on file. The 6th and final Inspector's Certification states that the site was desk assessed only. The area is sensitive to fisheries but not within 6km of a Freshwater Pearl Mussel zone. It lies within a Hen Harrier Special Protection Area (SPA) and is partially or wholly within a 'Red Zone' area for Hen Harrier. The project lands are not in a High Amenity area and there are no other high amenity considerations. There are no archaeological sites or features on the site, the proposal would not impact any Way-Marked Way or densely populated area, or any area commonly used by the public for recreational purposes. Soils are stated to be predominantly podzols, and the slope is predominantly steep. The project area is crossed by/adjoins an aquatic zone. The approximate percentage digitised forest area licensed for thinning and clearfelling within 5km is stated to be 4.13%. The proposed development, together with existing thinning and clearfelling of 3 years or less within 500m radius is stated to be 44.24ha. Eight Natura sites within a radius of 15km are identified - Bolinbrook Hill SAC, Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Lower River Shannon SAC, Silvermine Mountains SAC, Silvermines Mountains West SAC, and Slievefelim to Silvermines Mountains SPA.

The DAFM requested the submission of a Natura Impact Statement (NIS) on 30.09.2019, and this was submitted with the completion date being 30.03.2020. The NIS notes that the soils are mineral (Plots 1 and 2), and peaty (Plots 3-6). The slope is predominantly moderate but partly steeper (Plot 6). The site has a number of drainage ditches and there are relevant watercourses. There is a fast-flowing watercourse through Plot 4 and adjacent to Plot 3 – categorised as upland eroding rivers. There are currently no forest drains within the proposed site discharging directly into the aquatic zone. The site is bordered by both mature and newly replanted conifer plantation and wet grassland. Unplanted areas of 'Biodiversity' will make up 10-15% of the overall area. Nine Natura 2000 sites are identified within a 15km radius and are screened. Six of the sites are screened out for Stage 2 Appropriate Assessment with reasons given - Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Silvermines Mountains West SAC, Bollingbrook Hill SAC, and Silvermines Mountains SAC. Three Natura 2000 sites are screened in for Stage 2 assessment with reasons given - Slievefelim to Silvermines Mountain SPA (proposed development within this site), Lower River Shannon SAC (separation 5.5km downstream), and the River Shannon and River Fergus Estuaries SPA (separation c. 3.6km downstream). A Stage 2 assessment is carried out for these sites, with qualifying interests and conservation objectives identified, and an examination for adverse effects on the qualifying interests



completed. Mitigation measures are proposed where deemed appropriate. In respect of the Slievefelim to Silvermines Mountains SPA, it is stated that the proposed development does not offer suitable breeding or foraging habitat for the Hen Harrier. Operations will be restricted to the proposed development site and there will be no alteration of habitats outside the site as a result of the works. The works would be undertaken outside the Hen Harrier breeding season and, as such, avoid any potential disturbance of the species. In respect of the Lower River Shannon SAC, the NIS concludes that there would be no effect on the Natura 2000 site's qualifying interests. The site is outside the core range of the Otter and Dolphin associated with the SAC. The small watercourse which the proposed development will cross does not offer suitable spawning habitat for salmon and lamprey. In respect of the River Shannon and River Fergus Estuaries SPA, the NIS concludes that the proposed development site is outside the core foraging range for the special conservation interests associated with the Natura 2000 site. In-combination projects are considered, with the NIS noting that approximately 155ha of forestry has been felled in the River Annagh catchment between 2011/2013-2017. There are two known proposed felling licence applications within the same catchment area totalling 38ha. Approximately 60ha of afforestation has been planted within the catchment within the same time period. The NIS concludes that there are no potentially adverse cumulative and/or in-combination pollution effects on any of the qualifying interests identified.

An 'In-combination report is contained on file. This lists non-forestry projects as including silage pit and domestic extension. Forestry related projects listed are roads (1), private felling (9), and felling (18). The River Sub-basin Annagh (Tipperary)_020 has approximately 58% forest cover.

An Appropriate Assessment Determination (AAD) was made by an independent Ecologist on behalf of the Minister on 03.09.2020, and reviewed by a consultant Ecologist, dated 10.09.2020. This confirms the Natura 2000 sites screened out for Stage 2 assessment as Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Silvermines Mountains West SAC, Bolinbrook Hill SAC, Silvermines Mountains SAC, and Lower River Suir SAC. The three sites screened in for Stage 2 assessment are Lower River Shannon SAC, Slievefelim to Silvermines Mountains SPA, and River Shannon and River Fergus Estuaries SPA. The AAD states that the NIS submitted comprehensively considered the features and was conservative in its consideration. Further considerations are added in the AAD. While the River Shannon and River Fergus Estuaries SPA was screened in in the NIS, considering the scale, nature of the activity, the qualifying interests and separation distance downstream, risks were considered to be minimal. The AAD concludes that the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of any of the listed European sites, having regard to their conservation objectives, provided recommended mitigations are implemented. The mitigations recommended relate to:

- Water protection measures relating to exclusion zones



- Sediment trapping measures
- Otter requirements
- Hen Harrier requirements

Licence

The licence was issued on 20.10.2020. It is subject to standard conditions and additional conditions relating to:

- Adherence to specified Guidelines and Code of Practice
- Treatment of conifer stumps requirements
- Management requirements
- Any aerial fertilisation to require prior written approval
- Public road network usage requirements
- No felling for 28 days
- Site Notice requirements
- Hen Harrier protection requirements
- Adherence to all AAD mitigations

Appeal and Statement of Facts

There is a single appeal against the decision to grant the licence. The grounds of appeal (in summary) are as follows:

1. The appellant had limited access to the application documents contrary to requirements of the EIA Directive and the Aarhus Convention. The decision does not meet with the standards and requirements for public participation as is legally required.
2. The appellant was unable to make a precise and targeted submission identifying any defects in the application procedure. In the absence of relevant information, the appellant contends that the proposed development is likely to impact on foraging, roosting or nesting of protected species in an SPA site.
3. It is not clear if the original application was ever subject to a proper or adequate EIA or AA, or if the cumulative impacts and effects of this crop was ever properly assessed. Arguably, there are implications for remedial assessment and remediation of the site. If deforestation is proposed, further screening for EIA may arise. Regardless, the initial afforestation is being materially altered due to felling and, as such, the proposed development falls within the EIA Directive.
4. The Forestry (Miscellaneous Provisions) Act 2020 does not adequately or correctly transpose the EIA Directive, either for screening or conduct of EIA by the FAC.



5. The site appears to be within the Slievefelim to Silvermines Mountains SPA, which is designated for Hen Harrier. Clearfelling can cause disturbance to nesting Hen Harrier, as outlined by the NPWS. Any nest disturbance can be of grave significance. Forestry has been shown to have a significant impact on the breeding success and productivity of this species by reducing and fragmenting the area of available foraging habitat. A full Appropriate Assessment should have been undertaken and should have been subject to public participation.
6. The decision should have been considered in the context of Articles 4, 5 and 9 of the Birds Directive, Articles 12-16 of the Habitats Directive, Article 4 of the Water Framework Directive, and climate impacts.
7. The licence should be refused in order to prevent adverse impacts on the integrity of the SPA, or the risk of adverse impacts. The population of Hen Harrier needs to be considered, and reference is made to the 2015 National Survey of Breeding Hen Harriers in Ireland. There is a risk of an adverse effect on the integrity of the SPA resulting from loss of foraging area/loss of roosting area/loss of nesting area (as appropriate) in particular.

The DAFM responded to the written grounds as follows (in summary):

1. It is open to any person to make a submission during the public consultation process, after which they receive a copy of the decision and, if requested, a copy of the file. The appellant was free to make such a submission at the time.
2. The administration of the appeals system, including fees, is a matter for the FAC. The FAC carries out its functions in an independent and impartial manner in respect of the appeal process, as required by Irish law.
3. Operational activities of thinning or clearfelling and replanting an already established forestry area are not categorised under Annex II of the EIA Directive. There is no change of use or extension of an earlier authorisation for the project within the meaning of the EIA Directive, as future felling and replanting would have been envisioned and accounted for at the time of the forest's establishment as one of the main cyclical management options going forward.
4. The appeal site is located within the Slievefelim to Silvermines Mountains SPA. Appendix 21 of the Forestry Standards Manual (November 2015) addresses DAFMs procedures regarding disturbance operations within SPAs designated for breeding Hen Harrier. The Hen Harrier disturbance operations procedure is operated by DAFM with the agreement of the NPWS. A condition is imposed on the licence prohibiting forestry operations associated with the licence during the Hen Harrier nesting period from 1 April to 15 August inclusive.



5. An in-combination report, including both forestry and non-forestry projects in the vicinity of the project area was considered. The proposed development, when considered with other plans and projects, will not give rise to any adverse effect on the integrity of any European site.
6. Merlin is not a Special Conservation Interest for the Slievefelim to Silvermines Mountains SPA.
7. Appropriate Assessment screening was carried out based on European sites within a 15km radius of the project area, and sites beyond that and hydrologically connected. Specific mitigation measures set out in the Appropriate Assessment Determination (AAD) ensure that the proposed development will not result in any adverse effect on any European site. The conditions of the licence are consistent with best forest practice, national forest policy, and protection of the environment.
8. In respect of the Water framework Directive (WFD), the DAFM applies a wide range of checks and balances in its evaluation. The licence is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM 2019).

Correspondence subsequent to submission of appeal

On receipt of the appeal, the FAC provided the appellant with copies of all information that had been provided to it by the DAFM in accordance with section 7(2) of the Forestry Appeals Committee Regulations of 2020 (SI 418/ 2020). Subsequently, the appellant submitted an expansion of its grounds raised in its original appeal documentation, as provided for under section 14(b)(6) of the Act. In the particular circumstances of this appeal, the FAC decided to accept and consider this further submission, which is an expansion of the original appeal.

This expansion submission is (in summary) as follows:

1. The FAC procedure is unlawful and invalid. The appeals Committee is made up of members of the Minister's staff who are answerable to the Minister. The process lacks independence and is objectively biased. The criteria against which the Minister may grant a licence is not set out in legislation.
2. The public consultation process is inadequate. The failure to make all information available free of charge and as soon as it is available, breaches Article 6(6) of the Aarhus Convention and Article 7 of the Directive 2003/4.
3. The FAC is an Administrative Decision Maker. The FAC has not complied with appropriate notification and participatory obligations.
4. The FAC is an emanation of the State. It falls to the FAC to conduct matters such as AA, Article 4 of the WFD, and ensure the adequacy of compliance required



under Articles 12-16 of the Habitats Directive. Also, the adequacy of screening in respect of AA and EIA.

