



19th November 2024

Subject: Appeal FAC094/2023 against licence decision DU02-FL0148

Dear

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 Marine (the Minister). The FAC, established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

A hearing of appeal reference FAC094/2023 was held remotely on the 2nd October 2024. In attendance:

FAC Members:	Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, Mr. Vincent Upton & Mr. Luke Sweetman.
FAC Administration:	Ms. Aedín Doran

In the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

Decision

Having regard to the information before it, including the record of the decision on the Forestry Licence Viewer (FLV), the notice of appeal, the Department of Agriculture, Food, and the Marine (DAFM) Statement of Fact (SoF), additional submissions and response to same, the FAC has decided to set aside and remit the decision of the Minister to grant felling licence DU02-FL0148 for the reasons set out hereunder.

Background

The licence under appeal is for the clearfell of 5.37ha of Sitka spruce in Killakee, Mountpelier, Co. Dublin and was issued on the 24th November 2023. The species to be felled is 100% Sitka spruce and the majority of the trees to be felled (4.88ha) will have a Fell Age of 55 years with two smaller sections totalling 0.38ha ranging from 19 to 29 years. Within the approved clearfell area is a patch of 0.11ha, labelled in the application as "BAREPL", which appears to be comprised of grass, and scrub species with Gorse prevalent. The application specifies that the area will be restocked with Birch (40%), Scots pine (20%), Oak (15%), and Rowan (15%), with 10% "Open Space". The licence was issued with conditions which include a requirement to adhere to specific standards & guidelines, requirements in relation to ground stability and contacting Inland Fisheries Ireland (IFI) prior to commencement, provision for "minor site level changes" during harvesting or reforestation works, in the interest of environmental protection are permitted, and detailed archaeological requirements.

The Applicant's *Appropriate Assessment Pre-Screening Report* describes the proposal site as having a moderate slope (15% or less) in a north-westerly direction, the predominant soil composition is a combination of peaty podzols with shallow rocky soils with some outcropping of rock, and the existing habitats are 98% WD4 – Conifer Plantation and 2% GS4 – Wet Grassland. The *Appropriate Assessment Pre-Screening Report* states the proposal is “part of a larger conifer plantation of varying age and class to the south, north-west, west, and east. The project area is bordered by an area of grassland to the north, which surrounds the ruins of a Hellfire Club. The surrounding area and wider landscape support agricultural grasslands with pockets of conifer plantations, and housing estates.”

Information available online from the Environmental Protection Agency (EPA) shows that there are no EPA-mapped watercourses within the proposal area. The nearest mapped watercourse is the Dodder_020 which is c.400m to the south-west. The proposal is split across three River Sub-Basins: the Dodder_020, the Dodder_040, and the Owenadoher_010. According to the “Cycle 3 HA 09 Liffey and Dublin Bay Catchment Report, May 2024”, the “Status 16-21” for the Dodder_020 is “Good” and “Not at risk”, while the Dodder_040 and the Owenadoher_010 are both listed as having “Moderate” status and being “At risk” with “Urban Runoff” listed as the significant pressure. The proposal is underlain by the Kilcullen Ground Waterbody which has “Good” status but is “At risk” with “Ag, Unknown, For” as Significant Pressures and “ChemicalQualityDiminution, ForSW, Nutrients” listed as Significant Issues.

Appropriate Assessment (AA)

The Applicant submitted an AA Pre-Screening Report (AAPSR) which was completed on the 21st October 2022. The AAPSR describes the proposal site and details the hydrological connectivity of the proposal, stating that in each Sub-Basin “there is no clear flow path” between the proposal and the nearest aquatic zones/features, which are separated by a range of between 270m to 400m at their nearest points. The AAPSR provides reasons including the absence of a “clear flow path” and the presence of intervening buffers between the proposal and the surrounding EPA-mapped watercourses before concluding that there is “no potential for significant effect on any European sites within this River Sub Basin” in all three Sub-Basins.

Section 3 of the AAPSR states that there are no hydrologically connected European sites within or beyond 15km of the project area and describes the proposed operational details for the proposal before detailing the possibility for “Individual Effect on European Sites” of the nine European sites within 15km. These are:

- Ballyman Glen SAC
- Glenasmole Valley SAC
- Knocksink Wood SAC
- Poulaphouca Reservoir SPA
- Red Bog, Kildare SAC
- South Dublin Bay and River Tolka Estuary SPA
- South Dublin Bay SAC
- Wicklow Mountains SAC
- Wicklow Mountains SPA

For each European site the relevant Qualifying Interests (QIs) or Special Conservation Interests (SCIs) are listed and the possibility of the project itself (i.e., “alone”) having a significant effect on each site is recorded and the rationale for each decision described. Section 4 of the AAPSR is titled “In-Combination Plans & Projects on European Sites” and concludes that:

Cumulative and in-combination effects can occur where a project results in individually insignificant effects that, when considered in-combination with impacts of other proposed or permitted plans and projects, can result in significant effects. In reviewing the above best objective information, no cumulative impacts were identified arising from the project that could cause significant effects. Furthermore, no additional impacts were identified that might arise from the combination of projects and plans with the proposed project.

