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31st January 2019

An Taisce wish to make the following submission on the Implementation of Section 7(1) of the Heritage Act 2018

An Taisce welcome the opportunity to take part in this public consultation on the Implementation of Section 7(1) of the Heritage Act 2018 Burning Regulations. We would like to raise the following issues.

1.0 Preliminary Issue

1.1 Constitution Article

Article 15.2.1 of the Constitution provides "*The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State*." It is therefore established in the constitution that it is for the Oireachtas to establish the principle and policies of legislation, and it may delegate administrative, regulatory and technical matters.

An Taisce submits that the current draft form of the Wildlife (Burning of Vegetation) Regulation may be considered unconstitutional for the reasons set out below.

1.2 The Statutory Scheme

1.2.1 The Wildlife Act, 1976

The statutory scheme is the Wildlife Act 1976. The long title is described as:

> "***An Act for the conservation of wildlife (including game) and for that purpose to protect certain wild creatures and flora****, to enable a body to be known in the Irish language as an chomhairle um fhiadhulra and in the English language as the wildlife advisory council to be established and to define its functions, to enable certain other bodies to be established to provide or administer certain services, to enable reserves and refuges for wildlife to be established and maintained, to enable dealing in and movement of wildlife to be regulated and controlled, to make certain provisions relating to land, inland waters and the territorial seas of the state, to amend certain enactments and to make other provisions connected with the foregoing*." (Emphasis Added)

Section 2(1) provides the following relevant definitions:

> *"conservation" includes management and regulation of the use of land in relation to the interests of wildlife and, where appropriate, development and improvement of land having regard to those interests;*

> *"fauna" means all wild animals (both aquatic and terrestrial) and includes in particular wild birds, wild mammals, reptiles, non-aquatic invertebrate animals and amphibians, and all such wild animals' eggs and young, but in relation to fish or aquatic invertebrate animals (or their eggs or spawn or brood or young) only includes fish and such aquatic invertebrate animals which are of a species specified in regulations under section 23 of this Act which are for the time being in force;*

"flora" means all plants (both aquatic and terrestrial) which occur in the wild (whether within or outside the State) and are not trees, shrubs or other plants being grown in the course of agriculture or horticulture and includes in particular lichens, mosses, liverworts, fungi, algae and vascular plants, namely flowering plants, ferns and fern-allied plants and any community of such plants;

"wildlife" means fauna and flora;

Section 40 (1)(a)(b) the Act provides that "*40. —*

"(1) (a) It shall be an offence for a person to cut, grub, burn or otherwise destroy, during the period beginning on the 1st day of March and ending on the 31st day of August in any year, any vegetation growing on any land not then cultivated.

(b) It shall be an offence for a person to cut, grub, burn or otherwise destroy any vegetation growing in any hedge or ditch during the period mentioned in paragraph (a) of this subsection".[1]

Section 40(2) provides eight circumstances where the provisions of section 40(1) do not apply. Notwithstanding these eight circumstances, section 40(2) provides that "*this subsection shall not operate to exclude from subsection (1) of the section anything done by burning*".

[1] Substituted (12.03.2001) by *Wildlife (Amendment) Act 2000* (38/2000), s. 46(a), S.I. No. 71 of 2001.

1.2.2 The Heritage Act 2018

The Heritage Act 2018 is described to "*amend and extend the Wildlife Act 1976, the Canals Act 1986 and the Heritage Act 1995 and to provide for related matters*". Section 7 of the 2018 Act provides for the destruction of burning of vegetation on uncultivated land.

