



Comhairle Ceantair
Lár Uladh
Mid Ulster
District Council

MID ULSTER

Natural Heritage

February 2016

Natural Heritage

Purpose: To provide members with an opportunity to consider existing planning policies as they pertain to Natural Heritage and to consider the need for alternative policies in light of the forthcoming Local Development Plan.

Content: The paper provides information on:

- (i) The legislative requirements for natural heritage and existing planning policies**
- (ii) Mid Ulster District Council (MUDC) objectives for natural heritage and the linkages between the MUDC objectives for future growth and the Sustainability Appraisal, Regional planning policy and Strategic Planning Policy Statement objectives**
- (iii) Consider existing policies and consider preferred and alternative policy options for natural heritage within the Local Development Plan**

Recommendation: That the Planning Committee notes the findings and considers how this paper shall be used to inform the Preferred Options Paper (POP) and strategic policies in the Local Development Plan (LDP)

1.0 Introduction

1.1 The purpose of this paper is to inform the Planning Committee of current planning policies associated with natural heritage and assess whether or not they are fit for purpose against the Council's objectives regarding the need to protect, conserve and enhance the Natural Environment through the new Local Development Plan (LDP) 2030.

1.2 This paper contains an assessment of how existing planning policies relevant to natural heritage take account of the Regional Development Strategy 2035 (RDS 2035), the Single Planning Policy Statement (SPPS), Sustainability Appraisal themes and the MUDC natural environment objectives through the proposed LDP objectives.

1.3 It should be noted that the Northern Ireland Environment Agency (NIEA) has the principal responsibility for the designation of a hierarchy of sites that are of nature conservation importance. It is the Council's role as the responsible authority to ensure the protection of these sites through the use of relevant planning policy i.e. Planning Policy Statement 2 – Natural Heritage. In addition the Council has the power to identify and designate Local Nature Reserves, Wildlife Refuges and Sites of Local Conservation Importance (SLNCI) through the LDP process. And in relation to trees and woodland the Council can also

protect trees of special value in terms of amenity, history or variety, through the use of Tree Preservation Orders (TPO's).

2.0 Legislative Context

2.1 The protection of natural heritage is an intricate and legally complex area with laws and regulations to conserve or regulate how it is used, that have origins at global, European Union, national and sub-national level.

2.2 **International:** The United Kingdom (UK) is a contracting party to a number of legally binding international agreements, such as the Ramsar Convention on the protection of wetlands of international importance, under which Ramsar Sites are listed.

2.3 **EU:** Once party to such agreements countries are often obliged to transpose their requirements into national law. Conventions therefore give rise to much national legislation, such as the following key directives, adopted by the EU, applying to the UK, the:

- Birds Directive. Provides for the selection of sites for their importance as areas for breeding, over wintering and migrating birds known as Special Protection Areas (SPA).
- Habitats Directive. Requires the protection of certain natural habitats through the designation of Special Areas of Conservation (SAC).
- Water Framework Directive. Aims to establish a framework for the protection of all surface waters and groundwater to reach good ecological and chemical status in all waters as a rule by 2015

SAC's and SPA's make up a network of nature protection areas, collectively called Natura 2000 sites.

2.4 **UK:** Nature conservation policy is a devolved function as such there may be some divergence in approaches to legislation between the country administrations as long as they are consistent with international obligations.

2.5 **Northern Ireland (NI):** Our main legislation which relates primarily to nature reserves, Areas of Special Scientific Interest (ASSI's), wildlife protection and the implementation of the Habitats Directive is contained within the:

- Wildlife (Northern Ireland) Order 1985
- Nature Conservation and Amenity Lands (NI) Order 1985

2.6 Amendments to which have taken place through the:

- Wildlife (Amendment) (Northern Ireland) Order 1995
- Conservation (Natural Habitats, &c) Regulations (Northern Ireland) 1995
- Environment (Northern Ireland) Order 2002
- Wildlife and Natural Environment Act (Northern Ireland) 2011

3.0 The Objectives

(a) Regional Development Strategy 2035 (RDS) and the Strategic Planning Policy Statement (SPPS)

- 3.1 The RDS provides an overarching strategic planning framework to facilitate and guide the public and private sectors. It addresses economic, social and environmental issues aimed at achieving sustainable development and social cohesion. This overarching document sets out clear objectives for natural heritage that have been fully considered in formulating the objectives of the SPPS.
- 3.2 The SPPS, which was formally adopted in September 2015, is a statement of the Department's policy on important planning matters that should be addressed across NI. It has been agreed with the NI Executive and its objectives have been judged to be in general conformity with those of the RDS 2035. The regional strategic objectives contained within the SPPS for natural heritage are to:
- protect, conserve, enhance and restore the abundance, quality, diversity and distinctiveness of the region's natural heritage;
 - further sustainable development by ensuring that natural heritage and associated diversity is conserved and enhanced as an integral part of social, economic and environmental development;
 - assist in meeting international (including European), national and local responsibilities and obligations in the protection and enhancement of the natural heritage;
 - contribute to rural renewal and urban regeneration by ensuring developments take account of the role and value of natural heritage in supporting economic diversification and contributing to a high quality environment; and
 - take actions to reduce our carbon footprint and facilitate adaptation to climate change.
- 3.3 To achieve its objectives the SPPS sets out regional strategic policy¹ which Councils must take into account in the preparation of LDP's and in the determination of planning applications. It highlights the planning authority i.e. the Council should apply the precautionary principle when considering the impacts of a proposed development on national or international significant landscape or natural heritage resources. And outlines a number of measures² to be followed in implementing its strategic policy.

¹ Regional Strategic Policy for Natural Heritage, paragraphs 6.173 to 6.193, pages 80 to 84, Single Planning Policy Statement

² Implementation of Regional Strategic Policy for Natural Heritage, paragraphs 6.194 to 6.198, pages 84 to 85, Single Planning Policy Statement

For further details on the Natural Heritage Regional policy please refer to Appendix 1.

