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12<sup>th</sup> October 2021

**Subject:** Appeal FAC 404/2020 regarding licence GY10-FL0158

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Background**

Licence GY10-FL0158 for Tree Felling Licence on a site of 18.64ha at Loughatorick North, Co. Galway, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 26<sup>th</sup> of June 2020.

#### **Hearing**

An oral hearing of the above appeal, of which all parties were notified and representatives of the DAFM, the Applicant and the appellant attended, was held by the FAC on the 10<sup>th</sup> of February 2021.

#### **In Attendance at Oral Hearing:**

Department Representative(s):

Mr. Luke Middleton, Ms. Eilish Keogh,

Appellants:

[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway, and Mr. Seamus Neely.

Secretary to the FAC:

Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions received including at the oral hearing, clarifications obtained, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence GY10-FL0158.

### Summary of Departmental File

The licence pertains to the felling and replanting of forest on 18.64ha at Loughatorick North, Co. Galway. The application was dated the 2<sup>nd</sup> of December 2019 and indicates that the current stocking of the site is over 80% Lodgepole Pine (LPS) with some Sitka spruce (SS) and a small area of open space. Restocking is to be 70% Lodgepole Pine (LPS), 25% Sitka spruce (SS) and 5% other broadleaf species (OBS) with the total open space on the site to be 10%.

An application pack document includes site location maps, harvest guidelines, and an AA pre-screening (noting 13 SACs and 4 SPAs within 15km – one SAC is listed twice).

A separate Appropriate Assessment Pre-Screening Report prepared by the applicant, which includes an in-combination effects assessment, dated the 7<sup>th</sup> of May 2020 is on file. This details the Qualifying Interests (QIs)/Special Conservation Interests (SCIs) for each Special Area of Conservation (SAC)/Special Protection Areas (SPA) within 15Km and details the possible effect that may arise. This is done for 4 SPAs and 12 SACs (the SAC counted twice above being counted once in this instance). All are indicated to be screened out except the Slieve Aughty Mountains SPA [4168], in which the project site is located.

A referral to NPWS is on file dated the 10<sup>th</sup> of December 2019, and response was received on the 24<sup>th</sup> of January 2020. This has 5 recommendations with reference to Merlin, the Hairy Wood Ant, the water quality of the Woodford River, management of invasive species, and adherence to forestry best practice. A referral to Galway County Council is on file dated the 8<sup>th</sup> of January 2020, with no response being on file. Two submissions from the public are on file, one dated the 3<sup>rd</sup> of March and the other undated.

### Screening for Appropriate Assessment and EIA.

An Appropriate Assessment Screening (AAS) Report is on file, with a completion date by a Forestry Inspector of the 13<sup>th</sup> of May 2020. It describes the site as follows:

*The Underling [sic] soil type is approx. Blanket Peats (100%) The slope is predominantly moderate 0-15%. The habitat is predominantly WD4. The project is within the Kinvarra-Coastal 29\_01 catchment area and waterbody Cannahowna\_SC\_010(98%) & Graney [Shannon]\_SC\_020(2%).*

The screening report identifies the same 4 SPAs and 12 SACs as noted in the Coillte Pre-Screening report of the 7<sup>th</sup> of May. The sites are:

1. [4168] Slieve Aughty Mountains SPA
2. [4058] Lough Derg (Shannon) SPA
3. [4056] Lough Cutra SPA
4. [4134] Lough Rea SPA
5. [2126] Pollagoona Bog SAC
6. [0308] Loughatorick South Bog SAC
7. [1913] Sonnagh Bog SAC
8. [0261] Derrycrag Wood Nature Reserve SAC
9. [0319] Pollnaknockaun Wood Nature Reserve SAC

10. [2181] Drummin Wood SAC
11. [2180] Gortacarnaun Wood SAC
12. [1313] Rosturra Wood SAC
13. [0248] Cloonmoylan Bog SAC
14. [0299] Lough Cutra SAC
15. [0304] Lough Rea SAC
16. [0231] Barroughter Bog SAC

The Slieve Aughty Mountains SPA is screened in by virtue of the project being within its boundaries. The screening assessment notes that the Special Conservation Interests (SCIs) are Hen Harrier and Merlin for this SPA.