Section 7(1) provides the following:

> **"***Notwithstanding section 40 (as amended by the Inland Fisheries Act 2010) of the Act of 1976, the Minister may make regulations, in relation to land referred to in that section, to allow the burning of vegetation during such period or periods during the month of March of such year in such part or parts of the State as specified in the regulations,* ***subject to such conditions or restrictions specified in the regulations to ensure the protection of fauna or flora***." (Emphasis Added)

1.2.3 The Wildlife (Burning of Vegetation) Regulations 2018

In exercising the powers conferred upon the Minister under Section 7(1) of the Heritage Act 2018, the Minister for Culture, Heritage and the Gaeltacht has proposed the Wildlife (Burning of Vegetation) Regulations 2018. The articles within the proposed draft Regulations provides:

> *1. Vegetation may be burned in those parts of the State set out in Schedule 1 during the periods during the month of March set out in that Schedule.*

2. For the protection of fauna and flora, any burning of vegetation carried out in accordance with these Regulations shall be carried out taking account of the Best Practice Guidelines set out in Schedule 2 of these Regulations.

1.3 Constitutional issues

Firstly, An Taisce considers that Article 7(1) of the Heritage Act 2018 gives excessive legislative powers to the Minister to establish regulations that modify primary legislation, which can be considered ultra vires.

Secondly, without prejudice to the above point, it must be implied that the making of the Regulations by the Minister as is prescribed under s.7(1) of the Heritage Act 2018 is subject to such conditions or restrictions specified in the regulations **to ensure the protection of fauna or flora.** The current form of the provisions set out under the Wildlife (Burning of Vegetation) Regulation lack the necessary level of detail to ensure the protection of flora and fauna (see below sections for further detail).

The ambiguity of the proposed regulations is such that its adaptation in its current form provides for the burning of vegetation during March which has the potential to cause damage to fauna and flora, thus contravening the provisions of s.40 of the Wildlife (Amendment) Act 2000 and s.7(1) of the Heritage Act 2018. The adoption of the Regulations in their current form may be an impermissible intervention by the Minister pursuant to the powers of making regulations vested in her by s.7(1) of the Heritage Act 2018. Having regard to this point, An Taisce notes the judgement of Finlay C.J. in **Harvey v. the Minister for Social Welfare** where it was held that "*for the Minister to exercise a power of regulation to him by these Acts so as to negative the expressed intention of the legislature is an unconstitutional use of power vested in him*".

2.0 Compliance with EU law obligations and the Aarhus Convention

The Draft regulations and associated Best Practice Guidelines ("**BPG**") on the matter of the proposed burning in March are not adequate for the purposes of compliance with, and/or evidencing compliance a number of EU Law obligations, including:

- Article 6(3) of the Habitats Directive in respect of the regulations themselves, and also in respect of individual proposals to burn;
- Obligations under the EIA Directive in respect of the regulations themselves, and also in respect of individual proposals to burn;
- Obligations under the SEA Directive in respect of the regulations themselves, and particularly in light of recent clarifications by the EU Court of Justice in c-671/16 on the breadth of plans and programmes encompassed by that Directive
- Obligations under the Birds Directive including Articles 1, 2(1), 5(a), 5(d), 9(1) and 9(2)
- Obligations under Article 4 of the Water Framework Directive particularly in light of the clarification from the EU Court of Justice on assessment and derogation requirements in case c-461/13 in relation to consents and the further implications of that for regulations made by the State.
- Obligations under s.15 of the Climate Action and Low Carbon Development Act 2015

An Taisce raises additional concern about the compliance with the Air Quality Directive, (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).

The Minister has also failed to evidence consideration of these, and to provide for the necessary public consultation required in respect of a number of these obligations. The Minister has thus failed to provide for the associated and necessary effective public consultation and has further failed to adequately meet the requirements of Article 7 and 8 of the Aarhus Convention.

An Taisce wishes to preface our further remarks by highlighting that: The Minister cannot rely on any deficiency in Irish legislation in respect of these obligations, when she is acting as an emanation of the State, and as Public Authority. In this regard, An Taisce wishes to rely in particular on the clarification provided by the EU Court of Justice in case C-378/17,

(*Minister for Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission),* where the court's judgment declared:

> "*EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law.*"

In short, the implications of this judgment are profound, and require that a public authority to disapply national legislation if it conflicts with EU law, in order to comply with EU law.