5. The FAC is obliged to consider all matters raised to its attention in determining the lawfulness or otherwise of DAFM decisions.
6. If an AA is to comply with criteria set out by the CJEU it must include an examination, analysis, evaluation, findings, conclusions and a final determination. It must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps.
7. contend that the evidence does not show that the Minister's decision met the required standard. There is no basis on which the FAC can determine that there will be no adverse impacts on the integrity of the Natura 2000 sites at issue.
8. In respect of sites designated for the Hen Harrier, Ireland has delayed implementation of obligations under a number of EU Directives. There is a remedial obligation issue to be addressed in respect of forestry and the EIA Directive, and circumstances where there is a breach of EU law. The FAC must consider the dates of planting and any interim replanting. In this case the forestry appears to have been planted around 1994, but it is unclear if this was first planting or reforestation. The FAC must address remedial issues as well as ongoing residual requirements.
9. The Slievefelim to Silvermines Mountains SPA site code was not signed until 18.1.2011. There is no programme of measures for the protection of this site and it is not permissible to grant a licence without regard to such a programme. Documents designating the site do not establish whether the Hen Harrier is to be maintained at favourable conservation status or is to be restored to favourable conservation status. The designation of the site does not accord with the objectives of the Birds Directive. There is no sound basis to determine the sensitivity of the site to the proposed activity. The application documents include discrepancies in respect of the site area. There are multiple Inspector's Certifications.
10. The NIS submitted is incorrect in not identifying some of the plots lie within a Hen Harrier Red Zone. It is also inconsistent in regard to foraging habitat.
11. Protective measures adopted to date have clearly failed to avoid adverse impacts on sites for the Hen Harrier. The effect of mitigation must be certain.
12. There is no credible consideration of the effect on the Hen Harrier outside of the breeding season, and this needs to be considered. The requirements of the Hen Harrier do not seem to have informed the proposed reforestation. In the



Slievefelim to Silvermines Mountains SPA there is over 53% conifer plantation, and a further 5.18% defined as improved grassland. This is too high. The SPA has an area of 11,201.9ha and, in order to reduce to 40% forest cover, 2839.9ha of forestry would have to be removed. To meet 40% forest cover across the whole SPA network, 22,158ha of forestry would have to be removed. The supposition in the NIS that forestry is neutral in respect of Hen Harriers is unsound and without adequate scientific basis.

13. Pre-thicket second rotation forestry potentially presents an ecological trap for Hen Harriers.
14. Hen Harriers feed on small mammals. There is no assessment of the impact of vegetation loss on small mammals or consequent impact on Hen Harriers.
15. National surveys for Hen Harrier in 2010 and 2015 demonstrate a decline in the species. The most recent survey shows a continued decline. It can hardly be considered that favourable conservation status is being achieved.
16. The period for prohibiting forestry operations during the Hen Harrier breeding season should be extended back to 1st March. There is also argument that the period should be extended to the end of September to protect fledglings. The needs of the species outside the breeding season should also be considered.
17. Reference is made to two academic papers – one peer reviewed and another a Coford sponsored report. The views of the two reports do not appear to marry.
18. The NIS accepts that the proposed development could have an adverse impact on Lamprey and Salmon in the Lower Shannon SAC. Mitigation measures rely heavily on silt management. There is no information on the design of silt barriers, the exact number or location. Leaving details to be drafted and implemented after licensing amounts to a post consent condition and this is impermissible. As such, the decision cannot be deemed to be robust. Other mitigation measures are over vague.
19. There is an over-reliance on Best Management practices. Forestry impacts on 16% of Ireland's waterbodies with the most common problems relating to the release of sediment and nutrients, and impacts from acidification. Forestry may also give rise to changes in stream flow regimes caused by associated land drainage. Procedures outlined in the Standards for Felling and Reforestation (DAFM, 2019) are not sufficient to fully protect water bodies. Buffer widths of 10-25m may not be capable of removing all nutrients from run-off. In high storm events the retention time may be too short for uptake of soluble phosphorus by vegetation. The risk of run-off is being underestimated as peat catchments are susceptible to high rates



of run-off. It is not possible to reach conclusions beyond reasonable scientific doubt.

20. There are significant irregularities in the Inspector's Certifications, of which there are six, all completed by the same Inspector. The first certification indicates that the site was field and desk assessed but all other certifications indicate desk-based assessment only. There is confusion in the certifications regarding spatial overlap with Silvermines SPA. Certificate 6 acknowledges spatial overlap but goes on to screen out Appropriate Assessment due to lack of spatial overlap. Figures for clearfelling and thinning differ between certifications. Certification 6 indicates the possibility of a significant impact but concludes no need for EIA. It is not clear what documentation and information was relied on. The decision is compromised.
21. There are material inconsistencies on the matter of hydrological connection to the Clare Glen SAC. This is of particular concern given the designation for the Killarney Fern in the SAC and the presence of invasive species in the Slievefelim SPA. The risk of the spread of these species is accelerated by felling and thinning activities.
22. There is inadequate consideration of the potential impact on Annex IVa species. Article 12-16 of the Habitats Directive provide for the strict protection of Annex IVa species. There is no Otter survey and mitigations are entirely insufficient. The physical disturbance of Otters is not considered. Otter breeding and resting places are subject to strict protection. Otter territories can stretch from 10-15km. Female otters can range up to 1km away from a river to establish a natal holt, and they can breed at any time of the year.
23. The site, as blanket peat, may be unsuitable for replanting, depending on the depth of soil.
24. The incorrect test is applied to cumulative assessment.
25. The Forest Service Guidelines should be subject to SEA.

The appellant's expansion submission was circulated to the other parties and relevant referral bodies but no responses were received.

Oral Hearing

The FAC convened a limited agenda Oral Hearing in Portlaoise on 17th and 18th November 2021 relating to 13 appeal cases, including TFL 00150218. Representatives from DAFM, (applicants), (representing (applicant), (representing deceased, applicant for TFL 00150218) and (representing applicant), and (appellant) attended and participated. Referral bodies (County Council, Inland



Fisheries Ireland (IFI), and the National Parks and Wildlife Service (NPWS)) were notified but did not attend. The Oral Hearing had a limited, specified agenda relating to the protection of the Hen Harrier and the Merlin. The FAC engaged a consultant ornithologist to advise it, and he attended and participated at the Oral Hearing, and subsequently submitted a report containing advice sought in accordance with a brief provided by the FAC. Copies of Oral Hearing notifications, introduction and agenda, the consultant's brief, and submissions made by the parties at the Oral Hearing are contained on file.

Assessment of grounds of appeal – ornithological

In addressing the grounds of appeal, the FAC firstly considered the ground of appeal contending that the licence should be refused in order to prevent disturbance to Hen Harriers resulting in adverse impacts on the integrity of the SPA within which the project lands lie, or the risk of adverse impacts. The appellant contends that the population of Hen Harriers needs to be considered, and they make reference to the 2015 National Survey of Breeding Hen Harriers in Ireland, and that there is a risk of an adverse effect on the integrity of the SPA resulting from loss of foraging area/loss of roosting area/loss of nesting area (as appropriate) in particular. The appellant's representatives expanded this ground at the Oral Hearing through an illustrated submission by [redacted] ornithologist. In addressing the issue of 'favourable conservation status' (FCS) he referred to Article 1 of the Habitats Directive and noted that EC Guidance stated that principles underpinning FCS are equally applicable in relation to the objectives of the Birds Directive. Conservation status is favourable when population dynamics data indicate that a species is maintaining itself on a long-term basis as a viable component of its natural habitats, and the natural range is neither being reduced nor is likely to be reduced for the foreseeable future. A species must be able to maintain itself without human intervention. He referred to Favourable Reference Values (viability) and noted that no FRVs exist for Hen Harrier or Merlin in Ireland. Records from 17 counties indicate that there were 300 breeding pairs of Hen Harrier 50 years ago. This reduced to 108-157 breeding pairs in 2015. The Hen Harrier does not appear to be self-sustaining, with a 52% decline in breeding pairs over the last 40 years. There is now a greater proportion of Hen Harriers outside the designated Special Protection Areas (SPAs), and this, he contends, ultimately means that the requirements of the Birds Directive are not being met in relation to the protection of the Hen Harrier. Conservation Objectives for the six breeding Hen Harrier SPAs designated in 2005 have not been progressed. The natural range of the Hen Harrier has reduced and a population trend decline of 28.6% is unfavourable. Second rotation pre-thicket forestry is associated with low levels of breeding success for Hen Harriers. The submission addressed landscape scale interactions with forestry on Hen Harrier conservation, with reference to wind turbines, intensively managed agricultural land, disturbed peat, and forestry greater than 13 years old. [redacted] illustrated areas unsuitable for Hen Harriers due to cumulative impact. The submission addressed potentially suitable areas, and referred to case studies of Hen Harrier in the



South Stacks Complex, Slieve Aughty Mountains, the Slieve Bloom Mountains, the Slievefelim to Silvermines Mountains, and Duhallow. The case study for the Slievefelim to Silvermines Mountains revealed that there were 9 Hen Harrier territories in the study area between 1998 and 2001, but this was reduced to 3 Hen Harrier territories in 2010.

referred to inconsistencies in the Forestry Service Appropriate Assessment procedures. Ordinarily, forestry activities in Ireland have a 52-week window and are exempt from Sections 22 and 40 of the Wildlife Acts. There is no general system in place for the protection of birds during ordinary forestry operations. Hen Harrier breeding success can decrease noticeably when the percentage of 2nd rotation pre-thicket forest in the landscape is >10%. The Forest Service does not provide data on the percentage of pre-thicket forestry in the landscape. The draft Hen Harrier Response Plan includes commitments to long term forest reduction and management strategy, and it is not clear how forestry licences can be approved in light of these commitments. There are no site-specific objectives for Hen Harrier SPAs and, as such, the requirements of Article 6(3) of the Habitats Directive cannot be met. Due to known negative effects of forestry on Hen Harriers in SPAs, it is not envisaged that any future approvals for re-planting or afforestation in SPAs can be compliant with the Habitats Directive. There are no procedures in place to avoid the afforestation of important winter roosts. Cumulative impacts of licensed activities must be considered.

The FAC engaged Dr Alan Fielding, consultant ornithologist, to provide opinion in respect of conditions attached to the appealed licences as to their adequacy to avoid impact on Hen Harriers and Merlin in terms of habitat loss, damage to nest sites, or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of these species. The consultant was also asked if there is any scientific basis for the temporal and spatial parameters attached to the conditions, and is there any known scientific basis for varying these parameters (Copies of the consultant's brief and report are attached to the file). Samples of the conditions were provided, and Dr Fielding attended and participated at the Oral Hearing held on 17th and 18th November.

Dr Fielding's report, dated 02 December 2021, addresses the ornithological issues raised by the appellant in both the written grounds of appeal (as expanded in a second submission), and submissions made at the Oral Hearing. It also references and considers relevant studies carried out in Ireland and the UK before reaching the following opinions:

- The felling and replanting conditions, amended to include a temporal restriction for Hen Harriers to be extended to begin on 1st March, are unlikely to have a negative effect on the current conservation status of Hen Harriers in the SPAs
- The felling and replanting conditions, as currently specified, are unlikely to have negative effects on the current conservation status of Merlin in the SPAs



- There is scientific basis for the temporal and spatial parameters attached to the conditions, but to remove any element of potential disturbance, the temporal restriction for Hen Harriers should be extended to begin on March 1st.

The Fielding report addresses the timing of operations, distance restrictions, Green and Red Hen Harrier areas, and re-forestation in respect of the thirteen appealed cases. Additional context is provided in sections relating Hen Harriers and forests, and Favourable Conservation Status. Addressing the timing of operations, the Fielding report states that the felling licence conditions restricting operations between 1st April to 15th August fit with the peak period of nest activity, but operations in March have the potential to prevent Hen Harriers from selecting nest sites that could be close to the proposed forest operations. Starting felling operations prior to April 1st could lead to a relatively small change in a nest location but it also has the potential to displace the birds over much greater distances, including to a new location outside the SPA. In Scotland, NatureScot have defined the Hen Harrier breeding season as **March to mid-August inclusive**. The report suggests that the current Hen Harrier breeding season restriction of April 1st to mid-August should be extended to 1st March to August 15th. The FAC noted that [redacted] on behalf of the appellant, contended that the egg laying period is the most vulnerable to disturbance. Based on the information before it, the FAC concludes that conditions imposed to restrict operations during the Hen Harrier breeding season should refer to the period 1st March to 15th August for the reasons set out in the Fielding report.

