



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

04 June 2021

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FAC ref: 577/20 & 597/20

Subject: Appeal in relation to felling licence TY07-FL0062

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of felling licence TY07-FL0062.

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 the parties to the appeal.

Background

Felling licence TY07-FL0062 was granted by the Department on 10 July 2020.

Hearing

The FAC conducted an oral hearing of appeals 577/20 & 597/20 on 10 November 2020 which was adjourned and was reconvened on 25 May 2021.

Attendees 10 November 2020:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman & Mr Pat Coman
Secretary to the FAC:	Ms Ruth Kinehan (Mr Michael Ryan & Ms Marie Dobbyn observing)
DAFM Representatives:	Mr Frank Barrett & Ms Eilish Kehoe
Applicant Representatives:	[REDACTED]

Attendees 25 May 2021:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
DAFM Representatives:	Mr Anthony Dunbar & Ms Eilish Kehoe

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the oral hearing and all

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other submissions before deciding to set aside and remit the decision to grant this licence (Reference TY07-FL0062) to the DAFM as outlined below.

The proposal comprises 10.91 ha of clearfelling comprising 10.28 ha within plots 1 and 2 (100% Sitka spruce) and 0.63 ha within plot 4 (57% Sitka Spruce, 42% Japanese larch and 1% other broadleaves) and replanting with 100% Sitka Spruce at Bohernarude, Borrisnafarney & Kilduff, Co Tipperary. Application seeks 0.55 ha of open space. Application included a harvest plan document and a pre-screening report with details of two SAC sites and one SPA. The application was the subject of a desk assessment. There was a referral to Tipperary County Council by the DAFM and no response is evidenced.

Per the DAFM assessment of the proposal, the underlying soil type is approximately Acid Brown Earths, Brown Podzolics (6%) & Lithosols, Regosols (94%). The slope is predominantly steep 15-30%. The habitat is predominantly conifers. Cultivation type is windrow and mounding. The project is located within the Lower Shannon catchment (66%) and the Suir catchment (34%), within the Ollatrim_Sc_010 (66%) and the Suir_Sc_010 (34%) sub-catchments, and within the Ollatrim_020 (66%) river waterbody and the Suir_030 (34%) river waterbody.

The DAFM carried out an Appropriate Assessment (AA) screening and examined for three European sites within a 15km radius of the proposal, these were the Kilduff, Devilsbit Mountain SAC, the Slievefeilim to Silvermines Mountains SPA, and the Lower River Suir SAC. The AA screening also included the Lough Derg (Shannon)SPA which is significantly outside of the 15 km radius which was screened out along with the Slievefeilim to Silvermines Mountains SPA due to separation distance. The Lower River Suir SAC was screened out for reason of absence of direct upstream hydrological connectivity and lack of pathway. The Kilduff, Devilsbit Mountain SAC 000934 Natura 2000 site was screened in for Stage 2 AA for reason of possible effect due to location of the project within the Natura site.

The DAFM completed an AA Report and an AA Determination on 06 July 2020 and both were subject to a review by an Ecologist on 08 July 2020. The AA Report adopted the screening conclusions reached in the AA screening. The AA Report included an in-combination assessment that examined for in-combination effects with the proposal from the following: Non-forestry – dwellings, domestic extensions, slatted waste storage, silage slab. Forestry (since 2016) – Afforestation (4), forest roads (2), Private felling (4), Coillte felling (11). Noting the River Sub-Basin Suir_030 has approximately 7% forest cover and the River Sub-Basin Ollatrim_020 has approximately 29% forest cover. The Qualifying Interests of the screened in Natura 2000 site are European dry heaths, and Species Rich Nardus Grasslands on siliceous substrates in mountain areas. The AA Determination recommended site mitigation measures:

- Adhere to all water protection measures relating to exclusion zones
- Adhere to the Interim Standards for Felling and Reforestation and Environmental Requirements for Afforestation
- Application and demonstration by the contractor of sediment trapping measures at appropriate intervals. Installation of geotextile silt traps
- Silt fences specification. Monitoring, maintenance and repair requirements



The AA Determination concluded that the proposed activity under TY07-FL0062, individually or in combination with other plans or projects will not adversely affect the integrity of any European site, in particular Kilduff, Devilsbit Mountains SAC, having regard to its conservation objectives, and will not affect the preservation of this site at favourable conservation status, if carried out in accordance with specific mitigation measures.