The DAFM produced an AA Screening Report & Determination (AASRD) for the proposal which states that it was prepared by a Forestry Inspector on the 13th November 2023. The AASRD outlines the project details and provides a description of the proposal site and surrounds. Section 3 lists the information that was considered in undertaking the screening for AA. The AASRD screened the same nine sites as the AAPSR but differed from the AAPSR as the Wicklow Mountains SPA was screened in due to "the proximity of potential habitat for the species listed as the Special Conservation Interest of this European site." The remaining sites were screened out for Stage 2 AA with reasons provided.

The AASRD refers to an "Appendix A: In-Combination Report for felling and reforestation proposed under DU02- FL0148" which is stated to be "on file." Appendix C is a "Screening Validation", completed by a Consultant Ecologist on the 16th November 2023. Appendix C contains "Table 1 Appropriate Assessment screening recommendation made by the Felling Inspector (FI) in relation to Felling and Reforestation project proposed under DU02- FL0148, and where the screening decision differs between the FI and the Ecologists." In this table the Consultant Ecologist "alters" the FI's screening recommendation, and provides the rationale for doing so:

The habitat at or in the vicinity (sic) of the project area is not suitable for the SCI species. The European site is 2.3 kilometres east to southeast of the project area. The project area is located on the outer limits of the foraging range for Peregrine (2km, SNH, 20161). Additionally, the project site does not provide suitable nesting habitat (cliffs, quarries etc.) for this SCI. Merlin traditionally nest on the ground on heath, mountain and blanket bog but now predominantly nest in trees with a strong preference for conifer plantations (favouring older trees and often nesting within 10m of forest edge). Breeding success is positively related to the proportion of suitable foraging habitat (heath, extensive grassland, bog, other open and semi-open habitats) within the breeding territory (Lusby et al., 20172). Heathlands are vital hunting habitats for Merlin (Fernandez-Bellon & Lusby, 20113). While the project site is located within the foraging range of Merlin (as per DAFM bird foraging table, 2020), the surrounding habitats consist of improved grassland, amenity grassland, pockets of scrub and a large block of conifer plantation. Therefore the habitat surrounding the project area does not provide suitable foraging habitat for Merlin. Given the unsuitability of the habitat, this SPA can be screened out. To note the AA Pre-Screening Report (dated 21/10/2022) submitted by the applicant is in agreement with this screening outcome.

The Screening Validation concludes that "As such, the project does not advance to the appropriate assessment stage in relation to these European Sites."

On file is a document titled "Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project DU02-FL0148". This In-Combination Report considers the potential for the proposal to contribute to an in-combination impact on European sites and consulted various online planning systems and datasets (including the DAFM's FLV) on the 1st November 2023 to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basins Dodder_020,

Dodder_040 And Owenadoher_010. The In-Combination Report indicates that it consulted the websites of South Dublin County Council, An Bord Pleanála, the EPA, and the Objectives relating to Natura 2000 sites set out in the "South Dublin County Council Development Plan 2016-2022." The In-Combination Report concluded that:

... there is no likelihood of the proposed Felling and Reforestation project DU02- FL0148, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in combination with other plans and projects. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed elsewhere in the Screening Report, have been taken into consideration in reaching these conclusions. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that they do not have any significant effect on those same European Site(s). There is no likelihood that the proposed project will have, or contribute to, any significant effect on those same European Site(s), when considered in combination with other plans and projects...

Referrals & Submissions

There is no record of any submissions on the FLV and the DAFM's SoF states "N/A" regarding submissions received. The application was referred to South Dublin County Council and IFI. The County Council did not respond. IFI responded on the 20th July 2022 stating that:

The proposed felling is within the catchment of the Piperstown Stream, an important spawning tributary of the R. Dodder. The R. Dodder is exceptional among most urban rivers in the area in supporting resident Atlantic salmon (Salmo salar) and Sea trout in addition to resident Brown trout (both Salmo trutta) populations...

IFI also made recommendations regarding the protection of water quality, the monitoring of ground stability, and notification of IFI personnel prior to commencement of the proposal.

The file was also referred to the DAFM's Forest Service Archaeology Unit with the result that an archaeological report was produced and archaeological conditions were attached to the licence.