(b) Mid Ulster Council

- 3.4 Position Paper One³, set out key baseline data and presented a potential growth strategy to generate ideas on how planning can best meet the needs of a growing community and the different groups within that community.
- 3.5 It outlined that a LDP designed to complement a community plan can assist in combating many of the issues highlighted by formulating policy and proposals for the area designed at truly achieving sustainable development
- 3.6 Accordingly, it outlined a number of needs and policy goals that will assist in formulating the aim and objectives of the future LDP. One of these objectives was to enhance the environment and improve infrastructure, namely;
 - The need to protect and enhance the natural and built environment to achieve biodiversity, quality design, enhanced leisure and economic opportunity and promote health and wellbeing.

The statutory requirement to protect designated natural heritage sites, species and habitats, is reflected in the above strategic policy objective for the LDP.

(c) Sustainability Appraisal (SA) Objective

- 3.7 MUDC has a statutory requirement in the formulation of its LDP, to further sustainable development by ensuring that it is subject to a Sustainability Appraisal incorporating a Strategic Environmental Assessment (SA/SEA).
- 3.8 An SA/SEA is an appraisal of the economic, environmental, and social effects of a plan from the outset of the preparation process to allow decisions to be made that accord with sustainable development.
- 3.9 A key objective of the Sustainability Appraisal⁴ is to conserve and enhance biodiversity. Current planning policy should take account of the need to;
 - Conserve and enhance habitats of borough or local importance and create habitats in areas of deficiency;
 - Conserve and enhance species diversity; and in particular avoid harm to protected species;
 - Conserve and enhance sites designated for their nature conservation interest at the regional or national level
 - Protect and enhance woodland cover and trees and promote their management; and

³ Position Paper One Population and Growth, September 2014, Mid Ulster

⁴ Appendix II Mid Ulster Sustainability Assessment Incorporating Strategic Environmental Assessment June 2015

- Improve access to and promote the educational value of sites of biodiversity value.
- 3.10 A further key objective of the SA/SEA is to maintain and enhance the character and quality of landscapes. All future planning policies will be subject to SA/SEA as Mid Ulster must carry out an appraisal of the sustainability of the LDPs policies. New policies should take account of the need to;
- Improve the landscape character and visual amenity of open spaces
 - Protect and enhance local distinctiveness and sense of place
 - Minimise visual intrusion and protect views

4.0 Evaluation and Assessment of Planning Policy Statement 2 (PPS 2) - Natural Heritage

- 4.1 The purpose of this section is to assess the effectiveness of PPS 2 in more detail and to consider the following:
1. Do the policies contained within PPS 2 accord with the objectives of the SPPS and the LDP in relation to natural heritage?
 2. Whether or not the policies require any amendments to ensure that they accord with the objectives of the SPPS.
 3. Are the current policies are fit for purpose in the context of MUDC or is there a need to adapt policies which will reflect the aims, objectives of the SPPS and yet tailored to the specific circumstances of the plan area?
- 4.2 PPS 2 sets out key planning policies for the protection, conservation and enhancement of our natural heritage, which it defines as, “the diversity of our habitats, species, landscapes and earth science features”. It embodies the Government’s commitment to sustainable development and environmental stewardship.
- 4.3 In addition to the knowledge and experiences of planning staff in the day to day operation of PPS 2 and the information gained from preparatory papers, MUDC liaised with NIEA (Natural Heritage) as part of this evaluation to gauge their expert opinion on the effectiveness and robustness of the existing policies. Their feedback has helped to inform the overall assessment of the PPS 2.
- It should be noted that all evaluations and assessments are based on datasets supplied by NIEA, dated 2014.
- 4.4 It is acknowledged that these datasets will need to be updated by NIEA and the Planning Department of MUDC prior to the production of the Preferred Options Paper. Other sources of archaeological and built heritage data may also become available. Source data should be keep under review.

International Designations

4.5 The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended), known as the Habitats Regulations places a statutory duty upon MUDC to ensure development proposals are restricted where they are likely to impact upon the integrity of European or Ramsar sites, as these are afforded the highest form of statutory protection.

4.6 With regard to international designations the existing policy PPS 2, Policy NH 1 - European and Ramsar Sites - International and the SPPS (Regional Strategic Policy) both clearly state that:

“Planning permission will only be granted for a development proposal that, either individually or in combination with existing and/or proposed plans or projects, is not likely to have a significant effect on:

- a European Site (Special Protection Area, proposed Special Protection Area, Special Areas of Conservation, candidate Special Areas of Conservation and Sites of Community Importance); or
- a listed or proposed Ramsar Site”

And

4.7 “Where a development proposal is likely to have a significant effect (either alone or in combination) or reasonable scientific doubt remains.” They both outline the following procedure, though the SPPS however makes it clearer that;

“the planning authority is required by law to carry out an appropriate assessment of the implications for the site in view of the site’s conservation objectives. That, only after having ascertained that it will not adversely affect the integrity of the site, can the planning authority agree to the development and impose appropriate mitigation measures in the form of planning conditions.”

4.8 The thrust of the existing policy remains within the above paragraph, however the SPPS’s simple restructuring and use of stronger wording leaves no uncertainty as to the procedure and the duty placed on MUDC, which if not undertaken correctly could lead to judicial review or EU infraction at EU level.

4.9 Finally PPS 2 and the SPPS both state that;

A development which could adversely affect the integrity of a European or Ramsar site may only be permitted in exceptional circumstances. The SPPS simple states, exceptional circumstances as laid down in the relevant statutory provisions, which it references as a footnote. PPS 2 on the other hand details the exceptional circumstances, as follows, where:

- there are no alternative solutions; and
- the proposed development is required for imperative reasons of overriding public interest; and
- compensatory measures are agreed and fully secured.

