



Ammonia and Nutrients Policy Branch
 DAERA, Dundonald House
 Upper Newtownards Road
 Belfast BT4 3SB

27th October 2023

Dear Sir or Madam

FUTURE OPERATIONAL PROTOCOL TO ASSESS THE IMPACTS OF AIR POLLUTION ON THE NATURAL ENVIRONMENT

Please find enclosed a response to the above 'Call for Evidence'. This response is fully supported and endorsed by all the organisations listed and we would ask that you treat it as a joint response from all. The agri-food sector organisations included represent all the livestock and poultry sectors in Northern Ireland and the local feed industry and therefore represent a very significant proportion of the agri-food sector and the wider NI Economy.

As is outlined in the response we are also working with KPMG on an additional economic assessment of the proposed protocol and will endeavour to submit this to you at the earliest opportunity.

If you wish to discuss this response further, we would be happy to engage with officials.

Yours faithfully

Gill Gallagher
 Chief Executive
 NI Grain Trade Association

Declan Billington MBE
 Chairman
 NI Poultry Federation

David Brown
 President
 Ulster Farmers' Union

Darryl McLaughlin
 Chief Executive
 NI Meat Exporters Association

Deirdre McIvor
 Chief Executive
 NI Pork & Bacon Forum

Ian Stevenson
 Chief Executive
 Dairy Council NI

Colin Smith
 Interim Chief Executive
 Livestock and Meat Commission



Ulster Farmers Union

**Future Operational Protocol
to assess the impacts on
Air Pollution**

Response to Call for Evidence

October 2023



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1. Introduction

- 1.1 This is a response filed on behalf of the Ulster Farmers' Union to the consultation on the Future Operational Protocol to Assess the Impacts of Air Pollution on Natural Environment issued by the Department of Agriculture, Environment, and Rural Affairs in July 2023.
- 1.2 The Ulster Farmers' Union is the largest farming organisation in Northern Ireland representing over 12,000 members. Its membership encompasses farmers from all sectors across Northern Ireland and from all farm sizes, reflecting the diverse nature of the agricultural sector in Northern Ireland. The future direction of any operational protocol for assessing air quality emissions is of interest to the Ulster Farmers' Union and its members because of the impact it will have on the agricultural sector in Northern Ireland.
- 1.3 In preparing this response, the Ulster Farmers Union' has sought advice from a team of experts across the topic areas covered by the consultation. The experts that have inputted into this response and their respective areas of expertise are set out below.
 - (i) Mr Conor Fegan BL (Environmental law)
 - (ii) Clyde Shanks (Planning)
 - (iii) Irwin Carr (Air quality modelling)
 - (iv) Ecology Solutions (Ecology)
 - (v) KPMG (Economics).
- 1.4 The Ulster Farmers' Union instructed KPMG to model the impact which a revised operational protocol may have on the agricultural sector in Northern Ireland. In order to model the impact, KPMG have had to gather a significant amount of information from stakeholders over the last number of weeks. It has not been possible for KPMG to complete this work in the timeframes imposed by the Department. Accordingly, where in this response the Ulster Farmers' Union intends to rely on analysis from KPMG it will indicate so and a final report from KPMG with further analysis will follow in due course.
- 1.5 In reading this response, two further points should be borne in mind.
 - (i) The structure of this response largely mirrors the structure of the Call for Evidence itself. Headings generally align with the questions asked in the Call for Evidence or sections within the Call for Evidence. Answers are provided to the sixteen specific questions posed to stakeholders in the Call for Evidence; and, consistent with question seventeen, which invites stakeholders to make any other comments that they wish on the

information presented, the Ulster Farmers' Union has commented generally on the information presented where relevant. References to page numbers in brackets are references to page numbers in the Call for Evidence (unless otherwise stated).

- (ii) Whilst the Call for Evidence states that the information shaded in green has been provided "*for information only*", in some cases the Ulster Farmers' Union disagrees with, or wishes to comment on, that information (p. 7). It has done so in this response and has not confined itself to commenting only on those matters shaded in yellow.

2. Overview

- 2.1 The Ulster Farmers' Union acknowledges the need to tackle ammonia emissions in Northern Ireland and recognises that this represents a significant challenge. The Ulster Farmers' Union set out its position on the issue of ammonia emissions in Northern Ireland more generally in its response to the Draft Ammonia Strategy. Any steps taken to tackle ammonia emissions in Northern Ireland must not, however, threaten the sustainability of the agricultural sector in Northern Ireland.
- 2.2 It is well known that the current operational protocol has caused significant problems for the agricultural industry in recent months, especially in light of the pausing of planning advice instigated by the Department on 31 May 2023. Whilst the Ulster Farmers' Union welcomed the decision to resume the giving of planning advice by the Department on 29 September 2023, it remains the case that many applications for planning permission remain held up in the system. Attempts to rely on rights under the Planning (General Permitted Development) Order (Northern Ireland) 2015 have also begun to be affected. Many proposals have not even entered the planning and consenting systems, as applicants have been dissuaded from doing so by the present uncertainty. This situation is regrettable.
- 2.3 The Ulster Farmers' Union considers that a balance needs to be struck between the need to tackle ammonia emissions and the need for a sustainable agricultural sector in Northern Ireland. The Ulster Farmers' Union welcomes the key objective set out at the beginning of the Call for Evidence which recognises the importance of achieving both a protected and improved environment and a sustainable agricultural sector. It will expect the Department to use this key objective as a yardstick against which to assess any revised operational protocol.
- 2.4 It is important that the agricultural sector is viewed as part of the solution and not part of the problem. Too often in both the Call for Evidence and more generally, the Department and others have singled the agricultural industry out for criticism. That view lacks balance. It fails to appreciate the significant steps already taken by the agricultural industry to help tackle ammonia emissions, the significant burdens already placed on individual farmers seeking to secure their livelihoods, and the willingness of the industry to play a role in finding a solution to the problem.
- 2.5 It would be unfair to place a disproportionate burden on the agricultural industry in seeking to resolve this problem. It is not only the interests of individual farmers that would be adversely affected if the sustainable development of our agricultural sector is undermined moving forward, but also the interests of society as a whole.
- 2.6 The Ulster Farmers' Union is concerned that there is a lack of understanding and recognition in the Call for Evidence about just how difficult it will be for individual farmers and the agricultural industry as a whole to shoulder the burdens proposed by the proposals contained within the Call for Evidence. No meaningful counter measures are proposed, for example subsidies to offset the significant financial

burdens associated with complying with a more complex operational protocol. This is a source of considerable concern for the Ulster Farmers' Union and represents a lack of joined up thinking by the Department.

- 2.7 The Ulster Farmers' Union has instructed KPMG to model the impacts of the proposals. This will assist in filling the gap in the existing evidence base on the potential impacts of the proposals set out in the Call for Evidence. The Ulster Farmers' Union will expect the Department to give careful consideration to these impacts as it brings forward a revised operational protocol. The social and economic aspects of sustainable development must not be overlooked.
- 2.8 The proposals set out in the Call for Evidence will stymie sustainable agricultural development, discourage investment, and disincentivise farmers from making improvements to already existing developments. A lack of clarity on the proposals lies at the heart of the concerns held by the Ulster Farmers' Union. The proposals will not deliver the certainty necessary for investment decisions to be made, for development proposals to be formulated, or for consenting decisions to be progressed. The revised operational protocol must set a clear framework for decision-making, which enables applicants and their agents to reach informed views about the likely effects of proposals at an early stage in the development process at minimal cost.
- 2.9 The proposals ultimately fall far short of delivering the necessary clarity and certainty to support the sustainable growth of the agricultural sector in Northern Ireland, consistent with wider government plans and strategies. The Ulster Farmers' Union will expect any revised operational protocol to represent an improvement on the proposals set out in the Call for Evidence, setting out a clear and robust framework to guide farmers, their agents, and decision-makers when addressing air quality impacts. It will also expect to see wider government initiatives brought to bear in order to offset the inevitable costs associated with complying with any revised operational protocol and to help tackle the problem of ammonia emissions more generally. All of this is necessary if the Department is to achieve the key objective which it has set for itself.
- 2.10 The Ulster Farmers' Union and its professional team would be willing to meet with the Department to discuss its concerns further and to input into the development of the revised operational protocol as it moves forward. It is considered that a further consultation is necessary once the Department has worked up firm proposals for the revised operational protocol. The Ulster Farmers' Union views the Call for Evidence as the first step in a longer process of engagement.
- 2.11 The Ulster Farmers' Union would also request that the Department commits to keeping any revised operational protocol under review; and, in particular, to keep under review the impacts which any revised operational protocol may have on the agricultural sector. This should be written into any revised protocol. A clear review mechanism with deadlines should be identified. This should involve stakeholders.