The Fielding report refers to several studies of disturbance distances for Hen Harriers, and notes that these vary. The report states that felling licence distance constraint for Hen Harriers is implicit in the definition of Red Areas (as set out in Appendix 21 of the Forestry Standards Manual (2015)), and historic nest sites are buffered to 1,200m. As such, the maximum distance to the edge of a planned forest operation, before a licence condition becomes applicable, would be 600m. This is within the normal range of suggested working distances and the report states that there is no need to change this as long as the definition of Red Areas is robust. The FAC noted that a paper prepared by the Irish Raptor Study Group *Hen Harrier Conservation & Forestry Sector in Ireland*, 2015 concluded that Forest Service Red Areas are a positive way of minimising the risk of nest failures due to forestry related activities within the SPAs, and that, at the Oral Hearing, the appellant's representatives considered this to be correct, subject to adequate compliance being operated. The Fielding report examines the issue of Green and Red Hen Harrier areas, noting that Hen Harriers can breed in close proximity to each other and often have overlapping foraging ranges. The report assumes that, given the loose colonial nature of many Hen Harrier nesting attempts, combined with a tendency to nest in the same general areas between years but not the same exact location, this would result in overlapping buffers rather than isolated 1.2km buffers. At the Oral Hearing, this was confirmed in a verbal response by DAFM. The Fielding report states that it is reasonable to assume that likely nesting locations are included within the Red zones (High Likelihood Nesting Area). It concludes that



the use of Hen Harrier Red zones appears suitably robust. Based on the information before it, the FAC agrees with the conclusion of the Fielding report on this issue that the current separation distance, as required in licence conditions for Hen Harriers, should be retained.

Addressing re-afforestation, the Fielding report states that this can provide for new open areas and water course setbacks, and these are potentially new foraging strips. The largest concern about re-afforestation, excluding the continuing loss of previous open habitat, appears to relate to effects of second rotation pre-thicket forest on Hen Harrier productivity and survival. The Fielding report concludes that the evidence for a definitive and causal relationship between the extent of second rotation pre-thicket forest and reduced Hen Harrier breeding success is weak.

The proposed development project lands lie within the Slievefelim to Silvermines Mountains SPA. The Hen Harrier (*Circus cyaneus*) is the sole special conservation interest for this SPA and the conservation objective is stated to be "to maintain or restore the favourable conservation condition of the bird species listed as special conservation interest for this SPA". The proposal is for the thinning/felling of 19.87ha of mature conifer forestry, and the restocking of 15.87ha. The existing forestry does not provide suitable foraging or nesting habitat for Hen Harrier, although there are small unplanted areas within and adjoining the existing forestry which could be suitable. The proposed restocked area would provide unplanted areas, including setbacks, which could provide suitable foraging space for the Hen Harrier. In addition, the restocked area (2nd rotation forestry) could also provide suitable foraging lands for up to 12 years, when the canopy closes over. Following the submission of a Natura Impact Statement by the applicant, the DAFM carried out a Stage 2 Appropriate Assessment, including in respect of the Slievefelim to Silvermines Mountains SPA, before recommending mitigation measures to include prohibition on forestry works being undertaken during the Hen Harrier breeding season (1st April to 15th August) to avoid any potential disturbance to the species. Against this background, the FAC considered if the licensed development was likely to have a significant effect, either individually or in combination with other plans or projects, on the SPA, prejudicing the achievement of the conservation objective for this Natura 2000 site. The FAC noted that the appellant's representatives contended that the Hen Harrier in the SPA does not currently have favourable conservation status as the population does not appear to be self-sustaining with a decline in breeding pairs, and also to the views contained in the Fielding report in respect of these issues. The FAC considered that the conclusions reached in the Fielding report in respect of the questions put in the brief provided, were based on a detailed examination of scientific information contained in Irish and UK studies, and are soundly based. The FAC accepted the conclusions reached, including the extension of the temporal restriction for Hen Harriers to begin on March 1st. The FAC examined the extent, type and level of maturity of existing forestry in the area, noting the statement in the 6th Inspector's Certification that the proposed development, together with existing thinning and clearfelling of 3 years or



less within 500m is 44.24ha, and the NIS statement that the River Sub-basin Annagh (Tipperary)_020 has approximately 58% forest cover. The FAC examined the potential for in-combination effects, having regard to the QIs/SCIs and conservation objectives of the screened in Natura 2000 sites and found no reason to examine any other Natura 2000 sites for in-combination effects. The FAC considered the characteristics of the wider landscape before concluding that, subject to an extension of the temporal restriction to 1st March, the proposed development individually, or in combination with other plans or projects would not have an adverse impact on the integrity of the Slievefelim to Silvermines Mountains SPA, the River Shannon and River Fergus Estuaries SPA, or the Lower River Shannon SAC. On this issue, the FAC found no reason to conclude that there was any significant or serious error made in the making of the decision to grant the licence.

There is no information before the FAC to indicate that the proposed clearfelling/thinning and restocking would have any significant impact on other wild bird species.

Assessment of grounds of appeal - administrative

The appellant contended that they had limited access to the application documents contrary to requirements of the EIA Directive and the Aarhus Convention, and that the decision does not meet with the standards and requirements for public participation as is legally required. They further submit that they were unable to make a precise and targeted submission identifying any defects in the application procedure, and that, in the absence of relevant information, they conclude that the proposed development is likely to impact on foraging, roosting or nesting of protected species in an SPA site. The DAFM reject this contention, stating that the right to participate was available at the application stage and that the appellant did not avail of that right. The FAC notes that the appellant lodged written grounds of appeal and expanded on these grounds in a subsequent submission, and also attended and participated fully in the Oral Hearing. Based on the information before it, the FAC concludes that the DAFM decision was made in line with fair procedures and that the appellant availed of their right to participate in the appeal process.

The appellant contends variously that the procedures of the FAC are unlawful and invalid for reasons of public participation and public access to environmental information. The appellant did not make a submission to the DAFM as part of the licensing process. The FAC note that, having submitted their grounds of appeal, the appellant was provided with the material provided to the FAC by the DAFM which informed the granting of the licences, and that this material in turn informed the appellant's expansion of their grounds of appeal. For these reasons and the reasons outlined in the previous paragraph the FAC do not consider that the appellant was disadvantaged or had inadequate access to information required for the submission of an appeal.



The appellant contends that the composition of the FAC renders the procedures of the FAC unlawful on the basis that the FAC is made up of members of the Minister's staff who are answerable to the Minister. The FAC concludes that there is no basis for this contention. The FAC is independent and impartial in the performance of its functions, as required by legislation.

The appellant submits that the FAC is an Administrative Decision Maker; and has not complied with appropriate notification and participatory obligations as required by the Aarhus Convention; and that it falls to the FAC to conduct inter alia matters such as Appropriate Assessment under article 6(3) of the Habitats Directive and Article 4 of the Water Framework Directive and other obligations arising from EU law. The FAC's consideration of this appeal is in accordance with the provisions of the Forestry (Miscellaneous Provisions) Act, 2020, and the FAC's determination of this appeal is made in accordance with Section 14B(13) of the Act.

Assessment of grounds of appeal - other

The appellant, in their expansion submission, contend that there are significant irregularities in information contained in a series of six separate Inspector's Certifications, and that it is not clear what documentation and information was relied on in making the decision to grant the licence. The FAC notes that the application was date stamped 26.04.2018 and that the six Certifications appear to have been developed over time (approximately 30 months) before the decision was issued on 20.10.2020. It is reasonable to conclude that some information contained in the Certifications is likely to have changed over that period. The FAC examined all of the Certifications on file and concluded that the 6th Certification contains the information which is most recent at the time of the making of the decision to grant the licence. In particular, the FAC noted that the 6th Certification, which indicates a spatial run date 01.10.2020, was processed after the submission of an NIS (30.03.2020), the receipt of an In-combination report (02.09.2020), and the completion of an AAD (03.09.2020). It is one of a suite of documents available at the time of the making of the decision. The FAC examined, in particular, the appellant's contention relating to apparent anomalies in the answers provided to questions 3, 4 and 7 of the 6th Certification. Question 3 asks – *As District Inspector, have you reviewed all referral responses in relation to the above (European sites)?* - and the answer provided is 'NO'. The FAC considered that, as the submitted NIS and the AAD prepared by independent, qualified ecologists, together with the application details, were before the DAFM at the time of the making of the decision, there was sufficient information before the DAFM in order to objectively assess the application and make its decision. Question 4 asks – *Is there sufficient information within the application and available from elsewhere to form a sound judgement regarding the likelihood of the project having a significant effect on a European site?* – and the answer is 'NO'. On this issue, the FAC is satisfied that there was sufficient information before the DAFM at the time of the making of the decision to grant the licence, including the NIS and the AAD, both of which were prepared by independent, qualified ecologists. Question 7 asks – *Based on the extent*



of licensed thinning and or clearfelling as outlined (4.13ha within 5km), is the cumulative effect of this application likely to have a significant impact? – and the answer is ‘YES’. The FAC noted that the proposal is for clearfelling of 15.87ha, and thinning of 3.27ha, and reforestation, and that the project lands are in a wider area of mature and recently restocked conifer forestry. Cumulative impacts potentially most likely to occur relate to visual amenity, transportation and impact on water quality. Visual impacts will occur over time due to clearfelling and restocking, but these are likely to be short-term and not significant having regard to the characteristics of the surrounding landscape. Traffic impacts would also be short-term using the existing road network. The issues of likely significant impacts on water quality, and the potential for adverse impacts on Natura 2000 sites, having regard to their conservation objectives, are addressed elsewhere in this decision letter. The FAC concluded that, while some information contained in the Inspector’s Certifications appears to be confusing and apparently contradictory in part, the suite of information before the DAFM at the time of the making of the decision, including the application documentation, NIS and AAD, was adequate and that no significant or serious error occurred in the making of the decision in relation to this matter.

The FAC considered the appellant’s contention that the proposed development should have been addressed in the context of the EIA Directive. The EU Directive sets out, in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine through thresholds, or on a case-case-basis (or both), whether or not EIA is required. Neither afforestation nor deforestation (nor clear-felling) are referred to in Annex I. Annex II contains a class of project specified as “initial afforestation and deforestation for the purpose of conversion to another type of land use”. (Class 1 (d) of Annex II). The Irish regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The FAC concludes that the felling and subsequent replanting, as part of a commercial forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly is not covered in the Irish regulations. Furthermore, the proposed development does not include any works which, by themselves, would fall within a class covered by the Directive. The appellant argues that, if deforestation is proposed, screening for EIA may arise. The FAC considers that there is no basis for this contention as the licence issued is for thinning/felling and reforestation and does not consent to any change of land use. In considering Class 13(a) of Annex II of the Directive, the FAC found no convincing reason to conclude that the proposed development would constitute “any change or extension of a project listed in Annex I, or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment”, as there would be no change or extension to the existing commercial forestry project which may have



significant effects on the environment. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

The project lands lie within the Lower Shannon catchment, Kileengarrif Sub-catchment, and the Annagh (Tipperary)_020 river waterbody. The waterbody had 'Good' status in the 2013-2018 period and is not identified as 'at risk'. There is a small stream flowing from east to west through the site (Plot 4), and there is another stream adjacent to the south west of the project lands. These streams merge with the Annagh River approximately 700m to the north of the site. A 10m exclusion zone is proposed along the stream in plot 4. The Harvest plan submitted shows aquatic zones crossing Plots 5 and 6, and indicates crossing points along these zones. It is a condition of the licence that the development be carried out in accordance with the Harvest plan submitted, and another condition requires adherence to specified guidelines and standards, including guidance relating to Forestry and Water Quality. Having regard to the characteristics of the site, the nature and scale of the proposed development, and subject to adherence to conditions in respect of water protection attaching to the licence, the FAC concludes that the proposed development is not likely to have an adverse impact on water quality.

