

## **BirdWatch Ireland**

### **Submission to the consultation on the Draft Wildlife (Burning of Vegetation) Regulations 2018 and Draft Best Practice Guidance for Burning Management.**

#### **1.0 Introduction**

From the time of our submission on the Review of Section 40 of the Wildlife Act through to the debates on the Heritage Bill in the Seanad and the Dáil and based on the best available scientific evidence, BirdWatch Ireland has opposed the proposal to extend the period for burning due to concerns with the potential for serious, negative impacts to breeding birds. The establishment of a forum of stakeholders to address the issues relating burning and to tease out the agricultural policy needs for our uplands and the farmers who manage them was called for instead but this call was denied. This is unfortunate as we are not confident that the Heritage Act provisions to allow burning in March will stop the out-of-control fires which dominate headlines every Spring. BirdWatch Ireland is also concerned with existing issues relating to regulating burning as an activity in the uplands. Neither the draft regulations or the draft Best Practice Guidelines as they stand provide confidence that this situation will improve. In fact, we are concerned that the situation for upland birds could worsen. In this submission BirdWatch Ireland addresses both the regulations and the guidance document, beginning with the former. In advance an overview of the ecological status of upland habitats, sites and selected bird species is provided.

We suggest several recommendations in this submission at the end of the document but foremost is that a licensing system is required for burning consents in the open period (September 1-Last day in February), for lands both within and outside of Natura 2000 sites, for impacts on breeding birds and indeed for those landowners who will use the 'adverse weather concession' to burn in March.

#### **2.0 Overview of the impacts of Burning in Ireland.**

Burning has had a significant impact on fragile habitats of uplands, lowland hills and wildlife in Ireland. Burning can destroy nests, eggs and kill chicks and other wildlife that cannot move out of a fire's way. Out-of-control fires have destroyed carbon stores of blanket bogs and released carbon into the atmosphere. They have destroyed properties and threatened lives. Small patch burning for conservation can help create suitable habitats for upland birds. However, upland burning in Ireland is undertaken mainly to increase the type of vegetation which is more palatable and accessible to livestock or sometimes to clear 'gorse' to increase the amount of 'productive farmland' as eligible for the Basic Payment under the Common Agriculture Policy.

The Review of Section 40 of the Wildlife Act shows that 141 of the 181 submissions highlighted the issue of burning. These submissions were analysed by BirdWatch Ireland staff. Of these, 94 of the 141 (67%) were concerned with damage caused to biodiversity, wildlife protection and habitat conservation.

- 38 of the 94 (40%) wanted burning banned completely.
- 56 of the 94 (60%) did not want any change to the current closed season. Of these, some wanted changes only if ecological research determined it would benefit the environment, and this then includes changes to extend the closed season.
- 44 of the 141 (31%) wanted to shorten the closed season.
- The analysis also identified that many people wanted better enforcement of the law, an end to uncontrolled burning and an end to land mismanagement.

Despite the significant concerns raised in the submissions and in subsequent provision of information during the Heritage Bill debates about the impacts of uncontrolled burning on wildlife and habitats, the Department of Culture, Heritage and the Gaeltacht has proceeded to extend the open period for burning in March for two years at least without any provision of a scientific justification or evidence to show that this extension will result in better conservation of habitats and species or a reduction in out-of-control burning. Indeed, it has been proposed that the extension to allow burning in March will help stem the large fires that were seen over the last few years such as fire in the Cloosh Valley in Galway in 2017. It was also proposed that since there is an extended period for burning in Northern Ireland, the Republic should also allow such flexibility. It is interesting to note though that this lengthy open season for burning has not stopped out-of-control fires in the north. Between January and May 2017 there were 2,231 upland fires in Northern Ireland that the Northern Ireland Fire and Rescue Service had to attend and 511 of these occurred after May 1 after the closed period for burning.<sup>12</sup> In the Republic, the cost to the exchequer to deploy the fire service to attend out-of-control fires in upland mountains and lowland hills between 2010-2015 in 10 counties was €6.1million<sup>3</sup>. There has been a significant impact to public goods and the public purse from illegal and out-of-control burning over the years. We suggest that this money could be better spent on conservation measures which support the uplands and the farmers who farm there.

### 3.0 Current ecological status of upland habitats and species

Most of Ireland's upland mountain areas are also Special Areas of Conservation (SAC) and Special Protection Areas (SPAs) for birds and many of these sites already have unfavourable conservation status due a variety of pressures including the 'high' impact of burning. Over 21,400ha of Natura land (SACs and SPAs) have been burnt between 2011-2016<sup>4</sup> releasing carbon into the atmosphere, degrading habitats, impacting on the species such as the threatened Hen Harrier and globally Red-Listed Curlew that breed in the uplands and impacting on goals to achieve favourable conservation status of habitats as required under the Habitats Directive.

The 2013 Article 17 report on the Status of EU Protected Habitats and Species in Ireland<sup>5</sup> lists burning as one of the pressures and threats to important upland habitats like Blanket Bog, Wet Heath and Dry Heath all of which, nationally, have 'bad' conservation status. The National Survey of Upland Habitats (NSUH)<sup>6</sup> commissioned by NPWS assessed the status of selected upland SACs and while additional sites need to be assessed, the information gleaned formed the basis of Ireland's 2013 Article 17 report on EU protected upland habitats. This survey provides evidence of the impacts of burning on Blanket Bog\* (Code 7130) (\* when active is a priority habitat), Northern Atlantic wet heaths with *Erica tetralix* (Code 4010), and Dry Heath (Code 4030) the majority of which have Bad status. Twelve mountain ranges were surveyed as part of the NSUH. Of these for **seven SACs assessed burning is listed as an impact of high intensity on the status of all of these habitats**

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<sup>1</sup> <https://www.bbc.com/news/av/uk-northern-ireland-39864562/wildfires-burn-in-northern-ireland-countryside>

<sup>2</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/lives-may-be-lost-in-worst-gorse-fires-in-six-years-warns-fire-chief-35698500.html>

<sup>3</sup> BirdWatch Ireland research undertaken through Freedom of Information requests to local authorities.