All other sites are screened out for reasons that include:

- *Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise (sites 5, 6, 7, 8, 9, 10, 11, 12, 13, 15 and 16 above).*
- *Due to the location of the project outside of the core foraging range and the absence of a direct hydrological connection, and subsequent lack of any pathway, hydrological or otherwise (Site 14 above).*
- *Due to the separation distance between the Natura Site and the project (Sites 2, 3 and 4 above).*

All sites screened out also include the reason that *"as there is no possibility of the project itself (i.e. individually) having a significant effect on this Natura site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects"*. The In-combination report referred to is on file, with planning searches shown as having taken place on the 19<sup>th</sup> of May 2020

An Appropriate Assessment Report (AAR) is on file with a final review by an ecologist being recorded on the 23<sup>rd</sup> of June 2020. This considers impact on the SCIs for the Slieve Aughty Mountains SPA [4168]; namely the Hen Harrier and the Merlin. In relation to the Hen Harrier no mitigation is observed as being required as the project lies wholly within a "Green Area". In relation to Merlin, mitigation is by way of imposing restrictions on felling and other associated forestry operations within 100m of the forest edge during the period 1<sup>st</sup> March to 31<sup>st</sup> August inclusive. The section Environmental Management Framework includes several forestry-related guidelines, and states that these incorporate *"the mitigating principles required to ensure that the work is carried out in a way that avoids or minimises the potential for any environmental impacts to occur"*.

The AAR also includes an in-combination effects statement. This includes a review of planning applications carried out on the week of the 16<sup>th</sup> of June 2020 in both Clare and Galway County Councils (4), An Bord Pleanála (0), the EPA (0), Afforestation (1), Forest Roads (8), Private Felling (6), Coillte Felling (54). A review of Galway County Development Plan was also carried out. In the statement, DAFM conclude that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the listed Natura sites.



An AA Determination with the same final review date (23<sup>rd</sup> June of 2020) is also on file, which includes the mitigations described above. These can be seen to be reflected in the licence conditions.

#### **FAC Assessment of the site**

In considering the appeal, the FAC consulted a number of publicly available information sources including mapping websites provided by the EPA and the OSI.

A Forest Road application (CN86760 - 300m) which enters the site from the north and proceeds to the centre of this application was received by DAFM on the 23<sup>rd</sup> of June 2020 and is shown as Approved on the Forest Licence Viewer and would appear to be an extension of a forest road map marked on the licence application. Teagasc soils mapping confirms the Screening description of the site soil type (Peat).

OSI mapping indicates the site is in an elevated position relative to the local landscape - the site is enclosed within a 200m contour which falls away in every direction. The site half surrounds a small lake of ca. 2.1ha, marked on OSI mapping as Shanemore's Lough. This lake is not named on EPA mapping and does not appear as a lake waterbody.

EPA mapping also shows the site as being within the Galway Bay South East [29] WFD Catchment and marginally within the Lower Shannon [25C] WFD Catchment, and confirms the WFD Sub-catchments [Cannahowna\_SC\_010(98%) & Graney [Shannon]\_SC\_020(2%)]. EPA mapping also shows that there are several branches of two waterbodies within less than 1km of the site. The first water body is the Bleach\_010 (25C\_8 Graney [Shannon]\_SC\_020) with two branches ca. 1000m and 425m from the project site. EPA data indicates that this water body has a Water Framework Directive (WFD) status of Good/At Risk in the last WFD reporting cycle (2013-2018). The second waterbody is the Owendalulleagh\_010 (29\_7 Cannahowna\_SC\_010). There are three branches ca. 370m, 490m and 905m from the site. EPA data indicates that this water body has WFD status of Good/Not at risk in the same reporting cycle. EPA maps also show that the site also spans two Ground Waterbodies: GWDTE-Caherglassaun Turlough [IE\_WE\_G\_0091] and Lough Graney [IE\_SH\_G\_157] which are shown respectively as Poor and Good under the 2013-2018 monitoring cycle. The site is predominantly in the former.