Grounds of Appeal

There is one third-party appeal (FAC094/2023) against the decision to grant DU02-FL0148. The grounds of appeal were considered in full by the FAC. In summary, the Appellant contends that:

1. There was no effective public participation in the licencing process.
2. Post-permission surveys are required to determine whether a Derogation Licence is required, which is incompatible with EUCJ requirements as per decision in Case C-463/20.
3. Bat surveys from May and September 2019 related to the Dublin Mountains Visitor Centre (DMVC) planning application are outdated. The site of the proposed felling "clearly contains Bat fauna." "Applicant for permission must carry out adequate surveys sufficient to identify use of the woods by bat fauna and the necessity for any derogation licence prior to the grant of a felling licence." The Appellant contends this point also applies to application of the EIA and Habitats Directives.

4. Otter survey data associated with DMVC are also obsolete. Otters are a QI for the Wicklow Mountains SAC and are given strict protection under Articles 4 & 12 of the Habitats Directive. Survey techniques employed were sub-optimal.
5. Page 134 of the *Ecological Surveying Techniques for Protected Flora and Fauna during the planning of National Road Schemes (NRA,2008)* states, "Otter surveys can be undertaken at any time of year, but are less likely to provide reliable results mid-t-late-summer, when the presence of dense vegetation may make it difficult to find field signs and holts."
6. Aside from passage of time and sub-optimal survey period "These Guidelines were identified by the Council as *recognised guidance* (6.2.1. EIAR)."
7. "...the Board's grant of permission is inconsistent with Annex IV of the Habitats Directive that protects all Annex IV species from *inter alia* disturbance and destruction of breeding and resting places throughout the range of the species (Article 12.)"
8. If the FAC concludes that a derogation licence is required, certain legal restrictions apply.

Attached to the main grounds of appeal were "Further Grounds and Links to documents and files to be included and used in this appeal" which for are labelled i) to xvi) below. These grounds were considered in full by the FAC and are summarised below:

- i) The Appellant refers to project splitting and contends the felling licence should have preceded the planning permission and should have been part of the EIAR for that project.
- ii) The 2019 Dublin City Otter Report indicates significant and increasing Otter activity on the Dodder Catchment.
- iii) A Heritage Officer's Report regarding Taylor's Lane LRD23A/0002 found outdated surveys to be an issue. "The same opinion applies in this instance".
- iv) The licence application has not assessed the cumulative effects with regards to a list of LRDs/SHDs etc. BOLAP Scoping Documentation outlines additional tributaries on Hellfire Mountain that were not included in the DMVC surveys.
 - a. Refers to aquifer fragility status of the area.
 - b. States there are two unauthorised dumps on Hellfire/Montpellier Mountain with nearby watercourses omitted from the BOLAP.
- v) There has been no assessment of the effect of the proposal on the underground Lake on Hellfire Mountain or on the Dodder Catchment.
- vi) Questions mapping/assessment of forest drains and the hydrological connectivity to the Dodder River Catchment and "the Natura 2000 site." Also states it is not clear if all forest roads were authorised/legally compliant.
- vii) There has been "No assessment to minimise soil disturbance." Reference is made to risk of carbon loss, sedimentation, and nutrient loss.
- viii) Contends four licences were applied for to facilitate the DMVC in an attempt at project splitting to avoid environmental scrutiny and AA. Submits that such a practice is contrary to various EU Directives.
- ix) Non-disclosure by Coillte of their status as co-applicant in DMVC.
- x) The applicant has not identified all the protected structures/national monuments within this site. Proper archaeological assessment is required.

- xi) Unauthorised works on site and nearby have not been reported to National Monuments/Local Authority for enforcement. Proposed forestry works will impact protected structures. No assessment of these risks.
- xii) "The cumulative effects of project splitting facilitates the Applicant to ignore the group significance of archaeological structures and their collective heritage significance within Dublin and Wicklow Mountains."
 - a. Refers to damage to a Standing Stone, lack of appropriate conservation plan etc. for national monuments/protected structures before/during/after proposed works.
- xiii) Any tree within the curtilage of a protected structure or national monument will have an injurious impact on its character etc and requires planning permission. "Such tree removal is contrary to the Archaeological Heritage Protection Guidelines."
- xiv) Refers to 11 Key Indicator species and habitats. Contends none of the surveys relied upon assess the proposal's impact on these receptors with "scientific certainty" and therefore the Applicant has "failed in their statutory obligations."
- xv) Submits that the applicant has failed to carry out a hydro-morphological assessment. Refers to Owendoher Catchment "being a spawning river for the Dodder." Contends forestry activity represents a high risk for aquatic life.
- xvi) Refers to Massey's Nature Trail – there many iconic trees within the proposal site, unclear which will be impacted. Risk to natural and built heritage and recreational amenities. Cumulative effects on amenity zone not assessed.

