

From: Cliona OBrien (Housing)
Sent: Thursday 28 November 2024 14:18
To: Andy Bleasdale (Housing)
Subject: RE: Hen Harrier mitigation CK11-FL0108
Attachments: Request for legal advice28Nov2024.docx; Gregory
McLucas (Housing)_R [REDACTED]
[REDACTED]

Hi Andy

As requested - [REDACTED]
[REDACTED]
[REDACTED]

Sorry this took longer than anticipated.
Best wishes
Cliona

From: Andy Bleasdale (Housing) <Andy.Bleasdale@npws.gov.ie>
Sent: Monday 18 November 2024 09:04
To: Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie>
Subject: FW: [REDACTED]

As discussed Cliona, when you a chance you might draft something up to get the ball moving on this.

Thanks!

Andy

From: Gregory McLucas (Housing) <Gregory.McLucas@housing.gov.ie>
Sent: Monday 11 November 2024 15:23
To: Andy Bleasdale (Housing) <Andy.Bleasdale@npws.gov.ie>

Cc: Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie>

Subject: RE [REDACTED]

Andy

I refer to [REDACTED]

Thanks

Gregory

From: Andy Bleasdale (Housing) <Andy.Bleasdale@npws.gov.ie>

Sent: Sunday 10 November 2024 13:03

To: Gregory McLucas (Housing) <Gregory.McLucas@housing.gov.ie>

Cc: Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie>

Subject: F [REDACTED]

Gregory,

Thanks in advance,

Regards

Andy

From: Neil Foulkes <neilfoulkes62@gmail.com>

Sent: Monday 21 October 2024 09:00

To: Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie>

Cc: Housing Mos <MOS@housing.gov.ie>; Andy Bleasdale (Housing) <Andy.Bleasdale@npws.gov.ie>;
Sinead Cummins (Housing) <Sinead.Cummins@npws.gov.ie>

Subject: Re: Hen Harrier mitigation CK11-FL0108

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Cliona,

Thank you for your reply.

It is reassuring to hear that the NPWS is engaging with the Forest Service.

My concern with the mitigation applied in CK11-FL0108 goes beyond whether there has been historic nesting activity proximate to the project area. The project is within an SPA and the works are to take place in the future so any past data can only be indicative and not definitive. In such circumstances the DAFM's mitigation should reflect the precautionary principle but does not. It is not for me or anyone else to prove that there will be a significant effect on Hen Harriers as a consequence of this licence, it is for the Minister to demonstrate to a reasonable degree of scientific certainty that there will not. At the theoretical level it permits for the possibility of disturbance which is not conducive to the protection of the conservation interests of the Natura 2000 site. The proposed mitigation is fundamentally inadequate as mitigation in an Appropriate Assessment. This is the main thrust of the BWI Report. There is simply no scientific evidence to validate that the mitigation will ensure that the conservation objectives of the Natura Site are not significantly affected and the Determination of the Appropriate Assessment is unsound. The loss of a single breeding pair for a single season must constitute a significant adverse effect given the precarious conservation status of the species. In a broader context than just disturbance the Appropriate Assessment of this project is inadequate.

I would have no concerns regarding the outcome of bringing a JR against that licence if it was affirmed at appeal by the FAC and if the NPWS will not challenge this decision I will - but it should not be down to me to do this. I don't have a statutory role in terms of nature conservation.

That said, I have been informed by reliable contacts that Hen Harrier were nesting regularly in the proximate Townland of Curraleigh up until 2021. In terms of the restoration objective of the SPA this is significant. My understanding is the SPA currently is not achieving favourable conservation status.

I am also conscious of the broader context that the current exemption under Wildlife Act that permits forestry works during the breeding season is not aligned with the Birds Directive and needs to be modified.