The response from NPWS indicates that the Hairy Wood Ant is found in the area in which the site is located. Details in <https://www.npws.ie/sites/default/files/publications/pdf/IWM68.pdf> indicate that the ant prefers Sitka Spruce to Lodgepole pine. Figure 6 on that publication indicates the identified Ant nests are some kilometres to the east from the project site.

OSI mapping shows the Slieve Aughty Bog NHA to be less than 0.5 of a km to the west, and also extends to the north of the site.

#### **Grounds of Appeal**

The decision to grant the Licence is subject to one appeal.

The grounds given, in summary, are:

1. Breach of article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA.
2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project.
3. A further breach of Article 4 (4) of the EIA Directive 2014/52/EU through failure to describe aspects of the environment which are like to be significantly affected by the development.
4. That there is no evidence that the impact on a nationally designated site has been adequately considered as part of the approval process.
5. That the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework Directive River Basin Management Plan for Ireland 2018-21.
6. That there has been inadequate consideration of feedback from a Consultation Body.
7. That the Stage 2 Appropriate Assessment determination is not valid.
8. That given the low yield class, consideration should have been given to not re-stocking this site in the context of the SPA.
9. That DAFM has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination.
10. That the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation.
11. That the licence conditions that do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC.
12. That the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV(a) of the Habitats Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.
13. That the licence should contain a condition to notify the Minister of the commencement and conclusion of operations.
14. That the licence should contain a condition that plans and works must be inspected by the Forestry Service prior to, during and post works,
15. That the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

#### **Oral Hearing and Statement of Fact**

A Statement of Fact (SoF) was provided to the FAC dated the 12<sup>th</sup> of December 2020. The Statement of Fact addresses each of the grounds and clarifies a number of matters, in particular that the undated submission from a member of the public was received by the Forest Service on the 6<sup>th</sup> of February 2020; and that in relation to Ground 4 regarding the Slieve Aughty Bog NHA, that the afforestation of the site took place in 1976, while the NHA was designated in 2005.

An oral hearing was held by the FAC in relation to FAC 404/2020 on the 10<sup>th</sup> of February 2021 with all parties participating remotely. At the hearing, the representatives from DAFM further confirmed the details of the SoF and elaborated on the chronology of the processing of the application.



The appellant opened his submission by noting that the project site is boggy in nature and that queried whether adequate consideration had been given to a lake water body. The appellant further said that he had concerns in relation to the scientific basis being proposed in relation to Hen Harrier and Merlin.

In relation to the Merlin, the appellant submitted that it is an elusive species, and that sightings of such birds are more often than not by chance. He submitted that the licence condition relating to notification of NPWS is likely to be ineffective as forestry contractors do not carry binoculars and were unlikely to notice such birds. The appellant further referenced the book *Raptors: a field guide to survey and monitoring* (Hardey et al. 2013) and the following guidance regarding surveying of Merlin and the references contained therein:

*"To minimise the risk of disturbance it is recommended that nesting areas are viewed from distances of 300–500 m" (Ruddock & Whitfield, 2007; Whitfield et al., 2008b).  
p168.*

The appellant further submitted that the two references (Ruddock & Whitfield, 2007; and Whitfield et al., 2008b) were themselves relevant to this point, in particular what the appellant characterised as strong advice in relation to a disturbance distance of 300-500m, and noted that this advice was based on monitoring and not active works which are likely to have a significantly greater disturbance effect. The appellant submitted that even if there were validity to the use of a 100m exclusion zone such as that proposed, such a buffer should be mapped by an ecologist with reference to the relevant habitat and not left to the applicant's representatives on the ground who may not have the appropriate expertise. The appellant submitted that DAFM had recently issued licences where Merlin was a consideration in which a blanket temporal exclusion was used rather than a buffer zone and submitted that this was a more appropriate approach.