The appellant contends that an assessment should be made of climate impacts arising from the proposed development but do not submit specific views in respect of potential impacts. Climate impacts could potentially arise from the proposed development in terms of carbon sequestration and also carbon release and, as referred to in the Fielding report, may have wider implications for foraging of Hen Harriers by impacting on the availability of prey. Having regard to the nature and scale of the proposed development, which includes both felling and restocking, and based on the information before it, the FAC finds no reason to conclude that any significant or serious error was made in the making of the decision to grant the licence in respect of this issue.

Habitats Directive provisions

The FAC considered the procedures undertaken by the DAFM in respect of the provisions of the Habitats Directive. The DAFM requested the submission of a Natura Impact Statement (NIS) as described above. The NIS identified and screened nine Natura 2000 sites within a 15km radius. Six of the sites were screened out for Stage 2 Appropriate Assessment with reasons given - Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Silvermines Mountains West SAC, Bollingbrook Hill SAC, and Silvermines Mountains SAC. Three Natura 2000 sites were screened in for Stage 2 assessment with reasons given - Slievefelim to Silvermines Mountain SPA (proposed development within this site), Lower River Shannon SAC (separation 5.5km downstream), and the River Shannon and River Fergus Estuaries SPA (separation c. 3.6km downstream). A Stage 2 assessment is carried out for these sites, with QIs/SCIs and conservation objectives identified, and an examination for adverse effects on the QIs/SCIs completed. Mitigation measures were proposed as deemed appropriate. Following consideration of an in-combination report that listed both forestry and non-



forestry projects, an Appropriate Assessment Determination (AAD) was completed by an independent Ecologist on behalf of the Minister and also reviewed by a consultant Ecologist. This confirmed the Natura 2000 sites screened out for Stage 2 assessment as Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Silvermines Mountains West SAC, Bolinbrook Hill SAC, Silvermines Mountains SAC, and Lower River Suir SAC. The AAD also confirmed the three sites screened in for Stage 2 Appropriate Assessment - Lower River Shannon SAC, Slievefelim to Silvermines Mountains SPA, and River Shannon and River Fergus Estuaries SPA. The AAD states that the NIS submitted comprehensively considered the features and was conservative in its consideration. Further considerations are added in the AAD. While the River Shannon and River Fergus Estuaries SPA was screened in in the NIS, considering the scale, nature of the activity, the qualifying interests and separation distance downstream, risks were considered to be minimal. The AAD concludes that the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of any of the listed European sites, having regard to their SCIs, provided recommended mitigations are implemented. The mitigations recommended refer to water protection measures relating to exclusion zones, sediment rapping measures, Otter requirements, and Hen Harrier requirements. The recommended mitigations are attached as conditions of the licence granted. Based on the information before it, the FAC finds no reason to conclude that there was any significant or serious error made in complying with the provisions of Article 6(3) of the Habitats Directive, or that the overall conclusion of the AAD was incorrect (other than the temporal period for the Hen Harrier breeding season as discussed above).

The appellant submits that there was inadequate consideration of the impact of the licenced operations on certain species listed under Annex IVa of the Habitats Directive, which provides for strict protection of those species under Article 12-16. Specifically, it is submitted that consideration of such species is confined to their being qualifying interests for Natura 2000 sites, SACs, and that the protections required under the Directive extend beyond such circumstances, and cites the Otter as an example. The FAC notes that the appellant has not provided any convincing evidence of other Annex IVa species on the project lands or demonstrated how such species would be likely to be adversely impacted by the proposed development. There is no documentary evidence before the FAC to indicate that the Otter is present on or near the site. The Otter is a qualifying interest of the Lower River Shannon SAC, and reference to the publicly available EPA website indicates that this European site is approximately 4000m downstream of the project lands. The AAD recommended mitigation in respect of the Otter, and adherence to the AAD mitigations is a condition of the licence granted. The FAC found no reason to conclude that any significant or serious error was made in the making of the decision to grant the licence in relation to this issue.

The project lands are, in part, hydrologically connected to the Clare Glen SAC. The special conservation interests for this European site are old sessile oak woods, and



the Killarney Fern. The downstream hydrological separation distance between the project lands and the Clare Glen SAC is approximately 4000m. The Killarney Fern is recorded as being rare and vulnerable in Ireland, and is listed on both Annex II and Annex IV of the Habitats Directive. There is no evidence of the existence of the Killarney Fern on the subject lands. The main threats to the species are loss of habitat, and exposure and encroachment of invasive species and vigorous native species. Woodland management operations can be a threat where they reduce canopy cover, and alter the relative humidity of the Fern habitat. Having regard to the nature and scale of the proposed development, and to the separation distance between the project lands and the Clare Glen SAC, the FAC conclude that the proposed development would not have an adverse impact on the Killarney Fern or give rise to encroachment of invasive species. As such, the FAC concluded that no significant or serious error was made in the making of the decision in respect of this issue.

Based on the evidence before it, the FAC finds no reason to conclude that there was any significant or serious error made in the making of the decision to grant the licence for reason of inadequate consideration of Annex IV species.

Conclusion

The FAC considered all of the documentation before it, including written submissions and oral submissions made at the oral hearing, and the consultant ornithologist's report, and concluded that a significant error had been made in the making of the decision to grant the conditioned licence by reason of applying an incorrect Hen Harrier breeding season (1st April to 15th August, inclusive) to conditions h) and i) of the licence. In deciding to vary the decision to grant the licence, the FAC concluded that, while all other conditions should be applied to the licence, condition h) should be amended as follows:

Amend condition h) by amending reference to the Hen Harrier breeding season (1st April to 15th August, inclusive) to read as "the Hen Harrier breeding season (1st March to 15th August, inclusive)", while otherwise retaining the wording of condition h).

Amend condition i) so that, in all cases in mitigation measures as per the AAD, where reference is made to the Hen Harrier breeding season being 1st April to 15th August, inclusive, this shall be amended by reference to the Hen Harrier breeding season being "1st March to 15th August, inclusive"



**An Coiste um Achomhairc
Foraoiseachta**
Forestry Appeals Committee

Yours sincerely

Des Johnson on behalf of the Forestry Appeals Committee



Brief for Consultant Ornithologist

Introduction:

The Forestry Appeals Committee (FAC) are currently considering 3rd party appeals against the decision of the Minister for Agriculture, Food and the Marine to grant licences for the carrying out of forestry operations at various locations throughout the country. There are thirteen licences concerned and all of these were granted with conditions attached.

Specifically, the subject appeals are against the decision of the Minister to grant a licence for forestry operations, which include felling, restocking and afforestation, on sites which are in or adjacent to European sites for which the Hen Harrier and/or the Merlin are qualifying interests.

The FAC will convene Oral Hearings on these cases in Portlaoise on Wednesday 17th and Thursday 18th November 2021. The Committee hearing the cases will consist of the Chairperson and three Deputy Chairpersons. In addition, the Committee will be assisted by a Consultant Ornithologist, who will hear the submissions made and participate in the proceedings at the discretion of the Chairperson. The agenda for the Oral Hearings will be limited to hearing submissions (and discussion at the discretion of the Chairperson) in respect of the conditions relating to the protection of the Hen Harrier and/or Merlin.

In advance of the Oral Hearing, the FAC will provide to the Consultant Ornithologist a synopsis of each of the cases to be heard.

Advice sought:

The advice sought from the Consultant Ornithologist relates to specific conditions attached to each of the appealed licences, specifically relating to the protection of the Hen Harrier and/or Merlin. Samples of the conditions concerned are attached below.

Based on the information before the FAC in relation to each appeal (including information submitted at the Oral Hearings), and having regard to the location of the sites concerned and the extent of existing forestry operations in the vicinity of each of the sites, the FAC is seeking expert opinion, including specifically on the following matters:

1. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Hen Harrier in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of that species? If the conditions are not considered adequate, then how should they be amended to achieve their purpose?
2. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Merlin in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation



status of that species. If the conditions are not considered adequate, then how should they be amended to achieve their purpose?

3. Specifically, is there any scientific basis for the temporal and spatial parameters attached to these conditions, and is there any known scientific basis for varying these parameters?

Following the Oral Hearing, the Consultant Ornithologist will submit a written report to the Chairperson containing the advice sought. The report should be submitted as soon as possible, but within the period of 3 weeks following the closing of the Oral Hearing.

Sample Conditions

h) No Felling or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, within 100 metres of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland; or within 100 metres of a clearing in the forest of larger than one hectare. Such operations can commence in sections of the project area furthest away from the 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive.

Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for GY10-FL0140.

j) The site of this project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, if the Department of Agriculture, Food & the Marine (DAFM) is notified by the National Parks & Wildlife Service of a new Hen Harrier nesting site, and if the site of the project lies within or partially within 1.2 km of this location, the DAFM will inform the Applicant of this situation and will amend the terms of the licence, with immediate effect, to exclude potential disturbance operations from taking place during the Hen Harrier breeding season (1st April to 15th August, inclusive). (A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance.)



Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for GY10-FL0140.
Forestry Appeals Committee
15.10.2021.

Ornithological Opinion on conditions
attached to appealed felling licences,
specifically relating to the protection of
the Hen Harrier and/or Merlin

Report to the Forestry Appeals Committee

Dr Alan Fielding BSc (Hons), MSc, PhD, FHEA, FLS

2nd December 2021

Background and Requests

The FAC sought my opinion on the following three matters:

1. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Hen Harrier in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of that species? If the conditions are not considered adequate, then how should they be amended to achieve their purpose?
2. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Merlin in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of that species. If the conditions are not considered adequate, then how should they be amended to achieve their purpose?
3. Specifically, is there any scientific basis for the temporal and spatial parameters attached to these conditions, and is there any known scientific basis for varying these parameters?

My comments should be interpreted as applying specifically to the appeals considered in the meeting on the 17th and 18th November 2021 dealing with case reference numbers: GY10-FL0141, TFL 00426019, TFL 00225618, LS06-FL0053, LS06-FL0054, GY21-FL0039, GY21-FL0038, CK01-FL0063, GY10-FL0140, LK01-FL0207, GY27-FL0050, GY22-FL0008, TFL 00150218.

I recognise that my conclusions may have more general application outside of the above cases. My conclusions were derived whilst paying due regard to the precautionary principle.

Sample Hen Harrier Condition (Green Area)

The site of this project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1st April to 15th August, inclusive).

Sample Hen Harrier Condition (Red Area)

The site of this project overlaps with a High Likelihood of Nesting Area relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). To do so will lead to the immediate cancellation of this licence and may represent an offence under the Birds & Habitats Regulations (2011) (S.I.477 / 2011). (A potential disturbance operation is a forestry operation associated with a licensed project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance).

Hen Harrier Condition Observations

Assuming there are no restrictions relating to merlin or other qualifying species.

- a. No operations are allowed anywhere within the site during the breeding season if the site is within 1.2 km of a known hen harrier nest site. This condition is effectively a temporal constraint as the restriction, once applied, has no other spatial exemption. **Therefore, the first issue for my opinion relates to the start and end dates of the hen harrier breeding season.**
- b. If the site is not within 1.2 km of a known hen harrier nest site there are no restrictions unless a new hen harrier breeding site is identified before felling begins. If a new site is found condition applies. **Therefore, the second issue for my opinion relates to the adequacy of the High Likelihood of Nesting Areas.**

Sample Merlin Condition

No Felling or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, within 100 metres of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland; or within 100 metres of a clearing in the forest of larger than one hectare. Such operations can commence in sections of the project area furthest away from the 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive.