This will allow the impacts of any revised operational protocol to be regularly reviewed, alongside any other relevant developments in the legislative framework, case law, or science. It should include consideration of whether the governing legislative framework, in particular the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, requires any amendment moving forward.

3. Procedural matters

- 3.1 The Ulster Farmers' Union has not seen evidence of a rural impact assessment having been undertaken. Such an assessment is required as a matter of law. The absence of such an assessment significantly undermines the ability of the Department to reach an informed view of the likely impacts of the revised operational protocol.
- 3.2 Public authorities such as the Department are under a duty to have due regard to rural needs in the circumstances set out in section 1(1) of the Rural Needs Act (Northern Ireland) 2016. Rural needs includes social and economic needs (section 6 of the Rural Needs Act (Northern Ireland) 2016).

“(1) A public authority must have due regard to rural needs when —

(a) developing, adopting, implementing or revising policies, strategies and plans, and

(b) designing and delivering public services.”

- 3.3 Section 1(a) is engaged as the revision of the operational protocol amounts to *“revising polic[y]”*. There is no statutory definition of *“polic[y]”*. It is a straightforward phrase with a plain meaning. It is a plan of what to do in a particular situation that has been agreed officially (Cambridge English Dictionary). Useful guidance on the meaning of *“polic[y]”* can be found in *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52, [104]–[106]. The Court in that case was dealing with the meaning of the phrase *“Government policy”* in section 5(8) of the Planning Act 2008. The Court explained that the *“epitome of ‘Government Policy’ is a formal written statement of established policy”* ([106]). There is no good reason to take a narrow view of the phrase *“polic[y]”* in section 1(1)(a). The statutory purpose is to ensure that government initiatives and actions capable of affecting rural needs are subject to proper assessment. It would be wrong to adopt a narrow view of the phrase *“polic[y]”* which effectively excluded from its scope important government initiatives capable of impacting on rural needs. Whether or not a document amounts to *“polic[y]”* must be a matter of substance. The label attached to the document (e.g. guidance) cannot be determinative or else the statutory duty could easily be circumvented by public bodies.
- 3.4 Applying these principles, the revised operational protocol will be an official government document which will set out how the government proposes to exercise statutory functions, including consenting functions and consultation functions. It has the character of policy. It is clearly capable of having an impact on rural needs. The fact that the Department refers to the operational protocol as guidance does not deprive the operational protocol of its status as policy in substance.

3.5 Even if that is wrong, section 1(1)(b) would be engaged in any event. The Department, in issuing consultation responses and determining applications, is “*delivering public services*” (section 1(1)(b)). The Department in exercising its power to issue guidance, is doing so as part of the “*deliver[y] [of] public services*” (section 1(1)(b)). The services it provides in this respect are clearly “*public services*”. They are not private in nature. They are services for the benefit of the public engaging in statutory consenting procedures and consenting authorities. Indeed, this characterisation is consistent with how the Department describes its role in the Call for Evidence (p. 6).

“DAERA, in its role as the appropriate nature conservation body [...] has a duty to provide advice to planning authorities and other competent authorities on the potential impacts of air pollution, including ammonia, from plans and projects on designated sites and protected habitats”.

- 3.6 Accordingly, the Ulster Farmers’ Union requests that the Department clarifies whether such an assessment has been undertaken. If so, it should be published for comment; and if not, then consistently with the statutory provisions set out above, an assessment should be undertaken and then published for comment.
- 3.7 Additionally, it appears that the Department intends the revised operational protocol to apply to Areas of Special Scientific Interest designated under the Environment Order (Northern Ireland) 2002 (a point addressed further below). Under article 48(1) of the Environment Order (Northern Ireland) 2002, the Department and any other body exercising functions under Part IV of that Order are required to have “*due regard to the needs of agriculture, forestry and fisheries*” (article 48(1)) (underlining added). In applying any revised operation protocol to the facts of a particular case — for example in responding to a consultation response under article 40(2) on the basis of any revised operational protocol — this duty would apply. Given its relevance at a project specific level, it would appear sensible to assess the impacts on agriculture at a policy making level too. This may, in fact, be legally required depending on the source of the power being exercised by the Department in revising the protocol. Given that there is no express statutory power to issue guidance in respect of Areas of Special Scientific Interest under Part IV, it is presumed that such guidance would be issued pursuant to implied statutory powers under Part IV (see by analogy *Suffolk Coastal District Council v Hopkins Homes* [2017] UKSC 37, [19]–[20]). If that is so, then the duty could apply at this stage. On any analysis, due regard must be given to the needs of agriculture by the Department in the development and / or implementation of any revised operational protocol.
- 3.8 The Ulster Farmers’ Union notes that the Call for Evidence confirms that the evidence gathered will ultimately be “*for consideration by an incoming Minister and future Executive*” (pp. 5 and 7). The Ulster Farmers’ Union welcomes this confirmation. The Ulster Farmers’ Union does not consider that the implementation

of a revised operational protocol is a matter which could lawfully be pursued by civil servants under the terms of the Northern Ireland (Executive Formation etc) Act 2022. This is a significant matter which requires democratic oversight. By analogy, the Ulster Farmers' Union notes that in a letter dated 11 September 2023 sent by the Permanent Secretary to the Chief Executive of the Office for Environmental Protection, the Permanent Secretary confirmed that the Environmental Improvement Plan was a matter which could not be progressed under the terms of the Northern Ireland (Executive Formation etc) Act 2022. For the same reasons as is given in that letter, this is not a decision which can be made by civil servants in the absence of ministers.

- 3.9 The Ulster Farmers' Union agrees with the Call for Evidence when it says that this would be a matter for consideration by a "*future Executive*" (pp. 5 and 7). This is a matter which is evidently significant, controversial and / or cross cutting within the meaning of the Northern Ireland Act 1998. It is not a decision which can be taken by an individual minister when the Northern Ireland Assembly is restored.
- 3.10 For the avoidance of doubt, it is of no significance that the Department views the operational protocol as technical guidance as opposed to government policy. Even assuming that it is correct (which, for the reasons stated above, is not accepted), the mere classification of the revised operational protocol as technical guidance does not negate the fact that the protocol is an expression of how the Department intends to exercise its statutory functions, in particular its functions under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, and will be afforded significant weight by other decision-makers, including planning authorities and the Planning Appeals Commission, in the absence of good reason to the contrary. Its significance and effects cannot be downplayed simply by labelling it as technical guidance as opposed to government policy.

4. Overview (section 2), background to ammonia in Northern Ireland (section 3), and legislation (section 4) (question 1)

- 4.1 Ecology Solutions has reviewed the case studies referred to in the Call for Evidence as well as the background material set out in the Call for Evidence (pp. 9 – 14). Ecology Solutions have the following comments to make on that material.
- 4.2 There is a concern over the language used to describe critical levels and loads. It is important that any revised operational protocol accurately explains the relevance of critical levels and loads as tools for ecological assessment.
- 4.3 On the webpage which summarises the findings from the recent studies undertaken (<https://bitly.ws/YzPi>), the Department makes the following remark (underlining added).

“These sites contain peatland habitats with an annual critical level for ammonia concentrations of 1 µg m⁻³. This is the level above which ecological damage is expected to occur”

- 4.4 A similar remark is made in the Call for Evidence itself (p. 9) (underlining added).

“above the Critical Levels and Loads at which damage to plant and biodiversity will occur”

- 4.5 It is wrong to assess the significance of effects working on the basis that concentrations above a defined critical level or load will lead to ecological damage. It would be wrong to imply that any exceedance of the critical level or loads must automatically lead to a finding of adverse effects on the integrity of a site. It is possible in some cases where a critical level or load has already been exceeded to show that a particular project will not cause any harm to the integrity of that site.
- 4.6 The correct definitions of critical levels and loads for assessment purposes are set out later in the Call for Evidence (p. 18). These accord with the nationally and internationally recognised meaning of those phrases in this context (p. 18) (emphasis in original) (underlining added).

*“**Critical Levels (Cle)** — concentrations of pollutants in the atmosphere above which direct adverse effects on receptors, such as human beings, plants, ecosystems or materials, may occur according to present knowledge*

***Critical Loads (CLo)** — a quantitative estimate of exposure to more or more pollutants below which significant harmful effects on specified sensitive elements of the environment do not occur according to present knowledge”*

- 4.7 Both definitions are caveated with reference to “*present knowledge*”. This underscores the importance of keeping critical levels and loads under review.
- 4.8 On review of the case reports and studies cited, it is clear that ammonia monitoring and assessment was undertaken at a small sample of designated sites. Whilst the monitoring and assessment work assists in quantifying the levels of ammonia at the sample sites, limited evidence is presented regarding the actual impacts of ammonia levels at the sample sites. In the Ballynahone Bog SAC study, it is highlighted that different sites will be affected differently (p. 16).

“The results show how the sites are impacted differently, depending on the particular situation at each site and the make-up of emission sources (e.g., is there one or more point source(s) or are there several diffuse sources). This makes it difficult to directly compare the results from one site with another”.

