

20% Lodgepole pine, while one also contains 5% other broadleaves (OB). Replanting is to be 100% Sitka Spruce with 5% of the area to be open space. The application includes location and site maps, inventory and replanting details, a harvest plan, and an Appropriate Assessment pre-screening report. This last item identifies 14 European sites within a 15km radius of the project site and considers the Qualifying Interests (QIs) or Special Conservation Interests (SCIs) in each case. The site maps indicate an irregular shaped site with a forest road entering and crossing the northern portion of the site while a separate road bounds the south of the site. A watercourse can be observed to flow to the northwest of the site ca. 350m at its closest point. Old woodland is marked bounding portions of the west and north of the site.

Submissions from members of the public were received in relation to the application on the 6th and 17th of February. A referral to the NPWS is on file dated the 10th of December 2019 with a response received on the 22nd of January 2020. This refers to the need to adhere to Forestry best practice and the management of invasive species, and attaches a copy of a document entitled “*General observations from the National Parks and Wildlife Service of the Department of Culture, Heritage and the Gaeltacht in relation to forestry application referrals*”.

Two Appropriate Assessment Screening (AAS) documents are on file. The first is dated the 5th of May 2020, and describes the site as follows:

The Underling soil type is approx., Peaty Gleys (100%), The slope is predominantly moderate 0-15% The habitat is predominantly WD4 The project is located in the Shannon catchment (100%), the Cappagh[Galway]_Sc_010 (100%) Sub-Catchment, the Ballinlough Stream_020 (100%) Waterbody

This AAS identifies 14 European sites within 15km of the project site and does not include any sites beyond this distance. The sites identified are:

1. Pollnacknockaun Wood Nature Reserve SAC [0319]
2. Rosturra Wood SAC [1313]
3. Derrycrag Wood Nature Reserve SAC [0261]
4. Cloonmoylan Bog SAC [0248]
5. Barroughter Bog SAC [0231]
6. Lough Derg, North-east Shore SAC [2241]
7. Loughatorick South Bog SAC [0308]
8. Pollagoona Bog SAC [2126]
9. River Shannon Callows SAC [0216]
10. Ardgraique Bog SAC [2356]
11. Sonnagh Bog SAC [1913]
12. Slieve Aughty Mountains SPA [4168]
13. Lough Derg (Shannon) SPA [4058]
14. Middle Shannon Callows SPA [4096]

One of these sites is screened in, the Slieve Aughty Mountains SPA [4168] on the basis of a possible effect arising from the project being located within the Natura site. The remaining sites are screened out for the following reasons:

- Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise (sites 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 as listed above).
- Due to the separation distance between the Natura site and the project (sites 13 and 14 as listed above).
- Due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise (site 11 as listed above).

In considering the European sites, the relevant QIs and SCIs for some sites can be observed to be truncated.

The second AAS document on file is dated the 8th of October 2020, and while in a different format provides an identical site description and records the same 14 European sites and screening conclusions. The full QIs/SCIs for each European site are recorded.

Both documents refer to an in-combination assessment, however this is not recorded on file.

An Appropriate Assessment report (AAR) is on file dated the 16th of June 2020, with a final review by a consultant Ecologist on the 23rd of June 2020. This considers the SCIs for the Screened in Slieve Aughty SPA. In relation to Hen Harrier, it states that the site is within a “Green Area” for that species, and as a result specifies that potential disturbance operations associated with the project can take place during the Hen Harrier Breeding season (1st April to 15th August inclusive), with the qualification that operations will be restricted within this timeframe if the NPWS notify DAFM of nesting activity. In relation to Merlin, it requires no operations in a 100m buffer of the forest edge, where the edge bounds specified habitats, between 1st of March and 31st of August and the planting of broadleaves to maximise opportunities for prey species. These requirements are listed as required mitigations for any licence that may be granted.

In relation to in-combination effects, the AAR states:

In relation to GY10-FL0161, the potential for the proposed project to contribute to an in-combination impact on European sites was considered by the Department of Agriculture, Food & the Marine (DAFM).

The AAR includes summaries of results of searches conducted on the 16th of June 2020 of planning systems focusing on the general vicinity of the project in the Shannon catchment (100%), the Cappagh[Galway]_Sc_010 (100%) Sub-Catchment, the Ballinlough Stream_020 (100%) Waterbody. These include Galway County Council (1 application), An Bord Pleanála (no applications), the EPA (no applications), DAFM afforestation projects (2 applications), DAFM Forest Road projects (no applications)

and DAFM Tree Felling projects (4 projects). Consideration of the Galway County Development plan is also included.