Minister's Statement

The Minister provided an SoF responding to the grounds of appeal, which was provided to the parties. The Minister's SoF was considered in full, and the following is a summary:

- The decision was issued according to relevant procedures, S.I. 191/2017 and the 2014 Forestry Act, and the DAFM 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 SoF included a letter dated 11th June 2024 from the DAFM Archaeologist wherein it is stated in response to the grounds of appeal that "...as regards protection of the archaeological resource and other structures and built features of architectural heritage interest on or near the site there is nothing therein that would warrant a reconsideration of the decision made to approve the TFL or change the specific archaeological and architectural heritage protection conditions recommended for attachment to the TFL."
- There was public participation in the licencing process, and this included the publication of the application on the FLV and the DAFM's website.
- Regarding the presence of otter/bat populations within the proposal area the DAFM considered the detailed submission from the applicant, and the application had been subject to a third-party statutory referral process which included the Local Authority and IFI and a public consultation process.
 - There was no reference in the application to suggest that the project area supported a population of Bats and no submissions were received from the local Authority or members of the public.
 - Regarding Otter, there is no direct hydrological connection within the project area and no submission regarding risks to Otter in the AAPSR or from third parties.

- Bats and Otter are protected under the Wildlife Act 1976 and subsequent amendments and this is referred to in the licence conditions.
- The DAFM submit that their position is consistent with the Environmental Impact Assessment Report (EIAR) and NIS prepared for the DMVC and the planning decision to allow the development to take place including the felling of trees located within the boundaries of this application. Section 6.9.3.3 of the EIAR submitted with the planning application provides for a pre-construction survey to identify if roosting has taken place since the 2019 surveys. There are no mitigations in the EIAR for otter as “No signs of otters were recorded on the site or within 500m upstream and downstream of the site.”
- An In-combination assessment in relation to DU02-FL0148 was completed on the 1st November 2023 at AA screening stage
- Regarding water quality there are wide range of checks and balances during 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).
 - Any felling licence issued is conditional on adherence to the Standards for Felling and Reforestation (DAFM, 2019) which prescribes various water protection measures.
 - The water-related eco-system services water setback delivers is described in the document Woodland for Water: Creating new native woodlands to protect and enhance Ireland’s waters (DAFM, 2018).

Post-Appeal Submissions

The Applicant made a submission dated 10th July 2024 providing a response to the grounds of appeal. This submission was considered in full, and the following is a summary:

- The Applicant referenced the “Appellant’s attempt to conflate the granting of the Tree Felling Licence by the Forest Service with a grant of planning permission by An Bord Pleanála to South Dublin County Council in June 2020.”
- Regarding Point 1 of the grounds of appeal (public participation), the Applicant contended it is standard practice to advertise felling licence approval through the FLV
- Regarding Points 2 and 8 (Derogation licence) the Applicant submitted that DU02-FL0148 is not a known location for any species listed in Annex IV of the Habitats Directive and consequently the felling licence did not include a condition to carry out pre-operation surveys for any species.
 - The Applicant also submitted that other studies conducted at this site arising from the proposed DMVC do not foresee the proposal interfering with or disturbing any protected species, therefore it is not a requirement to seek a derogation licence prior to the felling licence approval.
- Regarding Point 3 (Bats) the Applicant states there is no bat designation (SAC) within, or in close proximity to the proposal with the result that there are no bat related conditions on the felling licence. The Applicant stated that previous survey findings have not identified the presence of any bat roosts or any man-made features or trees with high bat roost potential.
- Regarding Points 4 to 7 (Otter) the Applicant submitted that there is no hydrological connectivity to an SAC where otter is a Qualifying Interest and there is no possibility for direct effects on otter as no watercourses have been identified within the footprint of DU02-FL0148, and as such there are no licence conditions relating to otter.

- Regarding Project Splitting the Applicant contended that it is standard practice to apply for a felling licence after receipt of planning permission from the Local Authority. The Applicant stated that each felling licence application has a different harvest type and reforestation plan, and it is a requirement of DAFM to submit a separate felling licence application to reflect these objectives.
- Again, regarding otter, the Applicant stated that the Dublin City otter report is not directly relevant to DU02-FL0148 due to the absence of suitable otter habitat (aquatic zones/streams) or hydrological connectivity to suitable otter habitat.
- Regarding hydrology and drainage, the Applicant submitted that they had submitted an "Appropriate Assessment report" to the DAFM which identifies and assesses hydrological connections and potential impacts of the proposal. The Applicant stated that the proposal area was subject to a field survey to collect, record and verify the presence of aquatic zones and relevant water courses on site and no relevant watercourses or aquatic zones were identified within DU02-FL0148 and there is no hydrological connectivity to surface water in the surrounding environment. The Applicant also noted that there are no groundworks proposed and no potential pathway for an effect on groundwater systems.
- Regarding soil and tree growth the Applicant stated that all operations on this site will be conducted in adherence to the Felling Licence conditions.
- Regarding the ownership of the land, the Applicant stated that Coillte is the owner of the land and the forest crop within the proposal and has therefore submitted the felling licence application to the DAFM.
- In relation to archaeology the Applicant submitted that the DAFM completed an assessment of the application which resulted in archaeological licence conditions being prescribed. The Applicant highlighted that a consultant archaeologist will be appointed to review the plan, submit an Archaeology Report to DAFM prior to the commencement of operations and to conduct monitoring of these forest operations.
- Regarding birds and habitats, the Applicant submitted that as part of the felling licence application the applicant has "undertaken an appropriate assessment" to assess potential impacts on designated species and habitats within the Natura 2000 network. The Applicant also stated that the site will be subject to an environmental assessment prior to commencement of operations and appropriate mitigations will be implemented accordingly where required.
- The Applicant contended that a hydromorphological assessment is not relevant in this case due to the absence of water features and stated that no surface water connectivity has been identified between DU02-FL0148 and the Owendoher Catchment.
- Regarding Iconic Trees and Amenities of "Massy's Estate Woodland the Applicant submitted that the proposal is in a separate property.
- In relation to EIAR the Applicant reiterated that it is standard procedure to get planning permission before applying for a felling licence.