- 4.9 In light of this, taken together with the general lack of analysis specific to Northern Ireland which sets out the impacts of high levels of ammonia emissions on designated sites, Ecology Solutions doubts whether the Department is sufficiently informed so as to justify the use of low thresholds from an ecological perspective.
- 4.10 The information on the current status of habitats in Northern Ireland is expressed at a high level. It does not indicate what the driver for the unfavourable condition at each site is, which could, for example, be a lack of appropriate management, visitor pressure, hydrological changes, as opposed to air quality impacts.
- 4.11 The Call for Evidence acknowledges that seasonal variations associated with farming practices and fluctuations in the weather had a bearing on ammonia concentrations at the sample designated sites. It is unclear how these have been factored into the proposals set out in the Call for Evidence and how these would be expected to be addressed at the development management stage. It is unclear if this would affect the expectations of the Department if site surveys were being undertaken in support of the application. It is also unclear if the Department accepts that timing restrictions could play a role in the design of mitigation strategies, with more protective limit values applying at certain times of the year and, conversely, higher values being acceptable at other times. Guidance should be provided on these matters in any revised operational protocol.

Q1. Do you have any comments or feedback on the legislation listed above, or any other legislation you feel should be considered?

- 4.12 As explained in the previous section, the Rural Needs (Northern Ireland) Act 2016 has wrongly been omitted.

Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland)

- 4.13 The correct reference is the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland). Save in the limited circumstances set out in regulation 9(4) of the Conservation of Habitats and Species Regulations 2017, the 2017 regulations do not extend to Northern Ireland. The reference the 2017 regulations on p. 6 should be replaced with a reference to the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland) (the relevant regulation is regulation 5).
- 4.14 The summary of the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland) fails to recognise the important exception that in some circumstances a plan or project which does adversely affect the integrity of a designated site can be consented. This is provided for in regulation 44 of the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland).
- 4.15 The Department will be aware of the extensive case law surrounding the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland). Given that the revised operational protocol will be relied on by decision-makers when discharging their duties under these regulations, the Ulster Farmers' Union considers that it would be useful for the revised operational protocol to remind decision-makers of the following, often overlooked, principles from the case law. Such principles should inform the approach in the revised operational protocol too.
- 4.16 The habitats regulations are *"intended to be an aid to effective environmental decision making, not a legal obstacle course"* (*R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P&CR 16, [72]). The process which is required *"should not be over-complicated [...] all that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an 'appropriate assessment'.* *'Appropriate is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand [...] no special procedure is prescribed"* (*R (Champion) v North Norfolk District Council* [2015] UKSC 52, [41]).
- 4.17 Whilst the decision-maker must be certain that there is no adverse effects on the integrity of designated sites at the point of consent, this certainty should not be construed as meaning absolute certainty. As Advocate General Kokott explained in *Waddenzee* [2005] All ER (EC) 535, [107].

"the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their

point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty”

- 4.18 Related to this, what is required is not the absence of any doubt whatsoever but the absence of reasonable scientific doubt. In *Eco Advocacy CLG* (Case C-721/21), Advocate General Kokott explained as follows ([91]–[93]).

“91. This does not necessarily mean, however, that the statement of reasons for the decision not to carry out an appropriate assessment must also expressly and individually remove each of the doubts raised in connection with the adverse effects on the protected site during the public participation process.

92. In so far as doubts are not reasonable from a scientific point of view, the competent authority cannot be required to expressly ‘remove’ them. Quite apart from the fact that there is no justification for devoting an authority’s resources to doubts with no scientific foundation, it will in addition often be entirely impossible to dispel such doubts. How, for example, would an authority refute the objection that a project will anger the spirits of the ancestors?

93. The answer to the fifth question which I set out in point 90 therefore holds good for doubts expressed in development consent proceedings only in so far as those doubts are reasonable from a scientific point of view.”

- 4.19 Whilst a precautionary approach must be taken, it must be applied proportionately. A precautionary approach is not a reasonable worst case scenario approach (*R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, [9](8)). The question will always be whether there is still room for reasonable scientific doubt (*R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, [9](8)). Useful guidance on this matter can be found in the Communication from the Commission on the Precautionary Principle (2000). The Commission makes a clear distinction between the precautionary principle and the search for zero risk (p. 8).

“It is also necessary to clarify a misunderstanding as regards the distinction between reliance on the precautionary principle and the search for zero risk, which in reality is rarely to be found”.

The Commission then goes on to explain that reliance on the precautionary principle is no excuse for derogating from general principles of risk management, which include proportionality (p. 17). It explains again that the precautionary principle is not aimed at zero risk (p. 17).

“Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists”.

4.20 The Ulster Farmers' Union is concerned that in some respects the proposals in the Call for Evidence go further than is necessary to protect designated sites and fail to pay due regard to the principles set out above. The need for proportionality in any assessment is particularly important. The Ulster Farmers' Union would also like to see the Department and the Shared Environmental Service taking a more proportionate and evidence based approach to the assessment of individual proposals at the development management stage.

Environment (Northern Ireland) Order 2002

- 4.21 The Call for Evidence rightly observes that the legal tests under the Environment (Northern Ireland) Order 2002 for the protection of Areas of Special Scientific Interest are not the same as those set out for designated sites protected under the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland).
- 4.22 The key duty is in article 40 of the Environment (Northern Ireland) Order 2002. The question under article 40(2) is whether a proposal is *"likely to damage any of the flora, fauna or geological, physiographical or other features by reason of which an ASSI is of special scientific interest"* (article 40(2)). This is very different to the test under the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland) which requires an applicant to show an absence of adverse effects.
- 4.23 Even if a proposal is likely to cause damage, it can still be consented consistently with article 40(6). Article 60(6A)(a) envisages that some damage may be permissible (*"give rise to as little damage as is reasonably practicable"*). This is in direct contrast to the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland).
- 4.24 Given the difference in the legal tests, the Ulster Farmers' Union is concerned that the Call for Evidence appears to be advocating a one-size-fits-all approach, where the assessment of effects on Areas of Special Scientific Interest will be treated in the same way as the assessment of effects on designated sites protected under the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland).
- 4.25 There is no justification for this. The sites which fall within the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland) are afforded a higher level of protection than the sites which fall within the Environment (Northern Ireland) Order 2002. Planning policy also reflects this by applying different tests to different designations. The Ulster Farmers' Union is concerned that the very high standard of protection required under the Conservation (Natural Habitats, etc.) Regulations 1995 (Northern Ireland) is influencing the contents of the revised operational protocol and no recognition is being given to the fact that a similar high standard of protection does not necessarily apply under the Environment (Northern Ireland) Order 2002.

- 4.26 The Ulster Farmers' Union would advocate a more proportionate approach for assessing impacts on Areas of Special Scientific Interest specifically.
- 4.27 As explained above, the Ulster Farmers' Union considers that due regard must also be had to agriculture under 48(1) of the 2002 Order.

Ramsar Convention

- 4.28 The Call for Evidence asserts that Ramsar sites are part of the national site network and are subject to the requirements of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. The Department is asked to clarify its position on this point. Regulation 2(2) of the 1995 Regulations defines the "national site network" as follows.

"the national site network' means the network of sites in the United Kingdom's territory consisting of such sites as —

(a) immediately before exit day formed part of Natura 2000; or

(b) at any time on or after exit day are European sites, European marine sites and European offshore marine sites for the purposes of any of the retained transposing regulations".

- 4.29 Ramsar sites do not appear, on the face of it, to fall within this definition (although it is the case that many Ramsar sites overlap with other relevant designations).
- 4.30 The position appears to be comparable to England and Wales where the protection afforded to Ramsar sites arises as a matter of policy. The Strategic Planning Policy Statement places Ramsar sites on the same footing as Special Protection Areas and Special Areas of Conservation as a matter of policy. The point was recently addressed in England and Wales in *CG Fry and Son v Secretary of State for Levelling up, Housing and Communities* [2023] EWHC 1622 (Admin), [7].

Strategic Planning Policy Statement for Northern Ireland

- 4.31 This is not legislation. It is government policy. It should not be included in a section entitled, 'Legislation'. There is an important difference between law and policy.
- 4.32 The Call for Evidence has not accurately summarised some of the policy tests in the Strategic Planning Policy Statement. Subtle differences in the wording of planning policies are important. The Department must proceed on a correct understanding of planning policy.
- 4.33 In relation to SACs, SPAs, and Ramsar sites, the Strategic Planning Policy Statement includes reference to the imperative reasons of overriding public interest test at paragraph 6.178.

“A development proposal which could adversely affect the integrity of a European or Ramsar site may only be permitted in exceptional circumstances as laid down in the relevant statutory provisions”.