An Taisce also note the numerous clarifications by the CJEU not limited to cases commonly referred to as Wells, Boxus and Solvay in respect of the obligations of national courts, and which inter alia clarify the obligation of national courts to take general or particular measures to address a lack of compliance with EU environmental law. These may need to include the suspension, revocation or annulment of unlawful decisions or acts. We note in particular that this also includes the disapplication of legislation and regulatory acts.

It is in that context that our remarks below should be considered. These are made in the interests of ensuring the Department does not advance regulations which are non-compliant with Ireland's legal obligations, and which most particularly fail to address adequately obligations in respect of Natura 2000 sites for which the Minister has a particular responsibility.

In either scenario a) or b) below where the Draft regulations are being proposed:

a) For the current year with the particulars of the dates and location of the burning to be completed by the Minister on making the regulations, or

b) As a generic set of draft regulations which will act as the format for all such future regulations, with the particulars of the dates and locations of the burning to be completed by the Minister each time on the making of any such regulations.

We submit that the draft regulations fail to comply with Ireland's obligations in respect of a number of EU Directives. The failures and concerns are in respect of specific screening and

assessment obligations arising, and also the associated consultation obligations for those assessments are addressed below.

2.1 Article 6(3) of the Habitats Directive (Appropriate Assessment)

Article 6(3) of the Habitats Directive provides:

> " ***Any*** *plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4 , the competent national authorities shall agree to the plan or project only*" **[An Taisce emphasis]**

We submit this obligation needs to be considered in respect of the regulations themselves, and in respect of individual burnings, as outlined below.

2.1.1 AA obligations of the regulations themselves

An Taisce submits that there is no basis to limit the ambit of the term "any" in Article 6(3) in its preface to "plan or project". Thus, the Minister's regulations are themselves a plan (or project) and thus trigger the Art. 6(3) requirements, and should be subject to AA screening, as it would seem they arise in circumstances which are not necessary for the management of Natura 2000 sites. This is very clearly so where the burning is to be done outside Natura 2000 sites but still may impact upon them. It is only reasonable to conclude that any such screening will result in the requirement for an AA to be done on the regulations themselves.

The Minister then needs to satisfy herself with the requisite degree of scientific certainty that her regulations will not give rise to an adverse impact on the integrity of Natura 2000 sites. Some, but not all, of the considerations the Minister would therefore need to address would be:

1. Given the very limited provisions in the Minister's draft regulations and Best Practice Guidelines, and the lack of effective controls therein, An Taisce submits that it would be impossible for the Minister to conclude beyond reasonable doubt that the regulations will not have a likely significant impact on the Natura 2000 sites. Therefore she will be obliged to make her regulations much more specific and robust in each instance and in respect of all Natura 2000 sites which could be impacted, and in accordance with Art. 6(3).
2. The Minister would be obliged to consider the practicalities and efficacy of enforcement to ensure compliance with the legal obligations in Natura 2000 sites, and in respect of burning in sites which are not Natura 2000 sites but which could be impacted.
3. The Minister would also be obliged to fully consider the requirements she would need to apply under the Habitats Directive obligations to protect the conservation objectives and status of the habitats and species involved, and how cumulative considerations are considered.
4. The Minister would need to be mindful of the potential conflict of interest in conducting an Appropriate Assessment on her own regulations.
5. Any AA would be required to undergo public consultation

2.1.2 AA obligations of the regulations themselves

While there has been some consideration of AA obligations in the BPGs for specific burnings, the guidelines seem to be limited to the consideration of burning and AA obligations only within SACs and SPAs, as outlined in the Best Practice document: "*Is the area that is to be burnt designated?*"

Clearly however, the burning does not need to be undertaken in an SAC or SPA for it to have a likely significant effect on an SAC or an SPA, or indeed an adverse effect on the integrity of the site. For example, the burning could potentially result in ash deposition, or lead to soil erosion, with concomitant run off into water courses, thus impacting on Natura sites. In addition, smoke and the impact of the fire could cause serious disturbance to species in adjacent SACs and SPAs.

