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30<sup>th</sup> July 2021

**Subject:** Appeal FAC874/2020 regarding licence LS09-FL0147

Dear [REDACTED]

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

#### **Background**

Licence LS09-FL0147 for felling on 2.38 hectares at Glenkitt, Co. Laois was issued by the Minister for Agriculture, Food and the Marine (DAFM) on 4<sup>th</sup> December 2020.

#### **Hearing**

A hearing of appeal FAC874/2020 was held by the FAC on 14<sup>th</sup> July 2021. In attendance at Hearing:  
FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas, Mr. Derek Daly and Mr. Vincent Upton.

Secretary to the FAC: Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister for Agriculture, Food and the Marine regarding licence LS09-FL0147.

#### **Decision of the Minister for Agriculture, Food and the Marine**

The decision relates to a licence for the felling of 2.38 ha at Glenkitt, Co. Laois. The application was submitted on 31<sup>st</sup> July 2020 and includes inventory, restocking and environmental information and a series of maps. The forest is stated to be managed for Timber Production and the regeneration objective is Standard conifer reforestation for roundwood production. The licenced area is currently comprised of Sitka spruce planted in 1988 with a yield class of 24 and replanting would be of the same species. Maps show the area to be within the Slieve Bloom Mountains SPA on a slope with a southerly aspect and with access through an existing forest road network. The Application was referred to the Laois County Council

and no response is recorded. There are two submissions from members of the public including one from the Appellant.

The Applicant submitted an Appropriate Assessment Pre-screening Report dated 22nd September 2020. This describes the site as being on Acid brown earths, Brown podzolics soil, deep, well drained mineral soils, a moderate slope (15%-30%) and being comprised of WD4 Habitat Class (Coniferous Plantation). The Report notes that a stream flows from the southern boundary of the site and describes its path before meeting the boundary of the River Barrow and River Nore SAC after 6.3km and River Nore SPA after 10km. The report notes that the harvest block falls within an extant Freshwater Pearl Mussel catchment which is subject to Statutory Instrument S.I. 296 of 2009 (NPWS, 2017) and is wholly within the Slieve Bloom Mountains SPA. The Report describes the operations that would be undertaken. The report records considerations of nine European sites and determines that three should proceed to be considered in an Natura Impact Statement, namely River Barrow and River Nore SAC (002162), Slieve Bloom Mountains SPA (004160), and River Nore SPA (Site Code: 004233).

The Applicant submitted a Natura Impact Statement (NIS) dated as completed on 22<sup>nd</sup> September 2020 and covers two areas within the same townland, LS09-FL0148 and LS09-FL0147. The NIS outlines the specific details of each site and operational details. Each screened-in European site and its associated qualifying interests/special conservation interests are considered in turn and mitigation measures are outlined or reasons are provided where no measures were considered necessary. In relation to LS09-FL0147 and the River Barrow and River Nore SAC (002162) measures are considered necessary for the following interests Freshwater Pearl Mussel (*Margaritifera margaritifera*) (1029), White-clawed Crayfish (*Austropotamobius pallipes*) (1092), Sea Lamprey (*Petromyzon marinus*) (1095), Brook Lamprey (*Lampetra planeri*) (1096), River Lamprey (*Lampetra fluviatilis*) (1099), Twaite Shad (*Alosa fallax fallax*) (1103), Salmon (*Salmo salar*) (1106), Otter (*Lutra lutra*) (1355), Nore Pearl Mussel (*Margaritifera durrovensis*) (1990), Water courses of plain to montane levels with the *Ranunculus fluitantis* and *Callitriche-Batrachium* vegetation (3260), and Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels (6430). In relation to Slieve Bloom Mountains SPA (004160) and the Hen Harrier (*Circus cyaneus*) (A082) it is stated that,

*Nesting birds can be disturbed by activities or operations that involve excessive noise, vibration, mechanical movement, artificial lights. The use of machinery in clearfelling and restocking can give rise to such disturbance, depending on their location in relation to nesting hen harrier. The project relates to the clearfelling and reforestation of an existing forest. In its current state (mature conifer plantation), the project area does not provide suitable foraging, nesting or roosting habitat for breeding hen harrier. Therefore, the proposed clearfelling and reforestation will not result in any direct impact on the SCI species of this SPA in terms of habitat loss or direct mortality.*

The NIS further notes that the project site is located >1.2km from the nearest known breeding pair and that the licence will include a condition to preclude disturbance operations taking place during the Hen harrier breeding season should the DAFM be notified by NPWS of a new Hen Harrier nesting site and if the site of the project lies within or partially within 1.2 km of this location. In relation to the