<sup>4</sup> Data from Irish Government reports to European Forest Fire Information System, Forest Fires in Europe, Middle East and North Africa 2016. EUR 28707 EN, Publications Office, Luxembourg

<sup>5</sup> NPWS (2013). The Status of Protected EU Habitats and Species in Ireland. Overview Volume 1. Unpublished Report, National Parks & Wildlife Services. Department of Arts, Heritage and the Gaeltacht, Dublin, Ireland. Editor: Deirdre Lynn

<sup>6</sup> Perrin, P.M., Barron, S.J., Roche, J.R. & O'Hanrahan, B. (2014). Guidelines for a national survey and conservation assessment of upland vegetation and habitats in Ireland. Version 2.0. Irish Wildlife Manuals, No. 79. National Parks and Wildlife Service, Department of Arts, Heritage and the Gaeltacht, Dublin, Ireland.

and undermines their ability to achieve Favourable Conservation Status (FCS). For Atlantic wet heaths with *Erica tetralix* (code 4010) the report notes that any improvements due to lower grazing levels are likely to be tempered by other ongoing impacts such as unregulated burning. For Dry Heath (Code 4030) **inappropriate burning within sensitive areas of this habitat was recorded at 50% of the sites surveyed by the NSUH**. This is a breach of Article 6.2 of the Habitats Directive which requires that member states avoid the deterioration of habitats.

Information from the NSUH referring to the ‘overall assessment’ (valuation of area, future prospects, and structure and functions<sup>7</sup>) and area of habitat impacted by burning is presented in Appendix 1, shows that only Ox Mountain Bogs cSAC has a ‘favourable’ overall assessment for Dry Heath, in contrast with the rest of the sites surveyed which all present Unfavourable-Bad status<sup>8</sup>. The Comeragh Mountains cSAC stands out presenting a 25%, 20% and 30% of habitats 4010, 4030 and 7130 respectively affected by burning. It is important to note as well that the SACs identified as part of the NSUH are also known to support bird, plant and animal species with various levels of EU protection under the Annexes of the Birds and Habitats Directives including declining breeding Hen Harrier and Freshwater Pearl Mussel and a variety of nonannexed species.

The Article 12 report for the period 2008-2012 on the Status of birds in Ireland states that the **pressure** of ‘fire and fire suppression’ is an impact of high importance and moderate quality for breeding Red Listed Golden Plover<sup>9</sup> (Annex 1 of the Birds Directive) in Ireland. It is of medium importance and moderate quality for breeding Red Listed Dunlin<sup>10</sup> (Annex 1 of the Birds Directive) and of low importance and moderate quality for Amber Listed Hen Harrier<sup>11</sup> (Annex 1 of the Birds Directive). However, the most recent Hen Harrier Survey<sup>12</sup> from 2015 provided further insight into the pressures on Hen Harrier breeding habitat. Uncontrolled burning is listed as a pressure within Hen Harrier SPA’s especially the Sliabh Aughties and Sliabh Beagh. Burning can also negatively impact habitats for the globally threatened Curlew and is identified as a pressure in some Curlew breeding sites in Ireland. A study Quantifying the Impacts of Wildfires in Northern Ireland<sup>13</sup> found that “bird species richness was significantly lower at burnt quadrats than at unburnt quadrats and this was consistent across the three years of survey”. The extended burning period in Northern Ireland has not resulted in a reduction in out-of-control fires impacting on wildlife.

## 4.0 Draft Wildlife (Burning of Vegetation) Regulations 2018

### 4.1 Name of the Regulations

The following points are made in relation to the regulations. In the first instance the regulations should not be called the Wildlife Regulations because nothing in the regulations relates to the

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<sup>7</sup> Perrin, P.M., Barron, S.J., Roche, J.R. & O’Hanrahan, B. (2014). Guidelines for a national survey and conservation assessment of upland vegetation and habitats in Ireland. Version 2.0. Irish Wildlife Manuals, No. 79. National Parks and Wildlife Service, Department of Arts, Heritage and the Gaeltacht, Dublin, Ireland.

<sup>8</sup> Perrin, P.M., Roche, J.R., Barron, S.J., Daly, O.H., Hodd, R.L., & Devaney, F.M. (2014). National Survey of Upland Habitats (Phase 4, 2013-2014), Site Report No. 16: Caha Mountains cSAC (000093), Cos. Cork and Kerry. National Parks and Wildlife Service, Department of Arts, Heritage and the Gaeltacht, Dublin, Ireland.

<sup>9</sup> [http://cdr.eionet.europa.eu/Converters/run\\_conversion?file=/ie/eu/art12/envuvesya/IE\\_birds\\_reports-14328-144944.xml&conv=343&source=remote#A140\\_B](http://cdr.eionet.europa.eu/Converters/run_conversion?file=/ie/eu/art12/envuvesya/IE_birds_reports-14328-144944.xml&conv=343&source=remote#A140_B)

<sup>10</sup> [http://cdr.eionet.europa.eu/Converters/run\\_conversion?file=/ie/eu/art12/envuvesya/IE\\_birds\\_reports-14328-144944.xml&conv=343&source=remote#A466-A\\_B](http://cdr.eionet.europa.eu/Converters/run_conversion?file=/ie/eu/art12/envuvesya/IE_birds_reports-14328-144944.xml&conv=343&source=remote#A466-A_B)

<sup>11</sup> [http://cdr.eionet.europa.eu/Converters/run\\_conversion?file=/ie/eu/art12/envuvesya/IE\\_birds\\_reports-14328-144944.xml&conv=343&source=remote#A082\\_B](http://cdr.eionet.europa.eu/Converters/run_conversion?file=/ie/eu/art12/envuvesya/IE_birds_reports-14328-144944.xml&conv=343&source=remote#A082_B)

<sup>12</sup> Ruddock, M., Mee, A., Lusby, J., Nagle, A., O’Neill, S. & O’Toole, L. (2016). The 2015 National Survey of Breeding Hen Harrier in Ireland. *Irish Wildlife Manuals*, No. 93. National Parks and Wildlife Service, Department of the Arts, Heritage and the Gaeltacht, Ireland

<sup>13</sup> Kelly, R., Boston, E., Montgomery, W. I. & Reid, N. (2016) Quantifying the impact of wildfires in Northern Ireland: Final Report 2016. Report prepared by the Natural Heritage Research Partnership (NHRP) between *Quercus*, Queen’s University Belfast and the Northern Ireland Environment Agency (NIEA) for the Research and Development Series

protection of wildlife, in fact they could make matters worse for breeding birds. They should be called the Burning Regulations.

