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27th September 2021

Subject: Appeal FAC 872/2020 regarding licence LS08-FL0115

Dear [REDACTED]

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

Background

Licence LS08-FL0115 for felling of 10.82 hectares at Bockagh and Monicknew, Co Laois was issued by the Department for Agriculture, Food and the Marine (DAFM) on 15th December 2020.

Hearing

A hearing of appeal FAC872/2020 was held by the FAC on 14th 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 Dobbryn.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister regarding licence LS08-FL0115.

Licence Application

Licence LS08-FL0115 is for a clear felling licence application in relation to an area of 10.82 hectares at Bockagh and Monicknew, Co Laois. The species to be felled are 95% Sitka Spruce and 5% Lodgepole Pine planted in 1991. Replanting is proposed with 100% Sitka spruce, with an open area of 0.54 hectares. It is stated that due to inherent levels of fertility, no fertiliser application is required to promote the establishment and growth of newly-planted trees. If deemed necessary following an appraisal of the project area, herbicide (glyphosate) will be required to manage competing vegetation through manual spot spray application, to encourage rapid tree growth and to reduce trees losses through completion.

This project lies in the River Sub-Basin DELOUR_010. This sub-basin has approximately 71% forest cover, compared to the national average of 11%. At 10.82 hectares the project is considered of medium scale.

The site is described as having a predominant soil composition of shallow gley soils both surface and ground and gley soils are indicative of poor drainage mostly due to a high clay content with 77% Peaty gleys (Peaty Gleys, podzols, lithosols) 12% Mineral soils (Surface water gleys, ground water gleys) 8% Podzols (Peaty), Lithosols, Peats, 3% Peaty gleys - shallow (Peaty Gleys, podzols, lithosols) with some outcropping rock. In relation to slopes it is described as gentle (15% or less) in southerly direction and the habitat is WD4. The project area consists entirely of plantation conifer high forest with forestry in contiguous areas.

An Appropriate Assessment pre-screening report dated the 13th November 2020 accompanied the application in addition to an application form and mapping. In relation to aquatic zones the Appropriate Assessment pre-screening report indicates that there are no aquatic zones present within the project area. There is an aquatic zone present along the eastern side of the project area. This is a headwater stream of the Delour River, a tributary of the River Nore, which becomes the River Barrow & River Nore SAC 2.829km downstream of the project area at Dooley's Bridge.

An assessment lists all European Site(s) within 15 km of the project area, and European Site(s) beyond 15 km but where potential pathway with the project may exist. These were Clonaslee Eskers and Derry Bog SAC (000859); Coolrain Bog SAC (002332); Knockacoller Bog SAC (000233); River Barrow and River Nore SAC (002162); River Nore SPA (004233); Slieve Bloom Mountains SAC (000412 and Slieve Bloom Mountains SPA (004160). It was determined that the project will have direct, indirect or in combination effect(s) on four European sites, namely the Slieve Bloom Mountains SPA, Slieve Bloom Mountains SAC, the River Barrow and River Nore SAC and the River Nore SPA and concluded that the project should proceed to Appropriate Assessment (Stage 2).

The Appropriate Assessment pre-screening report submitted by the applicant also identifies that the project area is located within the Slieve Bloom Mountains SPA. It is however indicated that no SAC habitat is present within the project area. All other sites were screened out for reasons which include an absence of hydrological connection between the project site and the Natura site, the particular terrestrial nature of the qualifying interest and habitat, and separation distance of the Natura Site from the project area.

The Applicant also provided a Natura Impact Statement (NIS) for a project comprising four projects subject to separate licence applications which includes the current appeal LS08-FL0115. The projects identified in the NIS are licence applications Road Construction CN84375 and Clearfell and Reforestation LS08-FL0115, LS08-FL0111 and LS08-FL0110, located in the vicinity of Bockagh, Co. Laois was completed on the 13th November 2020. Each project is individually described. The NIS describes details which are common to all locations including felling operations and replanting methodology and practice.