An Appropriate Assessment Determination (AAD) document prepared by a Forestry Inspector is on file dated the 16th of June 2020, with a note that it was reviewed by a further Forestry Inspector on the 17th of June 2020, and by an Ecologist on the 23rd of June 2020. This includes a summary of the screening process and the reasons for screening in or out of each of the 14 European sites listed above. The AAD refers to the application and the AAR, and makes a determination that includes those mitigations proposed in the AAR.

The licence was issued by DAFM on the 26th of June 2020 and contains standard conditions and references to good practice forestry guidelines and standards, as well as conditions that are reflective of the recommendations from the AAD.

Grounds of Appeal and Statement of Fact.

There is one appeal to the granting of the licence. The full grounds of appeal are on file, in summary, the grounds of the appeal (FAC 656/2020) are:

1. A breach of Article 4(3) of the EIA Directive 2014/52/EU by reason of a failure to carry out screening for EIA on the basis that the licence is in a class of development covered under Annex II of the EIA Directive and that DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA.
2. A breach of Article 4 (4) of the EIA Directive 2014/52/EU on the basis that the licence is for an area of 7.66 ha in Coillte's Forest Management Unit (FMU) GY10 and that on the same date that the application for this licence was submitted a further eighteen applications for clear felling licences were submitted for the same FMU totalling 195.67 ha. It is submitted that Article 4 (4) of the EIA Directive) requires a developer to submit details of the whole project and that the application for this licence does not represent the whole project therefore it is in breach of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.
3. A breach of Article 4 (4) of the EIA Directive 2014/52/EU as Article 4 (4) of that Directive requires a developer to submit a description of the aspects of the environment likely to be significantly affected by the project, and that the application has not described any aspects of the environment which are likely to be significantly affected.
4. That the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 on the basis that clear felling has the capacity to impact on water quality and that there is a significant potential In-Combination effect for the catchment.

5. That the Stage 1 and 2 AA determinations are not legally valid as an assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected areas concerned, that DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question, and that the In-Combination effect of all of the forestry activity on Natura 2000 sites has not been assessed adequately.
6. That DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination.
7. That the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation.
8. That the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive.
9. That the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.
10. That the licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence.
11. This licence should contain a condition that plans and works must be inspected by the Forest Service prior to, during and post works to ensure compliance with all environmental conditions contained within the licence.
12. 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 as current legislation and regulations do not provide for adequate warning/protection for local residents, landowners and special interest and community groups within the zone of influence of the spraying and that the potential need for spraying with toxic chemicals was not contained in the licence application as would be required by Annex IIa of the EIA Directive.

In a Statement of Fact (SoF) to the FAC in relation to FAC 405/2020, DAFM stated that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. The SoF addresses each of the grounds of appeal. In summary, it submits that in this instance the EIA Directive is not applicable as the project is not a class of project listed in Annex II of the Directive, is sub-threshold, and as a consideration of requirement for EIA deemed no EIA to be required that Article 4(3) of the Directive

is not applicable. Similarly, the SoF submits that Article 4(4) is not applicable for similar reasons and sets out the view that the Coillte FMU process and any resultant BAU strategic plan does not constitute a plan or programme. It further submits that the FMU process operated by Coillte is not an obligatory statutory process

The SoF submits that the range of standards, checks and balances operated by DAFM ensures that the proposed project does not represent a risk to the River Basin Management Plan for Ireland 2018-21. It further submits that consideration of the licence was in accordance with the requirements of the Habitats and Birds Directives, that licence conditions are matters for the Minister, and that permission granted by the Minister does not relieve the applicant of their obligations under other legislation.

Oral Hearing

An oral hearing was held by the FAC in relation to FAC 405/2020 on the 19th 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 DAFM drew the attention of the FAC to licence conditions that are specific to the protection of certain bird species, in particular conditions h) through to j).