There is a nettle here that needs to be grasped by the forestry sector. They have built a forestry model on a flawed transposition and implementation of EU law. I understand the problem that the sector has in terms of trying to balance protection of breeding birds with protection of water quality. The solution is not deciding which environmental factor can be sacrificed. The solution is to recognise that the forestry model is not a sustainable one. Please bear in mind that improving the biodiversity in commercial plantations will increase the potential for conflict with the Birds Directive if summer clear-felling continues to be permitted on a wide scale. This is not a problem that will diminish in the future. Other activities such as agriculture, fishing, hunting, etc understand and accept the need for seasonal restrictions but not the forestry sector (or only on a selective basis). I can only work as a hedge layer at certain times of year. But a forester who is capable of doing much more environmental damage than me can work 365 days a year unless specifically restricted by a licence condition. The law is back to front and the BWI Report is basically making this point.

Also, I hope that you can address the issue of legacy licences with the FS. These are licences that issued prior to the amendment of the breeding season date back to 1st March. There are many licences in the system (I have identified a number) which are still active until c. 2032 which only have the April 1st restriction even though they are known to be in "Red Zones". All licences issued before a certain date in 2022 have the April 1st date for seasonal restriction. The Minister has previously refused to modify these legacy licences - probably because the Department do not have an easy administrative means of identifying all licences which would need to be changed. That is not an adequate reason to avoid complying with his duties under section 27.

In terms of compliance with Article 27 I would also point out that the FS is issuing extensions to licences without any reconsideration under Article 6(3) of the Habitats Directive. This includes projects that were screened out prior to the decision in People Over Wind - i.e. projects were screened out based on standard mitigation which is not permissible. As an example I point to CN85726, a Forest Road in Kerry. The AA Screening is seriously flawed for this project. A request for an extension of the licence was made on the 6-8-24 and the extension issued a day later. The licence was awarded on 27-5-20. There has clearly been no re-assessment before issuing the extension. I have documentation acquired under AIE to support this. Let me know if you would like me to provide a copy.

I also have evidence that the FS issues extensions to licences that have expired - e.g. CN86685. There is EU case law that indicates that this is not a legitimate act.

I have brought some concerns regarding the assessment of HNVF to Dr Maria Long and I am now also identifying concerns with the ecological approach to the assessment for bats which is not aligned with NPWS Guidance (2022).

Since Peter Sweetman, Save Leitrim and myself brought Judicial Reviews against a number of decisions of the FAC they have, since November 2022, only affirmed one decision of the Minister of a third party appeal. They now understand that the Department is not issuing decisions that are legally robust. The other 106 decisions have either remitted or cancelled the Minister's decision. Most of these are based on flawed AA or EIA Screening assessments. This is a statistic that does not get the publicity that it deserves. It demonstrates the systemic problems in the FS of which Hen Harrier conservation is but a small part.

On the subject of the NIS for CK11-FL0108 - it is signed as being completed by Coillte on the 19-6, which is within the window of consultation, but it does not appear on the FLV until the 5th July, after the window has closed. Information acquired under AIE indicates that Coillte submitted the NIS to DAFM in June (no date available).

In my view Coillte should be submitting their Pre Screening Report / NIS's with their applications. There are examples of NISs being available to the NPWS during the consultation window and these have resulted in some excellent bespoke submissions - CK26-FL0061 being a very good example. The Department failed to have due regard for the submission and just applied their standard mitigation. This licence has been appealed and relied heavily on the NPWS submission in the grounds of appeal. I will let you know the outcome.

Regards, Neil

On Fri, Oct 18, 2024 at 11:06 AM Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie> wrote:

Dear Neil,

Thank you for your email; I can assure you that we are bringing these matters to the Forest Service, both in terms of the broader issues you raise, and also specifically about how the referral process between us works, in terms of, for example, the timing of the sharing of NISs. We are also working with the national survey partners (Golden Eagle Trust, Irish Raptor Study Group and Birdwatch Ireland) to ensure the Forest Service can get access to more up to date and more extensive nesting location data, as they are keen to do so they can act on it.

I am not in a position to confirm to you whether NPWS will appeal this specific decision, as the specifics of it would need to be examined first, but I have forwarded your concerns on to the Forest Service this morning. We are also checking about the proximity of nest sites based on most recently available information to us and will share that with the Forest Service if we find there is a proximate nest.