The Appellant made a further submission that again contended that the decision was not made in compliance with the EIA Directive, that the AA screening process was not compliant with the law, that the Harvest Plan is not to the requisite standard, that there is no protection to the Recreational trail, that conditions 10 and 11 are unenforceable, that there was inadequate and ineffective public notice in contravention of Article 6(2) of the Aarhus convention, that there are insufficient protections in relation to Article 5 of the Birds Directive and Article 12 of the Habitats Directive.

Considerations of the FAC

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified decisions of the Minister and to determine if a serious or significant error, or a series of errors, was made in making the decision under appeal, and if the decision was made in compliance with fair procedures. The FAC considered all of the submissions and material provided to it by the parties, including the record of the decision. As the parties were informed, the FAC considered the documentation related to the decision as provided by the Minister on the publicly available FLV. The Appellant had suggested that the FAC had access to information which had not been provided to the Appellant, but this is not the case.

The FAC considered in the first instance the grounds that referred to the decision for planning permission and the transposition of Conventions and Directives. The FAC is an administrative committee established under the Agriculture Appeals Act 2001 to determine appeals against certain decisions of the Minister for Agriculture, Food and the Marine. The Agriculture Appeals Act 2001, as amended, provides the following:

Establishment of Forestry Appeals Committee and its function

14A.

...

(2) The function of the Forestry Appeals Committee shall be to hear and determine appeals specified in subsection (4).

...

(4) (a) Where a person is dissatisfied by a decision made by the Minister under an enactment or statutory instrument specified in Schedule (2) (referred to in this section and sections 14B and 14D as a 'decision') he or she may, within a period of 28 days beginning on the date of the decision, appeal to the Forestry Appeals Committee against the decision.

...

Schedule 2

Section 7 of the Forestry Act excluding grants arising under the schemes mentioned in Schedule 1.

The Forestry Regulations 2017 (S.I. No. 191 of 2017) insofar as they relate to a licence for afforestation, felling of trees, forest road construction or aerial fertilisation of forests.

The FAC considers that its remit does not extend to making a determination on a planning permission application or a decision of An Bord Pleanála. Furthermore, the FAC understands its remit not to extend to the making of a determination as to whether the EU and Ireland have correctly implemented the UNECE Aarhus Convention. All parties noted the general relationship between the tree felling licence application

and the project which has attained planning permission, and this was confirmed by the DAFM and Applicant during the application process. The FAC considers its remit to extend only to the decision of the Minister for Agriculture, Food and the Marine to grant a tree felling licence following application by the forest owner. The FAC concluded that it should make a determination of the appeal against the tree felling licence based on its remit as provided in the Agriculture Appeals Act 2001.

The grounds contend that the public were not notified of the application by way of any public notice as required by the Forestry Act 2014 and the relevant Regulations. The DAFM and the Applicant contend that the application was made in keeping with DAFM procedures and the relevant legislation. The DAFM state that the application was submitted pm 24/03/2023 and advertised on 12/04/2023. No submissions were made on the application.

The FAC would understand that the Forestry Regulations 2017 provides for the Minister to publish a notice of a felling application in a manner determined by the Minister and to provide for the public to make submissions and to have regard to such submissions in making a decision.

The DAFM have stated that the application information was published on the FLV when received. The FLV is described as a system that allows members of the public to view the geographic location of any felling licence and to monitor felling activity in their area. The DAFM's SoF states the application was received on the 5th July 2022. The application is recorded as being published on the FLV on the 13th July 2022 and the SoF states it was advertised on the same date and the public could make submissions for a period of 30 days. In this case no submissions were made.