4.34 The Call for Evidence does not reference this important exception in regional policy.

4.35 In relation to Areas of Special Scientific Interest, the Strategic Planning Policy statement reads at paragraph 6.182 as follows.

“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 [Areas of Special Scientific Interest]”

4.36 It then goes on at paragraph 6.183 to include the following exception.

“A development proposal which could adversely affect any of the abovementioned sites 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”.

4.37 The Call for Evidence again fails to recognise the exception. It also misstates the policy test in paragraph 6.182 of the Strategic Planning Policy Statement. The relevant part of the test is not whether the proposal is *“not likely to damage the site”* (p. 16), but is instead whether the proposal is *“not likely to have an adverse effect on the integrity of the site”* (underlining added). Adverse effect on site integrity has an important meaning in this context. It is not the same as simply *“damag[ing] [a] site”* (p. 16).

4.38 Additionally, the Call for Evidence in dealing with protected habitats and species fails to recognise the exception to the policy test set out in paragraph 6.193 of the Strategic Planning Policy Statement which says as follows.

“A development proposal which is likely to result in an unacceptable adverse impact on, or damage to, habitats, species or features listed above 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.”

4.39 It is important that all of these exceptions are acknowledged in any revised operational protocol. They introduce an important element of flexibility and balance into the development management process which must be appropriately reflected in any revised protocol..

5. The proposal (section 6A)

- 5.1 Table 1 of the Call for Evidence lists the factors to be taken into consideration. The first of these is the Proposal. This is addressed in this way (p. 18).

“The proposal contains the key details of a project such as: the location of the proposal; the pollutant potentially being released: ammonia (NH₃), nitrogen oxide (NO_x) or other; whether it is an agricultural, industrial, road transport, or other pollutant source; the specific type of development proposal category (new development, replacement of existing facility: ‘like for like’ with no change in capacity; expansion of an existing facility; or a variation of an environmental permit)”.

- 5.2 The Ulster Farmers’ Union would like any revised operational protocol to provide a clear checklist of information setting out what is expected of applicants in terms of the provision of information about proposals and the scope of the assessment. Whilst the above summary is helpful, it is non-exhaustive (“key details such as”) (underlining added). If there are further details which the Department expects applicants to provide, these should be clearly identified and explained.
- 5.3 The Call for Evidence does not define what it considers the project to be for assessment purposes. The Ulster Farmers’ Union is aware that the Department requires proposals for the housing of livestock or anaerobic digestion plans to include in an Air Quality Impact Assessment an assessment of the potential impacts associated with the spreading of slurry / manure and / or digestate. The Ulster Farmers’ Union is concerned about the basis for requesting such an assessment. This does not accord with the position in other jurisdictions.
- 5.4 The Ulster Farmers’ Union considers that there is a distinction to be drawn between the effects of a proposed development and the effects of subsequent landspreading activities. Landspreading is already subject to control under the Nutrient Action Programme Regulations (Northern Ireland) 2019. A flexible approach should be taken where suitable landspreading locations have not been identified. This could take the form of a Grampian condition which allows for details of landspreading to be dealt with after the grant of planning permission.
- 5.5 In recent months, Ulster Farmers’ Union members and their advisers have seen a range of restrictive conditions imposed on consents relating to landspreading. Many of these conditions fail to appreciate the commercial realities of landspreading and the obligations to regularly update Nutrient Management Plans. The Ulster Farmers’ Union would like to see greater recognition of the fact that sufficient flexibility needs to be built into permissions in order to allow for changes to landspreading over the lifetime of a project if necessary and justified.

6. Zones of influence (section 6C) (question 2)

Q2. Do you have any additional evidence that you can provide to be taken into consideration in the determination of appropriate zones of influence to be used within the Operational Protocol?

- 6.1 The Call for Evidence sets out the extensive landmass within the current zones of influence. Having large zones of influence within a relatively small jurisdiction undermines the utility of zones of influence as proportionate screening tools. In our experience, the effect of large zones of influence is that large numbers of designated sites are screened in for assessment in Air Quality Impact Assessments. This increases the complexity of such assessments.
- 6.2 The Ulster Farmers' Union believes that the evidence supports reducing the zone of influence and requests that the Department gives further consideration to this.
- 6.3 At a minimum, the evidence supports a 7 km as opposed to a 7.5 km zone of influence. The Call for Evidence refers to a study undertaken by the UK Air Quality Technical Expert Group which *"took into consideration NI-specific prevailing wind conditions and recommended 7 km as the screening distance based on the Process Contribution falling below 1% of the lower Critical Level (1 µg m⁻³ NH₃)"* (p. 20). Whilst the Ulster Farmers' Union notes the analysis undertaken by the Department, this was based on a relatively small dataset. No clear reason for rejecting the views of the UK Air Quality Technical Expert Group have been provided.
- 6.4 Additionally, the Ulster Farmers' Union notes the use of lower thresholds in other jurisdictions (as set out in Annex A to the Call for Evidence). Consistently with other jurisdictions, the screening threshold could be reduced further, perhaps to 5 km (even if that was the case for some sites, as reducing the zone of influence for some sites may unlock development opportunities in some parts of the country).
- 6.5 The Ulster Farmers' Union would resist any suggestion that the zone of influence should be increased beyond 7.5 km. At a minimum, it should stay the same. No evidence has been presented which would justify any increase in the threshold.
- 6.6 Clarification is requested in relation to the zone of influence for in combination assessments. In the JNCC Technical Report, a section entitled, 'Catchment Area', says as follows (p. 18).

"The 5 km distance has not been explicitly defined using the results from, or inputs to, modelling, but is a best estimate of the distance beyond

which individual in-combination projects should not be considered within the concept of the current study.

The modelling described in Section 5 thus considers the potential for multiple in-combination projects to be within 5 km of each target project requiring assessment”.

- 6.7 This would suggest that a zone of influence for the assessment of other plans and projects acting in combination with a proposal to be 5 km. The Department is invited to confirm this in any revised operational protocol.

7. Process contribution (section 6D)

- 7.1 The current operational protocol and guidance sets out what is expected in calculating the Process Contribution and should be carried forward.
- 7.2 In calculating the Process Contribution, it is important to understand the appropriate Guideline Values applicable. In some cases, Irwin Carr reports having undertaken assessments based on a Guideline Value of 3ug/m³ only for the Department to respond and advise that the Guideline Value is actually 1ug/m³. This can unnecessarily delay the progress of applications through the system. The Ulster Farmers' Union would request that a publicly accessible spreadsheet setting out the relevant Guideline Value for each site is published and regularly updated in order to avoid this happening in the future.
- 7.3 The Ulster Farmers' Union notes the reference to the forthcoming UK Air Quality Assessment Service. A revised operational protocol must clearly set out the expectations of the Department in terms of modelling software. It must also include transitional arrangements so that once the UK Air Quality Assessment Service is made available, applications already in the system do not need to be updated to reflect the publication of the UK Air Quality Assessment Service.

8. Thresholds (section 6E) (question 3)

Q3. Do you have any additional evidence that you can provide to be taken into consideration in the determination of thresholds to be used within the Operational Protocol?

8.1 As a starting point, the Ulster Farmers' Union is aware of a misunderstanding amongst some that the use of thresholds is impermissible as a matter of law. This is not correct and the Department have rightly opted to use thresholds in the Call for Evidence. Case law clearly establishes the legality of threshold values.

8.2 In *Dutch Nitrogen* (Case C-393/18) [2019] Env LR 27, one of the arguments made was that the use of thresholds was unlawful. The Court rejected this argument. It held that the use of thresholds was lawful, provided that the competent authority was satisfied that, following the application of those figures, there would be no adverse impact on the integrity of designated sites ([111]).

"In particular, it must be ascertained that, even below the threshold values or limit values at issue in the main proceedings, there is no risk of significant effects being produced which may adversely affect the integrity of the sites concerned".

8.3 A similar point was made domestically in *Wealden District Council v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin), [53].

"Competent authorities are quite entitled to use threshold levels and values in order to eliminate from further consideration de minimis environmental impacts which, on scientific evidence, fall short of engendering any relevant risk".

8.4 Given the uncertainty around the use of thresholds generally, the Ulster Farmers' Union would like to see a revised operational protocol explicitly indicating that the use of thresholds is appropriate and giving guidance on how they are to be used. For instance, clear guidance needs to be given to decision-makers that the nugatory threshold is a level below which any adverse effect can be ruled out, without the need for undertaking further cumulative impact assessment.

8.5 As for the thresholds identified, the de minimis / nugatory threshold has been set at 0.1%. It is understood that below this threshold no further assessment would be required either alone or in-combination and is derived from the JNCC Main and Technical Report No. 696.