An Taisce submits that the BPGs are totally inadequate in respect of addressing AA obligations, and we would also express serious concern that the regulations only require the BPGs to be "*taken account of*". We submit that the screening obligations of Art. 6(3) of the Habitats Directive cannot be excluded for any burning project, and the regulations must be clear in respect of this. The regulations should be more explicit and prescriptive in respect of compliance with other EU law obligations in any burning undertaken, including Habitats, Birds Directive, EIA, SEA, WFD and Air Quality Directive.

The Guidelines also fail to properly set out the relevant tests in respect of AA. They state incorrectly:

> *"There are issues to consider when it comes to the use of controlled burning for managing heather – the land itself being one of the most important. Is the area that is to be burnt designated? Article 6.3 of the EU Habitats Directive* ***states that where a plan or project is likely to have a significant negative impact on a Natura 2000 site, then this cannot proceed except in very limited circumstances.*** *To enable a determination to be made by DCHG or DAFM, all the available information should be collated in advance to enable a screening assessment to be undertaken. In certain circumstances, a Natura Impact Statement may be requested from the applicant,* ***if it is deemed that an Appropriate Assessment (AA) is required to determine the likely effect of the burning activity."*** **[An Taisce emphasis]**

However, An Taisce would highlight that Article 6(3) of the Habitats Directive outlines that the requirement for an AA is where there are "likely significant effects", not impacts, as outlined above. We would also highlight that the test of "*adverse impacts on the integrity of the site*", is in fact the test which determines whether the project must be refused, unless it can proceed by meeting the requirements of Article 6(4).

The passage from the Guidelines included in italics above also fails to impress that these are binding national and EU legal requirements. As such, we submit that it is not appropriate to preface this as merely an "*issue to consider*". This section in the

Guidelines on legal requirements also fails to reflect the requirements in respect of SPAs.

2.2 Floral Protection Orders, (FPO)

The Draft regulations fail to consider provision in respect of any Flora Protection Orders which might apply in the areas to be specified for the removal of the burning ban.

2.3 EIA Directive

The obligations in respect of Environmental Impact Assessment ("**EIA**") arise for burning consequent on at least two considerations:

Firstly, it is a project listed under Annex II of the EIA Directive

"1. AGRICULTURE, SILVICULTURE AND AQUACULTURE

(a) Projects for the restructuring of rural land holdings;"

It is submitted that the regulations constitute a project, as defined in (a) above, and as such this alone should be enough to trigger the screening obligations under Article 4 of the EIA Directive.

Secondly, and without prejudice to the above, burning in the context of that proposed in the regulations, either collectively or in its individual occurrences, constitutes an intervention "*in the natural surroundings and landscape*". As such, in our considered opinion that burning falls within the definition of projects encompassed by the Directive as defined in Article 1 (2) (a):

'2. For the purposes of this Directive, the following definitions shall apply:

(a) "project" means: - the execution of construction works or of other installations or schemes, - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"

This argument is supported by the judgement in case c-50/09 (Commission v Ireland), where Ireland argued that demolition was not a project for the purposes of the Directive, as it was

not listed in Annex I or II (para 90 refers). However the Court in its findings clarified at the outset that:

> "*As regards the question whether demolition works come within the scope of Directive 85/337…..**it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'."*** [An Taisce emphasis]

The Court went on to conclude that demolition was in fact a project for the purposes of the Directive and that Ireland had failed in respect of its obligations. Following the same logic it is submitted that burning would be encompassed, notwithstanding that it is already captured at least within Annex II 1 (a).