River Nore SPA (004233) and Kingfisher (Alcedo atthis) (A229) it is noted that the felling is some 9.5km in hydrological distance from the SPA and that in the absence of more in-depth information regarding breeding or foraging locations of Kingfisher in this protected site, and based on the connectivity between the project area and the SPA that mitigations are necessary. Measures are outlined and include water protection measures including a 15 metre setback from the aquatic zone at the south of the site and restriction in relation to the notification of a new Hen Harrier nest. The NIS considers residual effects and other plans and projects and concludes,

*It is objectively concluded, in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge.*

The DAFM recorded a screening for Appropriate Assessment dated 20<sup>th</sup> November 2020 and identified and considered the same nine sites as the Applicant within 15km of the proposal area. The DAFM screening considered each site in turn and reasons are provided for the screening conclusion. The DAFM screening concludes that Appropriate Assessment should be untaken in relation to the Slieve Bloom Mountains SPA and River Barrow and River Nore SAC. In relation to the River Nore SPA it is concluded that Appropriate Assessment is not required having considered the project design and location, the European site and its qualifying interests and conservation objectives and the possibility of potential sources and pathways and due to the separation distance between the proposal and the SPA.

The Appropriate Assessment Determination (AAD) of the DAFM is dated 2<sup>nd</sup> December 2020. This states the screening decision and the conclusion to proceed to Appropriate Assessment in relation to Slieve Bloom Mountains SPA IE000416 and River Barrow and River Nore SAC IE0002162 for stated reasons. The AAD identifies the documentation that informed the decision including the NIS provided by the Applicant and the mitigation measures to be required if a licence is issued. These measures primarily relate to the protection of downstream aquatic based species and habitats and a number of listed species. The AAD concludes,

*Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.*

The licence was issued on 4th December 2020 with conditions, including conditions stated to be in the interest of protecting the interests of European sites and the protection of water quality related to the Appropriate Assessment undertaken.

## **Appeal**

There is one appeal against the licence decision and the Notice of Appeal and grounds were provided to all parties. The grounds contend that the FS failed to establish whether the original planting of the lands was in compliance with the Directives and failed to consider LS09 FL0148 which it is submitted forms part of the same proposed development. The FAC understands FS to refer to Forest Service and is in reference to the Department of Agriculture, Food and the Marine and Minister for Agriculture, Food and the Marine as the licencing authority.

The grounds go on to submit that the process of approving the project has not met the requirements of the EIA Directive and that clearfelling has the potential to have a significant effect on the environment, that the complete removal of trees from an area is deforestation, that an area of open space is proposed and that this represents deforestation and change in land use with reference to the CORINE dataset. It is further submitted that the developer has not submitted all of the requisite information required by the EIA Directive and that the DAFM failed to carry out an assessment of the need for an EIA of this project or demonstrate that adequate screening for the need for an EIA was undertaken for the afforestation of the lands in 1988.

With reference to project splitting under the EIA Directive it is submitted that the Applicant has indicated that the Forest Management Unit is the Business Area Unit that the combined area of deforestation and non-stocking must be calculated for the BAU area and that planning permission may be required under the Planning and Development Regulations (Schedule 5, Part 2, 1, d (iii)). It is submitted that multiple applications within a BAU being submitted with cross-referencing represents project splitting. It is further contended that the licence LS09-FL0148 has been licenced and is within 120 metres of LS09-FL0147 and that no reference to a "greening up" period has been included as referenced in the Interim Standards for Felling and Reforestation.

It is submitted that there has been no assessment of the direct and indirect impacts on climate change and that the application has not been referred to the NPWS consistent with the FS protocol in Circular 2 of 2013 and that this represents a serious error.

It is submitted that approval is not consistent with the requirements of Article 4 of the Water Framework Directive and that a Member State is required to refuse authorisation for an individual project where it may cause the deterioration of the status of a body of surface water or the attainment of good status and reference is made to Case C-461/13. It is submitted that the mitigation measures contained in the Interim Standards for Felling and Reforestation are not written with sufficient precision and clarity to ensure the elimination or reduction of adverse impacts and ensure compliance with Article 4 of the WFD. It is further contended that the cumulative impact of the project has not been properly assessed.

It is submitted that approval is not consistent with the requirements of Article 6 of the Habitats Directive in that the Mitigation Measures for Hen Harrier do not represent the precautionary principle, that potential impacts on the Slieve Bloom Mountains SPA and SAC have not been properly assessed, that consultation with the NPWS was required, that residual effects of the project can not be excluded and



that therefore the in-combination effects of the project has not been adequately assessed and that the conditions and referenced documentation are not written with sufficient clarity or precision regarding procedures to ensure that they will result in compliance with Article 6(3) of the Habitats Directive or the overall environmental regulatory framework or be meaningfully enforced. It is further submitted that the AA has not assessed the impact of the restocking of the site and that the SPA network will undergo an acute reduction in the extent of forest that is of use to Hen Harrier as a nesting resource and reference is made to a Draft Hen Harrier Threat Response Plan.