If you have any verified data about a nest in this location, please do share it with us, or any data that we might be able to get NPWS staff in the area to verify.

Kind regards
Cliona

From: Neil Foulkes <neilfoulkes62@gmail.com>

Sent: Friday 18 October 2024 09:13

To: Sinead Cummins (Housing) <Sinead.Cummins@npws.gov.ie>; Cliona OBrien (Housing) <Cliona.OBrien@npws.gov.ie>

Cc: Housing Mos <MOS@housing.gov.ie>; Andy Bleasdale (Housing) <Andy.Bleasdale@npws.gov.ie>

Subject: Hen Harrier mitigation CK11-FL0108

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Sinead, Cliona,

This is the mitigation now being applied by FS for Hen Harrier in 'Green Zones' (non Red Zone or HLNA). For the example identified it is the only mitigation in the AA.

"In relation to Hen Harrier, the following mitigation is required, presented in the form of conditions to be attached to any licence issued: 1. The site of this project lies within a Special Protection Area where hen harriers are a qualifying interest. If hen harrier breeding activity is identified within 1.2km of the project area, the National Parks & Wildlife Service should be notified immediately. If this activity is confirmed the Department will be informed and the licence amended to reflect this new status."

Any AA Determination based on this mitigation would have no chance of standing up in a court of law.

Who is going to identify any breeding activity? It does not rely on any monitoring or surveying to detect breeding birds.

It does not require the suspension of work pending confirmation of breeding activity - the complete opposite of the precautionary principle.

It does not exclude the possibility that birds could be nesting or seeking to nest in proximity to the site whilst works are ongoing. If birds are breeding, the mitigation permits disturbance.

In the event of breeding behaviour being reported it requires a process before the licence is amended. This period alone permits for the possibility of damage, destruction or disturbance.

It does not assess the restoration objective of the SPA in terms of re-stocking the site (which is with 90% Sitka Spruce).

You will be able to check for yourselves how close this project area is to a recorded nest site.

This is only scratching the surface of grounds that would be brought before the court. I could go on but I am sure that you can see the inherent inadequacy of this mitigation. It flies in the face of the findings of the BWI report commissioned by Coillte and commented upon extensively by the NPWS.

This mitigation would have been agreed by DAFM's Mitigation Review Group - it is not the work of an errant ecologist. This is systemic and is a further breach of duty by DAFM of their responsibility under Section 27 of the BNHR's.

This is not a one-off incident. This is now standard mitigation for Green Zones / Non Red Zone / Non HLNA within the Hen Harrier SPA network.

I am imploring the NPWS to appeal against a decision of the Forest Service to lay down a marker that this irresponsible attitude to the conservation of this species will not be tolerated.

What is the point in developing a MoU with Coillte when they are complicit in this process. The mitigation in the Coillte NIS states;

" Using the best scientific data available to Coillte, potential disturbance to breeding hen harrier is not considered likely and potential disturbance operation(s) associated with this project can take place during the hen harrier breeding season.".* "Not likely" does not exclude the possibility and does not meet the strict test of Article 6(3).

* 2019 as far as I am aware, so about 5 years out of date - no competent ecologist would rely on such out of date information. No attempt by Coillte to seek input from NPWS or any of the specialist Raptor groups.

Please note that Coillte's NIS was not available to the NPWS staff member who produced the submission. By an agreement between DAFM and Coillte, NIS's are not supplied by Coillte to DAFM until the consultation window has closed. NPWS were given an 8 week period from the 1st May to make a submission. The NIS was published on the licence viewer on the 5th July, days after the consultation window closed. The NPWS were intentionally deprived of an opportunity to view the NIS during the consultation period.

Can you please confirm that the NPWS will act on this matter? I would appreciate a prompt response as I am trying to raise the funds to appeal against this licence.

If you are not prepared to act then I will have to go directly to Europe. I think that I have brought enough material to you to demonstrate that the Forest Service is not compliant with their duty.

Yours sincerely, Neil Foulkes