4.10 As part of the consideration of exceptional circumstances, where a European or Ramsar site hosts a priority habitat or priority species listed in Annex I or II of the Habitats Directive, a development proposal will only be permitted when:

- it is necessary for reasons of human health or public safety or there is a beneficial consequence of primary importance to the environment; or
 - agreed in advance with the European Commission.
- 4.11 From what we have outlined above we can see quite clearly the existing policy accords with the SPPS. Although the level of detail between the two varies, as the SPPS which set out to reflect and update the provision of PPS 2 in a strategic way has in effect shortened and simplified the existing policy, in addition to some minor restructuring and the use of stronger wording it has made it clearer and more user friendly.
- 4.12 It has been established that the existing policy accords with the SPPS and in addition NIEA has advised that “This policy reflects the duty and process required by The Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended), known as the Habitats Regulations. As the process can be quite complicated and therefore leave cases open to judicial review, or infraction at the EU level, if not undertaken correctly.”
- 4.13 Put quite simply NIEA hold the view that the complex nature of the process justifies the detail of the policy, which they have found as it stands, adequate in providing protection of European sites and as such have cited a number of appeal decisions, judicial reviews and case law to demonstrate the legislative strength behind the policy:
- Joint Appeals⁵ for single wind turbines were dismissed partly due to the lack of information on peat slide risk which would have affected Owenkillew SAC River.
 - NI’s Judicial Review of the A5 road scheme⁶ that quashed outline planning permission as the procedure had not assessed the impact on ecology including the downstream SAC. It was quashed as the impact on the SAC had not followed the correct procedure following a public inquiry. As doubts and additional information were raised at the public inquiry of the impacts on the SAC river, the Habitats Regulations Assessment should have been reassessed.
 - Highlighting case law from other jurisdictions is also relevant in relation to EU directives and their interpretation into policy the N6 Galway City Outer Bypass road scheme⁷, was cited as the most recent infraction decision relevant to planning in that it considered Directive 92/43/EEC and the assessment process for the SAC. This looked at the criteria to be applied when assessing the likelihood that a plan or project will adversely affect the integrity of the site concerned.
- 4.14 NIEA set out the importance of the application of the existing policy, that, “it must be applied to all applications that have the potential to impact on such designated sites.” To this end they suggested consultation areas could be identified for designated sites within the Habitats Regulations Assessment. A similar procedure was utilised for some recent area plans such as the

⁵ 2013/A0155 & 2013/A0156

⁶ Sandale Development Limited’s Application [2010] NIQB 43

⁷ C-258/11, Lough Corrib site

Magherafelt Area Plan. This mitigation measure highlights the areas around a site where development has the potential to affect the site. Consultation areas if rolled out across the LDP area, to include the former Cookstown and Dungannon & South Tyrone districts would in theory give another control mechanism for the protection to European sites located within the MUDC area. Unfortunately these zones cannot cover every eventuality for example, the Magherafelt Area Plan didn't include a the two river systems in the district, highly sensitive to sediment release or poor water quality from development proposals as the policy would apply to all proposals within their catchments. And for obvious reasons the areas could not apply to proposals with large scale indirect effects such as intensive agricultural installations or wind turbines.

- 4.15 The drawbacks of a consultation areas is that they do not result in new policy but merely a tool which aids in the Development Management process. The idea of consultation areas is something that can be brought forward within its own right outside of the LDP process. In addition the identification of such consultation areas would represent an onerous task and would require monitoring and updating. Each consultation area would have to be tailored to the unique circumstances of each designated area and would have to be individually mapped. Therefore a one size fits all consultation zone could not be applied to all of Mid Ulster's designated areas. Above all the introductions of consultation areas would not provide any clear advice or guidance to an applicant. The current approach of consultation with NIEA on a case to case basis is considered to be acceptable.
- 4.16 However there is a rationale for adding an additional layer of protection on the most important sites within Mid Ulster. This option would be to introduce an additional level of constraint on all types of new development around existing (and proposed) international designations, such as a Ramsar, SPA, SAC etc. The SPPS advises that the tool to achieve this would be the introduction of a Special Countryside Area. Where appropriate these areas would have associated policies which would seek to protect the designated sites from unnecessary and inappropriate development. These Special Countryside Areas would effectively impose a restriction on all types of new development.

Options

- 4.17 **Option 1** - Adopt a policy approach similar to the existing policy which as it stands reflects the duty and process of legislative requirements, takes account of and has regard to the RDS, SPPS, and sustainability objectives and as demonstrated by NIEA is currently providing adequate protection to European sites.
- 4.18 **Option 2** - Develop a new policy which strengthens the desire to protect, conserve and enhance European sites and their settings which are of International importance by introducing a stricter policy through designation of a Special Countryside Area around all International / European designated sites.

This could be considered an overly restrictive option as it would effectively ban all types of development. Furthermore most Natura 2000 sites are afforded a

significant measure of protection through their designations and the existing accompanying policy.

- 4.19 **Option 3** - To use a combination of option 1 and option 2. Adopt a policy approach similar to the existing policy in combination with the introduction of a limited number of Special Countryside Areas to restrict all types of new development, focusing on the most sensitive and most at risk designated areas, e.g. Lough Neagh and Lough Beg.
- 4.20 **Preferred Option** - Based on the evidence provided it is suggested that the preferred option is, **Option 3**. There is however an opportunity to update the existing policy, simplifying it to make it more user friendly. The Mid-Ulster Council could adopt a similar policy wording, as set out below, with regards the new Local Development Plan International Designations:
- 4.21 ***The introduction of Special Countryside Areas around Lough Neagh and Lough Beg where there will be a presumption against new development other than for tourism at designated nodes.***

Outside of the Special Countryside Areas any development which would have a significant detrimental impact on an International / European designated site (proposed or adopted) will be in conflict with the LDP unless there is no alternative solution and there are imperative reasons of overriding public interest of regional significance

Protected Species

- 4.22 PPS 2, Policy NH 2 - Species Protected by Law and the SPPS (Regional Strategic Policy) are largely identical, but perhaps most immediately obviously Policy NH 2's use of sub headings which perhaps makes clearer the divide of Protected Species into European Protected Species (EPS) and National Protected Species, as there are differing duties and therefore policy requirements for each, as outlined below.
- 4.23 **EPS** - The Habitats Regulations requires a strict protection of EPS and dictates three tests⁸ where disturbance could take place. As such both PPS 2 and the SPPS states,
- 4.24 "Planning permission will only be granted for a development proposal that is not likely to harm a European protected species.