A number of grounds relate to specific conditions, it is submitted that condition 9 requires clarification regarding the treatment of boots prior to entering the site, condition 11 represents a risk to water quality if existing broadleaves can not be retained, condition 12 that water hotspots should have been identified as part of the AA, condition 13 that extraction routes and landing bays should have been identified and assessed as part of the AA, condition 17 and 19 that the design and location and necessity of sediment traps should have been made before the AA was conducted, condition 20 that the potential for the need for remedial action permits for the possibility of a residual impact which has been excluded in the AA Determination, condition 21 that potential top up use of insecticides would require a new AA and that residual effects have not been assessed, condition 23 that a discrepancy exists between the NIS and the condition in relation to the use of fertiliser, condition 25 does not exclude the potential of residual impacts in relation to chemical use and heavy rainfall, condition 27 that the potential of non-functioning of measures results in residual impacts not being excluded, condition 28 that if it is not safe to remove fallen trees from the exclusion zone that residual impacts have not been excluded, condition 29 that areas of wet woodland, carr or thick scrub should have been mapped as part of a field survey by an ecologist, condition 30 that a 25 metre setback is not reference in the project details, condition 31 is too vague to be acceptable as a mitigation condition and possible impacts have not been eliminated and heavy rainfall is not defined, condition 32 uses the term as far as possible does not eliminate the possibility of an impact, condition 33 and 34 should have been established by an ecologist as part of the AA, condition 35 and 36 represents the possibility of a residual impact which has been excluded in the AA.

It is submitted that the approval is not consistent with the requirements of Articles 5 and 9 of the Birds Directive or Article 12 of the Habitats Directive. It is submitted that the Harvest Plan submitted by the Applicant is not consistent with the requirements of the Interim Standards for felling and Reforestation and examples are given in relation to the maps provided. It is submitted that the Monitoring and Inspection regime implemented by the DAFM is not sufficiently robust to ensure that conditions will be enacted.

#### **DAFM Statement**

In a statement to the FAC in response to the appeal which was provided to the parties, the DAFM submitted that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in their standards and procedures have been adhered to in making a decision on the application. It is submitted that the standard operational activities of clear-felling and replanting an already established forest area are not

categorised either in Annex II of the Directive or in the national transposing legislation to be subject to a determination as to whether a sub-threshold EIA needs to be carried out or not, a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(4) of the Directive is not applicable. It is further submitted that the Forest Management Unit planning process and any resultant Business Area Unit strategic plan is not an obligatory statutory process, arising either from the legislation governing the operation of the company (the Forestry Act 1988 and the Forestry (Amendment) Act 2009) nor from the provisions for forest management plans set out in Section 10 of the Forestry Act 2014.

The DAFM submits that it has received sufficient information in relation to the felling and reforestation project to assess the potential impacts of the replanting of the lands in question and further submits that the replanting is both silviculturally and environmentally appropriate. It is submitted that the replanting of these lands ensures a continuation of forest cover at the licenced site and contributes to the maintenance of forest cover nationally with the attendant benefits of maintaining and enhancing local and national Irish forest carbon stores. It is submitted that the proposal is in keeping with the DAFMs Felling and Reforestation Policy (2017).

The DAFM submit that the DAFM procedures regarding disturbances within SPAs are outlined in Appendix 21 of the Forestry Standards Manual (2015) and that,

*Specific procedures apply in relation to applications for consent / grant approval / licences involving certain forestry operations which have the potential to disturb Hen Harrier breeding activity within and surrounding SPAs designated for breeding Hen Harrier. These procedures, agreed with National Parks & Wildlife Service (NPWS), focus on disturbance operations within so-called 'Red Areas' during the Hen Harrier breeding season, 1st April to 15th August, inclusive.*

It is further submitted that the NPWS provide data to the DAFM regarding nest sites and that the procedure is operated with the agreement of the NPWS and that the NPWS have inputted into projects concerning forest operations in SPAs.

It is submitted that the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018) and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation.