Merlin Condition Observations

Assuming there are no restrictions relating to hen harrier or other qualifying species.

- a. There is a spatial constraint, a 100 m exclusion buffer during the breeding season. This exclusion buffer only applies if the felling is adjacent to open areas. Felling and other operations are allowed outside of this buffer at all times. **Therefore, the first issue for my opinion relates to adequacy of a 100 m buffer.**
- b. If the felling is adjacent to open areas, no operations are allowed within 100 m of the forest edge during the breeding season. **Therefore, the second issue for my opinion relates to the start and end dates of the merlin breeding season.**

Conclusions

The evidence that I used to arrive at my responses is detailed in the report.

FAC Question	My response
<p>1. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Hen Harrier in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of that species? If the conditions are not considered adequate, then how should they be amended to achieve their purpose?</p>	<p>Using the best scientific information available to me, and my interpretations of such information, I am content that the felling and replanting conditions, amended as suggested in my response to question 3, will not have a negative effect on the current conservation status of hen harriers in the SPAs.</p>
<p>2. Are the specific conditions attached to each of the licences (including those relating to reforestation) adequate to avoid impact on the Merlin in terms of habitat loss, damage to nest sites or direct mortality, to such an extent as would be likely to prevent the achievement of favourable conservation status of that species. If the conditions are not considered adequate, then how should they be amended to achieve their purpose?</p>	<p>Using the best scientific information available to me, and my interpretations of such information, I am content that the felling and replanting conditions, as currently specified, will not have negative effects on the current conservation status of merlins in the SPAs.</p>
<p>3. Specifically, is there any scientific basis for the temporal and spatial parameters attached to these conditions, and is there any known scientific basis for varying these parameters?</p>	<p>Yes, there is scientific basis for the temporal and spatial parameters attached to the conditions. But, to remove an element of potential disturbance, I suggest that the temporal restriction for hen harriers is extended to begin on March 1st.</p>

Report Structure

My report focuses on six factors that are either directly, or peripherally relevant, to the appealed felling conditions. The first four factors are directly relevant to the appeals considered in the meeting on the 17th and 18th November 2021 dealing with reference numbers: GY10-FL0141; TFL 00426019; TFL 00225618; LS06-FL0053; LS06-FL0054; GY21-FL0039; GY21-FL0038; CK01-FL0063; GY10-FL0140; LK01-FL0207; GY27-FL0050; GY22-FL0008 and TFL 00150218.

The remaining two factors are less directly relevant to the above appeals but provide additional context for my conclusions with respect to the first four factors. It is important to recognise, at the start, that the ecologies of these species, particularly the hen harrier, are complex and often poorly understood so my conclusions reflect my interpretation and weighting of the evidence and published studies.

1. Timing of operations
2. Distance restrictions
3. Green and Red hen harrier areas
4. Re-forestation
5. Hen harriers and forests
6. Favourable Conservation Status.

1. Timing of Operations

The licence conditions for both species include restrictions covering the breeding seasons. What is the evidence that these periods are adequate and appropriate?

1.1 Hen harrier

If there is historic evidence of adjacent (see Section 3) hen harrier breeding attempts the felling licence conditions prohibit forestry operations between 1st April to 15th August, inclusive.

Table 1 is a summary of the assumed hen harrier breeding season in the United Kingdom (Hardey *et al.*, 2013), as applicable to hen harrier surveys.

Table 1. Summary of hen harrier breeding season in the UK (Hardey *et al.*, 2013).

Breeding activity (No. of days)	Range	Peak Period
Site occupation & display	Late February to late May	Early April to early May
Nest building	April to late May	-
Egg laying (5-12 days)	Mid April to late June	Late April to mid May
Incubation (29-31 days)	Mid April to late July	Late April to mid June
Hatching	Mid May to late July	Late May to mid June
Young in nest (28-39 days)	Mid May to late August	Late May to mid July
Fledging	Mid June to late August	Late June to mid July
Juvenile dispersal	August to September	-

O'Donoghue (2010) presented data on breeding dates for 86 clutches in Ireland. The median laying date was the 5th May with an earliest date of 16th April (Kerry, 2008) and a latest of 10th June (Slieve Aughties, 2008). Fledging occurred from as early as the week of 18th – 24th June, to as late as the week of 6th – 12th August, and peaked during the week of 9th – 15th July. Fledged young remained within 1 km of the nest until 26th August.

The felling licence conditions between 1st April to 15th August fit with the peak period of nest activity but operations in March have the potential to prevent hen harriers from selecting nest sites that could be close to the proposed forest operations. Starting felling operations prior to April 1st could lead to a relatively small change in a nest location but it also has the potential to displace the birds over much greater distances, potentially to a new location outside of the SPA.

Tree planting in Scottish SPAs is rare but I found one recent example (Cambusmore¹) with conditions imposed by SNH (now NatureScot). *“All operations will take place outwith the hen harrier breeding season (March to mid-August inclusive) or within this period only if preoperational hen harrier surveys have been done and concluded there was no breeding”*.

In verbal evidence at the hearing Coillte stated that if NPWS gets information before April 1st about a new nest location, not in an existing red zone, forestry activities will be stopped. There are two points of note about this statement. First, it wasn't clear if this action was codified in the relevant directives. Second, and of more relevance to this section, it is only possible to give notice of a new nest if it was discovered last year or was a new nest in the current year. If it is considered that a new

¹ I need to declare an interest in that I provided some advice and analyses following the death of Paul Haworth who had been providing advice on this scheme.

breeding location can be located before April 1st then clearly the April 1st start date is too late in the breeding season.

The current hen harrier breeding season restriction of April 1st to mid August may not take account of potential disturbance early in the hen harrier breeding season. It is suggested that the current restriction of operations period should be extended from March 1st to August 15th.

1.2 Merlin

The felling licence conditions prohibit forestry operations between 1st March to 31st August inclusive. Table 2 is a summary of the assumed merlin breeding season in the United Kingdom (Hardey *et al.*, 2013). There are few other sources of detailed information and more general descriptions are similar to those in Table 2. Fernández-Bellon *et al.* (2011) studied the diet of the merlin in Ireland during the breeding season using monthly surveys between April and July. Rebecca *et al.* (1992) surveyed for signs of occupation or nesting between March and May in NE Scotland. Finally, Heavisides (1987) noted that British merlin were generally found on their breeding sites from March (initial site occupation) until August.

Table 2. Summary of merlin breeding season in the UK (Hardey *et al.*, 2013).

Breeding Activity	Peak Period	Range
Site occupation		Late February to late April
Courtship display		Late March to late April
Egg laying	Early May to mid-May	Late April to early June
Incubation	Early May to mid-June	Late April to early July
Hatching	Early June to mid-June	Late May to early July
Young in nest	Early June to mid-July	Late May to early August
Fledging		Late June to early August
Juvenile dispersal		Early July to early September

The merlin felling licence conditions, restricting forestry operations between 1st March to 31st August, appear to be robust and no amendment is suggested.

2. Distance Restrictions

Distance restrictions during felling operations are in place to reduce disturbance and apply during the breeding season (Section 1). The most comprehensive review of disturbance distances is that of Ruddock and Whitfield (2007). The Ruddock and Whitfield (2007) review was based on literature reviews and conversations with experts, both national and international. The relevant values for hen harrier and merlin, from Ruddock and Whitfield (2007), are summarised in Table 3. The information, on which these summary statistics are based, is then summarised.

Table 3. An extract from Table 1 in Ruddock and Whitfield 2007. "Summary descriptive statistics on disturbance distances (m) from the expert opinion survey, split according to results on incubating birds and chick-rearing birds. Median values (n opinions in parentheses) and "80 %" range values (the range in opinion values after the lower 10% and upper 10% of opinions had been excluded) are shown for AD (= 'alert distance' or 'static' disturbance distance), and FID = ('flight initiation distance' or 'active' disturbance distance)."

	'ALERT DISTANCE'				'FLIGHT INITIATION DISTANCE'			
	INCUBATION		CHICK REARING		INCUBATION		CHICK REARING	
	Median	80%	Median	80%	Median	80%	Median	80%
Hen harrier	310 (24)	<10-750	225 (23)	10-750	30 (27)	<10-500	225 (29)	<10-750
Merlin	225 (22)	<10-500	400 (19)	10-500	30 (30)	<10-300	225 (28)	10-500

2.1 Hen harrier

The following is a summary from Ruddock and Whitfield's (2007) report.

- During wind farm construction, displacement has been suggested to potentially occur up to 500 m around construction sites with some disruption up to 1 km, depending on line of visibility.
- Expert opinion survey's produced a range of values and suggested a maximum buffer of 500 - 750 m.
- The active disturbance distance during the incubation stage was very low, which reflects the tendency for incubating females to flush at close range and reactions at larger distances may be more dependent on the presence of the male.
- Incubating birds may remain on the nest until the last minute even with the mate defending. Remaining on the nest until close range, nevertheless, does not mean that the disturbance source has not been detected.
- Signs of active disturbance were evident at much greater distances during chick-rearing than during incubation (median: 225 m and 30 m respectively).
- Although the expert survey range is compatible with the estimated disturbance displacement suggested during wind farm construction, it is much higher than that seen during wind farm operation (but operating turbines with infrequent maintenance visits is not directly comparable to a single approaching pedestrian or intense activity around construction sites).
- The larger distances of up to 1000 m may indicate acute sensitivity of some pairs as does the opinion of a small minority of survey respondents.

Other observations not in Ruddock and Whitfield (2007).

Caravaggi *et al* (2019) describe the surveying methods used in the Hen Harrier Project (<http://www.henharrierproject.ie/>) “Where sites were occupied, vantage points **were a minimum of 500 m from nests sites** (my emphasis). Vantage points were identified a-priori based on habitat suitability, topographical constraints and the potential for observers to cause disturbance to breeding birds.” I presume that they considered 500 m to be a safe distance that would not cause disturbance. Hardey *et al.*, (2013) , in their guide for raptor surveys in Scotland state that disturbance is minimised if nesting areas are viewed from distances of 500 - 700 m and that special care should be taken to minimise disturbance to hen harriers while they are laying, as nests containing one or two eggs may be deserted.

Tree planting in Scottish SPAs is rare but one recent example (Cambusmore) has conditions imposed by SNH. “All operations will take place outwith the hen harrier breeding season (March to mid-August inclusive) or within this period only if preoperational hen harrier surveys have been done and concluded there was no breeding. **No operations associated with this consent will occur within 750m of an active nest.** In addition prior to winter operations surveys will be undertaken for roosting hen harriers and any roost identified will be buffered as per best practice.” The buffering relates to protecting roost sites from any planting rather than disturbance.

The Scottish Forestry Commission (now Forest, Lands and Estates) defined the nesting season as April to August during which time the safe working distances were 500 – 1,000 m. There is an additional comment about the need to avoid winter roosts which is missing from the felling conditions under consideration here. Hardey *et al.*, (2013) also make a comment about winter roosts. Although most roosts seem to be in lowland marshes or mosses, some females will roost individually on old nests in breeding areas between August and October or February to April.

The felling licence distance constraint for hen harriers is implicit in the definition of red areas (Section 3). Historic nest sites are buffered to 1,200 m. Therefore the maximum distance from a nest to the edge of a planned forestry operation, before the licence condition became applicable, would be 600 m. Six hundred meters is within the normal range of suggested safe working distances and there is no need to change this. This conclusion is based on the assumption that the definition of red areas is robust (Section 3).