In exceptional circumstances a development proposal that is likely to harm these species may only be permitted where:-

1. there are no alternative solutions; and
2. it is required for imperative reasons of overriding public interest; and
3. there is no detriment to the maintenance of the population of the species at a favourable conservation status; and

4. compensatory measures are agreed and fully secured.

⁸ Regulation 53 sub-paragraphs (2)(e), (9)(a) and (9)(b)6

4.25 National Protected Species - Species protected under the Wildlife Order are also a material consideration for planning. And as such both PPS 2 and the SPPS states,

“Planning permission will only be granted for a development proposal that is not likely to harm any other statutorily protected species and which can be adequately mitigated or compensated against.”

4.26 Furthermore both PPS 2 and the SPPS outline,

“Development proposals are required to be sensitive to all protected species, and sited and designed to protect them, their habitats and prevent deterioration and destruction of their breeding sites or resting places. Seasonal factors will also be taken into account.”

4.27 As clearly outlined above, PPS 2 and the SPPS are identical in terms of their policy provision despite PPS 2’s use of sub headings, which its felt, makes clearer the divide of Protected Species and the differing duties for each, to the policy user.

4.28 Focusing on the ease of use of policy it’s also just worth noting, PPS 2 within its Justification and Amplification (J&A) states,

‘It is a criminal offence to harm a statutorily protected species. The presence of species protected by legislation is a material consideration when a planning authority is considering a development proposal that if carried out, would be likely to result in harm to the species or its habitats.’

4.29 However now in a role reversal it could be argued that the SPPS with the inclusion of its opening paragraph, although not worded as strongly as PPS2, is clearer to our roles and responsibility regarding protected species stating that,

“the presence or potential presence of a legally protected species is an important consideration in decision-making. If there is evidence to suggest that a protected species is present on site or may be affected by a proposed development, steps must be taken to establish whether it is present, the requirements of the species must be factored into the planning and design of the development, and any likely impact on the species must be fully considered prior to any determination.”

4.30 From what we have outlined above we can see quite clearly the existing policy accords with the SPPS. Although there are a couple of key differences that perhaps makes each, individually more user friendly (use of sub headings by PPS 2 and SPPS’s introductory paragraph) the thrust and content of the policies are the same.

4.31 Now we have established the existing policy accords with the SPPS the question is, is it working?

Again, in response to our consultation NIEA clearly outlined the existing policy adequately reflects the legal protection given to species protected by both domestic and European law, citing a number of wind turbine appeal decisions and case law to demonstrating the legislative strength behind the policy, such as:

- **Appeal 2012/A0062⁹** is of relevance in relation to bats and disturbance. The location of the turbine was amended at the hearing and with removal of scrub (not a priority habitat), an adequate buffer for bats was achieved. Although the appeal was allowed, this decision discusses the legislation and caselaw in relation to bats and is therefore a useful reference.
- **Appeal 2014/A0215¹⁰** is also of relevance in relation to bats. In this turbine case, there was no bat survey and a long length of hedgerow needed to be removed to allow for a buffer for the turbine. The appeal was dismissed due to uncertainties with impact on bats and the amount of priority habitat (hedgerow) that needed to be removed.
- **Joint Appeals 2013/A0155 and 2013/A0156¹¹** for single wind turbines were dismissed partly due to the lack of information in relation to impact on bats.
- **Appeal 2013/A0180¹²** was allowed as the commissioner considered that with some gorse hedge removal there was an adequate buffer for bats for the single wind turbine to landscape features.

4.32 And perhaps the most relevant case law in relation to EPS:

The Woolley Case and Morge Case (although from Great Britain applicable to Northern Ireland, as the legislation relates to a European Directive). The Woolley case and Morge case considered the necessary tests planners must consider to comply with the Habitats Regulations duty when dealing with EPS. These necessary (3) tests as outlined earlier in the paper were incorporated into PPS 2 policy to ensure case officers comply with legislation when making decisions.

R v Cornwall County Council ex parte Hardy [2001] considered where there was potential for a significant impact on an EPS, the survey to ascertain impact must be undertaken and considered during the planning process. This again highlights the legislative strength behind the policy, it shows if there is a lack of information regarding the impact of a development on a protected species it must be received as part of the planning process. It is not acceptable to attach a negative condition to a planning decision for a survey prior to development taking place, demonstrating alongside the need for the three policy tests there can be no case put forward for a relaxation of the existing policy regarding protected species.

⁹ Planning reference: K/2012/0122

¹⁰ Planning reference: W/2014/0402/F

¹¹ Planning reference: I/2013/0057/F and I/2013/0058/F

¹² Planning reference: O/2013/0364

Through the above appeals and case law NIEA have demonstrated the legislative strength behind the existing policy and the importance of its correct application. Legislation which must be carefully adhered to and for that reason, again, there can be no relaxation of the existing policy.

Before moving on to policy options it must just be recognised protected species by their very nature are harder to pin down, unlike designated sites they move about, as such NIEA stated that there was potential during the planning process for development which could have a significant impact on a Protected Species to gain approval (slip through net). Such developments may require a licence for works from NIEA (licencing body), post planning, therefore instances could arise whereby certain development activities do not receive a licence, leaving planning approval unsound as it could not be enacted.

As such to avoid such situations they highlight protected species need to be considered during the planning process. A point which as discussed earlier is stressed further in the opening paragraph of the updated SPPS.