It is submitted that the specific measures detailed in application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AA Determination ensure that the proposed felling and reforestation project LS09-FL0147 will not result in any adverse effect on any European Site and that the conditions attached to the licence for LS09-FL0147 are consistent with best forest practice, national forest policy



and protection of the environment. It is submitted that an in-combination report included on file, which included both forestry and non-forestry projects in the vicinity of the project area, was given due consideration during the production of the AA determination. It is submitted that DAFM are satisfied that the conditions laid out in the license are compliant with Article 6 (3) of the habitats directive. The DAFM submits that the licence conditions are appropriate and in keeping with good forest practice, policy and the Appropriate Assessment undertaken. It is submitted that the licence Applicant is bound legally by the conditions that have been issued in respect of the licence and that the DAFM will take appropriate enforcement measures where the licence conditions have not been adhered to.

### **Considerations of the FAC**

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that 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) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The Act defines afforestation as the conversion of land to a forest and deforestation as the conversion of a forest into land that is not a forest. As is evident from this definition, the wording in Annex II of the EIA Directive, and the etymology of the words, afforestation and deforestation involve the change from one land use to another. This is understood nationally and internationally to exclude felling and replanting or regeneration activities after felling. For example, the Intergovernmental Panel on Climate Change (IPCC) in its 2020 Special Report on Climate and Land<sup>1</sup> provides the following definitions,

*Forest A vegetation type dominated by trees. Many definitions of the term forest are in use throughout the world, reflecting wide differences in biogeophysical conditions, social structure and economics*

*Afforestation Conversion to forest of land that historically has not contained forests*

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<sup>1</sup> [https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/11\\_Annex-I-Glossary.pdf](https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/11_Annex-I-Glossary.pdf)

*Deforestation Conversion of forest to non-forest.*

In reference to Articles 3.3 and 3.4 activities of the Kyoto Protocol, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) had employed the following definitions<sup>2</sup> which are also included in the IPCC 2006 IPCC Guidelines for National Greenhouse Gas Inventories<sup>3</sup> and are referenced in relation to definitions employed by the UN Food and Agriculture Organisation,

*“Forest” is a minimum area of land of 0.05–1.0 hectare with tree crown cover (or equivalent stocking level) of more than 10–30 per cent with trees with the potential to reach a minimum height of 2–5 metres at maturity in situ. A forest may consist either of closed forest formations where trees of various storeys and undergrowth cover a high proportion of the ground or open forest. Young natural stands and all plantations which have yet to reach a crown density of 10–30 per cent or tree height of 2–5 metres are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest*

*“Afforestation” is the direct human-induced conversion of land that has not been forested for a period of at least 50 years to forested land through planting, seeding and/or the human-induced promotion of natural seed sources.*

*“Deforestation” is the direct human-induced conversion of forested land to non-forested land..*

The grounds of appeal refer to the CORINE dataset which is described as<sup>4</sup>,

*The CORINE Land Cover (CLC) inventory was initiated in 1985 (reference year 1990). Updates have been produced in 2000, 2006, 2012, and 2018. It consists of an inventory of land cover in 44 classes. CLC uses a Minimum Mapping Unit (MMU) of 25 hectares (ha) for areal phenomena and a minimum width of 100 m for linear phenomena. The time series are complemented by change layers, which highlight changes in land cover with an MMU of 5 ha.*

Land cover and land use are different concepts with the latter referring to activity. For example, the IPCC offer the following definition<sup>5</sup>,

*Land cover The biophysical coverage of land (e.g., bare soil, rocks, forests, buildings and roads or lakes). Land cover is often categorised in broad land-cover classes (e.g., deciduous forest, coniferous forest, mixed forest, grassland, bare ground)...*

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<sup>2</sup> <https://unfccc.int/resource/docs/2005/cmp1/eng/08a03.pdf>

<sup>3</sup> <https://www.ipcc-nggip.iges.or.jp/public/2006gl/vol4.html>

<sup>4</sup> <https://land.copernicus.eu/pan-european/corine-land-cover>

<sup>5</sup> [https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/11\\_Annex-I-Glossary.pdf](https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/11_Annex-I-Glossary.pdf)



*Land use* The total of arrangements, activities and inputs applied to a parcel of land. The term land use is also used in the sense of the social and economic purposes for which land is managed (e.g., grazing, timber extraction, conservation and city dwelling)...

The FAC does not consider that the definition of land cover provided by the Appellant is relevant to the decision under appeal. The guidance provided by the European Commission in *Interpretation of definitions of project categories of annex I and II of the EIA Directive* (2017), states that “‘Conversion’ refers to any conversion of land use” and “The change of land use is not in itself a project in the context of the definition of the EIA Directive, since a project implies some sort of works or intervention”.

The decision under appeal relates to a licence for the felling of an area of 2.38 hectares and replanting is proposed by the Applicant and is a condition on the licence. An area of open space of 0.12 ha is proposed in the application. As noted a forest in Ireland is defined as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity, which is reflective of international definitions. Thus, open space is recognised as a part of a forest. In this instance the forest will continue to be managed for the purpose of timber production.