In light of the scale of burning envisaged, An Taisce submits that it is not conceivable that the Minister could safely determine there are no likely significant effects from burning, and thus EIA obligations in full should be triggered. The Minister is thus now *inter alia* obliged to publish her screening decision under Article 4(5) and has failed to do so.

In the context of the obligations arising for anyone proposing to execute the burning, the Minister's draft regulations and BPGs entirely fail to make this legal requirement clear to the public, and as stands it conveys the impression that so long as the burning is confined to areas and times specified and are done "*taking account of the Best Practice Guidelines set out in Schedule 2 of these Regulations*.", that that is sufficient. In this regard Ireland will have failed in its fundamental obligation to adopt "*all measures necessary*" to ensure compliance with the obligations under the EIA Directive, as required by Article 2(1) of the Directive:

> "*Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment.*"

It is notable in this regard that the BPGs have a section entitled "*Satisfying Legal Requirements*". That section highlights the obligations in respect of notifications in proximity to Forests, and Appropriate Assessment obligations in respect of SACs, and other liability and health and safety considerations. However the obligations in respect of EIA are entirely omitted. This selective and exclusive approach significantly misdirects the public in regard to the full breadth of the legal requirements. The Minister's regulations should be explicit that the permission to burn is contingent on compliance with a comprehensive list of other legal requirements. This includes the requirement to consider cumulative impacts in the context of EIA screenings.

Finally, it is highlighted that, as previously mentioned, the regulations only require the Best Practice guidelines to be "*taken account of*" which is clearly not appropriate in this context, nor in relation to the legal obligations arising under a multitude of EU laws, which are largely omitted from the Minister's regulations and Guidelines.

2.4 Water Framework Directive (WFD)

The issue of run off to rivers, streams and other water bodies including ground water, as a result of burning has not been adequately addressed, as required under Article 4 of the Water Framework Directive.

2.5 SEA Directive

It is submitted that the Minister has failed to comply with the obligations of the SEA Directive in respect of the assessment of the Regulations. This is particularly in light of the recent clarification of the CJEU in c-671/16[2] on the definition of plans and programmes in Article 2, which should then be considered under Article 3 of the Directive. Clearly, given the arguments outlined in the sections on EIA and AA above, the provisions of Article 3 of the Directive are triggered.

[2]http://curia.europa.eu/juris/document/document.jsf?text=&docid=84209&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9379363

3. The rationale for burning in March

An Taisce has repeatedly called for the scientific evidence underlying the decision to extend the burning season in to March. To date, the Minister has failed to provide the scientific data which underpins her assertion that the changes to the Wildlife Act will not impact on birds or other wildlife, despite scientific evidence to the contrary. The proposal to permit burning in March will endanger birds just starting to breed[3456], such as the iconic and globally-threatened Curlew and the declining Hen Harrier[7], and there is no clear evidence that it will prevent wildfires later in the closed season. The Bill proposes a 2 year 'pilot' period, with the provision of a review and potential continuation by Oireachtas approval after this. This pilot has no scientific basis, as no baseline research has been done to determine bird nesting times prior to the implementation of the legislation, and as such the impact cannot be measured.

In a submission by the DAFM (2015) [8] to the NPWS consultation on the changing of burning dates, they highlighted the need for scientific evidence:

> '*the introduction of different closed periods for burning….should also take in to account the best available scientific evidence and practical implementation issues*.'

An Taisce would argue that no scientific evidence, nor rationale for the changed burning dates have been presented in the consultation documents. The regulations as laid out do not include any indication of the circumstances under which burning would be allowed, or what enforcement measures will be utilised.