The licence issued on 10 July 2020 and is subject to what are relatively standard conditions (a) to (g) with reasons, and the additional conditions (h) to (k) as follows, which reflect the mitigations from the AA Determination:

(h) Adhere to all water protection measures relating to exclusion zones, silt and sediment control, cultivation, fertilisation, herbicide application, the location of onsite storage depots and the disposal of waste, set out in Section 13 of the Standards for Felling & Reforestation. The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation, December 2016 (DAFM, 2016). Reason: In the interest of the protection of water quality and protection of the environment.

(i) Contractors must apply and demonstrate sediment trapping measures at appropriate intervals. Geotextile silt traps should be installed in new and existing drains. Silt traps should be staggered along the length of the drain, and not only at the lower reaches towards any outflows. Reason: In the interest of the protection of water quality and protection of the environment.

(j) Silt fences should comprise geotextile membrane slotted into the ground, secured to a minimum of three posts (e.g. roofing nails wrapped around end posts), arranged in an arc, c. 1-1.5m apart, the centre post set slightly back, encouraging flow towards the centre and preventing flow by-passing, at a height of ~ 0.5 – 0.75m above ground. Silt fences should be checked at least once per month in wet weather in the first 4 years and repaired/upgraded if water is bypassing it, if it is torn, collapsed or not functioning. If full with silt, this should be removed to a dry, vegetated area upslope of the fence, away from the drain. Sediment traps must be installed at intervals and ideally as close as possible to the source of the sediment (DAFM 2015, DAFM 2019). Reason: In the interest of the protection of water quality and protection of the environment.

k) The proposed works shall adhere to the:

- i. Environmental Requirements for Afforestation, December 2016 (DAFM, 2016).
- ii. Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019).
- iii. Appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out an agreed protocol for Hen Harrier developed by the Forest Service of the DAFM and the National Parks & Wildlife Service (NPWS), regarding potential disturbance operations.
- iv. Forest Harvesting & the Environment Guidelines (DAFM, 2000).
- v. Forestry Standards Manual (DAFM, 2015).
- vi. Felling & Reforestation Policy (DAFM, 2017).

Reason: In the interest of the protection of the environment during harvesting and restocking.

There are two appeals against the decision to grant the licence.

The grounds of appeal 577/20 are that the AA screening did not comply with the decision of Finlay J in Kelly. Under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. There has been no investigation as to whether the application site has complied with the requirements of EU law. According to the heads of the new bill the Minister has assumed control of the FAC.

In response to these grounds of appeal the DAFM stated that the 10.91 ha felling and reforestation regards TY07-FL0062 has been subject to the DAFM's AA screening procedure on European sites within 15 km. The potential for the project to result in impacts on the Qualifying Interests of the Kilduff, Devilsbit Mountain SAC 000934 was identified on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate such impacts were described. The mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Qualifying Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AA Report and AA Determination statement ensure that the proposal will not result in any adverse effect on any European Site. Also, the potential for the proposed project to contribute to an in-combination impact on European sites was considered. The DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination Statement. The DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (TY07-FL0062), either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of licence issued.

The grounds of appeal 597/20 are:

1. There is a breach of Article 4 (3) of the EIA Directive 2014/52/EU with a failure to carry out screening for EIA. This licence is in a class of development covered under Annex II of the EIA Directive. The DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA.
2. The Forest Service failed to supply, on request, in an appropriate timeframe, relevant records that have informed its decision to award this licence, as would be required under the EIA Directive. This has denied the appellant the opportunity to examine the basis and legal validity of the decision.

In response the DAFM set out that:

- 1) The statutory obligation regards screening for EIA is fully discharged once it has been clearly identified at the outset that the application in question does not involve an activity or project that falls within the specified categories of forestry activities or projects set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the



Forestry Regulations 2017, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. The standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for these particular activities.

Article 4(3) of the EIA Directive requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable.