#### *4.2 Scope of the Regulations*

The publication of draft Regulations which will apply only to some parts of the country during some periods of March with the requirement to have regard to the draft Guidelines could potentially create a two-tiered, further fragmented system of regulation for this activity. The Guidelines can therefore be ignored between September 1 to the last day in February. In addition, BirdWatch Ireland is concerned that if 'some' parts of the State are allowed burn in March and others not, that there will be confusion as to who can burn where with the word getting out that burning is allowed in March, challenges to this decision and ignoring of the decision. It is further not clear how this new regulation will interact with Cross Compliance regulations and documentation and Department of Agriculture inspections. Clarity is required on this issue. We would revert to our original position that there should be no concession to allow burning in March under the Regulations as presented.

#### *4.3 'Adverse weather conditions' needs to be defined*

During the Heritage Bill debate which spawned these regulations, the Minister for Culture, Heritage and the Gaeltacht on July 3rd 2018 stated the following in relation to proposal to allow burning in March<sup>14</sup>:

*'The Deputy is aware that the main reason for the burning provisions is to allow people managing land to burn for proper land management purposes in March where, for example, weather has prevented this'. and*

*'I am proposing to allow **controlled burning** in certain areas during March **if it is deemed necessary due to adverse weather conditions**'.*

The draft Regulations state that the Minister 'having formed the view 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 hereby make the following Regulations'

The regulations as stated create the potential for a subjective view of weather conditions and decision making to be taken to allow burning in March rather than a scientific view. The words 'reasonable opportunity' must be defined in the Regulations. The Regulations must in addition precisely list the criteria that will be used by the Minister to underpin her decision to allow burning. It is not enough that the Minister will 'form a view' as the potential arises for subjective decision making. In addition, the Minister used the words 'adverse weather conditions' in the Dáil while the regulations state 'pervading weather conditions. This alludes to the potential adverse weather conditions may not actually be the reason to allow burning. The exact wording of the Minister as is reflected in the Dáil debates should be used and defined.

No information is presented to explain how the DCHG plans to define or assess adverse weather conditions within the context of burning. No information is provided as to what meteorological data will be collected or what system will be used to assess soil moisture and other factors important to understanding the conditions for burning.

#### *4.4 Necessity of a Licensing System to Regulate Burning*

The principle behind the Regulations is that it is affording a land owner an opportunity to carry out a controlled burn during part of the Closed Period (March 1-August 31) due to a lack of opportunity to

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<sup>14</sup> <https://www.oireachtas.ie/ga/debates/debate/dail/2018-07-03/33/>

do so during the Open Period. For this to apply the land owner must **have had the desire or intention to burn during the preceding six months** but conditions did not permit the burn to be carried out. This would imply that a licensing system of individual consent and registration facility of 'indication to burn' should be put in place. Such a system should also include a record of procedures followed that includes the requirements to be met under Article 6.3 of the Habitats Directive for any proposed burning within Natura 2000 sites and derogations required under Article 9. The system should ensure that the applications to burn are open for consultation to the general public like applications by landowners for afforestation or applications to remove hedgerows on farmland. This system should be easily publicly accessible and open for effective public consultation as specified by the Aarhus Convention.

#### *4.5 Schedule 1 of the draft Regulations*

It is remiss that the public consultation documentation does not include the list of proposed areas to be granted burning opportunities in March 2018. We are unable, therefore, to assess and comment on whether these sites are suitable for additional burning or not or to determine the impacts on bird species. Nor are we able to assess the criteria which will be used to determine whether sites should be included. In addition, BirdWatch Ireland questions the process of the publication of this Schedule. There is no indication if Schedule 1 of sites will be published annually for the two-year length of the 'pilot' as per Section 7(4) of the Heritage Act. It is also unclear if lowland sites will be included since there is no geographic or topographic restriction as per the text in the Act or Regulations. Again Appendix 1 lists Natura sites whose habitats have 'unfavourable' conservation status due to burning.

Section 2 of the regulation states that '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'. How will these sites be monitored? What penalties will apply for burning outside of the windows set aside in the month of March when burning will be allowed as is described in Section 7(3) of the Heritage Act?

### **5.0 Best Practice Guidelines for Burning Management**

The Guidelines provide a helpful description of the ecology of heather and management of heather habitats for species and habitats. However, the Guidelines are missing some important substantive information including details of provisions to ensure that birds beginning their breeding activities in March are not impacted and that the provision to allow burning is in line with the Birds Directive. In addition, the Guidelines must be renamed as **Legal Requirements and Best Practice Guidelines for Burning Management**. The sections in the draft Guidelines relating to legal obligations are vague. They would benefit with being rewritten and provided with a more prominent position within the document. with and must also outline the penalties for failure to comply including cross compliance penalties.

The Guidelines would benefit from a description of the appropriate weather conditions and soil requirements under which burning should be undertaken since the focus of the regulations is on a concession to allow burning based on 'adverse' weather conditions preventing burning in the normal open season from September 1-the last day in February. Supporting sources of information such as Met Éireann statistics and metrics on appropriate burning times during the open period should be included. Soil moisture content is also an important factor and should be referred to. This information should be provided.

### 5.1 Focus of draft Guidelines

Controlled burning is rarely practiced in Ireland but it can be beneficial to the habitats of certain bird species if it is targeted, supported by people who are skilled in the practice and is undertaken under the right weather conditions. The report *Commonage Case Studies* reiterates that ‘burning may not be the easy solution that some imagine it to be. Controlled burning as a rehabilitation technique presents its own challenges, it is labour intensive, it needs skilled supervision, suitable weather conditions and in many cases consent from NPWS’<sup>15</sup>. Controlled burning groups are few and far between in Ireland. The draft Guidelines begin with a description of controlled burning of heather. We are concerned that unless there is national framework supporting the widespread establishment of controlled burning groups that these Guidelines may not serve the purpose for which they were intended.

Another issue is the focus on heather management with no reference to burning of other vegetation such as gorse and scrub and the impacts on species. Scrub mosaics can support rich communities of wildlife, including bees and other insects and birds<sup>16,17</sup>. Studies in the UK have shown the importance of scrub habitats to many threatened bird species<sup>18</sup> also occurring in Ireland, including Merlin, Whinchat, Grasshopper Warbler, Linnets and Yellowhammers. Consideration of the conservation needs for species supported by Gorse and Scrub habitat needs to be included in the draft Guidelines.