In relation to Hen Harrier, the appellant submitted that the use of Green zones was not a precautionary approach; and that implicit in the approach that a notification may be provided by the NPWS of nesting activity is acceptance that a disturbance may occur. The appellant made reference to a Hen Harrier Project monitoring report for 2020 and submitted that this indicates that the Hen Harrier population in the Slieve Aughty Mountains SPA has more than halved from twenty-seven territorial pairs at the time of SPA designation, and that this report specifically cites forestry operations as a pressure on the species. The appellant further asserted that the protocols referenced in the licence condition dealing with Hen Harrier were inadequate as they relied on notification of the presence of Hen Harrier, while the precautionary principal would indicate the need to assume their presence. The appellant also submitted that even were the approach proposed in the licence by DAFM to work, it is predicated on taking account of disturbance on breeding but does not take into account the impact of reforestation on foraging habitat, and that in light of the SPA the site should be allowed to revert to bog habitat.

The applicant submitted that access to the project site is from the north, and that any surface water leaving the site was unlikely, given the slope of the land, but that in any event the slope was away from the small lake to the southwest of the site. Following a question from the FAC, the applicant submitted

that the lake itself does not appear to be hydrologically connected to any water body but acknowledged that there was no obvious entry or exit point for water to enter the lake and speculated that it may simply be a point at which surface water collects given its presence on an elevated piece of land. The applicant agreed with the FAC that ortho-imagery for the site indicated planting close to the edge of the lake and confirmed that this was the case. In response to a question from the FAC, the applicant confirmed that standard forestry practice requires the control of invasive species, and that this is assumed in the licence conditions. The applicant also confirmed the location of the site in relation to river basin districts and Water Framework Directive catchments.

### **Post Hearing Correspondence**

Following the conclusion of the Oral Hearing, the FAC formed the view given the specific and detailed nature of the academic references cited by the appellant relating to the licence conditions concerned with the protection of Merlin, and in line with Article 14B of the Agricultural Appeals Act of 2001 (as amended) and keeping with fair procedures, that the parties should be allowed make submissions to the FAC on these issues and that these submissions would then be circulated to all parties for final observations. The FAC wrote to the DAFM on the 26<sup>th</sup> of April 2021 seeking observations on the submission at Oral hearing in the context of possible disturbance as identified in the Appropriate Assessment undertaken. A response was requested within two weeks.

On the 10<sup>th</sup> of May 2021, DAFM sought a one-week extension to respond to this request which was agreed to by the FAC. On the 20<sup>th</sup> of May, DAFM requested a further extension to the 18<sup>th</sup> of June 2021 to respond, which was also agreed to by the FAC.

On the 22<sup>nd</sup> of June 2021, the FAC received a written submission from the DAFM in response to the query raised. This submitted that in the preparation of its Merlin Mitigation, the DAFM had engaged a named expert and outlined the expert's academic and professional expertise. It further put forward the view that the relevant passage in *Raptors: a field guide to survey and monitoring* (Hardey et al. 2013), relies on the publication *A review of disturbance distances in selected bird species: A report from Natural Research (Projects) Ltd. To Scottish Natural Heritage* (Ruddock, M. & Whitfield D.P. 2007). DAFM submitted that:

*The paper highlights different views around the disturbance distance from "an approaching human" presumably in full view of the nest ranging from <10 metres to 300 – 500 metres. The summary also notes that empirical records of disturbance distances were few in the literature and confined to observations of non-breeding birds which flushed at up to 125 m distance from an approaching human.*

Note: the emphasis on <10 meters was added by DAFM.

DAFM then submitted that the appellant's reference to 300 to 500 meters is taken out of context and should not be used to undermine the Department's Merlin mitigation.



DAFM also stated its commitment to reviewing all its migration practices on a continuous basis and updating it where necessary and where new information becomes available, and stated that a number of related studies are due for publication in 2021.

On the 24<sup>th</sup> of June 2021 the FAC forwarded the DAFM submission to the appellant and applicant and invited comments. The applicant did not make any observations. The appellant responded on the 7<sup>th</sup> of July 2021 in the form of a written submission accompanied by correspondence between the appellant and DAFM in relation to an AIE request previously submitted by the appellant. This sought information on the mitigation protocol in relation to Merlin where the species is a qualifying interest of a Natura 2000 site, and the response indicated that no such records exist.