- 8.6 This represents a significant lowering of the de minimis threshold. The current operational protocol has a 1% threshold. The effect of lowering the threshold to 0.1% will, according to the technical team advising the Ulster Farmers' Union, be that the vast majority of projects will not be capable of being screened out and will require further detailed assessment. This will also have an impact on the ability of many farmers to rely on permitted development rights under the Planning (General Permitted Development) Order (Northern Ireland) 2015. It is the fact that almost all projects will be required to undertake a detailed assessment moving forward which is of particular concern to the Ulster Farmers' Union given the resource implications of such assessments, as set out elsewhere in this response and in the forthcoming report from KPMG.
- 8.7 The Call for Evidence sets out in Annex A the approach of other jurisdictions. It suggests that if the 0.1% figure is used, Northern Ireland will be out of kilter with other jurisdictions, and will have the strictest approach of any. The Ulster Farmers' Union has grave concerns about this. If higher thresholds are being used by competent authorities in other neighbouring jurisdictions, then the Department must clearly explain why it considers that Northern Ireland is required to apply a much stricter 0.1% threshold. The evidence on this is lacking.
- 8.8 The difference in approach of other jurisdictions is of particular concern in Northern Ireland where assessments often have to take account of impacts on designated sites in the Republic of Ireland. Clear guidance is needed on the appropriate guidance to apply in cases where transboundary impacts arise.
- 8.9 The Call for Evidence states that given the extent of Critical Level and Critical Load exceedance in Northern Ireland, the use of Site Integrity Assessment Thresholds will necessarily be limited. It is not clear that because a critical load or level is exceeded (either already, or likely as a result of a proposed plan or project) that site integrity will be affected. In simple terms, there may be harm, but that harm may not in fact be at a level which impacts on site integrity. This matter relates back to our earlier comments and the professional advice on the definition of Critical Levels and Critical Loads.

9. Site designation (section 6F)

- 9.1 Site designation matters, in particular concerns about the equivalence given to sites protected under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 and sites protected under the Environment (Northern Ireland) Order 2002 and the understanding of the position so far as Ramsar sites are concerned, have been dealt with already above and are not repeated.
- 9.2 No reference is made in the document to Sites of Local Nature Conservation Importance or other local designations. Confirmation that any locally designated sites, including those designated through in forthcoming and recently adopted plan strategies, will not be covered by the revised operational protocol would be welcomed. It would be disproportionate for these sites to be covered.

10. Conservation objectives (section 6G)

- 10.1 The Ulster Farmers' Union notes the reference to Conservation Management Plans which appear to be part of a wider strategic approach to tackling ammonia emissions and nitrogen deposition. Observations on the strategic approach more generally are set out below and are not repeated here.

11. Site specific survey (section 6H)

- 11.1 The Call for Evidence envisages that a site-specific survey may be required in order to inform a decision where a desktop-based assessment is not sufficient. The Ulster Farmers' Union has a number of concerns with this, not least because of the substantial costs implications ordinarily associated with site-specific work.
- 11.2 Where designated sites are under private ownership, it may be difficult for applicants for planning permission to achieve the consent of the landowners to undertake site specific surveys. This may particularly be so if the landowner objects to the proposed development. If the Department has identified a need for site surveys to be undertaken and, despite reasonable efforts, the consent of the landowner is not forthcoming, then the Department should commit to considering exercising its statutory powers of entry to allow authorised persons to enter the land to undertake the necessary surveys (article 44 Environment (Northern Ireland) Order 2002).
- 11.3 The Call for Evidence gives examples of when a site-specific survey "*might be required*". Whilst it is agreed that these situations could feasibly require, or benefit from, a site-specific survey or assessment, greater clarity is necessary around when site-specific survey or assessment will be necessary. Given the resource implications associated with undertaking site-specific field work, it is important that clarity is provided around precisely when such work will be required and what it will consist of. The detail of what information is to be obtained, collated and assessed should be properly and fully explained in any revised operational protocol.
- 11.4 Proportionality also needs to be borne in mind too. Because of the breadth of the zone of influence and the abundance of designated sites across Northern Ireland, it is not unusual to have Air Quality Impact Assessments dealing with a large number of designated sites (often in excess of ten). If site specific survey work was requested for each designated site, this would likely render development unviable simply as a result of the cost of survey work alone.
- 11.5 Clear guidance must be provided on the shelf life of site-specific surveys. This is important not just in the context of individual applications, but also in the interests of avoiding unnecessary duplication of work across several applications. If, for example, a site-specific survey is undertaken on a site (Site X) for a particular development (Development A), and then several months later another development (Development B) which has the potential to affect Site X is applied for, then in what circumstances will it be permissible to rely on the site-specific survey undertaken in connection with Development A? The Department should regularly publish updates to site-specific information where that information is available and capable of being relied on by applicants so as to avoid the need for applicants to undertake their own site-specific surveys except where necessary.

12. Strategic approach (section 6I)

- 12.1 The Ulster Farmers' Union welcomes the recognition that consideration of a strategic approach to ammonia emissions and nitrogen deposition is necessary. In its response to the draft Ammonia Strategy, the Ulster Farmers' Union set out its view on the measures proposed in the draft Ammonia Strategy. The Ulster Farmers' Union awaits further details on the proposed strategic approach; however, it will expect any such approach to reflect the need for appropriate accommodations to be made in order to maintain a sustainable agricultural sector.
- 12.2 Site Nitrogen Action Plans are noted as a way forward. The Ulster Farmers' Union awaits detail on what these plans would contain. Any such plans must be agreed and implemented alongside relevant landowners and should not be imposed by the Department. Measures will need to be in place to offset the costs of any actions required to be taken pursuant to Site Nitrogen Action Plans. It is important that adequate government funding is put in place to resource these plans.
- 12.3 It is noted that the Call for Evidence envisages these plans providing a timetabled trajectory towards favourable conservation status and establishing a firmer basis for undertaking environmental assessments for new developments. This seems to imply that where a Site Nitrogen Action Plan is in place, it will be capable of being relied on when undertaking environmental assessments for new proposals. Whilst this is welcomed in principle, the Department must ensure that the measures contained within the Site Nitrogen Action Plans are suitably evidenced and secured so that they are capable of being relied on in the context of assessments under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995.

13. Room for Development (section 6J)

- 13.1 The Ulster Farmers' Union welcomes in principle the room for development concept. This appears to be reliant on a strategic approach being developed. As explained above, it is important that a strategic approach is developed and properly resourced alongside the publication of any revised operational protocol. It is likely that stakeholders will engage more willingly with a strategic approach to mitigation if there are positive outcomes associated with such an approach, for example through the room for development concept.
- 13.2 Significant details around such a concept are missing and would need to be developed if this concept was brought forward. The Ulster Farmers' Union would expect to see details published on the following matters.
- (i) Method for calculating room for development.
 - (ii) Ability of individuals to take steps to create room for development (e.g. through closure or mitigation of existing facilities).
 - (iii) Process for availing of or allocating out room for development.

14. In-combination assessment (section 6K) (questions 4 and 5)

Q4. Do you have any additional evidence that you can provide to be taken into consideration in relation to in-combination assessments for use within the future Operational Protocol?

Q5. Do you have any additional information on other types of plans and projects that should be considered in the future Operational Protocol?

- 14.1 The Call for Evidence refers to an assessment being required “*under the Habitats Regulations*”. This is accepted. No reference is made to an in-combination assessment being required elsewhere, for instance when dealing with Areas of Special Scientific Interest under the Environment (Northern Ireland) Order 2002. The revised operational protocol should clarify that the need to undertake an in-combination assessment is limited to assessments undertaken for sites protected under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995.
- 14.2 As explained above in reference to the zone of influence, the search radius for in-combination plans and projects should be clearly identified. The JNCC report suggests that a 5 km zone of influence is appropriate. Any plans or projects beyond this should be capable of being screened out of assessment.
- 14.3 The Ulster Farmers’ Union is concerned about the list of plans and projects proposed for inclusion in an in-combination assessment. As the case law referred to in the Call for Evidence demonstrates, there is a need for judgement to be reached in the inclusion of plans and projects as part of an in-combination approach; and unless a proportionate approach is taken, there is a risk that the assessment will be unworkable in practice. Useful guidance on this matter can be found in the ‘Managing Natural 2000 sites — the provision of Article 6 of the ‘Habitats’ Directive 92/43/EEC’ guidance from the European Commission.
- 14.4 It suggests that what is required is an assessment of “*completed, approved but uncompleted, or proposed*” plans or projects (pp. 41 – 42). As for future proposals, it says this (pp. 41 – 42) (underlining added).

“As regard other proposed plans or projects, on grounds of legal certainty it would seem appropriate to restrict the in-combination provision to those which have been actually proposed i.e. for which an application for approval or consent has been introduced”.

14.5 Additionally, the European Commission Parliamentary Question (2005) puts it in this way (P-0917/05) (underlining added).

“[the assessment] needs to take account of particular circumstances of specific cases as well as the practical feasibility of making an assessment of combined effects [...] the combination provision must be applied in a manner that is proportionate to the timing, planning stage and the legality of the proposed plans and projects”.