Section 2 refers to screened in Natura Sites Potential Impacts and Proposed Mitigation (if possible). All four sites have the same Natura sites with varying degrees of overlap with the individual projects. All QIs in the Natura Sites are identified and assessed. Other sections outline the mitigation measures proposed, matters relating to Residuals indicating that the mitigation measures described will ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Qualifying Interests of the River Barrow and River Nore SAC, Slieve Bloom Mountains SPA, Slieve Bloom Mountains SAC and River Nore SPA from reaching favourable conservation status. The NIS addresses In-Combination Plans & Projects on European Sites. It indicates that the projects lie in a rural landscape in the townlands Bockagh, Monicknew, Bockagh and Baunreagh, Co. Laois in the River Sub-basins DELOUR_010 and MOUNTRATH_010. These sub-basins have approximately 71% and 48% forest cover, compared to the

national average of 11%. At 22.88 hectares the clearfell and reforestation component of the project is considered large in scale. Forestry projects are outlined for the sub-basins and other non-forestry projects and plans described.

The NIS 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.

DAFM Assessment

The proposal was referred to Laois County Council and no response was received. The proposal was referred to NPWS on the 6th March 2019 and the response dated the 14th June 2019 noted that 1. the compartment is wholly situated within the Slieve Bloom Mountain Special Protection area SPA (site code 004160). In addition, the proposed felling site is within a Hen Harrier 'Higher Likelihood Nesting Area' (HLNA). Therefore, it is recommended the proposed works should take place from August 15th to March 31st to avoid disturbance of nesting birds. If works are to take place outside these dates, then an Appropriate Assessment Screening should be undertaken as per Forest Service guidelines. 2. The compartment may contain open mountain blanket bog and heath habitats, both Annex 1 and priority habitats under the Habitats Directive. Any trees encroaching on to open mountain habitat on lands owned by the Applicant should be felled by chainsaw. This is to ensure the SAC habitats are not damaged by the encroaching conifers over time or by heavy machinery attempting to remedy the problem. 3. Firebreaks shall not be ploughed, sprayed or cut without Appropriate Assessment Screening within the Slieve Bloom Mountain SPA. The licence proposal was also referred to IFI on the 6th March 2019 with no response received. Submissions were made to DAFM by two other parties.

The DAFM undertook a screening for Appropriate Assessment dated the 10th December 2020 and identified seven sites within 15km of the proposal and other sites beyond this radius where a potential source pathway receptor was identified. Each site is considered in turn with its qualifying interests, special conservation interests and conservation objectives and reasons are provided for the screening conclusions.

Four sites were screened out River Nore SPA 004233 due to the separation distance between the Natura site and the project; Clonaslee Eskers and Derry Bog SAC 000859 due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise; Knockacoller Bog SAC 002333 due to the location of the project area within a separate water body sub-catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise and Coolrain Bog SAC 002332 due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

The DAFM screening considered determined that there is the likelihood of felling and reforestation project LS08-FL0115 having a significant effect, either individually or in combination with other plans and projects, on Slieve Bloom Mountains SPA 004160 due to possible effect due to the location of the project within the Natura site; Slieve Bloom Mountains SAC 000412 due to possible effect due to the direct proximity between the project area and this SAC and River Barrow and River Nore SAC 002162