In the appellant's written submission, it was submitted that while it was stated that a named ornithologist was involved in the formulation of the DAFM mitigation for Merlin, no evidence of this involvement had been provided. The appellant pointed to the AIE request in this regard, to which DAFM had responded by stating that no records exist in relation to the formulation of a mitigation protocol. The appellant further disputed the DAFM contention that the reference to 300-500m was taken out of context, highlighting that this figure was in the quoted literature in the context of minimising disturbance and not eliminating it. The appellant submitted that disturbance by an approaching observer was likely to be significantly less than forestry operations and submitted the view that the burden fell to DAFM demonstrate that disturbance would not occur in the context of forestry operations following mitigation, and that no lacunae may occur in an AA and that in this instance such a lacunae existed. The appellant submitted that the scientific literature relied upon by DAFM in the appropriate assessment: *The feeding ecology of Merlin Falco columbarius during the breeding season in Ireland, and an assessment of current diet analysis methods*. Irish Birds 9:159-164. (Fernández-Bellon, D. & J. Lusby. 2011) and *Breeding ecology and habitat selection of Merlin Falco columbarius in forested landscapes*, Bird Study, 2017 (Lusby, J., I. Corkery, S. McGuinness, D. Fernández-Bellon, L. Toal, D. Norriss, D. Breen, A. O'Donaill, D. Clarke, S. Irwin, J.L. Quinn & J. O'Halloran. 2017); did not comment on disturbance distances; but that in one case observed that Merlin are vulnerable to disturbance from forest operations with respect to nesting preference; and in the other stated that the principle prey of Merlin are subject to disturbance by forestry operations. In conclusion the appellant submitted that evidence that indicated the possibility of a disturbance effect at distances substantially greater than those used by DAFM in its mitigation, and the only refutation offered by DAFM was to name an ornithologist who had advised in the mitigation.

### **Consideration by FAC**

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the SoF provided by the DAFM, and the record of the application and licensing process. The FAC also consulted with several publicly available information sources such as mapping from the EPA, the Forest Service and the OSI.



In the first instance the FAC considered the contention set out in the grounds of appeal that the proposed development should have been addressed in the context of the EIA Directive. The EU EIA Directive sets out, in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 18.64ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations and therefore considered that a breach of Article 4(3) had not occurred.

In relation to the ground of appeal that there had been inadequate consideration of potential impact on a nationally designated site as part of the approval process, the FAC had regard for the SoF submitted by the DAFM. The SoF observes that the Slieve Aughty Bog NHA consists of 9 discrete blocks at various distances from the project site, with separations consisting of various land types. The SoF observes that that forest related to the project site was planted in 1976 while the NHA was designated in 2005, and that the NPWS site synopsis for the NHA indicates it is threatened by afforestation, but that felling and reforestation are not so indicated. The FAC is satisfied that the forest which is the subject of the project proposal was extant at the time of designation and that DAFM have adequately considered the implications of the proposal on the NHA.

When considering the ground of appeal relating to inadequate consideration of feedback from a Consultation Body, the FAC had regard for the Statement of Fact provided by the DAFM which stated that referrals to statutory consultees, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. In this instance DAFM submit that the licence application GY10-FL0158 was referred to the Local Authority and NPWS. DAFM further submit that due consideration was given to the comments and observations provided, and that conditions have been included on the issued felling licence which are consistent with the referral correspondence received from NPWS. The FAC note that no response was received from Galway County Council and that the submission from NPWS contains five recommendations, including a general recommendation that Forestry best practice be followed during

operations. A reference is made to the Hair wood Ant, and the FAC note that a specific condition in the licence refers to this species. The presence of breeding Merlin in the area in recent years is noted, and the licence contains the specific action requested by NPWS together with a more general licence condition in relation that species. In relation to the reference by NPWS to the Woodford River, the FAC note that while at ca. 2km distant the Woodford (Galway)\_020 river body is in close proximity to the site, it is in a separate sub catchment as delineated by EPA mapping. In relation to the reference to invasive species, the NPWS were not specific as to which species may be in question, and the FAC had regard to the submissions at Oral Hearing by the DAFM and the applicant that control of such species is part of normal operations to control competing vegetation and standard best practice as referenced in the licence. On this basis the FAC is not satisfied that there had been inadequate consideration of feedback from a Consultation Body.