14.6 As for the specific list set out in the Call for Evidence, the Ulster Farmers’ Union is concerned that the list is too broad and ignores the need for professional judgement to be exercised. Specific concerns relate to the following.

- (i) Application lodged but not yet determined: This raises practical issues. It would seem logical to consider applications lodged before the date of submission; however, there must be a cut off point for applications to be addressed, as new applications could come in subsequent to an assessment having been undertaken. There is also a risk that applications could be prejudiced by other applications in the system which are not likely to obtain permission or are sitting idle in it. An element of judgement must be permitted to be exercised; for example, if an application has been sitting in the system for several months and no progress is being made on it, it is legitimate to question whether it should form part of any assessment. A blanket rule would not be proportionate.
- (ii) Refusals subject to appeal procedures but not yet completed: This presents many of the same issues as above. Particular concerns also arise given the backlog in the processing of appeals. Appeals not yet determined, some of which are bound to be refused, may be taking up capacity in the assessment, thereby leading to refusals for new applications. Again, an element of judgement must be permitted.
- (iii) Projects authorised but not yet started: This must also be subject to an element of judgement. If an authorised proposal is nearing the end of its lifetime (e.g. time is about to run out for commencement) and there is good reason to believe that the proposal will not be started, then it would be disproportionate to include that in an assessment.
- (iv) Projects started but not yet completed: This is too vague. It must be specified that this relates only to authorised projects, either which benefit from consent or which benefit from a certificate of lawfulness (although practical issues arise in respect of certificates of lawfulness as information relating to these is not available on the planning portal). It would not be possible to capture all unauthorised development in an in-combination assessment. It would not be fair to do so either.

- (v) Proposals in adopted plans: This is too vague. Plans will typically contain high level projects which may or may not come forward over the plan period. It would be disproportionate, at the point of adoption of a plan, to require a developer to take account of all of the proposals set out in that plan as part of an in-combination assessment. Whilst some proposals in plans may be sufficiently worked up to take account of, judgement will have to be reached. Consistent with the guidance of the Commission set out above, the trigger for an in-combination assessment for some proposals should be where “*an application for approval or consent has been introduced*” (pp. 41 – 42), not simply where a proposal is set out in a plan.
- (vi) Proposals in finalised plans formally published or submitted for final consultation, examination or adoption: This is too broad. A developer should not be required to take account of a proposal which is at an embryonic stage. Take local development plans for example. It would be wrong to require a developer to take account of proposals in a consultation draft of a local development plan, as that ignores the fact that the plan must go through a formal process of independent examination before the plan can be adopted. During that process, the proposals within the plan are very likely to be refined or modified. The logical approach is to require consideration to be given to plans only where they have been formally adopted.

14.7 The Ulster Farmers’ Union would expect the Department to play a role in giving advice to applicants and their agents as to the projects and plans expected to be included in assessments. Where the Department expects applicants to assess the implications of projects or plans but the relevant information is not available in the public domain, this must be provided directly to applicants by the Department.

14.8 The Ulster Farmers’ Union is particularly concerned about the lack of readily accessible information to undertake the type of assessment envisaged by the Call for Evidence. In the JNCC Technical Report, it was acknowledged that “*a principal problem is that no single centralised record of all relevant historic projects exists*” (pp. 20 – 21). In undertaking its report, JNCC looked at data held by the Department and ultimately concluded that the data held was “*fundamentally limited*”, as the locations of the applications recorded were not known (pp. 20 – 21). The Ulster Farmers’ Union is extremely concerned that applicants and their agents will be expected to undertake very complex and time consuming in-combination assessments on the basis of limited and unreliable information.

14.9 The size, scale, and distribution of some designated sites in Northern Ireland also means that a very large number of applications will have to be considered as part of in-combination assessments. Lough Neagh and Lough Beg SPA were referred to in this regard in the JNCC report, but those sites are not unique. The River Roe

stretches for approximately 55 km, the River Foyle approximately 32 km, and the Upper Ballinderry River approximately 24 km. Given the scale of the designated sites, it is expected that the effects of ammonia and nitrogen deposition will differ depending on where the particular sources are acting within the designated site. It is not as simple as compiling a list of projects capable of affecting the site as a whole and adding those together. Nuanced judgements will have to be made.

14.10 Presently, when carrying out an in-combination assessment of up to 10% (based on the current standing advice), the Northern Ireland Environment Agency have been able to provide the current in-combination total they hold for a designated site but are unable to confirm the contributing applications. This detail will be necessary for nuanced judgements to be made under any revised operational protocol. The current information provided by the Northern Ireland Environment Agency is unacceptably caveated as extracted below.

“Please note, the information used to provide this detail is currently only used by Natural Environment Division casework officers, when providing a statutory consultation response to a Local Planning Authority. This information has not yet been quality assured or independently checked and therefore details of the applications that contribute to this total, will not be provided with this response.”

14.11 If the Department intends to hold a database for the purposes of completing an in-combination assessment, it needs to be made clear how the total for each site has been calculated to determine whether or not it is appropriate to add the individual process contributions, if indeed that is how in-combination totals will be derived. The raw data relied on by the Department will also need to be made available to applicants. It should be updated on a regular basis and available on request.

14.12 Clarification must also be provided on whether landspreading has to be accounted for in any in-combination assessment. The following is the approximate total of land typically required in order to spread litter / manure / slurry from a standard sized agricultural livestock shed (depending on soil sample analysis).

- (i) 16k x layers - 60–100ha;
- (ii) 37k x broilers – 60-70ha;
- (iii) 1,900 x fatteners – 25-40ha;
- (iv) 60 x dairy cows – 36-38ha.

14.13 In an area with three or more-layer sheds which have to be included in-combination, the assessment will involve not only assessing the potential impact from three sheds at all sensitive receptors in the vicinity, but also the designated sites within approx. 180 - 300ha of land. This would be disproportionate.

14.14 The Ulster Farmers' Union, therefore, has considerable concerns over the proposals in the Call for Evidence for an in-combination assessment. The proposals go beyond what is necessary and will not be feasible in practice.

15. Mitigation Measures (Section 6(I))

- 15.1 The Ulster Farmers' Union welcomes the recognition of the importance of mitigation measures and the ability to rely on them. However, mitigation measures often represent a significant financial burden for individual farmers and are not economically viable in the context of many proposals. Further detail on this will be set out in the forthcoming report from KPMG.
- 15.2 Whilst the Call for Evidence is generally supportive of mitigation measures, the recurring problem which the Ulster Farmers' Union and its members find is that the efficacy of mitigation measures is either not recognised by the Department and the Shared Environmental Service at the development management stage or, if it is recognised, the level of reductions applied are overly conservative. This is an area where the Department has thus far failed to take a proportionate approach.
- 15.3 Reference is made in the Call for Evidence to the need for documented evidence for the effectiveness of proposed mitigation measures. Often, particularly with emerging technologies, despite providing documentation showing that mitigation measures are effective, the Department and the Shared Environmental Service either do not accept the measures or apply overly conservative reductions. This dissuades applicants from bringing forward mitigation measures.
- 15.4 The approach taken is often said to be necessary as a result of the precautionary principle. As set out above, however, the precautionary principle does not aim at zero risk. What must be asked in any given case is whether reasonable scientific doubt exists as to the effectiveness of a particular mitigation measure. If an applicant can provide credible evidence of the effectiveness of a mitigation measure, then, in the absence of credible evidence or analysis to the contrary, this should be accepted by the Department and the Shared Environmental Service.
- 15.5 Greater certainty around precisely how applicants can demonstrate to the Department that mitigation measures are effective should be provided. There should be a process whereby an applicant can liaise with the Department in order to seek to prove the effectiveness of a particular mitigation measure prior to it being relied on. Only then will applicants have the confidence to invest in mitigation.
- 15.6 For clarity and certainty, it would be useful if the Department could publish a technical note alongside the revised operational protocol setting out accepted mitigation measures and the level of reduction capable of being applied. This note should be kept under regular review as new technologies emerge.
- 15.7 Reference is made to tree shelter belts. Whilst the Call for Evidence says that these are an accepted mitigation measure, this is not the experience of the Ulster Farmers' Union or its members. Clarification on the circumstances in which tree shelter belts will be accepted as mitigation and the reduction capable of being relied on should be provided. The Department should also commit to ensuring that

tree shelter belts planted principally as a mitigation measure will not later be deemed to be a priority habitat, as this is a matter which dissuades applicants from planting tree shelter belts.

16. Exemptions requiring site specific consideration (section 6(p))

- 16.1 Regarding exemption sites, similar points arise as already made in respect of the site-specific survey requirements. Any revised operational protocol must set out with clarity and certainty the situations where site specific exemptions will apply. Such sites must be clearly identified, with a register of such sites maintained and published. An appropriate review process must be adopted to ensure that the list of sites is always current and robust for assessment purposes.
- 16.2 Additionally, clarity should be provided regarding the detail of what information is to be obtained, collated and, assessed.