The FAC considered that the felling and replanting of trees, as part of a forestry operation in a commercially managed forest, with no change in land use, could not be considered as deforestation or afforestation and does not fall within the classes referred to in the Directive, and is not covered by the Irish Forestry Regulations (S.I. 191 of 2017). Matters related to approvals under Planning and Development legislation do not fall within the remit of the FAC. Therefore the FAC concluded that screening for EIA was not required in this case and that errors had not been made in making the decision in relation to related grounds submitted in the appeal.

The grounds also question whether the project area has been properly defined and suggest that the larger Business Area Unit should represent the project or that another licence LS09-FL0148 forms part of the same project. The FAC does not accept that the internal administrative, managerial divisions set by the Applicant could be considered to represent a project for the purposes of a specific felling licence. The FAC considers that the felling of individual stands within a larger managed forest during the same or similar periods is in keeping with standard forestry practice and could not be considered in itself as evidence of an attempt to avoid or circumvent regulatory requirements.. Licence LS09-FL0148 lies to the northwest of the proposal. It is submitted to lie within 120 metres from the proposal and that this should have resulted in restrictions being placed on the timing of felling in line with the DAFM *Interim Standards for Felling and Reforestation*. Neither the DAFM nor the Applicant contested this distance and aerial imagery would suggest that the boundaries of the two areas are c.110 metres from each other, although the actual distance could be established on the ground. In any case, public records show that LS09-FL0148 was licenced after LS09-FL0147 and it is also considered in the NIS submitted by the Applicant and in the record of other plans and projects considered in-combination with the licence under appeal by the DAFM. Therefore, the FAC does not consider that there is evidence of error in this regard.

The grounds of appeal question whether the original planting of the lands was in compliance with “the Directives”. The FAC understands this to be the EU Habitats and EIA Directives. No evidence of deficiency in the planting of the lands was submitted in the appeal. The Application submits that the current forest was planted in 1988 while other documentation submitted by the applicant refer to 1990. The DAFM confirmed that the current forest was planted in 1988 and that this was a replanting operation rather than afforestation. The current forest was planted before the implementation of the Directive by Ireland in 1989 and its planting did not constitute afforestation. Publicly available Ordnance Survey Ireland maps (OSi Cassini 6inch mapping dated 1830s to 1930s) show the area to be under coniferous forest c.100 years ago and there is, thus, an established history of forest cover on the lands. The FAC is not satisfied that the Minister has erred in relation to these grounds.

The grounds submit that no assessment of the direct and indirect impacts of the project on climate change has taken place. The grounds do not provide a reason as to why a detailed individual assessment might be required in relation to the specific licence under appeal that involves the felling of 2.38 hectares of commercial forest managed for timber production. In relation to general Government Policy, the production of harvested wood products as a low-carbon material supporting decarbonisation in other sectors and as a carbon storage pool, and the avoidance of deforestation through replanting are both recognised in national Forest and Climate Change policy, including in the Climate Action Plan 2019<sup>6</sup>. Emissions and removals from Land use, Land use change and Forestry are accounted at the national level under EU Regulation 2018/841<sup>7</sup> for the period 2021-2030 for both afforested land and managed forest land in line with agreed accounting rules. The FAC is not satisfied that an error was made in the making of the decision in relation to these grounds.

The grounds of appeal suggest that the DAFM procedures require referral to the NPWS in this instance. In reference to a DAFM Circular from 2013. This predates the Forestry Standards Manual 2015, which outlines DAFM’s standards and procedures in relation to forestry applications. The Forestry Standards Manual 2015 states (pg 27),

*All applications within areas designated as a NHA, pNHA, SAC, SPA or National Park are referred to the National Parks & Wildlife Service, with the exception of breeding Hen Harrier SPAs (Regarding breeding Hen Harrier SPAs, mandatory referral to NPWS takes place if the project area, or any part thereof, is within a Hen Harrier ‘Red Area’, either within the SPA or extending outside the SPA.)*

Therefore the DAFM have identified a different procedure in relation to Hen Harrier SPAs outside of “red areas”. The Forestry Standards Manual 2015 also describes the Appropriate Assessment Procedure in relation to Hen Harrier SPAs in Appendix 21 and describes the protocol as being agreed with the NPWS. The FAC is not satisfied that the Minister erred in relation to referring the application to the NPWS in this instance.