Again, as outlined in the DAFM's submission:

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[3] 23 Henderson, I.G., Fuller, R.J., Conway, G.J. & Gough, S.J. (2004). Evidence for declines in populations of grassland-associated birds in marginal upland areas of Britain. Bird Study 51: 12-19 24

[4] Moss, D., Joys, A.C., Clark, J.A., Kirby, A., Smith, A., Baines, D. & Crick, H.Q.P. (2005). Timing of breeding of moorland birds. BTO Research Report, 362. Thetford

[5] Smith. A. A, Redpath. S. M, Campbell S.T , Thirgood. S. J. (2001). Meadow pipits, red grouse and the habitat characteristics of managed grouse moors. Journal of Applied Ecology 38: 390-400

[6] Tharme. A. P, Green. R. E, Baines. D, Bainbridge I. P, O'Brien M. (2001). The effect of management for red grouse shooting

[7] https://www.bto.org/volunteer-surveys/nrs/results/nrs-preliminary-results-2016

[8] https://www.npws.ie/sites/default/files/files/DAFM.pdf

'any measures to extend the burning season should be supported by suitable measures aimed at enhancing enforcement of relevant regulations on the ground'

Given the poor enforcement and application of penalties for unregulated burning in Ireland to date, An Taisce would submit that the lack of any such enforcement or penalty framework for burning in March is a major oversight, and will further exacerbate the problem of illegal burning, which is already an issue in much of Ireland's uplands, to the detriment of our protected upland SAC habitats and species.

In addition, the absence of specific dates detailed in the Draft Regulations that:

"reasonable opportunity would not have been afforded to persons to burn vegetation during the period XXX to YYY having regard to pervading weather conditions"

adds further to the lack of clarity for the Minister in making these regulations.

4. No provision of Schedule 1

An Taisce would highlight that Schedule 1 was not provided as a part of this consultation, thereby making it impossible to assess the impact of these regulations given that there is no indication of where burning will be allowed under the proposed change. As such, this consultation process does not provide for adequate public participation, and cannot be considered to be "effective" , as required in respect of obligations on public participation for the Minister in making these regulations in accordance with Article 7 and 8 of the Aarhus Convention

In addition, there are no clear statutory controls over the content and changes to the content of the Best Practice Guidelines for Burning Management provided in the Consultation. So the content may vary from year to year, particularly in light of pressures for greater leniency.

5. Lack of clear permission/licencing system with qualified operatives

It is not clear from the consultation documents under what circumstances burning within March will be allowed, nor in what areas due to the absence of Schedule 1. From the regulations, it would appear to be a carte blanche to all landowners within the Schedule 1 areas to burn in March, under the proviso that the burning is carried out taking account of the Best Practice Guidelines. However, An Taisce would submit that any burning which is allowed within March must be clearly justified using verifiable data/metrics, and should only be permitted on a limited case by case, carefully licenced system. The DAFM (2015) [9] made similar calls in their submission to the NPWS on changing the burning dates:

> *'derogations should be considered during the closed period under licence, and only where there are other overriding issues of public interest, or valid scientific or civil protection requirement…or where weather conditions under the preceding open season have not been suitable for planned prescribed burning'*

An Taisce would highlight that it would appear that the only requirement for burning in the non-Natura 2000 Schedule 1 areas in the month of March is that written notice is given to the Gardai and to Coillte. This process should be far more highly regulated, along the lines for what is suggested by the DAFM's Forest Service[10] for controlled burning:

> *`A written burning plan should be prepared for this purpose. This plan should include details of where and when it is proposed to burn, and descriptions of the conditions under which it is proposed to carry out the burning. The plan will also include the objectives of burning and details about the available levels of access, personnel, equipment, communications and health and safety precautions'*

In addition, the guidelines say this in relation to personnel carrying out controlled burning:

[9] https://www.npws.ie/sites/default/files/files/DAFM.pdf
[10] Forest Service (2012) Prescribed Burning Code of Practice – Ireland https://www.agriculture.gov.ie/media/migration/forestry/firemanagement/CofPPrescribedBurningFinal90212.pdf