The FAC considered the grounds of appeal that the Stage 2 Appropriate Assessment determination is not valid, and in so doing considered the submission at oral hearing by the appellant in relation to the Hen Harrier and Merlin. At the oral hearing, the appellant submitted that those mitigations proposed in the licence in relation to the SCIs for Slieve Aughty Mountains SPA [4168] (Merlin and Hen Harrier) are inadequate. In relation to the Hen Harrier species the appellant submitted that the use of “green zones” is not a precautionary approach, as it does not preclude the possibility of individual breeding pairs being present in such a green zone before their presence is observed. The FAC notes that the licence contains the following text in condition i) in relation the Hen Harrier:

*Regarding sites wholly within Green Areas, a disturbance operation(s) associated with the licence can proceed during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, the Forest Service will notify the licensee in the future if any new Red Area (generated by a newly recorded nesting site) overlaps the site. From the date of receipt of this notification, no disturbance operation(s) associated with the licence is to take place within the breeding season. To do so will lead to the immediate cancellation of the licence (where trees remain standing) and may represent an offence under the Birds & Habitats Regulations 2011. If notification of a new Red Area is given within the breeding season itself, any ongoing disturbance operation(s) associated with the licence is to cease immediately on receipt of the notification, unless otherwise agreed with the Forest Service, and can only recommence after the breeding season has closed.*

Having regard to the nature of the lands in question, the FAC considers that the licence condition above is appropriate for the protection of a SCI within a forest habitat where specific nesting sites are not known, and that where such a specific site becomes known an appropriate mechanism is in place to restrict forestry operations.

When considering the mitigations relating to Merlin, the FAC had regard to the submissions at Oral Hearing, subsequent written submissions and the licence application. Licence condition k), which is derived from mitigations detailed in the AAD, contains the following text:



*No Felling or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, within 100 metres of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland; or within 100 metres of a clearing in the forest of larger than one hectare. Such operations can commence in sections of the project area furthest away from the 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive.*

The FAC finds that there is agreement in the various literature submitted by DAFM and the appellant that Merlin are subject to disturbance by forestry operations, and that there is an absence of empirical data in relation to disturbance of breeding birds.

The appellant has submitted literature, derived from surveys of expert opinion, that static disturbance during incubation may occur up to a range of 300 – 500m. The FAC noted that the reference submitted by the Appellant, *Hardey et al.* (2013), is derived from Scottish research and a survey of primarily British experts, while the identified Irish research has noted a difference in nesting habits between the Irish and British merlin populations. The research underlying the recommendation in *Hardey et al.* itself notes the wide variety of responses received in the survey and suggests that this might be partially attributed to experience with different nesting habits.

The AAR and AAD were both reviewed by an ecologist and DAFM have submitted that a named expert ecologist has supported the development of a standard utilised in that AAR of 100m from the forest edge at which the possibility of disturbance can be precluded, although this information was not recorded in any of the documentation before the FAC.

All parties to the appeal and the NPWS were invited to submit their views in relation to that standard as included in the relevant condition of the licence, and the FAC has considered the responses received. In considering the information provided in relation to the processing of the application, the submissions at Oral Hearing, and submissions provided in post-hearing correspondence, the FAC is not satisfied that in relation to the Appropriate Assessment of the project subject of the application under consideration that the DAFM have evidenced or reasoned the sufficiency of the mitigations proposed as they relate to the conservation status of Merlin. The FAC is satisfied that this represents a serious error in the processing of the application and in the making of a decision to grant the licence and is therefore remitting the decision of the Minister to a Stage 1 (Screening) Appropriate Assessment.

In considering the ground of appeal that the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework River Basin Management plan for Ireland 2018-2021, the FAC had regard for publicly available mapping, ortho imagery and the decision of the High Court (Hyland J.) in *Sweetman v An Bord Pleanála* [2021] IEHC 16 (The Hyland Judgment) delivered in January 2021.