The appellant submitted that there were inconsistencies within the Schedule 3 of the restock table in the application compared to the licence issued, and that the precise level of restocking was unclear. It was submitted that the site is adjacent to another tree felling licence (GY10-FL0151), and that these applications should have been assessed together. The appellant questioned the scientific basis for the mitigations proposed for Hen Harrier and Merlin, and in relation to Merlin 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. 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 stated 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. Quoting from the guidance document provided by NPWS in its referral response, the appellant submitted that mitigations must be capable of being shown to be effective, and in order to do this the department licence should show the location of known Hen

Harrier breeding sites, or at a minimum that the ecologist recommending mitigations should know such locations and the proximity of the project site to the red zone given the declining numbers of Hen Harrier in the Slieve Aughty mountains.

The appellant submitted that the Appropriate Assessment process did not assess the impacts of restocking on the Natura site, and also raised concerns in relation to the nature of the soil on site. The appellant observed that the soil type at the project site is described in the AAS as a peaty gleys which is not a free draining soil and can result in saturation. The appellant further submitted that as the works will be restricted to winter months as a result of mitigation conditions associated with the Hen Harrier, there would be surface water originating from the site when works are occurring. The appellant referenced the Natural Impact Statement (NIS) produced for the Strategic Environmental Assessment (SEA) of Ireland's Forestry Programme 2014-2020 in this regard. The appellant submitted that this raised issues in relation to the Water Framework Directive and the screening for European sites where distance was cited as a reason to screen out and submitted that distance in and of itself is not an adequate test.

The applicant submitted that an environmental manager visited the site in November of 2019, and that their report indicates the presence of two water courses on site, which merge and exit flowing some 350m to the Cappagh waterbody.

Following questions from the FAC, DAFM clarified that following the initial preparation of the AAS, it was observed that some QIs/SCIs were truncated for some Natura sites, and that a revised AAS was then created. This revised AAS contained the same information as the original AAS, with the full QIs/SCIs included, but followed a revised template format. DAFM confirmed that while the SCIs/QIs had been truncated in the original AAS, all had been considered at the time of the screening activity. DAFM agreed with the FAC that it was confusing that the revised AAS had a different format and date attached but confirmed that the screening took place at the time of the preparation of the original AAS.

In response to queries from the FAC, the appellant agreed that there was no mapping to indicate that the water course referred to were present on the site and indicated that this observation was based solely on the observations of the environmental manager who had visited the site.

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 26th 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 10th of May 2021, DAFM sought a one-week extension to respond to this request which was agreed to by the FAC. On the 20th of May, DAFM requested a further extension to the 18th of June 2021 to respond, which was also agreed to by the FAC.

On the 22nd 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 24th 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 7th 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 the FAC

In considering the grounds of appeal, the FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, DAFM, NPWS, and other on-line services. These confirm the details of the site as outlined above, in particular the presence of the 14 European sites identified in the various documents outlined above in connection with Appropriate Assessment, and the location of the site within the Slieve Aughty Mountains SPA. The SCIs for this site are listed as Hen Harrier and Merlin by the NPWS.

EPA mapping confirms that the river that can be seen to the north on the site map is a branch of the Ballinlough Stream_020 in the Lower Shannon [25C] Catchment and the Cappagh[Galway]_SC_010 subcatchment. The Ballinlough Stream_020 has a WFD Status of Good/At Risk. This drains via the Cappagh[Galway]_020 to the very top of Lough Derg at hydrological distance of ca. 8.9km. Before doing so it encounters and flows along the edge of the Barroughter Bog SAC [0231] at a hydrological distance of ca. 8.8 km, and after a further ca. 100m it encounters the Lough Derg, North-east Shore SAC [2241]. OSI mapping confirms the slope described in the AAS, showing contours that fall to the northwest from ca. 140m to 100m over a distance of ca. 600m. No national monuments are visible in or immediately proximate to the site. The site does not feature in the NPWS National Survey of Native Woodland. Portions of the Slieve Aughty Bog NHA are about 1km to the south and west of the site. A proposed NHA at Pollnacknockaun Wood is about 1km south. National Soils mapping describes the site as Acid Poorly Drained Mineral Soils with Peaty Topsoil (Peaty Gleys). The National Soils Hydrology Map describes the area as poorly drained.

In the first instance, the FAC considered those grounds of appeal relating to the EIA directive and had regard for the SoF provided by DAFM. Directive 2011/92/EU, as amended by 2014/52/EU, 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 of an area of 7.66 ha. 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 as requiring EIA in Irish Regulations.