'Prescribed burning should only be carried out by an appropriate number of personnel with ***adequate training, knowledge and experience in managing safe, controlled burning operations****. Prescribed burning has been described as both an art and a science. The science of fire behaviour is well established, but the art of controlled burning can only be learned by personal experience on the ground. Where the majority of landowners are concerned, it is recommended that supervision of prescribed burning should be* ***entrusted to experienced practitioners****, who have the knowledge required to burn safely and properly'* [An Taisce emphasis]

Although the best practice document provided does reference the need for experienced operatives, it does not specify what level or type of experience these operatives should have, nor the need to verify the operatives experience in advance of a planned burn. An Taisce submits that given the high risk of wildfires should a planned fire get out of control, there should be a register of qualified practitioners skilled in carrying out controlled burning who should be employed in any burning outside the September-February closed season. It is our understanding the there is only a limited number of such qualified people currently working in Ireland.

6. Focus on single species

The provided best practice guidelines do not refer to burning anything other than heather (Calluna), when the upland scrub clearly comprises far more species. As such, there is no recognition of alternative methods for dealing with scrub, such as by mechanical removal.

It has been clearly outlined in the DAFM document 'Prescribed Burning Code of Practice – Ireland'[11], that:

'*Carefully planned mechanised removal is more effective than fire for long term control of gorse and may be more cost effective in the long run*.'

[11] Forest Service (2012) Prescribed Burning Code of Practice – Ireland https://www.agriculture.gov.ie/media/migration/forestry/firemanagement/CofPPrescribedBurningFinal90212.pdf

In addition, it does not recognise the complications arising from burning species other than heather, including upland grass species, such as Molinia. This species can be very problematic for fire control due to its propensity to spread burning windborne fragments in windy conditions.

Complications also arise when dealing with gorse, again as outlined by the DAFM in the Best Practice guidelines:

> *'Attempts at burning extensive areas of gorse/furze or broom scrub/scrubland will be difficult to control, and should not be attempted without significant advance preparation of firebreaks and other control measures such as mechanised treatment. The presence of significant areas of gorse (furze/whin) may present a barrier to using prescribed fire on some sites to all but the most experienced of practitioners'*

The latter point again highlights the need for a very experienced burning practitioner, as outlined above.

We submit that unless burning within March is to be limited to just heather, the regulations and best practice must address the complications, requirements and alternatives to burning across various species and situations, and the high level of expertise which will be required.

7. Birds Directive Obligations

The Minister's regulations fail to comply with obligations arising under Art 1, 2(1), 4, 5 and 9 of the Birds Directive. The objective of the Birds Directive is the protection for all "*naturally occurring wild birds*" (Article 1(1)), and Article 1 (2) extends this to their habitats. We submit that the Minister has compromised her obligation to this objective in making the regulations, as she has failed to adequately, or indeed at all, comply with her obligations under Article 2(1), and to ensure the requirements of Article 5(a) and (d) and Articles 9(1) and (2) are complied with. In addition, in our considered opinion, she has failed to provide for the level of protection afforded under Article 4 of the Birds Directive when read in conjunction with Article 7 and 6(3) of the Habitats Directive, as is set out in the section of this submission

dealing with Appropriate Assessment. Pursuant to Article 2(1) Member states have a mandatory obligation to:

> *"take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."*

It would appear that the Minister has failed to comply with Article 2(1), and has not secured the necessary information to support such an assessment. Additionally, Article 5 provides for specific prohibitions in respect of all wild birds including requiring the Member State to implement a system of general projection specifically prohibiting:

> *"(a) deliberate killing or capture by any method;" and*
> *"(d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;"*

These regulations have entirely failed to highlight the obligation on any person intending to conduct burning the need to comply with these obligations.

Both the Habitats and the Birds Directives require the protection of certain species across the EU, both within and outside Natura 2000 sites, to ensure their conservation across their natural range within the EU, which includes all naturally occurring wild bird species. Under Article 3 of the Birds Directive, Member States are required to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the wild bird species in the European territory. This requirement includes habitat protection measures outside the Natura 2000 network.