Options

- 4.33 **Option 1** - Adopt the existing policy which as it stands reflects the duty and process of legislative requirements, takes account of and has regard to the RDS, SPPS, and sustainability objectives and as demonstrated by NIEA is currently providing adequate protection to EPS and National Protected Species.
- 4.34 The above said there may be some room for not changing but strengthening the existing policy to ensure proposals that could have a significant impact on a Protected Species don't as discussed earlier, slip through the net. This could simply be incorporating into the existing policy the opening paragraph from the SPPS which clearly sets out roles and responsibility regarding protected species stating that,
- 4.35 "the presence or potential presence of a legally protected species is an important consideration in decision-making. If there is evidence to suggest that a protected species is present on site or may be affected by a proposed development, steps must be taken to establish whether it is present, the requirements of the species must be factored into the planning and design of the development, and any likely impact on the species must be fully considered prior to any determination."
- 4.36 Or, perhaps going further to outline, if a development is likely to impact on a protected species, survey information should be submitted prior to a planning decision being made. And that for European Protected Species or a nationally protected species a licence may be required (post planning permission) in order to carry out the development. It is therefore important to refer directly to NIEA for licensing guidance.
- 4.37 **Option 2** - Develop a new policy which strengthens the desire to protect, conserve and enhance National and European species by introducing stricter policy tests such as identifying and designating the areas of the protected species through Special Areas of Constraint.

- 4.38 The drawbacks of a Special Areas of Constraint, are that a unique area would have to be identified and produced for each species protected by law within Mid Ulster. This in itself would be an onerous task but in addition it would be necessary to monitor and update each of the Special Areas of Constraint to ensure their accuracy. As such the introduction of Special Areas of Constraint, is not considered to be a viable option and it is recommended that issues can be addressed on a case by case basis utilising the existing control mechanism of HRA and where appropriate EIA alongside consultation with NIEA.
- 4.39 Furthermore the introduction of a Special Areas of Constraint, to be designated around the various types of protected species presents its own inherent difficulties due to the migratory nature of species. The onerous nature of this task and the level of ongoing monitoring that it would require mean that the introduction of Special Areas of Constraint, is not a feasible option under this policy.
- 4.40 **Preferred Option** - Based on the evidence provided it is suggested that the preferred option is, **Option 1**, adopt the existing policy. There is however an opportunity to update the existing policy, simplifying it to make it more user friendly and highlighting as the SPSS does, that any likely impact on protected species must be fully considered prior to any determination. The Mid-Ulster Council could adopt a similar policy wording, as set out below, within the new Local Development Plan for Protected Species:
- 4.41 ***“Proposals for development likely to impact on protected species must be fully considered prior to any determination. Proposals shall not accord with the LDP if:***
- 1. there is any likely to harm a European protected species, unless there are no alternative solutions; and it is required for imperative reasons of overriding public interest; and there is no detriment to the maintenance of the population of the species at a favourable conservation status; and compensatory measures are agreed and fully secured. Or***
 - 2. It is likely to harm any other statutorily protected species which cannot be adequately mitigated or compensated against.”***

National Designations

- 4.42 PPS 2, Policy NH 3 - Sites of Nature Conservation Importance - National and SPSS (Regional Strategic Policy) are at large identical word for word stating,
- “Planning permission will only be granted for a development proposal that is not likely to have an adverse effect on the integrity, including the value of the site to the habitat network, or special interest of:
- an Area of Special Scientific Interest;
 - a Nature Reserve;
 - a National Nature Reserve; or

- a Marine Nature Reserve.

A development proposal which could adversely affect a site of national importance may only be permitted where the benefits of the proposed development clearly outweigh the value of the site. In such cases, appropriate mitigation and/or compensatory measures will be required.”

4.43 That said the SPPS goes into slightly more detail to explain:

- **An Area of Special Scientific Interest** - sites of special interest by reason of their flora, fauna, geological and/or physiographical features are designated under Part IV of the Environment (Northern Ireland) Order 2002. There is a legal duty to take reasonable steps to further the conservation and enhancement of the features by which the ASSI is of special scientific interest;
- **A Nature Reserve or National Nature Reserve** – nature reserves can be of national (and sometimes international) importance. They are usually managed by the Department or by agreement with another Department, a council or a voluntary conservation body; or
- **A Marine Conservation Zone** - sea areas, including the inter tidal zone, designated by the DOE under Part 3 of the Marine Act (Northern Ireland) 2013. They are established for the conservation of marine flora and fauna, habitats, and features of geological or geomorphological interest.

4.44 It also states, “Planning authorities should note that nature conservation sites selected as European sites under the Birds and Habitats Directives may also be underpinned, either wholly or in part, by sites selected at national level.”

4.45 PPS 2 covers most of the additional detail above within its legislative context. However, regarding ASSI’s, although it states they are given legal protection under Part IV of the Environment (Northern Ireland) Order 2002 the SPPS emphasises that, “there is a legal duty to take reasonable steps to further the conservation and enhancement of the features by which the ASSI is of special scientific interest.’

4.46 Just of note MUDC area does not contain as referenced by PPS 2 Marine Nature Reserves which or Marine Conservation Zones referenced by the SPPS due to its geographical location.

4.47 From what we have outlined above we can see quite clearly the existing policy accords with the SPPS. That said, the SPPS emphasises our legal duty with regards ASSI’s.

4.48 Now we have established the existing policy accords with the SPPS the question is, is it working? NIEA were asked to consider if they felt the policy provided adequate protection to nature conservation sites of national importance and their response was:

“NIEA considers that the wording of this policy is appropriate to provide adequate protection to designated sites and enable the council to comply with the duty within the Environment Order.”

It is this legal duty which means there can be no relaxation in the current policy.