due to possible effect due to the direct hydrological connectivity exists between the project area and this SAC and that these sites should proceed to Appropriate Assessment. The DAFM recorded an Appropriate Assessment Determination (AAD) dated the 10th December 2020 which refers to the screening process and the NIS submitted and considered the information provided in the NIS was considered sufficient to derive appropriate conditions for a determination. Conditions are outlined reflecting mitigation measures outlined in the NIS. The AAD concludes that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The basis for this AA Determination is stated as follows: *This 10.82ha peaty gley podzol soil project area on a steep mainly southerly slope is located directly within the screened in SPA and is a Hen Harrier HLNA with corresponding conditions listed. Slieve Bloom Mountain SAC has been screened in with appropriate movement restrictions and bog restoration where site conditions are deemed suitable, which serve as aquatic protections in this instance also. The east border of the project area overlaps with a part of the Delour_010 which forms the hydrological connection to the River Barrow & River Nore SAC (2.8km downstream). While having downstream FPM records, the local area has no historic records of Freshwater Pearl Mussel, however it was identified by Moorkens (1992) as having suitable substrate. Historic records existing for FPM approx. 20km downstream. FPM requirements have been therefore set out. Appropriate aquatic zone and watercourse measure protections have also been set out, including specific otter measures and good practice aquatic measures for the relevant designated features. The above conditions in combination, will eliminate any pathways of impact of significance to the screened in features. 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.*

An In-Combination report was also carried out completed on the 10th December 2020 with a date of the week of the 17/11/2020 stating this project, which relates to the proposed activities under LS08-FL0115 only concluded that the proposed felling and reforestation, with mitigation measures set out in Section 4 of the determination, will itself (i.e. individually) not result in any residual adverse effect on the Slieve Bloom Mountains SPA IE0004160, Slieve Bloom Mountains SAC IE0000412, River Barrow and River Nore SAC IE0002162 and associated Qualifying Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects. 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. Therefore, DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.

The conditions recommended in the AAD are consistent with the recommended conditions in the NIS by the application of appropriate water quality protection measures including defined setbacks; the planting of species; retention of existing broadleaves; provision is also made in relation to identified water hot spots; the exclusion of machinery from the identified exclusion areas and operational procedures in relation to the use of machinery. Measures are also outlined in relation control of sediment and the use of fertiliser. Measures have also been set out for the protection of the Hen Harrier

species as a specific condition referred to in the AAD are not included in the conditions of the licence. Measures by way of conditions are also outlined in relation to the protection of blanket bogs and wet heaths and other Qualifying Interests.

The licence was issued on the 11th December 2020 subject to conditions.

Appeal

There is an appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- Reference is made to Commission observations to the CJEU Case C-461/17 others (i) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that a competent authority is obliged to record, with sufficient detail and clarity to dispel any doubt as to the meaning and effect of such opinion, the extent to which scientific opinion presented to it argues in favour of obtaining further information prior to the grant of development consent; (k) whether Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended has the effect that a competent authority when conducting an appropriate assessment, must provide detailed and express reasons for each element of its decision?" In the aforementioned *Lesoochranské Zoskupenie II* judgment, the Court emphasized That "an appropriate assessment of the implications of a plan or project for the site concerned implies that, prior to its approval, all aspects of that plan or project which can (...) affect the site's conservation objectives must be identified'.
- The Court clarified in the *Alto Si* judgment that such certainty as to the absence of adverse effects on the integrity of the site requires a "complete" appropriate assessment: "An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the [site] concerned
- Therefore, the Commission suggests to respond to question (h) as follows: Article 6(3) of the Habitats Directive does not allow authorizing a plan or project that leaves details of the construction phase (such as the compound location and haul routes) to post-consent determination by the developer unless the development consent establishes sufficiently narrow conditions for such details that ensure, as ascertained by the appropriate assessment, that they will not adversely affect the integrity of the site.
- The aforementioned case-law of the Court requires that the appropriate assessment be complete in the sense that it must not "contain gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the [site] concerned". This purpose of the appropriate assessment requires that it be recorded and reasoned.
- On those grounds, the Court (Second Chamber) hereby rules: 1 Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the

other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.

- Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.
- Reference is made to Case C-323/17.
- There is no assessment of the likely effects on the Fresh Water Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment only conditions.
- There can be no certainty concerning the conditions if it is not known what is being mitigated.
- The case law of the QEU has found that it is not legally possible to grant a permission to a development for which an Environmental Impact Assessment was required and not carried out.
- There is no evidence submitted that any of the afforestation in the overall forest was ever subjected to even an EIA screening.
- No Information has been provided and there has been no assessment of the alternative of returning the site to Nature for the benefit of the Hen Harrier,
- The Forest Appeals Committee carries out a de novo assessment.
- There is no assessment of the likely effects on the Fresh Water Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment only conditions.
- The Mitigation measures in the Natura Impact Statement/Report must be complete, precise and definitive. The Minister has not made an assessment under the Habitats Directive. The Minister has not made a screening under the Environmental Impact Assessment Directive. We have appealed these decisions to the Forest Appeals Committee the final decision must be made by the Forest Appeals Committee, it cannot be delegated.

In response to the appeal, the DAFM in a Statement of Facts state as follows:

The Administrative portion outlines a chronology of the assessment of the licence with the statement from the Department regarding the appeal stating that the decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act. The Department is satisfied that all criteria as outlined in the following standards and procedures have been adhered to in making a decision on the application.

The Statement from the Inspectorate indicates the FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in respect of the appeals process as mandated and required under Irish law. In regard to the granted Felling licence application, 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 and a Natura Impact Statement (NIS) were considered during the licencing process. These documents are stored on file and have been submitted to the FAC in respect of FAC Appeal FAC Reference: FAC 872/2020. In consideration of the felling licence application for LS08-FL0115, the DAFM carried out and documented an AA Screening exercise, arrived at a determination that the proposed felling and reforestation project meets the threshold of being considered likely to have significant effects on European sites, carried out and documented a Stage 2 Appropriate Assessment exercise and produced a formal determination as per Regulation 19(5) of SI 191 of 2017, as amended, and per Regulation 42(16) of SI 477 of 2011. This formal determination stated 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 measures identified. The formal determination also states that based on objective information, no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

In consideration of the felling licence application for LS08-FL0115, the DAFM carried out and documented an AA Screening exercise, arrived at a determination that the proposed felling and reforestation project meets the threshold of being considered likely to have significant effects on European sites, carried out and documented a Stage 2 Appropriate Assessment exercise and produced a formal determination as per Regulation 19(5) of SI 191 of 2017, as amended, and per Regulation 42(16) of SI 477 of 2011. The statement outlines the chronology of the screening process and determination. It is the view of DAFM that the project as submitted for licencing, LS08-FL0115, does not constitute project splitting. The total area applied for in LS08 on the day that the application was made for LS08-FL0111, LS08-FL0115, LS08-FL0110 was 57.9 ha (7 no.). This represents 2.8% of the total area for Forest LS08. LS08-FL0110 is 3.27 km from LS08-FL0111 and 2.76 km LS08-FL011. LS08-FL0111 and LS08-FL0115 are within 50 metres of each other at the nearest point where they are separated by a deep ravine. As such they are distinct blocks. The combined area of LS08-FL0111 and LS08-FL0115 is 17.4 ha.

The specific measures detailed in respect of site re-stocking operations and cultivation operations as 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 ensure that the proposed felling and reforestation project LS08-FL0115 will not result in any adverse effect on any European Site. The site-specific mitigations identified in the AA Determination were attached as conditions of licence issued for the felling and reforestation project licenced as LS08-FL0115. DAFM submits that the conditions attached to the licence are consistent with best forest practice, national forest policy and protection of the environment.

Assessment of Appeal

In addressing the grounds of appeal, the FAC considered the written grounds of appeal and response received from DAFM and the documentation submitted in relation to the licence application. In addressing the appeal, the FAC considered the requirements of the EIA and Habitats Directives which are referred to in many of the grounds of appeal, the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In relation to the grounds of appeal many of the grounds refer to the Council Directive 92/43/EEC of 21 May 1992 and that the Minister has not made an assessment under the Habitats Directive, that the Minister also has not made a screening under the Environmental Impact Assessment Directive, and that there is no evidence submitted that any of the afforestation in the overall forest was ever subjected to even an EIA screening. Reference is made to the functions of the FAC and there is reference to the absence of assessment of the likely effects on the Fresh Water Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment.