- 2) See No. 1. The appellant was advised for the need to submit an AIE request in respect of documents related to TY07-FL0062 on 11/08/2020. DAFM notes the appellant exercised their right to appeal the DAFM decision in respect of the granted licence.

A submission by the applicant to the FAC on the DAFM statements was received 28 October 2020 and set out that the proposal is located within Forest Management Unit BAU5 Central Munster on a moderate slope, with a westerly aspect. There is a forest road through the site. The site is adjacent to the Kilduff, Devilsbit Mountain SAC. The applicants also stated that due to location on the brow of a hill, all drainage from the site will flow in a south westerly direction, away from the SAC. They identified that watercourses form the north and south boundaries of the site and flow into the Ollatrim River, which in turn flows west, then northwards for 25.5 km, then drains to the Nenagh River for c. 9.8km before ultimately draining into the Lough Derg SPA, a total of c 35.3km in downstream distance.

An oral hearing of the appeal was convened on 10 November 2020 and was adjourned having regard to the information before the FAC and in the particular circumstances pertaining to this case. On 16 November 2020 the FAC invited the parties to each make a further and final written submission in respect of the decision of the DAFM to grant a licence subject to conditions.

On 15 December 2020 the appellant 597/20 responded with the following points:

- This licence is in a class of development covered under Annex II of the EIA Directive. DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA.
- The project has only been referred to the local authority despite being partly within an SAC. Why has the NPWS not received a referral as the competent authority for the SAC? Given the water quality considerations why was the input of IFI not sought?
- The Harvest Plan submitted by the applicant is not consistent with the requirements of the Interim Standard for Felling & Reforestation (ISFR). *"The harvest plan allows us (the*

Department) to fully interpret the felling licence application and then make a robust recommendation in regard to issuing a licence on that application and it also allows third parties to fully understand what is happening on the ground in terms of the submitted licence application. It is quite simple information but is relevant to the licencing process and particularly in regard to understanding potential environmental impacts which most third parties are interested in". DAFM Inspector Frank Barrett. The absence of a Harvest Plan consistent with the ISFR means that third parties cannot fully understand the proposed operations and assess their implications. The Department cannot fully interpret the application and produce a robust recommendation in regard to issuing a licence. The Harvest Plan, or at least key environmental details (which are or could be known at the time of application), should inform the application.

- The AA for potential for adverse impact on Dry Heath (4030) habitat is incomplete as it has not addressed the potential for colonisation by the coniferous species used in the plantation. There is a Source / Pathway / Receptor and an Appropriate Assessment is required.
- "Silt fences should be checked at least once per month in wet weather in the first 4 years and repaired/upgraded if water is bypassing it, if it is torn, collapsed or not functioning." This mitigation clearly indicates that residual impacts are possible. If silt fences are not functioning in any way prior to a monthly inspection, then there is a potential for an effect on the designated site. This could be for up to a month. "Wet weather" is not defined. Does this mean that silt traps must be inspected once a month if it has rained at all since the previous monthly inspection? How will this be monitored and enforced? Silt fences can be anything from 3m wide to 4.5 m wide and from 0.5m high to 0.75m high. There is a significant variance in what is permitted. What is the purpose of having such a range in the context of the necessity for protecting water quality? If the minimum figure is sufficient why specify larger figures?
- The AA has not taken full account of the potential impacts of reforesting this steep site on peat-based soil on the conservation interests of the SAC. The site has produced a very low yield class for the species.
- The regulatory system for this project has not ensured that there is no possibility of an effect which could be part of an in-combination effect on Site 0934.
- The AA In-Combination assessment is flawed as it is based on an assumption that the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. There is no evidence to substantiate this assumption.
- "The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation, December 2016 (DAFM, 2016)". Neither of these documents are written with the requisite degree of precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the overall environmental regulatory framework.
- The AA Determination is dated as being completed on 6-7-20 but the AA Report on which it relies was not authorised by the Ecologist until 8-7-20. An AA is, in essence, an ecological report. This makes the Determination *Ultra Vires*.
- Since licence condition (k) (ii) requires adherence to the ISFR condition (h) would appear to be unnecessary. Licence condition (i) *Contractors must apply and demonstrate sediment trapping measures at appropriate intervals. Geotextile silt traps should be installed in new and existing drains. Silt traps should be staggered along the length of the drain, and not only at the lower reaches towards any outflows. Reason: In the interest of the protection of water*



quality and protection of the environment. It is not clear how the contractors must 'demonstrate' sediment trapping measures? Where the silt traps are to be located (new and existing drains are not mapped on Harvest Plan)? What are '*appropriate intervals*'? Who determines what is appropriate? How can DAFM be sure that '*appropriate*' intervals have been applied unless it has sight of the plans?