### 5.2 Protections for birds beginning their breeding activities in March

All wild birds are protected in Ireland under the Birds Directive and as transposed into national laws and regulations. In Ireland Section 40 of the Wildlife Act 1976 (as amended 2000) restricts the burning or cutting of vegetation in order to protect breeding birds. The dates set for the period of this restriction are March 1 to August 31<sup>st</sup>. Former Minister for Arts, Heritage and the Gaeltacht Ms Heather Humphreys stated in a response to a Parliamentary Question that ‘Under section 40 of the Acts, burning of vegetation on uncultivated land is prohibited without exception from 1 March to 31 August primarily as a means to protect nesting and breeding birds and prevent forest fires’<sup>19</sup>. This section of the Wildlife Act supports the implementation of ‘a general system of protection for all wild birds’ as required under Article 5 of the Birds Directive<sup>20</sup>. The Birds and Habitats Regulations 2011 also contribute to the protection of the habitats of birds. Article 5(b) prevents the ‘deliberate destruction of, or damage to, their nests and eggs or removal of their nests’; and Article 5(d) prevents the ‘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’. Article 9 provides for a derogation process from this system of protection that is strict, narrow in focus and where no other satisfactory solution is available.

The Guidelines highlight the conservation value of burning for bird habitats if that is the objective of the burning but there is no reference to the legal requirements and need to protect breeding birds who will have begun their breeding activities in March or earlier if the winter weather is mild. No

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<sup>15</sup> Monaghan, F., Moran, J., Martyn, M., Boyle, P., and G. Jones (2014). *Commonage Case Studies 2014: Informing the development of commonage management plans under Ireland’s RDP 2014-2020*. Report produced for the European Forum on Nature Conservation and Pastoralism. October 2014.

<sup>16</sup> English Nature. 2003. *The Scrub Management Handbook: Guidance on the management of scrub on nature conservation sites*. English Nature, Wetherby.

<sup>17</sup> Gough, S.J. & Fuller, R.J. 1998. *Scrub Management for Conservation in Lowland England: Practices, Problems and Possibilities*. BTO Research Report No. 194. BTO, Thetford, Norfolk.

<sup>18</sup> Fuller, R.J., Atkinson, P.W., Garnett, M.C., Conway, G.C., Bibby, C.J. & Johnstone, I.G. 2006. Breeding bird communities in the upland margins (ffridd) of Wales in the mid-1980s. *Bird Study* **53**: 177-186

<sup>19</sup> Oireachtas Debates: 30<sup>th</sup> April 2005

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015043000052#WRA01450>

<sup>20</sup> [Directive 2009/147/EC](#) on the conservation of wild birds

information is provided in the Guidelines to support the protection of breeding birds. There is no consideration given to the potential that milder winters may mean upland birds will return to their breeding sites earlier than March. It is our view that the potential exists for burning in March to result in further negative impacts to breeding birds and that a derogation is required under Article 9 of the Birds Directive.

Further, the protection afforded breeding birds is not designation specific. It applies to all breeding birds in all habitats in Ireland. Ecological surveys conducted before burning and as part of a licensing system (and/or derogation system) would help to ensure that breeding birds were not impacted and that the landowners are compliant with EU law and indeed that the State is compliant with EU law.

#### *5.2.1 Evidence of birds beginning their breeding activities in March.*

While Ireland does not have an appropriate monitoring programme of the bird nesting period in Ireland, BirdWatch Ireland has sourced the best available data on bird nesting periods from the British Trust for Ornithology's Nest Record Scheme (NRS). Although this scheme and its database includes records from Ireland, they account for less than 1% of records. Nevertheless, it remains the most relevant source of data currently available on bird nesting times. The data used are from records from the period 2000-2009 and contain c.35-45,000 records per annum. They show that several upland bird species start their breeding activities in March.

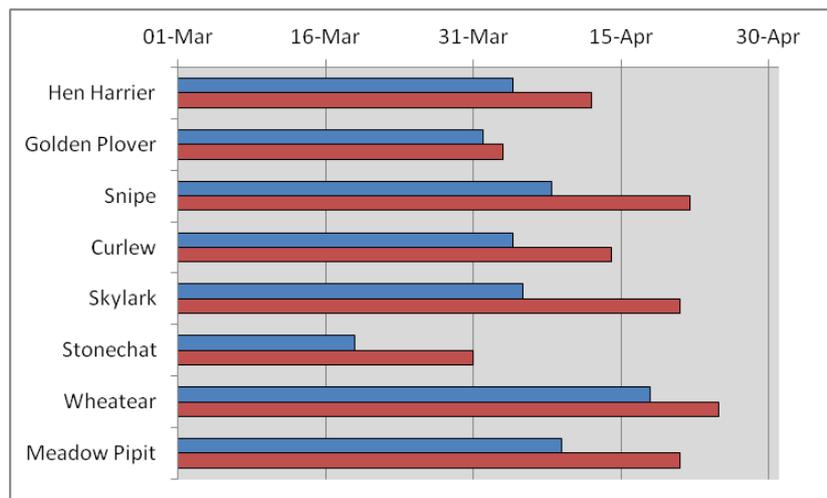
Certain caveats need to be borne in mind when applying these data to Ireland. The main consideration relates to the onset of the nesting season. Due to our milder climate, **it is likely that the average nesting season in Ireland will be earlier than that in the UK as a whole.** This will be especially emphasised for upland species which are typically nesting at both higher altitudes and latitudes in the UK than is the case in Ireland. As a result, it is likely that the nesting dates derived from the NRS for these upland breeding bird species in particular will be later than those encountered in Ireland given the NRS provides overall UK laying dates as opposed to laying dates across regions.

Although few of these species have eggs laid in March, it is important to note that so-called "First Egg Dates" do not represent the start of the nesting season. Before birds begin laying eggs they set out territories, they have to find a mate and nests have to be constructed. For example, studies in Scotland suggest that territory establishment for Curlew begins 40 to 60 days in advance of egg laying<sup>21</sup>. Therefore, with egg-laying for 5% of nests commencing on 14<sup>th</sup> April, the setting out of territories would start in late February or early March. Ratcliffe notes that with a milder winter, Golden Plover will reappear in upland habitats for breeding in February<sup>22</sup>.