The Forestry Regulations 2017 also require a site notice to be erected at the entrance to the lands to advise the public that the felling and extraction being undertaken is in accordance with a licence issued by the Minister. This requirement relates to the undertaking of felling after a licence has issued. The Forestry Regulations 2017 also provides for the erection of a site notice in relation to an application for afforestation and forest road works activities, however neither activity forms part of the decision before the FAC. The FAC does not consider that the Forestry Act 2014 required any additional notices to be made in relation to the application as suggested in the grounds. The FAC does not consider that an error occurred in relation to the making of the decision in relation to these grounds.

The grounds submit that the application is predicated on the necessity to carry out post-permission surveys in order to establish whether there is a necessity for a derogation licence. The FAC does not consider that the application as submitted, or the licence decision made, is predicated on the necessity to carry out post-permission surveys. As noted in the grounds, the High Court has referred questions to the Court of Justice of the European Union (CJEU) on similar consent systems. The FAC does not consider its remit to extend to making a determination on a decision of the High court or the CJEU. The decision under appeal to the FAC is in relation to the granting of a felling licence for approximately 5ha of plantation forestry comprised entirely of Sitka spruce. The FAC considered the Appellant's submissions regarding potential impact on otter but noted that the Appellant does not identify a reason as to how the felling of the forest as applied for in this case might have a significant effect on the species. The FAC understands

that the granting of a felling licence does not remove any legal obligations on the licence holder or their agents that are provided for in the Wildlife Acts or other relevant legislation.

The Appellant's submissions make some general references to otter and bats and also refers to Massey's wood. The FAC noted that Massey's wood is a separate forest estate located approximately 600m to the east of the proposal under appeal and is separated by various types of forestry, forest roads, a car park, and the R115 County Road. As detailed previously, the area under DU02-FL0148 is almost entirely composed of mature (55-years-old) coniferous plantation forestry and the FAC would understand this is not a habitat type typically considered highly valuable for bats or otter. The area under appeal is described as not containing any watercourses or aquatic zones. The appeal makes a general claim that the hydrology of the site has been described incorrectly but provides no convincing evidence to substantiate this claim nor explains how the proposal might have a significant effect on otter or bat species. The grounds refer to the restrictions on the granting of derogation licences under Article 16(1)(a) of the Habitats Directive, but the FAC has no role in the granting of such licences. The FAC is not satisfied that an error occurred in the making of the decision in regard to these grounds.

The FAC considered the Appellant's submissions related to alleged deficiencies in the Wildlife Acts regarding Annex IV species and birds. The FAC considered that the Appellant did not substantiate these claims in any real way and the FAC considers that its remit does not extend to making a determination of the legality of the Wildlife Acts. The grounds further question the enforcement of conditions 10 and 11 of the licence that refer to obligations in relation to invasive species and protected species. The FAC agrees that these conditions appear to be more akin to general statements that may be more suited to the application documentation or the cover letter that accompanied the licence, but the FAC is not satisfied that this constitutes a serious or significant error in itself as it has no real impact on the decision.

The grounds make some general references to the manner in which tree felling licence applications were made in the area and suggests that this constituted project splitting. The FAC understands that the overall planning proposal, including tree felling, was subject to an Environmental Impact Assessment and as previously noted, the FAC does not consider its remit to include making a determination on the planning decision. In relation to tree felling applications, the FAC considers that it is standard and good practice to manage forest stands or plots following individual prescriptions that might be based on the species composition and age of the trees and the overall management objective of the landowner in addition to any regulatory constraints. In the FAC's view, the submission of separate licence applications for the felling of trees separate from the planning application is in keeping with the requirements of the Forestry Act 2014. The FAC found that the Minister did consider other plans and projects in combination with the proposal in the AA screening. The FAC is not satisfied that an error occurred in the making of the decision in this regard.

The Appellant made further submissions regarding the planning process and the views of the Heritage Officer and IFI but these related to the planning application. The tree felling application was referred to the Local Authority, who did not respond, and IFI, who responded on the 20th July 2022 with comments relating to the location of the proposal "within the catchment of the Pippertown Stream, an important

spawning tributary of the R. Dodder". IFI stated that the R. Dodder supports resident Atlantic salmon (*Salmo salar*) and Sea trout in addition to resident Brown trout (both *Salmo trutta*) populations. IFI made recommendations regarding the protection of water quality, the monitoring of ground stability, and notification of IFI personnel prior to commencement of the proposal. The evidence before the FAC is that the DAFM had regard to this response from IFI and prescribed licence conditions in line with IFI's recommendations.