Specifically in relation to the EIA Directive, the 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 I (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, 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 did not consider that there was any requirement a screening for EIA or an EIA.

In relation to the Habitats Directive, the FAC examined the Appropriate Assessment undertaken by the DAFM including the initial screening and Determination. The FAC examined publicly available information from the EPA and NPWS and identified the same seven sites within a 15 kilometre radius. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the screening conclusions provided by the DAFM. The DAFM considered each site in turn and provided the reasons for screening all the sites and the FAC concurs with the conclusion to advance to Appropriate Assessment stage in relation to the screened in European Sites.

The FAC also considered and assessed the Appropriate Assessment Determination (AAD) and the findings and conclusions as set out. Details of other plans and projects were also examined including other forestry projects. The FAC noted in the AAD that the Minister determined that there is no likelihood of the felling and reforestation project LS08-FL0115 having any significant effect, either individually or in combination with other plans or projects, on European sites in view of their conservation objectives and the reasons as set out. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached. Conditions are outlined in the AAD in relation to the three sites, Slieve Bloom Mountains SPA Site Code 004160, Slieve Bloom Mountains SAC Site Code 00412; Slieve Bloom which are consistent with the measures as outlined in the NIS for these European sites.

The appellant contends that the Minister has not made an assessment under the Habitats Directive. In this regard, the FAC noted that the proposed project, the clear-felling and reforestation, was subject to initial screening and, following the submission and assessment of an NIS, was the subject of an Appropriate Assessment Screening and Appropriate Assessment Determination by the DAFM. In addition, the proposal was referred to Laois County Council and Inland Fisheries Ireland (IFI), was

referred to the National Parks and Wildlife Service (NPWS) who in a response indicated that *"the compartment is wholly situated within the Slieve Bloom Mountain Special Protection area SPA (site code 004160). In addition, the proposed felling site is within a Hen Harrier 'Higher Likelihood Nesting Area' (HLNA). Therefore, it is recommended the proposed works should take place from August 15th to March 31st to avoid disturbance of nesting birds. If works are to take place outside these dates then an Appropriate Assessment Screening should be undertaken as per Forest Service guidelines"* and recommended conditions to be attached to any grant of permission that may issue and as the area is within a Hen Harrier Red Zone set out that works should take place from August 15th to March 31st.

The FAC finds no reason to conclude that the DAFM erred in its processing of the application as it relates to this ground of appeal and is satisfied that the procedures followed leading to the making of the decision to grant the licence were consistent with the requirements of Article 6(3) of the Habitats Directive.

In relation to discharging its statutory functions, the FAC operates under the Agricultural Appeals Act 2001, as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

In relation to conditions, It is noted that the licence, in addition to standard forestry management operational conditions, has specific conditions operational conditions which are qualifying interests of the European Sites including meadow habitat, open heath or blanket bog habitats in relation to setbacks of operations, the location of drains, the control of natural regeneration of non-native tree species, the retention of broadleaves, identification and set back from water hot spots, that brash and branch wood is to be utilised to create and maintain brash mats along all machine routes, a range of measures to avoid discharge to watercourses in relation to silt and sediment, controls in relation to use of fertilisers and chemicals and ongoing inspection of all protective measures periodically to ensure continued functionality throughout operations. In this regard, having outlined conditions which largely relate to the application of good practice and guidance 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 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.