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<sup>6</sup> <https://www.gov.ie/pdf/?file=https://assets.gov.ie/25419/c97cdecddf8c49ab976e773d4e11e515.pdf#page=null>

<sup>7</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.156.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.156.01.0001.01.ENG)



In regards to the requirements of the Water Framework Directive (WFD) and the protection of waterbodies, the FAC noted that the licenced area is situated in the Nore\_SC\_020 subcatchment of the Nore Catchment. Camross stream as recorded by the EPA, runs to the south and another stream, Glenall stream, runs to the east of the proposal area and forms part of the Delour\_030 waterbody which has been assigned a High Status and Not At Risk in relation to the objectives of the Water Framework Directive. The waterbody has had a high status in past cycles of the WFD. The NIS describes the hydrological connectivity of the site,

*The harvest block is located on mineral soils, on a moderate slope in a-southeast direction. An aquatic zone flows southeastwards from the southern site boundary for 490m before merging with a 2<sup>nd</sup> order stream, the Glenall Stream. This stream flows in a southerly direction before merging with a first-order stream, the Camross Stream (IE\_SE\_15D010400). The Camross Stream is located c.140m straight-line distance southwest of the harvest block at its closest point.*

This description is in line with aerial imagery and maps of the area. The grounds query the licence conditions and Interim Standards for Felling and Reforestation, in particular, the consideration of cumulative effects and the information provided in the Application. The grounds do not identify a particular impact of concern. In relation to the application information, the FAC noted that no Harvest Plan was requested by the DAFM in this instance. The application included inventory, site and environmental information in addition to a Pre-screening Appropriate Assessment and Natura Impact Statement. These contain details and descriptions of the site and operations and a number of maps identifying environmental features in the area. The FAC notes that the DAFM also employs its own datasets, systems and procedures when assessing an application. The FAC is satisfied that the DAFM had sufficient information to consider potential impacts on water quality and to process the application.

The NIS notes that the total area licenced for clearfell and replanting in 2016-2021 in the Delour 30 sub basin amounts to 3.35% of the sub basin area and the DAFM recorded its own consideration of other plans and projects in combination with the felling licence under appeal. The FAC does not consider that there is any convincing evidence that the DAFM failed to consider the potential for the proposal to impact on the status of a waterbody. The licence conditions include a significant number of conditions in relation to water quality and require adherence with the *Interim Standards for Felling and Reforestation*. In reviewing the Standards, the FAC considered that the requirements are on the whole clearly laid out and concise and could be readily verified and inspected by the DAFM. In particular, the exclusion zones and setback areas in relation to watercourses and the use of sediment controls and use of inputs are, in the FAC's opinion, appropriately described. While a number of measures are described in discretionary or optional terms, the FAC considers this to be normal language in a standard of best operational practice. The proposal in this instance is of a small scale on a moderate slope and on a deep-well drained mineral soil with a watercourse at the boundary that leads to a WFD waterbody after some 490 metres. The conditions include a requirement to establish a 25 metre setback at replanting stage with 5 rows of broadleaf species. This measure is reflective of the slope and soil type of the land and the High Status of the closest waterbody. The establishment of a broadleaf area is in keeping with good forestry practice

and should provide permanent benefits as a buffer zone. The FAC does not consider that there is any convincing evidence before it that the proposal may result in the deterioration of a waterbody status or jeopardise the attainment of a good status by the date laid down in the WFD or that the Minister has erred in this regard.

The FAC further considered the grounds related to Appropriate Assessment and Article 6 of the EU Habitats Directive. Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Part 8 of the Forestry Regulations 2017 provide for Appropriate Assessment in relation to forestry licences. As noted, the DAFM undertook and recorded a screening for Appropriate Assessment and identified nine sites within 15km and three more which are hydrologically connected to the proposal. The DAFM proceeded to undertake an Appropriate Assessment in relation to the Slieve Bloom Mountains SPA and River Barrow and River Nore SAC. The grounds question the measures specified in relation to Hen Harrier (*Circus cyaneus*) in the SPA. The Conservation Objective specified in the NPWS documentation is generic in nature and states,

*To maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA.*

The SPA is described as a stronghold for the species. The grounds submit that the proposed measure does not account for a situation where a delay occurs between surveying for new nest sites and the licensee being informed by the DAFM and that disturbance operations should be restricted unless agreed with the NPWS in advance. The NIS describes the proposal lands as not suitable foraging, nesting or roosting habitat for breeding Hen Harrier being mature, coniferous forest. This was not questioned in the grounds and appears to the FAC to be reflective of available research on the species. Furthermore, the proposal area is situated within a larger area of mature, coniferous forest which, as noted previously appears to have a history of forest cover. The measures proposed in the Appropriate Assessment reflect a DAFM procedure, agreed with the NPWS, in relation to licence applications in Hen Harrier SPAs. The AA was prepared by an Ecologist and informed by a Natura Impact Statement submitted by the Applicant and other sources. The FAC does not consider that there is evidence that a substantial delay would occur in the DAFM informing the Applicant of a new nest site being identified within 1.2km of the proposal or that it would be reasonable to make such assumptions. The site itself is currently, unsuitable for the protected species. The grounds refer to suggested changes in the overall SPA network which the FAC considered to relate to broader policy and measures obligations on Ireland rather than the decision under appeal.