Options

- 4.49 **Option 1** - Adopt the existing policy which as it stands reflects the duty and process of legislative requirements, takes account of and has regard to the RDS, SPPS, sustainability objectives. And in NIEA's words it, "is appropriate to provide adequate protection to designated sites and enable the council to comply with the duty within the Environment Order."
- 4.50 In keeping with the status quo it may be worth including the following lines from the SPPS just to enforce "there is a legal duty to take reasonable steps to further the conservation and enhancement of the features by which the ASSI is of special scientific interest.'
- 4.51 **Option 2** - NIEA mentioned that buffers around ASSI's could be useful to highlight to case officers areas where development is likely to impact on them and when this policy should then be applied. This could be achieved through Special Areas of Constraint. As discussed previously these areas cannot cover every possible type of proposed development and for that reason when weighed up against the existing control mechanisms in place within the planning process such as MUDC's consultation with the environmental experts, NIEA, this is not considered a viable option. Also it raises the difficult question of just how far to define the Special Area of Constraint so that it adequately protects the national designations without being overly restrictive on areas in its vicinity.
- 4.52 **Preferred Option** - Based on the evidence provided it is suggested that the preferred option is, **Option 1**, adopt the existing policy. There is however an opportunity to update the existing policy, simplifying it to make it more user friendly and highlighting any likely impact on the species must be fully considered prior to any determination. The Mid-Ulster Council could adopt a similar policy wording, as set out below, within the new Local Development Plan for National Designations:

"Proposals for development which would affect national designations, shall not accord with the LDP unless:

(a) the objectives of designation and the overall integrity of the area will not be compromised; or

(b) any unacceptable impacts on the qualities for which the area has been designated are clearly outweighed by social, environmental or economic benefits of regional importance."

Local Designations

- 4.53 With regard to local designations PPS 2, Policy NH 4 - Sites of Nature Conservation Importance - Local and SPPS (Regional Strategic Policy) are again at large identical both clearly stating that,
- “A development proposal which could have a significant adverse impact on a site of local importance may only be permitted where the benefits of the proposed development outweigh the value of the site. In such cases, appropriate mitigation and/or compensatory measures will be required.”
- 4.54 They both outline Local Nature Reserves and Wildlife Refuges can be established by councils under the provisions of Nature Conservation and Amenity Lands (Northern Ireland) Order 1985. And Wildlife Refuge established under the Wildlife (Northern Ireland) Order 1985. Whereas PPS 2 states this within its supplementary guidance the SPPS is perhaps more user friendly stating it from the outset within its Regional Strategic Policy.
- 4.55 The Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 includes a duty to protect (so far as reasonably practicable) flora, fauna and geological and physiographical features of the countryside from any harmful effects and for that reason there can be no case made for a relaxation of this policy.
- 4.56 NIEA highlighted Sites of Local Nature Conservation Importance (SLNCI's) are features in the landscape of value to wildlife and included earth science features which were identified previously in area plans. They can contain priority habitat though this is not always the case especially in urban areas. And to this end they recommended Mid Ulster should continue with area plan designation or a similar one. NIEA highlighted that they have a local wildlife sites dataset which may aid with selection of possible sites.

Options

- 4.57 **Option 1** - Adopt the existing policy which meets legislative requirements, takes account of the RDS, the SPPS and sustainability objectives. The thrust of the planning policy takes account of the Council's own strategic objective to protect and enhance the natural environment. NIEA have stated, “this policy is appropriate for these local designated sites.”
- 4.58 **Option 2** - adopt the existing policy approach but augment it with SLNCI's. These have already been identified in the existing area plans, however in order to bring them forward it will require an extensive review. This approach is favoured by NIEA. There is no inherent requirement in the SPPS to do this and to a large degree the policy on species will go most of the way to achieve the appropriate protection.
- 4.59 **Preferred Option** - Based on the evidence provided it is suggested that the preferred option is, **Option 2**, as we are already a long way towards it within the existing area plans, though there will still be significant work to do. There is however an opportunity to update the existing policy, simplifying it to make it more user friendly. The Mid-Ulster Council could adopt a similar policy wording,

as set out below for Local Designations, within the new Local Development Plan:

- 4.60 **Proposals for development which could affect a Local Nature Reserve or a Wildlife Refuge or other sites of local nature conservation importance will accord with the LDP where the benefits of the proposed development outweigh the value of the site.**

Other Habitats, Species or Features of Natural Heritage importance

- 4.61 Policy NH 5 (PPS 2) and the SPPS (Regional Strategic Policy) are almost identical however the SPPS clearly identifies in its introductory paragraph as opposed to PPS 2 in its justification and amplification (J&A) that, “It is recognised that many other important habitats, species and features of natural heritage, which deliver ecosystem services, fall within or outside a designated site. To ensure international and domestic responsibilities and environmental commitments with respect to the management and conservation of biodiversity are met, the habitats, species and features mentioned below are material considerations in the determination of planning applications.”
- 4.62 PPS 2 however in its J&A gives greater detail to aid understanding of the complexity regarding priority habitats and species explaining they include both European (as identified under Annex I and II of the Habitats Directive and Annex I of the Birds Directive) and Northern Ireland priority habitats and species, identified through the Northern Ireland Biodiversity Strategy (NIBS) (in pursuance of the statutory duties under the Wildlife and Natural Environment (NI) Act 2011.)
- 4.63 Both PPS 2 and SPPS state, “Planning permission will only be granted for a development proposal which is not likely to result in the unacceptable adverse impact on, or damage to known:
- priority habitats;
 - priority species;
 - active peatland;
 - ancient and long-established woodland;
 - features of earth science conservation importance;
 - features of the landscape which are of major importance for wild flora and fauna;
 - rare or threatened native species;
 - wetlands (includes river corridors); or
 - other natural heritage features worthy of protection.
- 4.64 A development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species or features may only be permitted where the benefits of the proposed development outweigh the value of the habitat, species or feature. In such cases, appropriate mitigation and/or compensatory measures will be required.”

4.65 Noticeably the SPPS after the bullet point: “other natural heritage features worthy of protection”, has added, ‘including trees and woodland.” PPS 2, although in its J&A, gives greater detail outlining, ““Other” natural heritage features worthy of importance are most likely to include trees and woodland which do not fall under the priority habitat or long established woodland categories but are in themselves important for local biodiversity.”