17. Framework for assessment of new projects (questions 6 and 7)

Q6. Do you have any comments, feedback, or evidence on Option 1 Framework for Assessment of New Projects, and process flowchart?

Q7. Do you have any comments, feedback, or evidence on Option 2 Framework for Assessment of New Projects, and process flowchart?

17.1 The Ulster Farmers' Union is not supportive of either option. Both options lack clarity and will not provide applicants and decision-makers with the necessary certainty. The Ulster Farmers' Union would invite the Department to reconsider the options.

Option 1

17.2 This option is overly complicated and difficult to follow. It will prove difficult for applicants and decision-makers to apply in practice. If this option is to be adopted, clarity will be needed to ensure that proposers of plans / projects and decision-makers are fully aware of the steps required to be taken and the information that must be made available for assessment.

17.3 One of the principal concerns with this option is step (3), which requires the identification of a Site Relevant Threshold. This is based on risk of proliferation and level of contribution from the source group. Clarification is required on how these matters will be calculated.

17.4 It would appear that this option is based on the JNCC report, but there are differences in approach. The Call for Evidence applies two levels of proliferation whilst the JNCC Technical Report (see Figure 1) has four levels of Development Density (assumed to be the equivalent of Proliferation), also including very low and medium. Without an understanding of how the Department intends to calculate these matters, it is impossible for a meaningful response to be provided.

17.5 It is unclear if the calculation of Proliferation and Local Contribution will be matters for the applicant or matters which will be communicated by the Department. Applicants must be given sufficient information to be able to independently verify any judgements made by the Department under a revised operational protocol.

17.6 A number of specific points of detail also arise.

- (i) The JNCC Technical report shows that a low level of development density is 1-5 relevant in-combination projects and a high level is between 10-30 projects. Following the approach from the JNCC report, is the Department suggesting that a high level of proliferation is over 5 projects within 7.5 km of a sensitive area between 2017-2030? If so, most proposals will be within this category.
- (ii) For the assessment of an intensive agriculture application, is the ‘% local contribution’ only the impact from other intensive agriculture (i.e. the same source group)?
- (iii) It would be useful if the Department could confirm how many sensitive locations do not fall within the 0.1% SRT for an area with >50% local contribution from agriculture in an area at high risk of proliferation?

17.7 On face value, it would appear that in very many cases Option 1 will apply a Site Relevant Threshold of 0.1%, resulting in proposals having to proceed straight to step (4). Further guidance is needed on step (4); in particular, what will be required in terms of information to demonstrate an absence of adverse effects. It would seem likely, looking at the associated flowchart, that a site-specific survey will be required in many cases, with the criticisms of that already having been set out above. It is not clear when a desk-based approach would ever be sufficient.

17.8 Finally, of particular concern is that the outcome at the end of the process will be, at best, a low-risk response from the Department. This is inadequate. It is wholly inappropriate for the final step to be the issuing of advice comprising a risk category. Such a conclusion is not appropriate or acceptable in the context of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. A clear conclusion must be reached as to whether the project either will or will not adversely affect the integrity of designated sites. Applicants and decision-makers are entitled to expect clear advice from the competent authority on this matter.

17.9 The need to remove all reasonable scientific doubt means that if there is a low-risk response from the Department, a challenger could legitimately argue that all reasonable scientific doubt has not been eliminated, as the statutory nature conservation body has still identified a low risk. The Department as the statutory nature conservation body must give clear advice on these matters. If it issues advice on a risk scale, it is very likely to be asked to clarify its position by the Shared Environmental Service, the councils, and the Planning Appeals Commission in any event, all of whom expect clear advice to be given.

Option 2

17.10 Whilst this option is superficially simpler, in practice it would be difficult to implement. Adopting this approach, along with the very broad definition of in-combination assessment proposed in the Call for Evidence, the vast majority of proposals would have to proceed to step (4) and undertake a detailed assessment

(which no guidance is provided for). This option would increase costs at the application stage very significantly and would likely dissuade many applicants from proceeding with proposals.

17.11 It is of concern that this option refers to undertaking an “*Environmental Assessment (for ASSIs)*”. There is no statutory or policy basis for this. Whilst there is a basis for undertaking an “*appropriate assessment*” in the context of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, there is no recognised concept of an “*environmental statement*” under the Environment (Northern Ireland) Order 2002. The phrase “*environmental statement*” is also unhelpful and prone to confusion given its use in the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017.

17.12 There is a total lack of guidance on what would be expected to be seen in an assessment undertaken under step (4) of this option. This results in uncertainty.

17.13 It is again inappropriate for the output of the flowchart to be the issuing of risk category advice.

18. Priority habitats (question 8)

Q8. Do you have any comments, feedback, or evidence on the priority habitats?

- 18.1 The Ulster Farmers' Union welcomes the proposed retention of the existing 2 km zone of influence and 50% of the ammonia damage threshold. This is an established basis for assessment which reflects the hierarchy of nature conservation value and protection.
- 18.2 Clarification is, however, requested on whether the 50% will remain a standalone threshold for each plan / project individually or will be assessed in-combination. The Ulster Farmers' Union considers that the threshold should remain a standalone threshold. There is no justification for an in-combination approach.
- 18.3 It is understood that the 2 km zone of influence applies only from the application red line and does not apply to either the entire farm holding or landspreading areas. Clarification on this point is requested.

19. Framework for assessment of replacement of existing facilities, 'like for like' projects and variations including Reviews of PPC Permits (questions 9–13)

19.1 The Ulster Farmers' Union has particular concerns about the proposals set out in this part of the Call for Evidence. It does not believe that they are technically or legally justified. These options need to be revisited.

Q9. Do you have any comments, feedback or evidence on Option 1 Framework for replacement of existing facilities, 'like for like' projects, and variations including reviews of PPC permits, and process flowchart?

19.2 There is a fundamental flaw in the analysis of Option 1. The flaw can be found here (p. 40).

“To maximise the potential for the most favourable assessment, the project will need to be designed to minimise emissions. However, it may not be assumed that a replacement facility with lower emissions would automatically gain a favourable risk assessment for the designated site(s) in question. This is because DAERA has a legal duty to not only prevent future environmental damage but to reduce existing pollution pressures to levels which avoid deterioration of the habitats and species in question. If an ongoing activity, albeit with a reduction in emissions, has the potential to compromise the objective of restoration, or make it appreciably more difficult to achieve favourable conservation status, it will not be possible following an appropriate assessment to dismiss the ongoing risk of an adverse effect on site integrity. Therefore, any reduction in emissions must be both reactive, i.e. sufficient to address existing levels and proactive, sufficient to prevent future damage. To grant a consent, permission or other authorisation that continues or legitimises existing environmental damage is unlawful”.

19.3 The analysis overcomplicates what is essentially a simple task. It mixes up the general obligations which the Department is subject to under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 with the specific obligations which it is subject to under those regulations at the consenting and consultation stage. It fails to take account of the interaction between these obligations (set out and explained in *Waddenzee* [2005] All ER (EC) 535, [35]–[36]; and, *Grüne Liga Sachsen eV v Freistaat Sachsen* [2016] PTSR 1240, [42]–[43]).

- 19.4 Under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995, the question when considering a particular plan or project is whether it will adversely affect the integrity of designated sites. The assessment must be made against the baseline. That baseline will include emissions from existing approved developments. The assessment must take account of conservation objectives. These will typically involve restoring or maintaining a designated site at favourable conservation status. Where there is a proposal (Proposal A), which will replace an already consented proposal (Proposal B), and Proposal A, when compared with Proposal B, in fact reduces the overall level of ammonia emissions or nitrogen deposition on a particular designated site, it cannot rationally be said that Proposal A will adversely affect the integrity of the relevant designated site. In fact, when compared with the baseline scenario, it is contributing to its improvement.
- 19.5 Take this by way of an example. Assume a site with a critical level of 3ug/m³. Assume that it is being breached as a result of a number of nearby pig sheds. It currently sits at 5ug/m³. Assume that one of those pig sheds (Pig Shed X) is making a contribution of 1ug/m³. The owner of that pig shed then comes in for planning permission seeking the replacement of that shed with another pig shed (Pig Shed Y) which, whilst an increase in pig numbers proposed, has more extensive mitigation proposed, which means that Pig Shed Y will only make a contribution of 0.5ug/m³ as opposed to the contribution of 1ug/m³ made by existing Pig Shed X. In such a scenario, the net effect of granting permission for the replacement Pig Shed Y is to reduce the overall process contribution by 0.5ug/m³, bringing the designated site closer to its critical level. It cannot rationally be said in that scenario that, as assessed against the baseline, Pig Shed Y is adversely affecting the integrity of the designated site as it is introducing betterment.
- 19.6 It would be absurd in such a scenario if the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 required the Department to refuse planning permission for the replacement Pig Shed Y on the basis that the reduction does not go far enough. That is because the effect of doing so is effectively to continue to lock in the higher level of process contribution from Pig Shed X. That is not consistent with the statutory purpose of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. To put the point colloquially, the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 allows the decision-maker to say, 'a bird in the hand is worth two in the bush' (i.e. much better that we reduce the process contribution a little bit by approving this application, instead of holding out hope for another application which reduces it even more down the line (especially in cases where the consent is implemented, not time limited, and there is no prospect of it ever being revoked)).
- 19.7 This matter has been the subject of some judicial consideration and that consideration is flatly contrary to the view which the Department expresses in the Call for Evidence. In *Britannia v Secretary of State for Communities and Local*

Government [2011] EWHC 1908 (Admin), Wyn Williams J said this [88] (underlining added).