- Given the importance of the mitigating works the licence should put a duty on DAFM to approve and monitor the details of the project works. DAFM's function as a licencing authority includes a monitoring and enforcement role.
- 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.
- Licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.
- Licence condition k(iv) requires adherence to Forest Harvesting & the Environment Guidelines (DAFM, 2000). This includes *Plan operations with due regard to the breeding and nesting seasons of important species, and associated features such as badger setts and heronries. Important species to consider include birds of prey (buzzard, eagle, falcon, harrier, hawk, kite, osprey and owl) and mammals badger, bat species, red deer, hare, hedgehog, otter, pine marten and red squirrel.* Where works are planned to take place during the breeding and nesting season a survey of the site by a competent authority is required in order to establish if any key species may be impacted. Since the list is non-exhaustive NPWS should be contacted prior to any such works to confirm what species need to be included in the survey. Can DAFM confirm that the Forest Harvesting & the Environment Guidelines (DAFM, 2000) are mutually compatible with the Interim Standards for Felling & Reforestation (Oct 2019) and the Environmental Requirements for Afforestation, December 2016 (DAFM, 2016)? If there are any conflicts in the requirements or permitting procedures between any of these documents the licence is not internally coherent.

The appellant's (597/20) submission was circulated to the parties should they wish to respond. On 27 January 2021 the DAFM provided a response and set out as follows:

- Article 4(4) of the EIA Directive requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation are required to be subject to a determination as to whether a sub-threshold EIA needs to be carried out or not, the applicant is required to provide information on the characteristics of the project and its likely significant effects on the environment. However, the standard operational activities of clear-felling and replanting an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation, and 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.
- The clear-felling and replanting an already established plantation forest as granted under licence TY07-FL0062 is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the

requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. Furthermore, an application for a licence to clear-fell and replant an established plantation forest does not constitute a change or extension of an earlier authorisation for that project, as the future clear-felling and replanting would have been envisioned and accounted for at time of the of the plantation forest's establishment as one of the main cyclical management options going forward.

- Regarding consultations, 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, the application was referred to the Local Authority which is consistent with existing DAFM referral procedures.
- In regard to licence application TY07-FL0062, information submitted by the applicant in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-screening Report and associated Pre-screening Report methodology document were considered during the licencing process. The information submitted by the applicant in support of the granted licence was deemed as meeting DAFM requirements.
- In regard to licence application TY07-FL0062, information submitted by the applicant in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-screening Report and associated Pre-screening Report methodology document were considered during the licencing process. The 10.91 ha felling and reforestation project licenced as TY07-FL0062 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The related AA screening document is on file. Appropriate Assessment screening was carried out by DAFM for European sites within 15 km from the clearfell and reforestation project submitted for licencing.
- Having reviewed the details of relevant European sites, their qualifying interests and conservation objectives, the DAFM identified the possibility of the project having a significant effect on a screened European site (i.e. the Kilduff, Devilsbit Mountain SAC 000934). An Appropriate Assessment was carried out. The AA Screening involved review of Special Conservation Interests of the European site (as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service). These have also been considered in the AA Report and AA Determination Statement on file.
- The potential for the project to result in impacts on the Qualifying Interests the Kilduff, Devilsbit Mountain SAC 000934 was identified on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described. The mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservation Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive.
- In relation to TY07-FL0062, the potential for the proposed project to contribute to an in-combination impact on European sites was considered by DAFM. It was concluded that the proposed felling and reforestation project, when considered on its own, will not result in any residual adverse effect the screened in European sites and associated Special Conservation Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on these European sites, when considered in-



combination with other plans and projects. DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination Statement for TY07-FL0062.