Burning in March poses a serious risk to many bird species, but is particularly pertinent for early nesting species, such as the Hen Harrier, which begin their breeding activities in

March[12]. Hen Harriers (*Circus cyaneus*) are a protected raptor, listed in Annex I of the EU Birds Directive and as such, Member States are obligated to protect and conserve the species.

In the latest census a substantial proportion of Ireland's Hen Harriers were found roosting and foraging outside designated SPAs. Hen Harriers forage and nest in scrub, and as such upland burning after they have begun their breeding poses a huge risk. This lends further weight to our argument that burning the uplands during March should be strictly licenced on a case by case basis. The NPWS hold sensitive information on the roosting sites of Hen Harriers, and through a licensing regime thorough consideration can be given to ex-situ Hen Harrier roosting and foraging sites before any burning is permitted. To fail to do this would further threaten this endangered species, and thus place the Irish Government in contravention of the Birds Directive, as outlined above.

In addition, although the Birds Directive provides for certain derogations under Article 9, it does not seem that Ireland can safely argue that it meets the condition for these derogations, should the Minister wish to do so:

> *"Article 9*
> *1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution,*
> *for the following reasons:*
> *(a) — in the interests of public health and safety,*
> *— in the interests of air safety,*
> *— to prevent serious damage to crops, livestock, forests, fisheries and water,*
> *— for the protection of flora and fauna;*
> *(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;*

[12] https://www.bto.org/volunteer-surveys/nrs/results/nrs-preliminary-results-2016

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations referred to in paragraph 1 must specify:

(a) the species which are subject to the derogations;

(b) the means, arrangements or methods authorised for capture or killing;

(c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out."

8. Climate change

Any changes to legislation must be cognisant of Ireland's obligations to reduce our carbon emissions under the Paris Agreement, and with regard to s.15 of the Climate Action and Low Carbon Development Act 2015. The choice of burning over any alternative methods of scrub control will clearly increase our carbon emissions, in addition to increasing air pollution. This is particularly pertinent when it comes to allowing for burning in March, as outlined in the DAFM submission[13] on burning

'Climate change also needs to be considered…the impact of allowing burning during drier periods can have a significant impact on the release of carbon.'

[13] https://www.npws.ie/sites/default/files/files/DAFM.pdf

9. Summary

An Taisce submits that, in their current format, the draft regulations may be interpreted as being unconstitutional, and are likely to contravene the Wildlife (Amendment) Act 2000; the Heritage Act 2018; the Birds and Habitats Directives; the EIA, SEA and WFD Directives; the Climate Action and Low Carbon Development Act 2015 and the Aarhus Convention. The Minister cannot rely on the Guidelines as they are incomplete in addressing even the basic legal requirements which need to be satisfied, not limited to: proper consideration of circumstances triggering Appropriate Assessment Obligations under Art 6(3) of the Habitats Directive, but also EIA, WFD and Birds Directive obligations.

The provided consultation documents provide no clear regulations to adequately control upland burning. In addition they still lack the rationale for allowing this extension of the burning period, or the circumstances under which this burning will be permitted, or indeed the locations of this permitted burning. This lack of an appropriately nuanced approach is of particular concern, and most particularly in light of the fact the Draft Regulations merely propose the permitted burning is are carried out "taking account of" the guidelines. They have entirely failed to provide clearly for binding protections and conditions.

An Taisce submits that the provided consultation documents are not only too ambiguous to allow for the protection of Ireland's species and habitats, this ambiguity also undermines the ability for the public to fully participate. There is a real and valid concern that the Minister's approach will serve to misdirect the public as to what they are entitled to do, given the partial and incomplete coverage of obligations a prospective "burner" needs to consider.

Is mise le meas,

Elaine McGoff, PhD

Natural Environment Officer,

An Taisce- The National Trust for Ireland.