EPA mapping indicates that those river waterbodies in proximity to the project site, (the Bleach\_010 and the Owendalulleagh\_010) both have a Good status recorded by the EPA for the 2013-2018 WFD reporting cycle. As noted above, the project site half surrounds a small lake of ca. 2.1ha, marked on OSI mapping as Shanemore's Lough. This is neither named or appears as a lake waterbody on EPA mapping, and consequently the FAC is satisfied that it has an unassigned status for the purposes of the Water Framework Directive. Ortho imagery from the OSI and other public websites indicate that the forest is ca. 10m from the edge of the lake, and this was confirmed by the applicant at oral hearing.

Having regard to the Hyland Judgment, and to the fact that there is direct connectivity between the project lands and the waterbody known as Shanemore's Lough, the FAC note that this small waterbody is not identified by the EPA in its mapping, and that it is not recorded as part of any surface waterbody or system. Having regard for the Hyland Judgment, the FAC is not satisfied that the waterbody has been adequately described for the purposes of evaluation of the project with respect to the Water Framework Directive. In remitting the decision as described above for Stage 1 Appropriate Assessment, the FAC also are of the view that the DAFM should clarify the nature and status of this waterbody.

The appellant submitted in the grounds of appeal that given the low yield class, consideration should have been given to not re-stocking the site in the context of the SPA. The FAC had regard for the SoF in which DAFM submitted that the proposal for restocking of the site in terms of nominated species and stocking density is consistent the DAFM's Felling and Reforestation Policy document published in 2017. The FAC notes that the project site was subject to afforestation in 1976 which predates the adoption of Directive 79/409/EEC in 1979 and the designation of the Slieve Aughty Mountains SPA in 2012. The FAC is satisfied that there is no requirement for DAFM to give consideration for a change of land use in relation to the project site.

The grounds of appeal assert that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats directive on the AA determination. In the Statement of Fact provided to the FAC, DAFM summarise the opportunities for public participation in the decision-making process in relation to applications for felling licences, and in particular under Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017). The Statement outlines that Regulation 20 of those regulations expressly provides that in the making his or her decision on a felling license application, the Minister must have had regard to any written submissions or observations made by the public. Furthermore Regulation 19(4) expressly requires the Minister when carrying out an Appropriate assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. The FAC accepts the DAFM position that these provisions, and that any considerations and decisions made pursuant to them, concord with the requirements of Article 6(3) of Habitats Directive as regards public participation.



The grounds of appeal submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, archaeological features, designated sites and other environmental features. The Statement of Fact provided by the DAFM to the FAC asserts that application and associated information as submitted by the applicant in support of the applicant was considered and deemed by the DAFM as meeting that Department's requirements. The FAC is satisfied that the Harvest Plan submitted with the application is sufficient to inform the decision-making process in this case.

In relation to the submitted grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with Article 5 of the Birds Directive and relating to the requirements of Article 12 of the Habitats Directive with regard to a system of strict protection for the animal species listed in Annex IV(a) of the Habitats Directive, the FAC notes that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site (other than those relating to the QIs of the Slieve Aughty Mountains SPA as discussed above), or details of any animal species for which licence conditions should be provided. The FAC also notes that the licence conditions contain reference to standards of good forestry practice. Based on the evidence before it, the FAC concluded that no error arose in relation to the licence conditions of the nature described by the appellant.

On those grounds of appeal relating to the imposition of licence conditions the FAC finds that the spraying of chemicals are subject to licencing processes and that the imposition of licence conditions relating to the inspections and the commencement and completion of operations may be imposed at the discretion of the Minister. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in the grounds of appeal in this case, is not required.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was a serious or significant error or series of errors in the making of the decision to grant the licence. As a result, the FAC has decided to set aside and remit the decision of the Minister regarding licence GY10-FL0158 and is remitting the consideration of the application to Stage 1 (Screening) Appropriate Assessment, before making a new decision in respect of the application.

[REDACTED]

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John Evans On Behalf of the Forestry Appeals Committee