“In my judgment it would be strange, to say the least, if a proposal were refused planning permission on the grounds of its impact upon a protected site even though the reality might be that an existing lawful use might have a much greater impact upon nature conservation interests upon the protected site. In this case, for example, if the reality was that the Appellant could revert to using this site for storage and distribution of petroleum products or for other kinds of storage and distribution falling within B8 and it could be demonstrated that the trading estate use now in existence had significantly less effect upon the birds upon the protected site it would be an odd result, indeed, if the Directive / Regulations required that planning permission be refused”

- 19.8 Of particular note, Annex A of the Call for Evidence refers to guidance applicable in the Republic of Ireland. In the case of like for like or replacement applications (refer to step 6 of that guidance document), the Environmental Protection Agency only requires a demonstration that emissions from the new installation will be less than those existing (p. 11).

“In the case of an alteration to a site, demonstrate that emissions overall from the new installation will be less from those existing (as defined in section 3.9) installation due to use of new technologies / BAT (e.g. low emission housing)”.

- 19.9 Additionally, the approach set out by the Department to like for like replacement which is no worse than what was there before is out of kilter with other jurisdictions. Take England and Wales as an example. There is a well-known problem in some designated sites of excess nitrogen deposition. This led to Natural England issuing advice which allowed development to come forward if it could be shown that it was nitrate neutral (i.e. did not make things worse). It did not impose any requirement to make things better, only not to make things worse. At first instance in the *Wyatt* litigation, it was argued that this was not consistent with the requirements of the habitats regulations. Effectively the same point that is now being put by the Department was argued, namely that there is a duty to actively make things better at the consenting stage. Mr Justice Jay roundly rejected that argument (*R (Wyatt) v Fareham Borough Council* [2021] EWHC 1434 (Admin), [42]) (underlining added).

“Self-evidently, the concept of neutrality indicates that the ambition of the Advice Note is limited to not making things worse. Mr Jones latched onto this apparent limitation and forcefully submitted that it is flawed for that very reason, not least because the environmental condition of some of the protected sites is deteriorating. Article 6(2) of the Habitats Directive requires member states (and now the United Kingdom through a different

legal pathway) to take appropriate measures to avoid any deterioration. As was pointed out in the Dutch Nitrogen case, the perpetuation of an existing activity is capable of falling within article 6(2). However, I agree with Mr Mould that Mr Jones' submission rather misses the point. Competent authorities are precluded by the terms of the Habitats Directive from sanctioning development which is environmentally harmful. No doubt Natural England and other statutory bodies are taking other steps to avoid further deterioration for the purposes of article 6(2), all of which are outside the scope of this application for judicial review. The authorisation of an individual project which is no more than environmentally neutral is not inimical to the language and intent of the Habitats Directive and/or the Habitats Regulations."

19.10 Accordingly, the Department must revisit all of the options set out because the approach is not consistent with or required by the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. The legal position has been set out in summary above, however the Ulster Farmers Union is content to provide a further, more detailed, analysis of the position to the Department if this would be of assistance.

Q10. Do you have any comments, feedback or evidence on Option 1A flat-rate emissions reduction approach (flat-rate option) whereby all replacement facilities are required to reduce ammonia levels by a minimum of 30%?

19.11 This approach is irrational. It finds no support in policy or case law. It cannot lawfully be adopted under the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995. It is simply not open to the Department to require applicants to deliver a specified degree of reduction before granting consent.

19.12 As a starting point, the evidential basis for 30% is absent. The Ulster Farmers' Union would query the scientific basis for this figure. On even a superficial analysis, using a flat rate figure is irrational. Undoubtedly there will be variations from site to site and from time to time in terms of the levels of ammonia emissions and nitrogen deposition. Whilst it is not accepted in principle that it is open to the decision-maker to require an applicant to deliver reductions in the first place, even if it was, reductions would have to be site specific and linked to the specific designated site being assessed. Similar, for example, to the imposition of planning conditions, any reduction would have to be reasonably related to the development proposed and the particular designated site being assessed.

19.13 The Ulster Farmers' Union is doubtful of the lawfulness of withholding consent or issuing negative consultation responses on the basis of a failure to provide a 30%

reduction in ammonia levels. Certainly, in the absence of a robust evidence base, this would not be lawful.

Q11. Do you have any comments, feedback or evidence on Option 1B Distance from site emissions reduction approach ('distance from site' option) whereby the minimum reduction in emissions required is determined by the distance to a designated site, as presented in Table 5?

19.14 Precisely the same problems arise with this option. The introduction of different flat rates depending on the distance from the site does not overcome the fundamental problems with the approach set out above. There does not appear to be any scientific justification for the reductions required relative to the distances cited.

19.15 Both Options (1A and 1B) appear to only rely on distance from a sensitive site, and not the total ammonia produced. By way of example:

- (i) An agricultural shed located approx. 400m from a site producing (for example) 100kg.NH₃/yr has to improve by a minimum of 60%, whereas:
- (ii) An agricultural shed located approx. 1.8km from a site producing 1,000kg.NH₃/yr only has to reduce by 40%.

19.16 While the second shed is located further away from the sensitive location, there is the potential that it will have a greater impact on the habitat as it is producing more ammonia. This underscores the fact that this approach is not rational.

19.17 In addition, it should be noted that the impact from a proposed plan or project on a sensitive area is not necessarily proportional to the distance it is from the site. It is based on a number of factors, including but limited to:

- (i) Number and type of animal;
- (ii) Housing system;
- (iii) Type of ventilation;
- (iv) Mitigation measures; and
- (v) Final destination of waste (litter/ manure/ slurry).

Q12. Do you have any comments, feedback or evidence on Option 2 Framework for replacement of existing facilities, 'like for like' projects, and variations including reviews of PPC permits?

Q13. Do you have any comments, feedback or evidence on Option 2 Farm-specific emissions reduction approach whereby the facilities making the greatest contribution to ammonia emissions at a site are required to make the latest reductions?

19.18 An approach which fails to take account of the Conservation Objectives, as this approach proposes (*“it does not consider site conservation objectives”*) is plainly unlawful. Regulation 43(1) requires the assessment to be undertaken *“in view of that site’s conservation objectives”*. They cannot lawfully be ignored.

19.19 Table 7 suffers from the same problems as the previous approaches in that a flat rate is being applied depending on the contribution a facility makes to a critical level. The scientific basis for the reduction required is in particular not evident.

19.20 This option defines the facility as being the entire farm holding. It is unclear for farmers whose entire farm holding is located across a number of geographical areas whether the entire farm holding is to be used as the basis for assessment. It is only the extent of the farm holding associated with the particular proposal that should be considered.

19.21 It is unclear if landspreading would also be counted in this option.

20. Farm Enterprise Case Studies (question 14)

Q14. Do you have any comments, feedback, or evidence on the Farm Enterprise Case Studies presented?

20.1 This matter will be addressed by KPMG in its report.

21. Farm Mitigation Measures (question 15)

Q14. Do you have any comments, feedback, or additional evidence on the Farm Mitigation Measures Case Studies and Costs presented?

21.1 As outlined earlier, a technical note of all accepted mitigation measures and associated reduction levels for all animal housing systems should be published.

21.2 Specifically in relation to housing cattle, the following points should be clarified.

- (i) Reduction in crude protein of concentrate feed (% reduction per CP reduction);
- (ii) Increase in scraping frequency (i.e. how often does scraping have to be occurring to achieve a 20% reduction);
- (iii) Move from slurry storage under house to outdoor covered storage; and
- (iv) Installation of slat mats with scrappers.

21.3 Whilst these matters are referred to in the Call for Evidence, their use in practice is often subject to debate. Clarification on these matters would be welcomed.

21.4 The economics of mitigation measures will be addressed by KPMG in its report.

22. Environmental economics (question 16)

Q16. Do you have any comments, feedback, or additional evidence on the environmental economics information presented?

22.1 This matter will be addressed by KPMG in its report.