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<sup>21</sup> Nethersole-Thompson D & Nethersole-Thompson M. 1986. *Waders: their breeding, haunts and watchers*. T&AD Poyser, Calton, England.

<sup>22</sup> Derek A. Ratcliffe (1976) Observations on the Breeding of the Golden Plover in Great Britain, *Bird Study*, 23:2, 63-116, DOI: 10.1080/00063657609476488



*Figure 1: First egg (laying) dates for upland bird species. The data are derived from the British Trust for Ornithology's Nest Record Scheme. The blue bar indicates the first egg date for 1% of nests within that database, with the red bar indicating the first egg date for 5% of nests recorded.*

Figure 1 shows the first egg (laying) dates for selected upland bird species. All the species listed are of conservation concern, with Curlew, Golden Plover and Meadow Pipit on the Red List, and the remaining species Amber-listed<sup>23</sup>. Two dates are represented – the date when egg laying commences in 1% of nests for each species and the date when laying commences in 5% of nests (as derived from data held on the British Trust for Ornithology's Nest Record Scheme database). An additional period should therefore be allowed for nest-site selection and nest building when reviewing the bird nesting period. Again, as noted earlier, further fundamental information on wild bird breeding seasons and breeding activity is required in an Irish and should have been sought before the progression of the decision to allow burning in March. This is of particular importance for upland birds, for which the seasons may vary substantially from the UK data presented here.

No data was provided as part of the Review of Section 40 of the Wildlife Act or the Heritage Bill debates to negate the above data or to provide a counter view. Nor have we seen any scientific data to support the changes in the law to allow burning in March. Section 40 of the Wildlife Act was amended in 2000 to bring back the dates from April 15 to April 1<sup>st</sup> but due to extensive debate about the need to protect birds who were breeding earlier according to expert advice, the date was brought back to March 1<sup>st</sup>. Section 40 exists to protect breeding birds in Ireland and the Heritage Act now weakens the protections for breeding birds. It is our view that the provision to allow burning in March could negatively impact on breeding birds of uplands and lowland hills at the time when they are most vulnerable and in breach of Article 5 of the Birds Directive. Therefore it is our view that a derogation will be required for each individual landowner who intends to burn in March.

### *5.2.2 Distribution and abundance of upland breeding birds*

We present here information in relation to select species that are widely distributed upland breeding birds found in most upland sites where they begin their breeding activities in March and for Stonechat will be on nests and potentially with eggs. We present this information to illustrate that the provision of permission to allow burning in March could impact these breeding birds if the sites where burning is planned is not first assessed for their presence. The likelihood of impacts to these widely distributed breeding birds from burning is high and compliance with the Birds Directive is required. That is not to say that for the other upland birds listed in Figure 1 there will not be

<sup>23</sup> Colhoun K. & Cummins, S. 2013 Birds of Conservation Concern in Ireland 2014-19. *Irish Birds* 9:523-544

localised impacts. Their range is narrower but again the consequences of allowing burning in ‘certain parts of the country’ must be assessed to rule out impacts to these species who are of conservation concern in particular.

Figure 2 shows the breeding distribution of the Red Listed Meadow Pipit (*Anthus pratensis*) in Ireland. This data was collected as part of the Bird Atlas 2007-2011<sup>24</sup>. Records for breeding Meadow Pipit were found in 96% of the squares covered in Ireland with confirmed breeding in 71% of squares. All 857 10km x 10km squares were covered in the Republic of Ireland. Figure 3 shows the Breeding Relative Abundance or density of breeding Meadow Pipit.

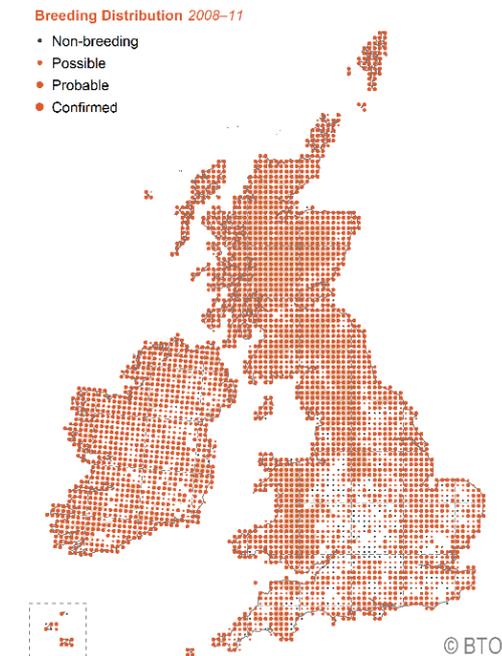


Figure 2: Breeding Distribution of Meadow Pipit

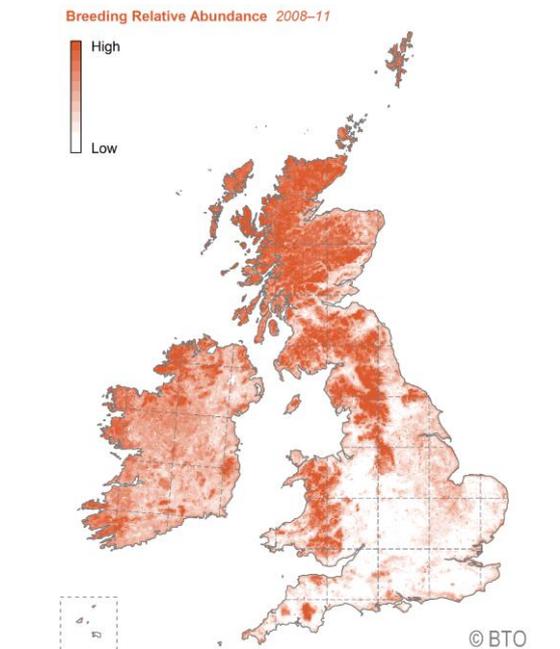


Figure 3: Breeding Relative Abundance of Meadow Pipit

The 2007-2011 Bird Atlas shows that records for breeding **Stonechat** (*Saxicola rubicola*) (**Amber listed**) was collected in 74% of squares covered with 50% of squares holding records of confirmed breeding. This data is presented in Figure 4. Figure 5 shows the Breeding Relative Abundance data for Stonechat.