It is however noted that in the conditions of licence although condition 41 iii does refer to 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 the FAC finds that the condition specific to the Hen Harrier recommended in the AAD:

"In relation to Hen Harrier, the following mitigation is required, presented in the form of conditions to be attached to any licence issued: A. The site of this project overlaps with a High Likelihood of Nesting Area relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). To do so will lead to the immediate cancellation of this licence and may represent an offence under the Birds & Habitats Regulations (2011) (S.I.477 / 2011). (A potential

disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance.). Reason: In the interest of protecting the Special Conservation Interest of the Slieve Bloom Mountains SPA as per the Appropriate Assessment determination for LS08-FL0115"

was not included in the conditions of the licence and this constitutes a significant and serious error as the project is wholly located within a SPA where the Hen Harrier is identified as a Qualifying Interest. The FAC consider this condition should form part of any licence.

In relation to the Freshwater Pearl Mussel and the grounds that there is no assessment of the likely effects on the Freshwater Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment it is noted the appellant has not specifically identified any particular site. The documentation submitted identifies all European sites with hydrological links to the project area and the Qualifying Interests of these sites. In relation to sites with a hydrological link to the project area, no European site downstream includes the Freshwater Pearl Mussel as a Qualifying Interest and there is no evidence submitted to the contrary. The Freshwater Pearl Mussel is identified as a qualifying Interest in the River Barrow and River Nore SAC 002162 which is within a 15 kilometres radius of the project site.

The NIS specifically in relation to this QI refers to sub-catchments of the River Barrow are listed in the Freshwater Pearl Mussel regulations (S.I. 296 of 2009/ S.I. 355 of 2018), the Mountain, Ballymurphy and Aughavaud Rivers. The project area is not hydrologically linked to any of these catchments. As such, there is no potential for the proposed project to directly or indirectly impact on Freshwater pearl mussel and mitigations are not considered necessary. In relation to Margaritifera durrovensis the Nore Pearl Mussel the NIS identifies that the project area occurs within the Nore Pearl Mussel catchment although further than 20km upstream from where the species occurs and mitigation measures are outlined. The AAD outlines mitigation is required presented in the form of conditions to be attached to any licence issued specifying a 25m setback which will include five lines of native broadleaves on the section furthest from the aquatic zone which is transposed as condition no 35 of the licence. Considering the information before it, the FAC finds no basis for the appellant's contention on this issue. The FAC however consider that condition 41 should also include as an addition *vii) Forestry and Freshwater Pearl Mussel Guidelines (DAFM 2008)*.

In relation to the Otter species the NIS identifies that in order to protect this aquatic species, the standard mitigation measures that are integral to the project will be adhered to, in order to ensure no release of silt/sediment, nutrients or chemicals to receiving waters. Mitigation measures are outlined in the NIS. The AAD in relation to the Otter outlines the mitigation required, presented in the form of conditions to be attached to any license issued: to minimise disturbance and protect established habitat potentially used by the feature in River Barrow and River Nore SAC as per the determination for LS08-FL0115 and these are included in the licence conditions nos. 33 and 34 although there is no specific reference to the Forestry and Otter Guidelines (Department of Agriculture, Fisheries and Food 2009).

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 making the

decision. The FAC is thus varying the decision of the Minister regarding licence LS08-FL0115 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to include the following additional conditions

The addition of vii) Forestry and Freshwater Pearl Mussel Guidelines (DAFM 2008) and viii) Forestry and Otter Guidelines (Department of Agriculture, Fisheries and Food 2009) to condition 41 and the following condition:

In relation to Hen Harrier, the following mitigation is required, presented in the form of conditions to be attached to any licence issued: A. The site of this project overlaps with a High Likelihood of Nesting Area relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). To do so will lead to the immediate cancellation of this licence and may represent an offence under the Birds & Habitats Regulations (2011) (S.I.477 / 2011). (A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance.).

Reason: In the interest of protecting the Special Conservation Interest of the Slieve Bloom Mountains SPA as per the Appropriate Assessment determination for LS08-FL0115"

Yours sincerely,

A black rectangular redaction box covering the signature of the official.

Derek Daly On Behalf of the Forestry Appeals Committee