- The DAFM has no regulatory or licencing role in regard to the other non-forest plans and projects considered in the in-combination information and statement incorporated into the AA report. However, the DAFM submits that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of other (non-forestry) plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any European Sites in view of those sites' conservation objectives. Therefore, DAFM deems that the felling and reforestation project, TY07-FL0062, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.
- Site-specific measures prescribed by the DAFM to mitigate against impacts on the Qualifying interests of the screen-in European site were identified in the AA determination and AA Report documents. The mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservations Interests or qualifying Interests reaching favourable conservation status. Specific conditions were attached to the licence in respect of mitigations identified in the AA Determination. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements /standards and to the site-specific mitigation measures set out in the AA Determination and granted licence ensure that the proposed felling and reforestation project TY07-FL0062 will not result in any adverse effect on any European Site.
- DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (TY07-FL0062), either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project TY07-FL0062.

The oral hearing was reconvened on 25 May 2021 and held remotely, the DAFM representatives participated and none of the appellants or the applicant participated. At the hearing a member of the FAC read the submissions from both the appellant (597/20) and the DAFM to the hearing record. The DAFM outlined the procedures followed in assessing the application, there was referral to the Local Authority, a desk based assessment was undertaken, an AA screening was undertaken and the Kilduff, Devilsbit Mountain SAC was screened in for Stage 2 AA and an AA Report and AA Determination were completed and site specific conditions were attached to the licence. Licence conditions (h), (i), (j) and (k) were read to the record. The DAFM confirmed the soils on site were established using the Teagasc soil maps layer on IFORIS and are approximately Acid Brown Earths, Brown Podzolics (6%) and Lithosols, Regosols (94%). The DAFM confirmed the slope on site is between 15 and 30 degrees and these same degrees of slope featured on the applicant's pre-screening document. The DAFM stated a

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detailed harvest plan is required to be available on site before harvesting commences and will show the locations of silt traps. Regards the status of waterbodies, the DAFM stated that the Water Framework Directive is incorporated into the AA Determination in this case and the Ecologist would have reviewed this. The DAFM stated the in-combination assessment was considered prior to the issuing of the licence. Regards on-site relevant watercourses the DAFM stated such a watercourse exists at the south-western corner and barely encroaches on the site – drains to Lower Shannon catchment, and there are none draining to the east to the Suir catchment. The DAFM confirmed the Ecologist did not raise any issue regards the Nardus Grassland (Qualifying Interest of the Kilduff, Devilsbit Mountain SAC) in the AA Report or Determination. Also, regards colonisation, there is no evidence on ortho-photo imagery of any encroachment to the SAC. Regards referrals the DAFM stated there is a rules-based referral criterion and in this instance there was no reason to refer the application to the NPWS. The DAFM accepted the proposal would be planted to the edge of the SAC, that the plantation to be felled may have predated the designation of the SAC. In response to the FAC regards the planting of Sitka spruce to the edge of the SAC, the DAFM stated that while there was provision for 1% broadleaves these would be dispersed, and the predominant species would be Sitka spruce. Another factor in this instance is that at an elevation of c. 400m broadleaf planting would not be expected to do so well and it is reasonable to replant with Sitka spruce. In response to the FAC the DAFM confirmed a neighbouring thinning licence TFL00285619 had not issued at the time licence TY07-FL0062 was awarded and the thinning licence is currently suspended as under appeal.

In addressing the grounds of appeal, the FAC considered the EIA Directive. The EU 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 (nor clear-felling) are 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 FAC concludes that the felling and subsequent replanting under TY07-FL0062, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). As such, the FAC concluded that there is no breach of the provisions of the EIA Directive.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to Natura 2000 sites within 15 km and in relation to the Lough Derg (Shannon)SPA which is outside of the 15 km radius but is hydrologically connected downstream of the proposal albeit at some distance. The FAC considers the use of a 15km radius and the inclusion of the downstream Natura 2000 site to have been in order having regard to the scale and nature of the proposal. The FAC is satisfied the screening conclusions are sound in



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respect of the sites. The Kilduff, Devilsbit Mountain SAC was screened in for Stage 2 AA for reason of possible effect due to location of the project within the Natura site.