The FAC then considered the grounds of appeal relating to Appropriate Assessment as they relate European sites with aquatic QIs, and also those grounds of appeal in relation to the Water Framework Directive, and had regard to the documentation on file, contributions at Oral hearing, and the publicly available information sources listed above. The FAC observed that two versions of the AAS are on file, and that both refer to consideration of an in-combination effects document, and that no such document is on file. The FAC also note that the AAR, with a final review date the 23rd of June 2020, in a section dealing with in-combination effects contains reference to searches of various planning systems on the week of the 16th of June. At oral hearing it was submitted that the two versions of the AAS arose as a result of a clerical error in which QIs and SCIs for European sites were omitted or truncated, and that the second version was for information only in order that those details would be available on file. It was submitted that all relevant SCIs and QIs were in fact considered as part of the Appropriate Assessment screening activity, and that this was recorded in the AAS dated the 5th of May 2020. As this is in advance of the planning searches recorded in the AAR, and no other record of consideration of in-combination effects is on file, the FAC finds that there is no record of the in-combination assessment which formed part of the basis for screening out a number of European sites, and this represents a serious error in the conduct of the appropriate assessment.

In relation to the consideration of in-combination effect as it relates to the screened in site (the Slieve Aughty Mountains SPA [4168]) and as recorded in the AAR, the FAC consulted with a number of the planning systems listed in that document. These included searches of planning systems for the local authority and DAFM licenced forestry operations. The FAC note that the AAR records a single planning application lodged with Galway County Council (planning reference 17952). This is for retention of a structure, the application for which was received by the Local Authority on the 29th of June 2017, and which was granted on the 30th of April 2018. This is located ca. 4km from the project site. Using the publicly available National Planning Application Database, the FAC identified a number of other planning applications in the vicinity of the project site. These include an application for a dwelling house received

by the Local Authority on the 3rd of December 2019 and granted on the 16th of March 2020, and which is located ca. 2km from the project site. The FAC also notes that the AAR records two afforestation projects, no forest road projects, one private felling licence and three Coillte felling projects. The project site itself is in a forested area, and the DAFM Forestry Licence viewer shows a thinning licence (GY10-FL0129) for 105.85 ha in 16 parcels, the application for which was received on the 14th of December 2018, and which was approved on the 26th of March 2019, which is in close proximity to the project site, and for which some parcels are contiguous with the project site. Based on the foregoing, the FAC is satisfied that the in-combination assessment presented in the AAR is incomplete and that this represents a serious error in the conduct of the Appropriate Assessment.

At the oral hearing, the appellant raised specific concerns in relation to the possibility of water exiting the site. The FAC note that there are no temporal exclusions in the license conditions relating to the Hen Harrier, in contrast to the submission by the appellant at Oral Hearing, unless there is a notification of a new Red Area. Therefore, felling operations will not necessarily be confined to the winter months. In any event, the FAC consider these concerns moot in the context of the submission by the applicant at oral hearing that an environmental manager's report following a site visit raised the possibility of water courses leaving the site. Such watercourses would result in a direct hydrological connection to Natura sites which were screened out due to the absence of a direct upstream hydrological connection, and the subsequent lack of any pathway hydrological or otherwise. These sites include the Lough Derg, North-east Shore SAC [2241] and the Barroughter Bog SAC [0231]. The FAC is satisfied that the evidence of such watercourses indicates an error in the conduct of the screening for appropriate assessment.

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 h) 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 the mitigation proposed in the AAR, 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.

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 was prepared 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 licence under consideration 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 the making a decision to grant the licence.

The FAC is further satisfied that the failure to identify all relevant watercourses on the site represents an error in the processing of the licence application with respect to the Water Framework Directive.

The appellant, in the grounds of appeal, submits that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. At the oral hearing, the appellant expanded on this submitting that there were inconsistencies within Schedule 3 of the restock table in the application compared to the licence issued. The FAC notes that application submitted by the applicant included a species inventory, details of proposed restocking, location maps showing relevant features, and harvesting procedures. The licence issued contains a listing of the species to be planted, followed by a condition requiring a proportion of broadleaves. The FAC is satisfied that the condition qualifies the stocking table included in the licence.

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, 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 is not satisfied that an error arose in relation to the licence conditions of the nature described by the appellant.

In relation to 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.

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-FL0161 and is remitting the consideration of the application to Stage 1 (Screening) Appropriate Assessment.

Yours sincerely,



John Evans On Behalf of the Forestry Appeals Committee