The FAC would understand that tree felling has the potential to negatively impact water quality, but this is dependent on a number of factors including the nature of the works, the location of the proposal, any good practice measures applied, and the status of any waterbody that might be impacted. The FAC considered that the grounds do not provide any convincing evidence that the proposal might have a significant adverse impact on water quality. The DAFM submit that a range of checks are carried out on a licence application and that any felling licence must adhere to the Standards for Felling and Reforestation (DAFM, 2019) which provides specific measures related to the protection of water. The FAC would understand from the DAFM submission and the Standards and the Felling and Reforestation Policy documents that it is the general policy of the Minister to condition felling licences on adherence to these standards. However, in reviewing the documentation on file, the FAC noted that Licence Condition 3 requires adherence to a list of specified guidelines and standards but does not include the Standards for Felling & Reforestation (DAFM, 2019) and no reason for their absence has been provided. Those standards state:

This document sets out the universal standards that apply to all felling (thinning, clearfelling) and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the Department of Agriculture, Food & the Marine under the Forestry Regulations 2017 (S.I.191 of 2017). (Pg 1)

The FAC understand this to be a policy statement and that it is the adopted policy of the Minister to condition adherence with these standards on felling licences unless there was a stated reason otherwise. The FAC considers that the failure to include these standards as a condition of the licence represents a significant error in the DAFM's issuance of DU02-FL0148 that should be addressed by remitting the decision to the Minister to condition adherence with these Standards or provide a reason for their omission.

The grounds suggest that the Applicant has not identified all of the protected structures and national monuments within the site and that the curtilage of the protected structures, their character and setting will be affected by the forestry works but provide no evidence to substantiate this claim. The grounds make specific reference to a standing stone. They also make reference to Massey's wood which is a different location. The application included mapping information that identified the location of monuments to the north of the proposal but none within the boundaries of the felling site. The DAFM have recorded an archaeological assessment of the proposal and have submitted that there are no recorded monuments within the site. The DAFM's Archaeology Report states that "The area proposed for felling... is adjacent to three Recorded Monuments / SMR sites – two Megalithic tombs (DU025-001001- and DU025-001002-) and a 18th century Hunting lodge (DU025-001003-)." The licence was issued

conditional on a number of actions related to the proximity to the monuments outside of the plot boundary and the grounds provide no convincing evidence that these are deficient in some regard. The FAC considered the treatment of the application, the report prepared by the DAFM and the conditions attached to the licence and considered them appropriate. The FAC is not satisfied that a serious or significant error was made in relation to these grounds. Notwithstanding this, the FAC noted that Licence Condition 15 sets out specific archaeological and architectural heritage protection requirements which shall be "fully complied with" while also referencing that an archaeological and architectural heritage protection report and illustrative map are attached for further details. The FAC considered that this wording creates some ambiguity as to whether the conditions set out in the report referenced as being attached to the licence are to be complied with or are there for further detail. The licence in this case is being set aside and remitted to the Minister for reasons set out elsewhere in this letter. The FAC considered that the Minister should take the opportunity to resolve any ambiguity that might arise from the wording in condition number 15 when making a new determination on the licence application.

The grounds make a number of general references to the EIA Directive. In considering these submissions, the FAC noted that the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case-by-case basis (or both), whether or not EIA is required. 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 (SI 191 of 2017), in relation to forestry licence applications, require 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. These provisions in the Forestry Regulations 2017 do not include the felling of trees or deforestation. As the Appellant has identified, the planning permission application, including the felling of trees, was subject to an EIA and as previously noted the FAC does not consider its remit to extend to making a determination on the planning permission decision.

The grounds further submit that the forestry licence should have been acquired before planning consent and should have formed part of the planning application and that the failure to do this was project splitting. The FAC would understand the reference to project splitting to relate to a situation where a developer might split a development into separate parts or applications to circumvent a regulatory process. In this instance, the FAC would understand that the landowner was required to attain a felling licence for the felling of trees in keeping with the Forestry Act 2014 and the FAC does not consider that there is any evidence of an attempt to avoid any regulatory requirements or assessments in relation to the decision before it.

The FAC considered the grounds of appeal related to the screening for AA. In this regard, the Forestry Regulations 2017 state:

19. (1) Where the Minister receives an application for a licence under sections 17 or 22 of the Principal Act, which is not directly connected with or necessary to the management of a European site, the Minister shall carry out a screening for appropriate assessment of the development, in view of the conservation objectives of the European site, to assess if the development, either individually or in combination with other plans or projects, is likely to have a significant effect on the European site.

The FAC considered that the grounds of appeal, while making some general references to possible impacts on the environment, did not provide any reasons or evidence as to how the proposed felling, itself or in combination with other plans and projects, might have a significant effect on a European Site and should have been subject to an AA.