The AA Report confirms the proposal is within the Kilduff, Devilsbit Mountain SAC as the criteria for screening in the site. The Qualifying Interests of the SAC are European Dry Heaths and Species-rich *Nardus* grasslands, on siliceous substrates in mountain areas, each of these were assessed in the AA Report. The in-combination statement that forms part of the AA Report states the project lies in a rural landscape in Bohernarude, Borrisnafarney, Kilduff, Co Tipperary in the River Sub Basins Ollatrim_020 and Suir_030. The River Sub Basins Suir_030 and Ollatrim_020 have approximately 7% and 29% forest cover which are lower and higher than the national average of 11%. At 10.91 hectares the project is considered medium sized in scale. Forestry activity including afforestation, forest roading and felling, have been either submitted and still under evaluation, licenced / approval in place or completed and approved in the River Sub Basin's in the last 5 years and are listed above. These are subject to environmental protection measures. There are a number of developments being granted planning permission in the River Sub Basins Suir_030 and Ollatrim_020 over the last five years. As can be seen from the ortho-photo this forest adjoins another forest. Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any European Sites in view of those sites' conservation objectives. The DAFM concluded that this project, when considered in combination with other plans and projects, would not give rise to any adverse effect on the integrity of any European Site. The AA Determination recommended mitigations and the FAC notes these are fully reflected in the licence conditions as outlined.

The FAC notes there was no referral to the NPWS in this instance while the reason for screening in the Kilduff, Devilsbit Mountain SAC was that the proposal is within the SAC. The DAFM's referral framework procedures indicate a mandatory referral to the NPWS where a proposal is within an SAC. While the FAC is satisfied the greater part of the proposal is outside of the SAC but within a 500m buffer, the basis for the screening in is clear, and the FAC considers the absence of such referral to the NPWS in this instance to be a significant error in the processing of the application.

Regards the grounds of appeal concerning potential colonisation, and while such colonisation is not raised in the site's conservation objectives, the FAC is satisfied that colonisation should have been considered in the AA Report in this instance of being within the SAC and alongside the SAC especially having regard to the qualifying interests of the SAC (see previously).

The DAFM evidence is that a relevant watercourse exists at the south-western edge of the proposal. The applicant's submission to the FAC includes that watercourses form the north and south boundaries of the site and flow into the Ollatrim River. The FAC notes the saddleback nature of the site and that the lesser area of the proposal (given as 33%) is within the Suir catchment shared by the Kilduff, Devils Bit Mountain SAC. The remainder slopes to the southwest and is within the Lower Shannon catchment. The nearest EPA marked watercourse is located at the south-west edge and flows

to the Ollatrim which is part of the Ollatrim_020 river waterbody for which the WFD status is given as moderate. There is no evidence of any watercourses flowing to the east, the nearest EPA marked watercourse is c. 1.2km from the edge of the proposal, and is part of the Suir_030 waterbody for which the WFD status is also given as moderate. The FAC is cognisant that the proposal is subject to the additional licence conditions, the Forestry and Water Quality Guidelines and other guidelines as specified at licence condition (k). The FAC is satisfied from the aforementioned that there will be no effect from the proposal on the waterbodies.

The FAC considers that the 'Harvest Plan' submitted is an operational plan for contractors carrying out the proposed development and that, in any event, the conditions of the licence must be complied with in full in the carrying out of the proposed development. Compliance with, and enforcement of conditions of the licence are matters for the DAFM, who are given separate legislative powers for this purpose. As such, the FAC finds no need to add additional conditions to the licence in respect of compliance.

Regarding the Birds Directive, the appellants did not specify which element(s) of the Birds Directive they contend the decision to grant licence TY07-FL0062 does not comply with and did not specify any evidence in respect of any particular bird species or animal species respectively. The FAC found no reason to conclude that the decision to grant the licence is in breach of the Birds Directive.

Based on the information before it, the FAC concluded that a significant error had occurred in the making of the decision by not referring the proposal to the NPWS, and the FAC's decision is to set-aside the decision to issue licence TY07-FL0062 and remit to the DAFM to make a referral of the application to the NPWS prior to completing a new AA screening and, if necessary, an AA, before making a new decision in respect of the proposed development.

Yours Sincerely

Pat Coman, on behalf of the FAC