The grounds further question the screening conclusion in relation to Slieve Bloom Mountains SAC which the grounds contend are within 550 metres from the proposal and within the colonisation distance of Sitka spruce and reference is made to a NPWS Upland Survey of Cuilcagh Anierin Upland SAC and



research from Norway<sup>8</sup>. The FAC noted in considering the referenced research from Norway that an avoidance of planting of Sitka spruce within 200 metres of certain conservation areas is recommended. In relation to the Cuilcagh-Anierin Uplands Survey the FAC examined the website of the NPWS and considered the report *Cuilcagh – Anieran Uplands SAC, Upland Survey Report*<sup>9</sup> which notes that seedlings and saplings of non-native conifers, mainly *Picea sitchensis* (Sitka spruce), were observed to have self-seeded from adjacent plantations in Dry Heath and Blanket Bog habitats in that SAC. However, while noting the influence as negative, the impact was described as low and that the area of both habitat affected was estimated as less than 1%. The FAC could not find a reference to distance that colonisation might occur.

The boundary of LS09-FL0147 lies c.530 metres at its closest to the boundary of Slieve Bloom Mountains SAC. The SAC lies northerly from the lands. The Conservation Objectives note that the terrestrial habitats of the SAC have not been mapped in detail while an area of alluvial forest has been mapped on the western side of the SAC. The SAC covers an extensive area of 4,877 ha. The proposal is for the felling of a mature coniferous forest followed by replanting and is separated from the boundary of the SAC by an area of mature forest. The land lies downslope from the SAC and on a well-drained mineral soil. The replanting of the lands is in keeping with the application details and Government Policy and is described in the file documentation and specific measures relate to the replanting stage. The FAC does not consider that there is any convincing evidence before it that the proposal has the potential to result in significant effects on Slieve Bloom Mountains SAC itself or in-combination with other plans or projects, and is not satisfied that the Minister has erred in not proceeding to Appropriate Assessment in relation to this SAC.

The grounds further question a significant number of specific licence conditions as previously noted. This includes questioning the imposition of a 25 metre aquatic setback which is larger than that specified in the NIS. The conditions include the planting of five rows of native broadleaves in the setback. Thus the setback will be comprised of 15 metres unplanted area in line with the NIS and five rows of broadleaf species. This is reflective of the Requirements and Standards of the DAFM in relation to High Status Objective waterbodies based on the slope of the lands. The FAC considers that this is appropriate and in keeping with the measures proposed in NIS and AA, while also reflecting the procedures of the DAFM.

The application of fertiliser was queried in relation to licence condition 23

*23) As set out in the NIS, fertiliser application will be restricted to elemental phosphate at no more than 42 kgs/ha to support the establishment and growth of newly-planted trees. Reason: In the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations.*

And reference was made to the Natura Impact Statement (NIS) which, in considering certain qualifying interests, states

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<sup>8</sup> Nygaard, P.H. and Øyen, B.H., 2017. Spread of the introduced Sitka spruce (*Picea sitchensis*) in coastal Norway. *Forests*, 8(1), p.24.

<sup>9</sup> [https://www.npws.ie/sites/default/files/publications/pdf/NSUH12\\_Cuilcagh\\_Anierin\\_Uplands\\_Report\\_01b\\_M.pdf](https://www.npws.ie/sites/default/files/publications/pdf/NSUH12_Cuilcagh_Anierin_Uplands_Report_01b_M.pdf)

*Fertiliser application is not proposed as part of this project, so runoff of fertiliser is not a threat.*

In its statement to the FAC in response to the appeal, the DAFM submitted that they had received an updated NIS clarifying that fertilisation is not required. A revised copy of the NIS is contained on the record which states that fertiliser is not required and is not proposed. The licence condition that provides for fertiliser use would appear, therefore, to be an error and, in the context of undertaking an Appropriate Assessment, one of a serious nature. However, the FAC is satisfied that the error is clear and recognised and understood by all parties. The Appellant drew specific attention to it while the DAFM had requested a revised NIS clarifying the matter and the Applicant had provided an NIS excluding the use of fertiliser from the described operations in keeping with its assessment of potential effects. The FAC considered that the error can be readily addressed through a variation of the decision to address the error. The FAC is therefore varying the decision to delete the existing condition and replace it with