2.2 Merlin

Lusby *et al* (2015) stated that “Merlin do not use young forests (<10 years) for nesting. Forests from 11 years to those older than 50 years were used for nesting, with most pairs nesting in forests between 31 and 40 years, which is within the age range for felling or thinning operations in commercial forests. This, coupled with the fact that Merlin naturally occurs at low population densities, highlights the importance of ensuring that forest management operations do not negatively impact their breeding performance.”

The survey techniques advice for surveying merlin in Scotland (Hardey *et al.*, 2013) states that “Care should be taken during visits in late March and April to avoid disturbance of merlins at occupied nesting ranges, as this may cause the birds to move. To minimise the risk of disturbance it is recommended that nesting areas are viewed from distances of 300–500 m”.

The following is a summary from Ruddock and Whitfield’s (2007) report.

- Little has been published on the effects of human disturbance on merlin.
- In pairs routinely exposed to predictable disturbance, tolerance and habituation is likely because urban nesting is recorded regularly in the US & Canada and reproductive output has been recorded as higher than rural populations.
- Flushing distances of wintering birds ranged from 17 – 180 m for pedestrian disturbance and from 44 – 85 m in response to vehicles.
- > 90% of birds flushed to pedestrians whilst only 38% flushed to vehicles.
- Tree nesting birds are likely to detect disturbance at greater distances than ground nesting pairs. Despite this, tree-nesting birds may respond at shorter distances as some studies have shown birds at a higher elevation appear to have a shorter response threshold.
- Merlin are particularly prone to desertion just prior to egg laying and the risk declines thereafter, although individuals were occasionally found breeding at a different site if disturbance occurred prior to or at the laying of the first egg.
- US forestry guidelines maintain a minimum 91 m no-cut buffer around known merlin nest sites when they are discovered. However, tree-nesting merlin use the old abandoned nests of other species which will have limited survivorship particularly if large merlin broods are reared, so that individual nests are unlikely to be used for more than a few seasons.
- A preliminary 200 – 400 m protective buffer around nest sites for forestry workers was proposed in the UK in 1997 with no apparent empirical support.
- Expert survey revealed a very wide range of opinions on the typical distance at which nesting merlin may be disturbed by an approaching human.
- Static disturbance during incubation ranged from <10 m to 300 – 500 m. This wide range may represent differences in experiences with ground- and tree-nesting birds.
- Empirical records of disturbance distances were few in the literature and confined to observations of non-breeding birds which flushed at up to 125 m distance from an approaching human.

The 100 m threshold for merlin appears appropriate, particularly given the practical difficulties with its implementation with respect to forest operations. Changing the distance has little empirical supporting evidence and any increase would be unlikely to introduce any material changes to forestry operations.

3. Green and Red Hen Harrier Areas

Red and green areas are designed to identify areas likely to be used for nesting. They are defined in Appendix 21 of the Department of Agriculture, Food and the Marine's Forestry Standards Manual (2015).

"Red areas are 1.2 km radius areas centred on known Hen Harrier nesting areas. The 1.2 km radius is based on half the maximum separation distance of annual nest locations within territories observed in the Slieve Aughty Mountains within the 2005-2010 period, plus an additional 500 metre buffer. Depending on the location of their centre point, Red Areas may encapsulate land outside the boundary of the SPA. The remainder of the SPA is referred to as 'Green Areas'. New Red Areas may be generated from time-to-time, as new Hen Harrier nesting sites are identified, either individually or as a result of a regional or national survey."

It is known that hen harriers can breed in close proximity to each other (e.g. Watson, 1977; Balfour & Cadbury, 1975; Simmons, 2000 and O'Donoghue, 2010) and often they have overlapping foraging ranges (e.g. Arroyo *et al.*, 2008). This close proximity can result in the formation of loose 'colonies'. Caravaggi *et al* (2019b) found that the 2010 hen harrier territories were located at least 141 m from the nearest territory in 2015 but with a mean separation of 3.8 km. Irwin *et al* (2012) suggest, using evidence from a *pers. comm.*, that pairs were capable of moving several kilometres between and even within seasons.

Given the loose colonial nature of many hen harrier nesting attempts, combined with a tendency to nest in the same general areas between years but not the same exact location, my assumption was that this would result in overlapping buffers rather than isolated 1.2 km circular buffers. This was confirmed in a verbal response by DAFM. Consequently, it seems reasonable to assume that likely nesting locations are included within the red zones (High Likelihood Nesting Area).

The main concern therefore relates to the historic nature of the data used to create the red zones, it will always be at least one year earlier. DAFM confirmed, verbally, that there is a rapid updating process when new nest sites are located.

How likely is it that a new nest site will be outside of a current red zone? A circle with a radius of 1.2 km has an area of ~4.5 km² so the area occupied by a series of overlapping buffers will be quite large. It would be interesting to know how red zones have changed over the period they have been operational. Have they increased in area, moved or shrunk?

It was suggested that hen harriers in Ireland may have much larger foraging areas than other populations. Caravaggi *et al.*, 2019b comment that *"Poor foraging opportunities in the surrounding landscape may be placing a larger provisioning burden on both parents who consequently must travel greater distances to find food"*. This assumption is based on a single satellite tracked flight and Irwin *et al* (2012) suggested that these were *"larger than usual as the 2010 and 2011 breeding seasons both followed unusually severe winters during which many of the resident upland passerines, an important prey item, was high"*. Other comments about the same tracked birds is also relevant *"..... the three birds showed preferences for second rotation pre-thicket forest, particularly those between 3 and 9 years of age, and for grasslands managed at low intensity"*. (See Section 4).

Breeding dispersal appears to be generally small and this is consistent across studies. In Wales, Whitfield and Fielding (2009) recorded a median breeding dispersal distance of 0.7 km. In Scotland, they usually nest in the same area in successive years, with the median distance moved between

sites from year to year being 0.71 km (Etheridge *et al.*, 1997). Picozzi (1984) found that, in Orkney, known females which had nested one year did so the next year within an average of 1.03 km (n = 163) of the previous year's nest. Etheridge *et al.* (1997) also found a small, but non-significant, difference in distance moved in successive years between successful female breeders (0.63 km) and unsuccessful females (0.81 km). **Breeding dispersal distances on this magnitude, if applied, in Ireland support the 1.2 km radius used for the Red zones particularly given the year on year accumulation of nest sites within a Red zone.**

Given that SPA populations of hen harriers are not large, new nest locations outside of the Red zones are unlikely and, in order to invoke a licence condition, it would have to be within 600 m of the proposed felling. While not impossible, this seems an unlikely scenario. **Therefore, the use of hen harrier red zones is suitably robust.**

4. Re-forestation

Re-forestation does not produce an identical tree cover to that felled because of new open areas and water course set-back distances. One consequence is that potentially new and important foraging strips may be created, particularly around water courses. If the water course runs through the felled block a new open strip up to 40 m wide could be created, which would have the potential to provide habitat supporting hen harrier and merlin prey. Based on considerable evidence from the Isle of Mull (Paul Haworth, *pers comm*) such open spaces can be well used by foraging hen harriers. Indeed, the 2015 national survey (Ruddock *et al.*, 2016) recognised the potential for such habitat use by adding 'Linear features' as a new foraging habitat category (drainage channels, hedgerows, forest rides and open habitat corridors containing power-lines).

Mull has very few merlin so there is no direct evidence that they would benefit in the same way. However, it is difficult to imagine a scenario in which there would be a negative impact from the re-forestation. A shortage of crow nests in remaining mature trees seems unlikely.

The largest concern about re-forestation, excluding the continuing loss of previously open habitat, appears to relate to effects of second rotation pre-thicket forest on hen harrier productivity and survival. The evidence is inconclusive with respect to it having a positive or negative impact.

It has been argued that the creation of significant areas of second rotation pre-thicket forest can become an ecological trap for hen harriers as they apparently suffer poor reproductive success despite a marked selection for this habitat. It has also been suggested that their breeding success can decrease noticeably when the percentage of second rotation pre-thicket forest in the surrounding landscape is greater than 10% (Wilson *et al.*, 2009). It is, therefore, worth examining this suggestion in detail, beginning with the observation that the negative relationship between second rotation pre-thicket forests and hen harrier breeding success appears to be significant only in the Slieve Aughty Mountains.

Irwin *et al* (2020) suggest that, in a forested landscape with a well-balanced age structure, approximately 25% of the forest will be in pre-thicket stage at any one time. This means that as long as there is less than 40% for total forest cover in the landscape the percentage of pre-thicket forest should not be >10%. Therefore, problems, if they are real, should not become apparent until >40% of the landscape is forested.

Irwin *et al* (2012) investigated the ecology of the hen harrier in Ireland between 2000 and 2005. As in other studies the main nesting habitats were pre-thicket stage forests, particularly second rotation plantations. They found no evidence that the area of post-closure plantations impacted negatively on hen harrier nest distribution but there was a positive association between changes in numbers of nests between 2000 and 2005 and changes in the area of pre-thicket second rotation plantations suggesting that the overall effect of plantation forests on breeding hen harriers in Ireland was positive. The same study used satellite tracking data from three breeding adults, tracked for four days, in the Ballyhouras. One surprising result was the maximum distances from the nest: a female was 7.5 km and a male was 11.4 km. However, it is possible that these are larger than usual as the 2010 and 2011 breeding seasons both followed unusually severe winters during which many mortality in the resident upland passerines, an important prey item, was high. Both forest and non-forest habitats were used in proportion to their availability but the three birds showed preferences for second rotation pre-thicket forest, particularly those between 3 and 9 years of age, and for grasslands managed at low intensity. It is difficult to understand why foraging hen harriers would preferentially forage in second rotation pre-thicket forest unless prey was more available (note that prey abundance and availability or not the same although there should be some linkage).

Given that much has been made of the 11km foraging distance it is worth noting that Irwin *et al* (2012) found that over 50% of all GPS records, consistent with hunting behaviour, were <2 km from the nest. Indeed, the concentration of hunting behaviour was more than 10 times higher within 1 km of the nest than it was between 2 - 5 km.

The effect of second rotation pre-thicket forest on hen harriers in Ireland is far from certain and it cannot be assumed to have a negative impact on hen harrier productivity. Wilson *et al* (2012) is a detailed analysis of productivity and habitat and it is worth including some quotes from this work. *"...the lower breeding success experienced by Hen Harriers breeding in landscapes with high levels of second-rotation pre-thicket described here are counter-intuitive – one might expect that Hen Harriers breeding in such landscapes would be more successful than in other habitats. It should be emphasized that these relationships were not consistent across all study areas and that, over the whole dataset, the model including both second rotation pre-thicket and study area explained just 9% more variation than the model with study area alone. **Moreover, we cannot be certain that these relationships were causal, but even if they were, it is likely that second-rotation forests are often valuable for Hen Harriers in Ireland, enabling them to breed in areas where they would otherwise be scarcer or absent"***. [my emphasis].

In a later study, pre-thicket forests were not observed to have an effect on breeding success (Caravaggi *et al.*, 2019b) and SPAs were observed to have a moderate positive effect on breeding success. However, they considered that the success of SPAs in facilitating breeding success may be skewed by increased success in locations where heather and moorland nesting and foraging habitats were of higher quality.

The evidence for a definitive and causal relationship between the extent of second rotation pre-thicket forest and reduced hen harrier breeding success is weak and generally any interpretations of a mechanism involve many plausible assumptions, typically about increased nest predation [Section 5.2].