<sup>24</sup> Balmer, D., Gillings, S., Caffrey, B., Swann, B., Downie, I. & Fuller, R. Bird Atals 2007-11: The breeding and wintering birds of Britain & Ireland. BTO Books, Thetford

**Breeding Distribution 2008–11**

- Non-breeding
- Possible
- Probable
- Confirmed

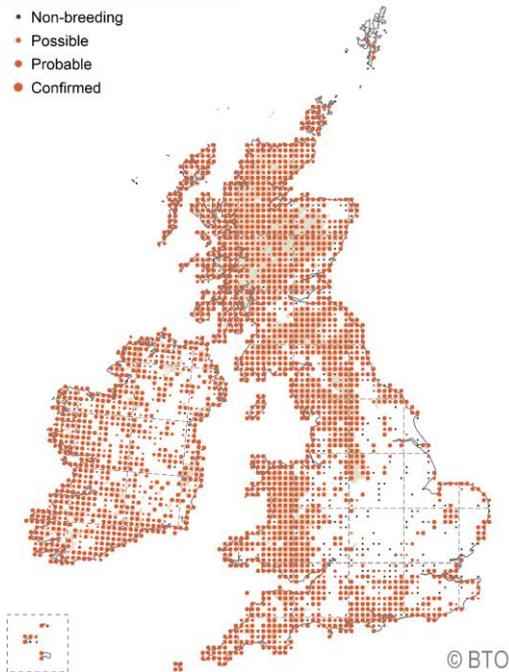


Figure 4: Breeding Distribution of Stonechat

**Breeding Relative Abundance 2008–11**

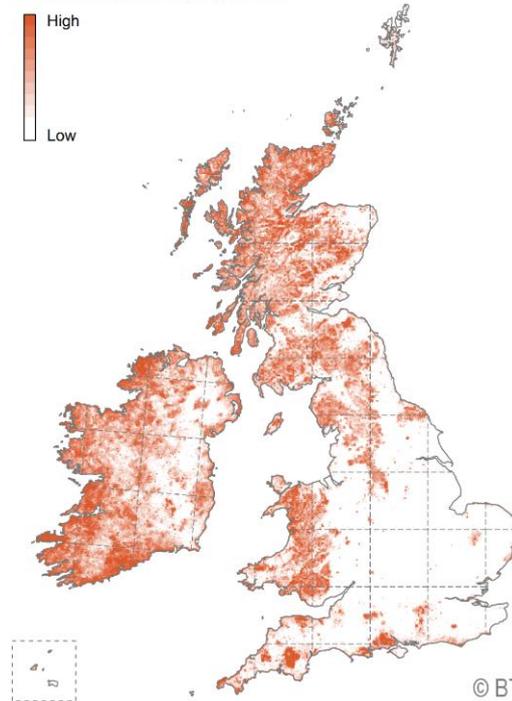
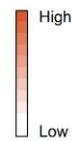


Figure 5: Breeding Relative Abundance of Stonechat

For both Meadow Pipit and Stonechat there is a high potential that burning in March in upland areas will impact breeding birds who are beginning their nesting activities and for Stonechat the destruction of eggs. There are no provisions within the Regulations to protect breeding birds and to ensure compliance with the Birds Directive.

**5.2.3 Failure to protect Annex 1 Bird Species**

The Birds Directive makes extra provisions to protect Annex 1 species. Article 4(4) of the Birds Directive states that ‘Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats’. The draft Guidelines should clarify the protections afforded Annex 1 species outside of SPAs in relation to burning. Hen Harrier winter roost sites are not afforded sufficient protection as it is and breeding may occur close to these sites which are not in SPAs.

BirdWatch Ireland is also concerned that burning as an ARC is not listed in the Statutory Instruments for Hen Harrier SPAs. This fact requires clarification as it suggests that there is no regulation of burning in these sites.

**5.2.4 Derogation Process under Article 9 of the Birds Directive**

The European Commission has provided some clarification in relation to the issue of burning and protection of breeding birds. Questions were put to officials in DG Environment and DG Agriculture by BirdWatch Ireland in relation to proposed changes to the dates in Section 40 of the Wildlife Act. DG Agriculture responded with a letter dated 29<sup>th</sup> of May 2017 and is attached to this submission. In it states:

“As regards cutting/destroying of hedgerows and trees and burning of vegetation in the uplands during the bird breeding and rearing season, there is a link to the Birds Directive as well.

The Birds Directive protects all wild bird species naturally occurring in the territory of the EU Member State. The Birds Directive (its Article 5) sets an obligation to establish a strict protection system which prohibits e.g. deliberate destruction of nests or eggs and deliberate disturbance of birds particularly during the period of breeding and rearing if disturbance would be significant having regard to the objectives of the Directive. In limited circumstances the Directive allows use of derogations provided that all derogation conditions under Article 9 of the Birds Directive are fulfilled. It is for the relevant competent authorities to examine the applicability of these conditions. Member States do not need to consult the Commission before applying derogations but there is an annual reporting system in place under the Birds Directive.

In addition, if the activities mentioned in the letter would be implemented within Special Protection Areas, then also Articles 6(2)-6(4) under the Habitats Directive<sup>3</sup> apply (similarly, Article 6 under Habitats Directive applies to Special Areas for Conservation). Again, it is for the competent authorities to make sure that damaging activities are avoided that could significantly disturb the species or deteriorate the habitats for which the sites are designated”.

It is our view that the restrictions of Section 40(1) of the Wildlife Act form a part of Ireland’s general system of protection for wild birds under Article 5 of the Birds Directive. Any deviation or relaxation from that general system of protection requires derogation under Article 9 of the Directive. The Regulations provided for by paragraph 7(1) of the Heritage Act require such derogation.

Derogation from the requirements of Article 5 is permitted but it is important to bear in mind that the European Court of Justice (ECJ) has stated that the possibility provided for in Article 9 of derogating from the restrictions and prohibitions contained in Article 5 of the Birds Directive, is subject to three conditions.

1. The Member State must restrict the derogation to cases in which there is no other satisfactory solution.
2. Secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1) (a), (b) and (c).
3. The derogation must comply with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them.

Although Article 9 therefore authorises wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations (judgments in Case 247/85 Commission v Belgium[1987] ECR 3029, paragraph 7, and Case 262/85 Commission v Italy[1987] ECR3073, paragraph 7).