4.66 From what we have outlined above we can see quite clearly the existing policy accords with the SPPS. Now we ask the question, is it working? NIEA have stated the existing policy enables planners to comply with the WANE act duty, Water Environment (Water Framework Directive) Regulations (NI) 2003 (wetlands including river corridors) and Habitats Directive, Article 10 (features of the landscape of nature conservation value. That they consider the policy is adequate for most biodiversity. That it offers a degree of flexibility to the policy through the balance of compensation in cases where habitat could be created against those which cannot be recreated, and in bringing the benefits of the proposal against the value of the habitat. And as such have quoted a number of appeals showing its workings and reinforcing its legislative strength:

- **Appeal 2012/A0155**¹³, involved a Site of Local Nature Conservation Interest (draft at time of appeal) which included priority habitat. The proposal was for infill which if allowed would remove the entire priority habitat within the site. The appeal was dismissed as the proposal would have caused unacceptable damage to priority habitat, priority bird species, wetland and natural heritage features worthy of protection within the site and the benefits of the proposal did not outweigh the value of the site. This appeal shows that the workings of the PPS2 policy provide an adequate basis for the defence of planning decisions.
- **Appeal 2012/A0186**¹⁴, dealt with loss of priority habitat for an EIA application (windfarm). The appellant had not provided detailed mitigation and compensation for the loss of blanket bog priority habitat. One of the reasons for failing the appeal was absence of clearly demonstrated mitigation and/or compensatory measures as the development would have an unacceptable adverse impact on biodiversity and nature conservation.
- **Appeal 2013/A0242**¹⁵, for a single wind turbine was dismissed on the impact of the proposal on priority habitat.
- **Joint Appeals**¹⁶ **2013/A0155 and 2013/A0156**, for single wind turbines were dismissed partly due to the impact on priority habitat.
- **Appeal 2013/A0180**¹⁷, planning reference O/2013/0364 was allowed as the commissioner considered that with some gorse hedge removal there was an adequate buffer for bats for the single wind turbine to landscape features. The loss of hedgerow and conifers was mitigated by hedgerow planting of 10 times the amount lost at a location away from the turbine.

4.67 NIEA did however highlight a number points worth considering:

¹³ Planning reference W/2010/0113/F

¹⁴ Planning reference J/2011/0148

¹⁵ Planning reference J/2012/0366/F

¹⁶ Planning references I/2013/0057/F and I/2013/0058/F

¹⁷ Planning reference O/2013/0364

PPS 2 centres on the mitigation hierarchy, an explanation of which was provided in supplementary planning guidance¹⁸ which was to accompany PPS 2 though never finalised: avoid feature/habitat, if it can't be avoided then mitigate the impacts, if there are still impacts that can't be mitigated then compensate and in cases where compensation is not possible then refuse. To aid transparency of the existing policy with regards mitigation Mid Ulster could consider providing some supportive text.

- 4.68 Mid Ulster could also provide greater clarity for habitats that cannot be compensated against e.g. Ancient and long Established Woodland and intact bog (occurs within the priority habitats, Blanket Bog and Raised Bog and is usually active peatland).
- 4.69 Bearing in mind the above point according to NIEA there have been some discussions for appeal hearings questioning is it necessary to have an active peatland policy within PPS2? Active peatland only occurs in the priority habitats Blanket bog and Raised Bog. If it were to be removed from the policy as it stands, explanatory text would need to indicate that its loss could not be fully compensated.
- 4.70 They also highlighted the existing policy is obvious where woodland is still present, but it can also apply where trees have been removed. Where the woodland has been lost and is now planted with conifers, the site would be classified as a planted ancient woodland site (PAWS). If these sites still had some remnant veteran trees or ancient woodland indicator plants, then the site would also warrant policy protection from permanent loss from development. As such suggested Mid Ulster may wish to have a separate policy for ancient and long established woodland which could also include the amenity value of the woodlands and highlight their species sensitivities especially as it cannot be recreated.
- 4.71 Additionally the existing policy was developed when water framework management plans were in infancy. And therefore Mid Ulster now has the opportunity to improve the cross over and linkage between the local policy plan and the local water quality management plans. An example of where this has already successfully be achieved is the recently adopted Northern Area plan, Policy ENV 4 Development Adjacent to a Main River. This policy includes a biodiversity strip of 10m along main rivers and encourages public access provision.
- 4.72 NIEA suggested the introduction of a stand-alone policy for the protection of trees. Trees that have a confirmed Tree Preservation Order or are within a Conservation Area are afforded a significant degree of statutory protection. This aside there may be scope to include an additional element within the new policy to reflect the importance of retaining trees or landscape features that make an valuable contribution to the wider environment.

¹⁸ Supplementary Planning Guidance to Draft Planning Policy Statement 2 Natural Heritage (Revised) March 2011, Introduction, page 4.

Options

- 4.73 **Option 1** - Adopt the existing policy which meets legislative requirements, takes account of the RDS, the SPPS and sustainability objectives. The thrust of the planning policy takes account of the Council's own strategic objective to protect and enhance the natural environment.
- 4.74 **Option 2** - Develop a new policy which strengthens the desire to protect and conserve habitats, species or features of natural heritage importance through the introduction of individual designations, each with its own unique policies.

It is noteworthy that not all Habitats, Species or Features of Natural Heritage importance have been identified and as such their designation would involve a significant piece of work. As these sites have not all been recorded there is the concern that some could be overlooked in the consideration of development proposals.

- 4.75 **Preferred Option** - Based on the evidence provided it is suggested that the preferred option is, **Option 1**, adopt the existing policy. There is however an opportunity to update the existing policy, simplifying it to make it more user friendly. Picking up on NIEA's comments on adding transparency and clarity to the policy by introducing supportive text regarding mitigation measures, giving greater clarity for habitats that can't be compensated against, looking at the necessity of the active peatlands policy, improving the cross over and linkage between the local policy plan and the local water quality management plans. It is however still hoped the degree of flexibility to this policy through the balance of compensation could be retained. The Mid-Ulster Council could adopt a similar policy wording, as set out below for Other Habitats, Species or Features of Natural Heritage importance, within the new Local Development Plan:

Proposals for development which are likely to result in the unacceptable adverse impact on, or damage to Other Habitats, Landscape Features, Species or Features of Natural Heritage importance, shall not accord with the LDP unless the benefits of the proposed development outweigh the value of the habitat, species or feature. In such cases, appropriate mitigation and/or compensatory measures will be required.