*23) In line with the description of the operations, no application of fertiliser will take place as part of the operations licenced under LS09-FL0147. Reason: For clarity and for the proper implementation of the operations as described.*

The grounds refer to residual effects on a number of occasions. It appears to the FAC that this relates to residual effects after mitigation measures are implemented. For example, the European Commission in its guidance<sup>10</sup> suggest that,

*If, however, there is still a residual adverse effect on the integrity of the site, even after the introduction of mitigation measures, then the plan or project cannot be approved.*

The grounds submit that certain measures such as those in relation to ongoing monitoring suggest that residual effects can not be excluded. The FAC considers that such measures and standards are in keeping with good practice and are not an indication in themselves that residual adverse effects on the integrity of a European site can not be excluded. Considering the scale, nature and location of the proposal and European sites, the FAC does not consider that the AA and licence conditions taken as a whole demonstrate evidence of serious or significant error.

In relation to other identified conditions, the FAC consider that the Minister has included a significant number of good practice measures as mitigation measures in the Appropriate Assessment stage of considerations. The FAC considers that the primary measures of exclusion zones, setbacks and sediment control are clear and readily implementable and enforceable. The FAC also considers that the nature, scale and location of the proposal should be considered in the context of the Appropriate Assessment. The area is relatively small and situated on a deep, well drained mineral soil which would not be associated with the same risk of sediment mobilisation or poor buffering and nutrient retention capacity

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<sup>10</sup> [https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions\\_Art\\_6\\_nov\\_2018\\_en.pdf](https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_6_nov_2018_en.pdf)



as, for example, deep peat soils. The FAC does not consider that there is any convincing evidence before it that there is any reasonable, scientific doubt remaining that the proposal if carried out in line with the Appropriate Assessment would have an adverse effect on the integrity of a European site. The FAC is not satisfied that the measures identified represent serious errors in the making of the decision.

In reviewing the record of the decision the FAC noted that the AAD contained a requirement to adhere with the DAFM Forestry and Otter Guidelines and Forestry and Freshwater Pearl Mussel Requirements. The FAC confirmed that this refers to the Forestry and Freshwater Pearl Mussel Guidelines (DAFF, 2008). These do not appear to have been subsequently transferred to the licence conditions. The FAC considers this to be a serious error but one of a clerical nature and that the decision can be varied to effectively address the matter. The FAC is thus varying the decision to include the following in condition 37 "The proposed works shall adhere to the:"

*vii) Forestry and Otter guidelines (DAFF, 2009),*

*viii) Forestry and Freshwater Pearl Mussel Guidelines (DAFF, 2008)*

The grounds submit that the decision is not in compliance with Articles 5 and 9 of the Birds Directive and that Section 22 of the Wildlife Act does not represent a faithful transposition of the Birds Directive and further suggests that this is acknowledged by the NPWS. No convincing or specific evidence of the presence of birds or their nests was submitted in relation to the decision under appeal while this was contended to be the case. The FAC considered 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 does not consider that assessing whether Ireland has correctly transposed the EU Birds Directive in the Wildlife Act falls within its remit. The FAC is not satisfied that the Minister has erred in relation to these grounds of appeal.

In relation to species of animal listed in Annex IV of the Habitats Directive, the grounds do not provide evidence of such species on the site or the potential for such species to be present. The FAC does not consider that a mature, coniferous commercial forest of 33 years would generally be considered as important habitat for such species. The licence conditions do include restrictions on habitat associated with otter (*Lutra lutra*) and protection of water quality. The granting of the licence does not remove any other obligations on the licensee under any other statute. The FAC is not satisfied that an error has been made in the making of the decision in this regard.

In relation to the monitoring and inspection regime of the DAFM, the FAC noted that the Forestry Act and Forestry Regulations provides for the inspection of lands by authorised officers, in addition to other powers provided to the Minister and their Officers. The FAC does not consider that any reasonable assumption can be made regarding the suggested shortcomings of inspection or monitoring in this particular instance such that it might affect the decision.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. The FAC is satisfied that a serious error was made in the making of the decision. The FAC is thus varying the decision of the Minister regarding licence LS09-FL0147 in line

with Article 14B of the Agricultural Appeals Act 2001, as amended, to include the following in licence condition 37.

*vii) Forestry and Otter guidelines (DAFF, 2009),*

*viii) Forestry and Freshwater Pearl Mussel Guidelines (DAFF, 2008)*

and to delete condition 23 and replace it with,

*23) In line with the description of the operations, no application of fertiliser will take place as part of the operations licenced under LS09-FL0147. Reason: For clarity and for the proper implementation of the operations as described.*

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

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Vincent Upton On Behalf of the Forestry Appeals Committee