5. Hen Harriers and Forests

5.1 Habitat choice

Habitat is the aggregation of physical and biotic factors which make up the sort of place an organism lives. The quality of these factors, especially resource availability and predator exposure, affect an animal's survival and reproductive success. Selection should favour an active choice of areas that enhance reproductive success and survival. In hen harriers, reproductive success has been the focus of many studies, but the habitat factors that correlate with success are difficult to pinpoint. Breeding site choice is the most obvious candidate that can be specifically linked to offspring production and this has been the subject of a number of studies including many in Ireland.

Nesting habitat choices are more adaptable than was previously thought, especially with respect to woodland; this has been noted in Ireland, France and the west of Scotland. Availability of extensive areas of open habitat had always been thought of as vital for successful breeding and hunting by hen harriers; a particular problem when large areas of potential habitat are replaced with conifer plantations. It is important to note that forests planted as an agricultural resource differ greatly from natural woodlands, largely as a consequence of the limited age structure and an even high density of trees. After planting the pre-thicket areas can be attractive to hen harriers but become unsuitable after approximately 12 years.

Although large tracts of continuous forest are unsuitable for hen harriers, patchy woodland with relatively clear areas within hunting distance is not. New afforestation usually creates opportunities for hen harriers with the potential to create local high densities of breeding pairs. At its simplest, establishment of woodland initially provides tall vegetation for nest concealment. Additionally these areas are largely free from the risk of trampling by large herbivores. Finally, burning of adjacent land tends to be restricted allowing taller vegetation to develop around the new planting and reduced grazing can increase preferred prey both within and adjacent to woodland areas. However, as the planted open areas close up there will be an inevitable decline in the local population unless new areas are planted. Blake (1976) considered that new forest plantations were one of the main reasons for the re-colonisation of mainland Scotland by hen harriers. Studies in Ireland indicate that more nests are found in pre-thicket second rotation plantations than in any other habitat, even though that habitat represented < 5% of the study areas (Wilson *et al.*, 2009). This is good, if circumstantial, evidence that active choice for young or low level plantations was taking place.

It is important to place some of the major hen harrier studies, particularly in the UK, into a historical context with respect to large scale changes in forest planting. There were two peaks of planting; the first (1970s) was a combination of Forestry Commission and private schemes. The second, (late 1980s) coincided with the wing tagging study (1990-1995) reported by Etheridge and Summers (2006). Inevitably much of this young plantation habitat was lost as trees matured and, as in Ireland's SPAs, the young forest resource will never be the same again unless new open spaces are planted. Given the plantation ages, the forest estate across much of Scotland and the Irish SPAs is now in a phase of comprehensive restructuring which may involve changes to the trees planted, their density and the configuration of open space. Re-afforestation is not the same as afforestation and it has the potential to create more hen harrier habitat which may give rise to additional nesting opportunities. The progressive implementation of re-afforestation best practice could create more open areas, more broadleaf species and conifer-free riparian zones which have the capacity to

provide an enhanced prey base and nesting opportunities for harriers that could experience less disturbance.

There is some evidence that hen harriers can adapt to new habitats. For example, although approximately 15% of one of France's most important hen harrier populations nest in natural or semi-natural habitats (young plantations, fallow land and marshes) the majority nest in wheat or barley fields (Millon *et al.*, 2002). This preference for crops over natural habitats seems to be relatively recent and applies equally to Montagu's Harriers. There is little evidence of a similar movement in the UK or Ireland, although a relatively recent record of a successful nest in southern England hints that it is possible in the future.

Irish national surveys have demonstrated the importance of forests to a large segment of the breeding hen harrier population (Barton *et al.*, 2006, Ruddock *et al.*, 2012, 2105, Wilson *et al.*, 2009). Ruddock *et al.* (2016) reported that pre-thicket new and second rotation forestry made up 61.5% of all known nesting habitats in 2005 and 64.7% in 1998-2000. Petty and Anderson (1986) recognised the importance of landscape configuration if hen harriers were to breed in restocked conifer forest *"Access to suitable large areas of open ground could be critical for Hen Harriers, and this is seldom available in restocked forest, except at higher elevations where some adjacent moorland may remain unplanted"*. Since it is known that hen harriers have nested in forest rides in closed canopy woodland in Argyll (Redpath *et al.*, 1998) suitable forest restructuring may increase such opportunities.

Significantly, habitat configuration appears to become more important as the total amount of open habitat is reduced (Flather and Bevers, 2002). It is, therefore, unsurprising that in much of Ireland, restocked or partially failed forest is used more than elsewhere. A recent analysis of landscape characteristics in Ireland, in relation to hen harrier breeding success, indicated that, at local scales, total forest cover and percentage cover of closed-canopy forest was associated with reductions in hen harrier productivity (Wilson *et al.*, 2012). In some local areas high cover of second rotation pre-thicket reduced nest success and fledged brood size. Therefore, although hen harriers are choosing second rotation pre-thicket as a nesting habitat in much of Ireland, it may be a sub-optimal choice related to the landscape surrounding re-stocked forests. Re-stocked forest appears to be used less in Scotland because sufficient habitat remains outwith the forests, particularly as sheep grazing continues to decline and hen harrier populations in some non-forested regions are small because of other constraints such as persecution.

5.2 Predation on Hen Harriers

One of the main negative impacts of nesting in forests is *an assumed* increase in nest predation because of the extra cover provided to the predators (e.g. Avery and Leslie, 1990). Despite this, Etheridge *et al.* (1997) found that, for hen harriers, there were fewer losses due to predation close to forests than to nests in unmanaged moorland.

Eggs and young chicks are particularly vulnerable to predation when parents are absent, which is more likely when prey is in short supply or adults have been disturbed. Like most other places where hen harriers are studied, **data on the abundance and activity of upland predators in Ireland are scarce** and assessments of the level of impact are largely based on assumptions with a list of potential predators that includes foxes, pine marten, American mink, stoat, raven and hooded crow.

Hen harriers are very variable in their nest defence, showing both individual variability and temporal changes. It is assumed that nest defence has an important role in deterring ground predators, (Simmons *et al.*, 1986) though there are few direct examples. Unfortunately many examples of ground predators such as the red fox *Vulpes vulpes* and hooded crow, *Corvus corone cornix*, are anecdotal and quantitative information on population effects is scant.

O'Donoghue (2010) attributed 55% of all nest failures in south and west Ireland in 2007 and 2008 to predation events but it is unclear what a 'natural' predation failure rate should be. Is 55% high, normal or low compared to a theoretical population in an environment not altered by humans? Predation is part of the natural process of hen harrier population regulation. It becomes a problem only when anthropogenic activities lead to much more predation than would be expected in a natural landscape, leading to reduced survival or, more likely, reduced productivity. Conversely, anthropogenic activities can reduce natural levels of predation, for example, when ground and avian predators are controlled. However, it is clear from the current and recent hen harrier distribution in the United Kingdom that the comprehensive control of ground predators on grouse moors does not result in healthy hen harrier populations. When studies have been undertaken (e.g. Amar and Redpath, 2002 and Baines and Richardson, 2013) the conclusions are not robust enough to identify consistent and significant impacts on the conservation status of the hen harrier.

Adults, rather than young in the nest, are probably at greatest risk when there are large apex predators such as golden and white-tailed eagle. The white-tailed eagle may become an important predator of hen harriers as the Irish population increases. For example, Sansom *et al* (2016), in a review of the future for Scotland's white-tailed eagles noted that "*It would be interesting to study how the expanding population of white-tailed eagles affect other raptor species of conservation concern. In particular, the hen harrier (Circus cyaneus) breeds in high densities on some Scottish islands and it is possible that increased abundance of white-tailed eagles might have negative impact on hen harriers on these islands. In an international perspective, it is very rare that the geographical breeding range of hen harriers and white-tailed eagles overlap...*". Ireland, like the Scottish Western Isles will be another example where the geographical breeding range of hen harriers and white-tailed eagles overlap.

6. Favourable Conservation Status (FCS)

There are generic FCS rules for Ireland's hen harriers and merlins in NPWS SPA documents. The absence of specific targets is regrettable but it is possible to infer if actions are likely to be positive, neutral or negative with respect to FCS.

The favourable conservation status of a species is achieved when:

1. population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
2. the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
3. there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

Assessing the conservation status of a species inevitably involves comparing the current situation against targets such as a target population size which is a product of density and habitat extent. But, how large should target populations be? This is not a simple question to answer since it involves making value judgements about the relative merits of different species, habitats and time scales. This was expressed quite trenchantly by Monbiot (2013) as *"... A tendency I've noticed among some groups is to try to make all their target species common, even if they were naturally rare. Perhaps some species ought to be rare. Those which lived in open habitats – which would have been small and occasional before people started cutting and burning the forests – are likely to have been rarest of all."* In the case of an open ground predator, such as the hen harrier, this means that judgements have to be made about the desired extent and quality of open ground, both of which are influenced by factors other than their conservation status. If density is held constant but the extent or quality of habitat decreases so will the hen harrier population size.

In addition, a judgement is needed on the desired density of breeding attempts. In the case of hen harrier density there is additional complexity arising from its apparent loose coloniality which means that it cannot be assumed that breeding attempts are spaced evenly across suitable breeding habitat or are constant year on year.

Habitat constraints reduce the extent and quality of nesting and foraging habitat. Additionally, there may be landscape level effects that alter the spatial relationship between nesting and foraging habitat, for example by retaining good nesting habitat but reducing the extent and quality of foraging habitat close to nest sites and *vice versa*. The principal constraints on habitat are those which alter vegetation height and structure. Changes to the height and structure of vegetation can have direct and indirect effects on nesting habitat and on prey distribution, abundance and availability. Processes which may alter the extent and quality of habitat include grazing (and burning); forestry operations, weather and wind farm construction.

There is little information on merlins in Ireland so the majority of the subsequent text relates to hen harriers.

6.1 Dispersion and Site Fidelity

Dispersal and site fidelity are related to both the species range and its population dynamics. There are two categories of dispersal: dispersive and philopatric. Differences between them have important consequences for understanding hen harrier population biology.

Dispersive dispersal implies extensive natal (from the nest) and breeding dispersal. In this mode young birds do not come back to breed in their natal site and breeding birds do not return to the same site next year. This is important in the context of understanding the ecology of hen harriers in Ireland's SPA.

The alternative philopatric dispersal type has three modes:

- marked breeding site fidelity of adults, particularly males;
- faithfulness to the site and sub-group of adults within a colony (particularly males) with marked inter-colony movements of young birds particularly females or
- marked philopatry by adults and young males (return to breed close to where they fledged) but with some natal dispersal between sites by young females.

Categorisation of hen harrier dispersal is significant for understanding and modelling local and national hen harrier populations and understanding if the species has a FCS. New *et al.* (2011), describing their population model of a Scottish hen harrier population, stated "*We do not account for fecundity as it does not affect harrier density in an area.* This results from high rates of juvenile dispersal, with almost no natal site fidelity. However, after dispersal, harriers are site faithful". This assumption means that the fate of a population would be dependent entirely on recruitment which will not, apparently, contain a significant proportion of local birds. In the context of Ireland's SPAs this could mean that the number of hen harriers pairs is dependent on what is happening outside of SPAs. This assumption appears to rest on ringing and wing tagging studies in Scotland that may have been confounded by the state of the forest estate at the times of the study.

The New *et al.* (2011) population model attempted to explain changes in the number of breeding females in the Scottish Langholm population and this population was also modelled by Baines and Richardson (2013) but they had different assumptions and arrived at a completely different explanation. The New *et al.* (2011) model was based on two important dispersal assumptions that are relevant to understanding the conservation of hen harriers in Ireland's SPAs.