Derogation under Article 9 should follow the general principle of proportionality; any derogation of which a Member State intends to make use must be proportionate to the needs which justify it. (Case C76-08, paragraph 57)

In order to permit the competent authorities to resort to the derogations laid down in Article 9 only in a manner which complies with Community law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is

consonant with the principle of legal certainty. (Case C60/05, paragraph 33). Relevant national legislation applicable must specify the criteria for the derogation in a clear and precise manner and require the authorities responsible for applying them to take account of those criteria (Case C60/05, paragraph 34).

In the case of the burning of uncultivated land during the Closed Season, the intent may not be to disturb or damage bird's nests or eggs but the consequence of the action, which is being permitted as an exemption to a restriction placed to provide such protection, has the potential to do so and as such, requires derogation under Article 9 with its attendant requirements.

The exemption provided for by paragraph 7(1) of the Heritage Act is too general in nature to be justified by derogation under Article 9 - see ECJ Case 247/85, paragraph 28. This exemption to the restrictions of Section 40 is incompatible with Article 5 as it permits the deliberate disturbance of habitat and destruction of nests and eggs with no justification for derogation under any of the criteria of Article 9 (a)\*.

The fact that conditions or restrictions may be developed in the Regulations to ensure the protection of flora or fauna is not sufficient to be compliant with derogation under the Directive. Before the specifics of derogation are permitted there must first be justification under Article 9 (1). Also, derogation may be granted only where there is no other satisfactory solution. The draft Regulation provided do not refer to other satisfactory solutions.

What is the justification for this exemption in terms of Article 9 (1)? The reason cited by the Minister for the need for Section 7 (1) is to permit a degree of flexibility in land management. That is not a valid justification for derogation, under Article 9, from the general protections offered by Section 40 of the Wildlife Act.

\*These are the possible reasons for derogation under Article 9 (1) (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;

None of them appear to apply to justify the burning of uncultivated land where no other satisfactory solution exists. **Therefore Section 7 (1) would appear to be in breach of European Law.**

Annex 1 bird species are protected wherever they are found. If a Hen Harrier or Merlin is breeding on an undesignated site or are roosting at an undesignated winter roost site, burning activities may have a significant impact.

### *5.3 Regulation of Burning to date*

BirdWatch Ireland is concerned that the draft Guidelines and the regulations are insufficient to provide confidence in the regulation of burning so as to ensure no significant impact on protected species, habitats and sites. Earlier in this submission the ecological status of habitats, sites and species impacted by burning was described. The structure of the consenting process to date is problematic.

#### *5.3.1 Lack of implementation of Article 6.3 of the Habitats Directive*

The draft Guidelines provide an outline of the existing system of regulation for burning activities within Natura 2000 sites. Burning is listed as an activity requiring notification (consent called Notifiable Action (NA)) to the Minister or an Activity Requiring Consent (ARC). They are listed in the

Statutory Instruments for SPAs. Notifiable Actions are those where a person must notify the NPWS in relation to activities which may impact listed Habitats and Species<sup>25</sup>. The Notifiable Actions for Blanket Bog, Heath, Scrub and upland grasslands is given effect through Statutory Instrument 94 of 1997 where burning is an activity requiring notification to the Minister. However, for heath the specification states that 'burning of vegetation over 5 ha or burning any area more often than once every 15 years' is listed as an activity requiring notification to the Minister. Therefore burning up to 5ha of heath habitat (EU protected) does not require any consent. In addition, it is unclear if 5ha of heath was burned by each farmer side by side, there would be no assessment of cumulative impacts potentially seriously impacting this important habitat type. In addition there is no legal protection for any nesting birds. It is our view that ARCs and Notifiable Actions fall far short of the legal requirements of the Habitats Directive to protect internationally important habitats. They do not replace the requirement for screening for Appropriate Assessment under Article 6.3 of the Habitats Directive for the '*likelihood of significant impacts*' on the qualifying interests of Natura sites where a logical *step wise process* is undertaken which must prove *beyond reasonable doubt* that there will be no significant impacts on the qualifying interests of the Natura site in question. The process must result in '*complete, precise and definitive findings*'. This is a significant breach of the Habitats Directive.

In 2016, BirdWatch Ireland submitted to the then Department of Arts, Heritage and the Gaeltacht a request under *Freedom of Information* and *Access to Information on the Environment* legislation relating consents granted in Ireland from NPWS to allow burning in Natura 2000 sites. Our request for information resulted in **one record** being provided to us. The application made in 2014 was for consent to burn '3-4 small patches' of a habitat type which was redacted in a Co. Mayo SAC for the purpose of conservation of Red Grouse. The consent approval stated that Wet Heath was the habitat type but there was no detail of the number of hectares involved. Nor was there any monitoring or reporting on the extent of the habitat which was burnt in the end. The consent form also quoted the 1997 European Communities Regulations (No. 94 of 1997) though the 2011 Birds and Habitats Regulations superseded them. The information requested and supplied in our view is not sufficient to be able to assess and rule out significant impacts on birds and habitats.

## 6.0 Recommendations.

1. The Laws, regulations and consents associated with burning in the uplands and lowland hills need to comply with requirements of the Birds and Habitats Directives. The current system of consents requires examination for compliance and failures need to be addressed especially in relation to Article 9 of the Birds Directive and Article 6 of the Habitats Directive.
2. Burning should be by individual permit, licence or prior approval from NPWS, not by blanket consent. This licensing system should also include a registration system where farmers can register their intent to burn during the legal period to do so and so as to facilitate the concession to burn in March if adverse weather conditions prevail and assuming that the legal requirements to protect breeding birds and habitats have been satisfied and evidence supplied. A survey should be conducted by a suitably qualified person/s prior to any burn to ensure that no breaches of Section 22 of the Wildlife Act or the Birds and Natural Habitats Regulations (2011) could result from the burn. Records should be maintained of all burns carried out under the Regulations.