The FAC noted that the DAFM recorded an AA screening (AASRD) which identified nine European sites within 15km of the proposal and made a screening determination for each one. The AASRD concluded that AA was required in relation to one European Site, Wicklow Mountains SPA. The FAC also noted that Appendix C of the AASRD contains a "Screening Validation" as carried out by a consultant Ecologist on behalf for the Minister. This screening validation is dated 16th November 2023 and contradicts the initial screening conclusion contained in the AASRD which is dated 13th November 2023. The FAC found this to be a significant error for a number of reasons. Firstly, the Ecologist's conclusion is contained in an Appendix to the main screening, and it is not standard or good practice to include what the DAFM appears to be suggesting as being the actual screening conclusion as an Appendix to the primary document. In the FAC's view, it is not normal that an Appendix would fully contradict and supersede the findings of the main document and it is not clear from the documentation which conclusion is actually being adopted. The FAC considered that this approach introduces a significant lack of clarity to the document. Furthermore, the FAC considered that an Appendix cannot postdate the report to which it pertains. The FAC considers that this sequencing error is significant as it is fundamental to the processing of the AA screening of the proposal.

The FAC found that the In-Combination Report on file, which the FAC understands is for screened-out sites, and is dated the 1st November 2023, relies on the findings of the DAFM AASRD which itself is dated the 13th November 2023. The FAC considered this to be a further significant error in that the In-Combination Report cannot rely on an AASRD that postdates it.

In addition to the above, the FAC found that there appears to be no in-combination assessment for the site previously screened in by the Inspector (Wicklow Mountains SPA) as the screening conclusion of the Inspector was overturned by the consultant ecologist after the In-Combination Report was completed. The FAC found that this represents a further error in the processing of the application in so far as the AA of the project is concerned. Additionally, the In-Combination Report records that it had regard to an outdated County Development Plan (South Dublin County Development Plan 2016-2022), and Forestry Programme. The FAC found that the "South Dublin County Development Plan 2022-2028" was made on the 22nd June 2022 and came into effect on the 3rd August 2022. The FAC considers that this represents a further error in the processing of the application in this case.

In considering the content of the In-Combination Report, the FAC noted the DAFM's use of the word "residual" in their conclusion. The FAC considered that, in the context of AA, the term "residual effects" is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on AA titled *Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009)*. This document states on page 40:

If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions.

In the context of undertaking the screening again the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion. For the reasons outlined above, The FAC is satisfied that the DAFM's AA screening contains significant errors and that the decision to grant the licence should be set aside and remitted to consider whether the felling is likely to have a significant effect, either individually or in combination with other plans or projects, on European sites in view of the sites' conservation objectives.

The Appellant submitted that the application was deficient regarding the Harvest Plan submitted. The Forestry Act 2014 and the Forestry Regulations 2017 reference the information required to be submitted with a tree felling licence application and provide discretion to the Minister to prescribe further particulars and to seek further information. The FAC would understand from the Standards for Felling and Reforestation and Felling and Reforestation Policy that the submission of a Harvest Plan is not a requirement to make a tree felling licence application. In relation to recreational users the "Harvest Plan Map (Pre-Licence)" identifies forest roads and recreational trails, and the area is a commercial managed forest. The Harvest Plan map clearly shows the "General Extraction Direction" as being south, to the forest road. The stacking areas are shown as being both within and outside of the proposal boundary. The FAC noted that the Standards for Felling and Reforestation state, "locate timber landing bays at least 50 m from the nearest aquatic zone" and this has been complied with in the licence under appeal. The FAC considered that the Standards for Felling and Reforestation prescribe measures to minimise soil disturbance, which would reduce the risk of carbon loss, sedimentation, and nutrient loss. These Standards also address the matter of safety signs and the FAC has found that these Standards should be conditioned. The Appellant suggests that the mapping standard is 1:5,000 and that even this would be deficient based on the size of the site. The FAC noted that the Application included a number of maps at varying scales including two at a scale of 1:5,000 but does not consider, in any case, that the Minister has established an exact legal standard for the minimum scale of such maps. The FAC does not consider that there is any reason to conclude that the application was deficient in relation to these grounds.

The Appellant makes a general claim that there is no information that the "original forestry permission" was complied with and that "indicators on the ground" suggest that the landowner has not complied with such permission and that unauthorised works had taken place. The FAC found that over 90% of the trees to be harvested were planted before Ireland joined the EU (EEC). The Appellant does not substantiate the

grounds or provide a basis as to why the FAC might conclude that a serious or significant error had been made in the decision as it relates to this ground in the appeal.

The Appellant suggests that the licencing process is contrary to the FSC interim forest stewardship standard for Ireland but that is a voluntary, private, sustainable forest management certification scheme and is not a matter on which the FAC would make a determination.

Based on the evidence before it, as outlined above, the FAC is satisfied that significant errors were made in the DAFM's decision to issue DU02-FL0148. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to undertake a new screening for AA, and to address the other errors identified previously in this letter before making a new decision in relation to the application for DU02-FL0148.

Yours Sincerely,

Luke Sweetman on behalf of the Forestry Appeals Committee