1. Little natal site fidelity implies that **immigration, rather than productivity, determines the population growth rate**. They estimated that an increase of 100 Meadow Pipits per km² would raise recruitment, i.e. immigration, by 9% whilst the same vole increase would raise recruitment by 14%.
2. The **probability of settlement was related to the abundance of prey**. Predictions from their model were a good approximation to reality, which was a large increase between 1995 and 1997 followed by two years of decline.

Implications from the New *et al.* (2011) model are that quite large increases in the number of breeding attempts could occur in a particularly good prey year but this might be followed by a slow decline if there was no further recruitment but pairs remained faithful to their breeding sites. This type of dynamics has been observed in some of the Scottish SPA populations.

It is clear from population models that, as productivity increases adult survivorship becomes relatively less important but always remains the most important factor. Adult survivorship is influenced by a range of factors including predation, weather and prey availability.

The overall conclusion from this type of analysis is that accurate and robust estimates of annual survival rates must take account of both mortality and dispersal. It is very difficult to fully understand the dynamics of any hen harrier populations in the absence of this information. This

creates a problem for understanding how Ireland's SPA populations should be managed. For example, the New *et al.* (2011) and Baines and Richardson (2013) models make similar predictions for the same population despite making very different assumptions about population dynamics. Both cannot be correct. Nonetheless, their similar predictions reinforce the importance of robust knowledge about hen harrier dispersal and philopatry if appropriate management techniques and threat reductions are to be developed. **In the context of Ireland's SPAs it is essential to understand the balance between natal philopatry and immigration.**

Whitfield and Fielding (2008, 2009), in their study of the Welsh population, had a median natal dispersal distance of recovered hen harriers of 18.4 km (females) and 12.1 km (males). In Scotland, the median natal dispersal distance in female hen harriers was 10 km and 51 km for birds hatched on moorland and conifer forest respectively (Etheridge *et al.*, 1997). Whitfield and Fielding (2009) concluded that the Welsh population probably has low linkage with other breeding areas in the British Isles and that, at least currently and for females, is more-or-less 'closed'. It is reasonable to assume a similar logic applies in Ireland (including Northern Ireland).

Breeding dispersal appears to be generally small and this is consistent across studies. In Wales, Whitfield and Fielding (2009) recorded a median breeding dispersal distance of 0.7 km. In Scotland, they usually nest in the same area in successive years, with the median distance moved between sites from year to year being 0.71 km (Etheridge *et al.*, 1997). Picozzi (1984) found that, in Orkney, known females which had nested one year did so the next year within an average of 1.03 km of the previous year's nest and that female harriers that moved into a new territory moved further following breeding failure than after successful breeding. Etheridge *et al.* (1997) also found a small, but non-significant, difference in distance moved in successive years between successful female breeders (0.63 km) and unsuccessful females (0.81 km). **Breeding dispersal distances on this magnitude, if applied, in Ireland support the 1.2 km radius used for the red zones particularly given their five year roll over.**

6.2 Population trends

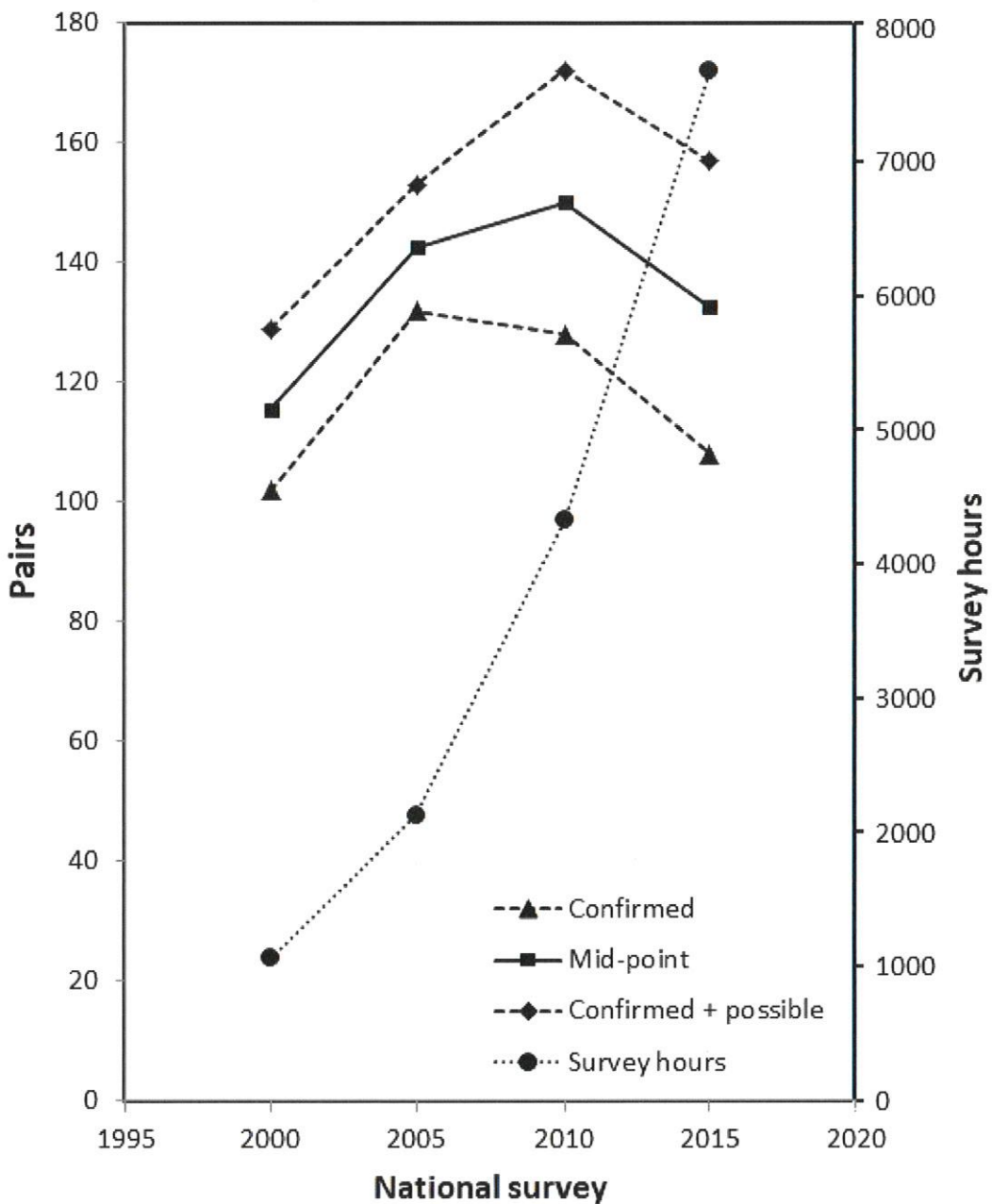
Figure 3 in Ruddock *et al.* (2016) appears to show a dramatic decline in hen harriers in the 2015 national hen harrier survey despite vastly increased survey effort. However, the axes and fitted curves are potentially misleading, at least without a detailed consideration of the data. Fig.1 is redrawn from Figure 3 in Ruddock *et al.* (2016) but with both axes starting at 0. Note that the survey hours in 1998-2000 survey are a hindcast and should be treated with considerable caution. The mid-point is halfway between the number of proven breeding pairs and the number of proven breeding pairs plus the number of proven plus probable breeding pairs. The interval between these two is the number of probable breeding pairs (this number includes pairs where the presence of a pair was not established with strong evidence). The use of the mid-point is an understandable but rather arbitrary value.

Fitting a linear trend to the number of proven pairs suggests no significant change, whilst the linear trends for the number of confirmed and possible pairs or the mid-point, are both significantly positive despite the 2015 decline.

The increase in survey effort is a problem for any interpretation of population trends but, in general, it should be interpreted that precision increases as the survey effort increases. While that might give weight to the suggestion of a decline, the increasing uncertainty or error associated with earlier

surveys means that the number of pairs should be considered to be increasingly imprecise in the earlier surveys. However, if it is assumed that confirmed pairs were correctly identified the uncertainty must rest in unrecorded and possible pairs. It is noticeable that increased survey effort is associated with an increase in the number of possible pairs which creates a wider gap between the number of confirmed pairs and the number of confirmed plus possible pairs. Therefore, despite the increased survey effort, the consequence is an increased uncertainty about the value of the mid-point. So, although increasing survey effort might be expected to increase precision it appears to have decreased it, at least for the mid-point metric is to be one of the most often cited trend measures.

Figure 1. Trends in hen harrier pairs across four national surveys (redrawn from Figure 3 in Ruddock et al (2016)).



Ruddock *et al* (2016) attempted to deal with the uncertainty created by changes in survey effort by restricting comparisons to only the 10 km squares surveyed in all four national surveys. “*Within these 78 squares in 1998 – 2000, there were 110 – 155 pairs which declined in 2005 to 110 – 127 pairs (-18.1%) with a small increase recorded in 2010 to 100 – 132 pairs (+3.9%) and finally a decline in 2015 to 78 – 103 pairs (-21.9%). Overall from 1998 – 2000 there has been a decrease by approximately one third (-33.5%) in these squares which have received coverage across all surveys.*” Note that the percentage declines refer to confirmed + possible pairs and not confirmed pairs. If confirmed pairs is used the small increase in 2010 is actually a -14.8% decline. It is reasonable to conclude that the number of pairs has declined in those 78 squares

However, a decline in those 78 squares masks complex changes, including increases and losses, across surveys and regions (Table 13 in Ruddock *et al* (2016)) which suggests some mobility in the breeding Irish hen harrier population, particularly given the spatial and temporal dynamic nature of first and second rotation pre-thicket woodland.

The Hen Harrier Project (<http://www.henharrierproject.ie/resources.html#>) reported that, in 2021, there were 62 confirmed breeding pairs and seven possible breeding pairs of Hen Harriers within the SPA network (a population range of 62 - 69 territorial pairs). **This is similar to the total numbers of territorial pairs recorded within the SPAs since their annual monitoring began in 2017 (58 -70 pairs); 2018 (53 - 68 pairs); 2019 (56 - 63 pairs); and, 2020 (58 - 62 pairs). It is possible that previous population fluctuations in the SPA populations have stabilised.**

Caravaggi *et al* (2019a) have considered how multiple factors need to be considered when attempting to understand the Irish hen harrier population. They suggest that the narrow focus of previous research means that there is little information about the broader range of anthropogenic pressures that might impact breeding their foraging and breeding habitat.

Pressures on Ireland’s hen harrier, and by extension the merlin, are not homogenous in severity or extent. The three most probable candidates for causing reduced productivity in Ireland are, in no particular order, insufficient available prey, poor breeding season weather and nest predation. It is unlikely that these three constraints are independent or constant across the hen harrier's range, as illustrated by the considerable year on year variability in productivity recorded by the Hen Harrier Project. For example, as a direct consequence of wet and cold weather, poor breeding season weather may lead to reduced prey populations and poor nest survival. Poor weather can reduce foraging time and increase the risk of nest failure and while reduced prey may be associated with an increased risk of nest predation as other prey become scarce and parents forage for longer. Caravaggi *et al* (2019b) showed that breeding success was negatively influenced by rainfall early in the breeding season and impending climatic instability could create greater year on year variation. Caravaggi *et al* (2019b) thought that chicks were most vulnerable to changes in minimum temperature, possibly exacerbated by rainfall, during the early stages of the breeding season.

In summary, attempting to understand the Irish hen harrier population in terms of only the extent and location of first and second rotation pre-thicket forestry in SPAs will never be successful.

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