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<sup>25</sup> <https://www.npws.ie/farmers-and-landowners/notifiable-actions/listed-habitats-and-species>

3. Information needs to be provided in an overarching Information Note on Process Relating to the Burning Regulations. This information should be published when the Regulations are published and circulated to interested parties so that they are aware of what the next two years of the 'pilot' entail.
4. This note should explain if Schedule 1 will be published annually for the two years of the 'pilot' or if Schedule 1 as published in 2019 will be the only published list for the pilot period.
5. Information on Powers of Enforcement and the penalties for lack of compliance with the regulations needs to be provided in the Regulations, in the Guidelines and in the Information Note.
6. Adverse weather conditions need to be defined with a scientific underpinning from Met Éireann.
7. The criteria and scientific underpinning including weather data for the selection of sites for which burning will be allowed in March needs to be published and subject to consultation.
8. The Schedule 1 sites should be subject to consultation so that NGOs and members of the public can review them for impacts to wildlife and habitats.
9. Information relating to the Powers of Enforcement should be included in the Guidelines.
10. The Best Practice Guidelines must include a description of the weather conditions appropriate for burning including reference to the soil moisture index.
11. The Guidelines should be renamed as Legal Requirements and Best Practice Guidelines for Burning Management.
12. Gorse and other upland habitat types and their importance for wildlife need to be described as heather management has been described within the draft Guidelines.
13. Irish research is required on bird nesting times in the uplands. In addition, the upland bird survey should be redone as it is now 15 years old.

## **7.0 Conclusion**

The issue of burning of vegetation in Ireland is a difficult and often controversial subject. Thousands of hectares of important upland habitats have been damaged by burning. Upland hill farming is an activity undertaken in often difficult terrain and weather conditions. There are fewer farmers farming in the uplands and the condition of the land is changing with land abandonment evident in some areas with overgrazing in others. The age profile of upland farmers reflects more of the older generation with fewer younger farmers involved and some of those with part time jobs off farm. The draft Guidelines focus on controlled burning but there is little evidence of this practice in Ireland and often fires go out of control burning many hundreds of hectares of land, most often land in Natura sites. We have already given the view that we are doubtful that burning in March will do anything to stop out-of-control fires. The proposed regulations and draft Guidelines offer no assurances for the protection of breeding birds, important habitats and other wildlife. There are also serious issues with compliance with the Birds and Habitats Directives with the passage of Section 7.1 of the Heritage Act.

Lastly, in relation to the public consultation process and provision of information it is regrettable that the Department of Culture, Heritage and the Gaeltacht chose to initiate the public consultation one working day before Christmas 2018 and up to January 17<sup>th</sup> 2019 and including the Christmas and

New Year breaks when most people are on holidays. This choice reduced the consultation period on these important regulations to two weeks which is not conducive to effective public participation. It was welcome that the consultation period was extended after groups raised the issue with the DCHG. We wish to state that setting consultation over periods traditionally considered as holidays has been adjudicated on by the Aarhus Convention Compliance Committee (ACCC). The ACCC stated the following in relation to a case in Spain:

*“Another issue is the time of year that the public participation is held. There are certain periods in public life which are traditionally considered as holidays and not much is expected to happen. For example, the days of the major religious festivals for each country, national days and to a certain extent, the main summer vacation period. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held: “a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country”<sup>26</sup>.*

**Point of Contact:**

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<sup>26</sup> Compilation of Findings of the Aarhus Convention Compliance Committee 2005 to date (2017)287ECE/MP.PP/C.1/2009/8/Add.1 para. 92, available here [http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_Compilation\\_of\\_Findings/Compilation\\_of\\_CC\\_findings\\_08.09.2017\\_new.compressed.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_08.09.2017_new.compressed.pdf)



SITE	Side Code	Habitat 4010 overall assessment (Northern Atlantic wet heaths with <i>Erica tetralix</i> )	Area of Habitat 4010 impacted by Burning (%)	Intensity of impact on Habitat 4010	Habitat 4030 : Overall assessment (Dry Heath)	Area of Habitat 4030 impacted by Burning (%)	Intensity of impact on Habitat 4030	Habitat 7130 overall assessment (Blanket Bog-Active)	Area of Habitat 7130 impacted by Burning (%)	Intensity of impact on Habitat 7130	Species of Note at these sites	Fire occurrence (Year)	County
Galtee Mountains cSAC	IE0000646	Unfavourable-Bad	3	High	Unfavourable/Inadequate	3	High	Unfavourable-Bad	1	High	Peregrine Falcon (Ann. 1)	2015 (2)	Tipperary/Limerick
Mount Brandon cSAC	IE0000375	Unfavourable-Bad	1.5	High	Unfavourable-Bad	6	High	Unfavourable-Bad	<1	High	Freshwater Pearl Mussel (Ann II & IV), Peregrine Falcon (Ann. I), Northern Fulmar, Chough (Ann. i), <i>Trichomanes Speciosum</i> (Ann II & IV)	n/a	Kerry
Ox Mountains Bogs cSAC	IE0002006	Unfavourable-Bad	1.8	High	Favourable	0.4	High	Unfavourable-Bad	4.5	High	White Fronted Goose(Ann 1), Golden Plover (Ann 1), Marsh Saxifrage (Ann II & IV)	2015	Mayo/Sligo
Slieve Mish Mountains cSAC	IE0002185	Unfavourable-Bad	9,8	High	Unfavourable/Inadequate	15,6	High	Unfavourable-Bad	7,1	High	Peregrine Falcon(Ann. 1), <i>Trichomanes speciosum</i> (Ann II & IV)	2012, 2015	Kerry
Caha Mountains cSAC	IE0000093	Unfavourable-Bad	2,3	High	Unfavourable-Bad	0,04	High	Unfavourable-Bad	0,1	High	Hen Harrier(Ann. 1), Kerry Slug, Peregrine Falcon(Ann. 1), Chough(Ann. 1)	2014	Kerry/Cork
Carlingford Mountain cSAC	IE0000453	Unfavourable-Bad	25	High	Unfavourable-Bad	13	High	Unfavourable-Bad	12	High	Peregrine Falcon (Ann. 1)	2012	Louth
Comeragh Mountains cSAC	IE0001952	Unfavourable-Bad	25	High	Unfavourable-Bad	20	High	Unfavourable-Bad	30	High	Hen Harrier (Ann. 1), Peregrine Falcon (Ann. 1), Chough(Ann. 1), <i>Hamatocaulis vernicosus</i> (Ann. II)	2012, 2015	Waterford

**Table 5:** Habitat assessment, area of habitats impacted by burning and intensity of the impact on burning on the priority habitats 4010, 4030 and 7130, as well as the year of fire occurrence on each site when applicable (in brackets when there are more than one). (Source: National Survey for Upland Habitats Reports for each site: Department of Arts, Heritage and the Gaeltacht.