Trees will be a presumption in favour of retaining trees where they make a valuable contribution to the wider environment and local amenity.

Areas of Outstanding Natural Beauty

- 4.76 Notably from the outset PPS 2 has an individual policy for AONB's (Policy NH 6). The SPPS on the other hand has incorporated AONB's within its Regional Strategic Policy for National Designations in doing so highlighting and clarifying their position in the natural heritage hierarchy.
- 4.77 It is the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 (NCALO), which places a duty on public bodies to conserve the natural beauty

and amenity of the countryside. And as such both Policy NH 6 (PPS 2) and SPPS (Regional Strategic Policy) outline AONB's are designated primarily for their high landscape quality, wildlife importance and rich cultural and architectural heritage under NCALO. PPS 2 says this within its legislative context whereas the SPPS is more user friendly stating it from the outset within its Regional Strategic Policy.

4.78 The SPPS goes on to say that, "Development proposals in AONBs must be sensitive to the distinctive special character of the area and the quality of their landscape, heritage and wildlife, and be in the accordance with relevant plan policies." Whereas PPS 2 states, "Development in Area of Outstanding Natural Beauty will only be granted where it is of an appropriate design, size and scale for the locality and meets all the following criteria:" which it then details. Here the SPPS uses stronger wording, however PPS 2 provides a greater level of detail to the policy user when making assessments.

4.79 PPS 2 within its J&A states, "In assessing proposals account will be taken of the Landscape Character Assessments and any other published guidance such as countryside assessments produced as part of the development plan process, as well as AONB Management Plans and local design guides." The SPPS not only states this within its strategic regional guidance but goes further than PPS 2 to include assessing, "cumulative impacts." PPS 2 does not provide a planning test in relation to need and therefore does not deal with cumulative issues. PPS 21 provides significant policy tests but does not however differentiate between Areas of Outstanding Natural Beauty (AONB) and the general countryside.

PPS 2 is therefore quite simply a design policy broad enough to apply across NI.

Options

4.80 It is acknowledged that there is a definite need to retain a be-spoke policy for AONB's, however, there are a number of ways which this can be achieved.

4.81 **Option 1** - Adopt the existing policy which meets legislative requirements, takes account of the RDS, the SPPS and sustainability objectives.

4.82 However one of the main issues with the existing policy is that it is essentially a design policy for rural housing only and as such does not fully consider the full range of development proposals received within the AONB. In addition the existing AONB policy does not deal with the cumulative impacts of development proposals within the AONB.

4.83 **Option 2** - Develop a new policy which strengthens the desire to protect, conserve and enhance AONB's by adapting the wording contained within the SPPS and is supported by areas of constraint on high structures.

4.84 **Option 3** – Develop a new Special Countryside Area, to protect the Sperrins AONB from all forms of development.

4.85 This option would indeed protect the AONB from insensitive forms of development however it would be a restrictive policy. It is considered that there

is no requirement at present for a Special Countryside Area across the AONB as such a policy would be overly restrictive and does not recognise the unique capacity of certain landscapes to accommodate development better than others. It is recognised that there may be a need for additional controls for minerals extraction and high structures within the AONB however such policy options will be brought forward under separate policy.

Preferred Option

- 4.86 Based on the evidence provided it is suggested that the preferred option is, **Option 2** as the introduction of a new policy which seeks to protect the AONB from insensitive development, including high structures, would meet the requirements of the RDS and SPPS. Within the Sperrins AONB it may be difficult to accommodate high structures, wind energy in particular, without detriment to the areas cultural and natural heritage assets. This policy would also introduce the additional element of assessing the cumulative impact of proposals in line with the SPPS. The Mid-Ulster Council could adopt a similar policy wording, as set out below, within the new Local Development Plan:
- 4.87 ***Development which is sensitive to the distinctive special character and landscape quality of the Sperrins Area of Outstanding Natural Beauty will be in accordance with the Local Development Plan.***
- 4.88 Specific policies, such as for high structures, will be dealt with under separate policy considerations. Where appropriate, the council will provide local policies and guidance in order to assist in the design of housing within settlements.

5.0 Conclusion

- 5.1 The existing policies contained within PPS 2, provides detailed criteria, justification and amplification for the assessment of new development against the need to conserve, protect and, where possible, enhance our natural heritage.
- 5.2 Mid Ulster District is endowed with a rich and diverse range of species, habitats, landscapes and earth science features which make up its natural heritage and add to distinguishing its special character and identity. This is recognised at local, national and international level and can be seen by the significant number of designated sites within the District. Some important because what they exemplify is rare and irreplaceable, such features of scientific, educational or research interest, once destroyed, cannot be recreated. Others are important as representative examples of their type on a local, national or international scale. They are also important economic assets providing revenue to the economy through environmental activities, tourism, recreation and employment. Their continued protection, conservation and enhancement where possible shall promote their sustainable development and help to meet the

Councils statutory obligations under the Strategic Environmental Assessment and Sustainability Appraisal¹⁹.

- 5.3 Planning Policy Statement 2 – Natural Heritage is relatively new policy, only published in 2013 and appears to be working well, with no significant issues having been raised hitherto in relation to its implementation. The current planning policy is meeting the key objectives of both the Sustainability Appraisal and the SPPS with perhaps some requirements for minor re-wording. The main thrust of the current planning policy meets the key objectives of the Mid Ulster Council. And although there is a high degree of expertise required from colleagues in NIEA to allow the planning department to properly assess all types of proposals. The evidence demonstrates, with some minor amendments, that all 6 policies contained within PPS 2 are robust enough to provide adequate protection for designated site and biodiversity.

6.0 Recommendation

- 6.1 It is recommended that the policy options contained within this Paper together with the preferred options are subjected to the Sustainability Appraisal/Strategic Environmental Assessment, before any final decisions are made on which options will go forward for public consultation in the Preferred Options Paper.

¹⁹ Sustainability Assessment Incorporating Strategic Environmental Assessment, June 2015, Mid Ulster