



19<sup>th</sup> November 2024

**Subject:** Appeal FAC 087/2023 against licence decision DU02-FL0174

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

#### **Hearing**

A hearing of appeal FAC 087/2023 was held remotely by the FAC on 2<sup>nd</sup> October 2024. In attendance:

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

Secretary to the FAC: Ms. Aedin Doran.

Having regard to the particular circumstances of the appeal, 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 evidence before it, including the record of the decision, the notice of appeal, and submissions received, the FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant licence DU02-FL0174. The reasons for this decision are set out hereunder.

#### **Background**

The decision under appeal relates to the granting of a felling licence at Kilakee, Co. Dublin. The application as submitted is dated 24/03/2023. The application included operational and environmental information and maps outlining the licence area and operational and environmental features. The operations would involve the felling of an existing plantation comprising an area of 5.50 ha. The proposed replanting is set out in the application as 30% Other Broadleaves, 30% Birch, 30% Scots Pine and 10% open space.

**Appropriate Assessment Pre-Screening Report (AASPR), dated 03/04/2023 (Applicant's)**

The applicant submitted a document titled Appropriate Assessment Pre-Screening Report, dated 03/04/2023. This report, which is marked as being for Clearfell and Reforestation project DU02-FL0174, located at Dergvone, Co. Dublin, describes the Project Area, including soil, slope, habitat, access, hydrology, land use, and operations in further detail and screens the proposal for potential significant effects on European sites. This document describes the proposal site as being located within an existing forestry block and is surrounded by forestry to the southwest and improved agricultural grassland borders the northern, northwest, eastern and southern boundaries. The wider surrounding landscape is described as comprising forestry plantations, improved agricultural grassland, the Wicklow Mountains and Dublin City.

The project site is described in the applicant's AASPR as being entirely covered in recently felled woodland that has naturally recolonised. The project site is said to be contained within two sub-compartments with the majority being in sub-compartment 11779H - 2 (approx. 5.02 hectares) and the balance being contained within sub-compartment 11779H - 10 (approx. 0.48 ha). A biodiversity feature is noted as being in the southwest of the project site. The majority of the project site is said to be underlain by Podzols (Peaty), Lithosols, Peats, some outcropping rock with the remainder described as being underlain by shallow acid brown earths/brown podzolics, Lithosols, and Regosols.

Plants used in restocking the project area are to be treated off site in the nursery with an insecticide (acetamiprid) approved by Pesticide Registration and Control Division, DAFF. The site is said to be monitored for any damage to young trees from newly emerged pine weevil (*Hylobius abietis*), and if deemed necessary following an appraisal of the project area through Coillte's Integrated Pest Management Policy, a top up spot spray may be applied to prevent excessive levels of damage and tree losses. It is also stated that due to inherent levels of fertility, no fertiliser application is required to promote the establishment and growth of newly planted trees. The site is described as being accessible via Forest Road DU02R0036.

The project site is said to be within the River Sub-basin OWENADOHER\_010 (IE\_EA\_090011700). The pre-screening report sets out that there are no relevant watercourses or aquatic zones within / adjacent to the project site with the nearest aquatic zone being that DU02-W-2117 which is approximately 104 metres southeast of the project site at the nearest point. The report includes that due to the intervening landscape which is comprised of improved agricultural grassland and no relevant watercourses or aquatic zones are within the project site that this in combination with the intervening distance means that a hydrological connection to European Sites is not considered likely in the case of this project area. It also states that a more distant aquatic zone being an order 1 Orlagh stream (Segment Code 09\_554) is approximately 381 metres northwest of the project site at the nearest point.

Nine European sites (Natura 2000 sites) were identified within 15km of the project, namely six SACs and three SPAs. The nearest designated European site is said to be the Wicklow Mountains SAC (002122) located 1,866 metres south of the project site while the furthest designated European site within the 15 km radius is the Red Bog Kildare SAC (000397) located 14,985 metres southwest of the project site. The

pre-screening exercise concludes that the proposed project, individually or in combination with other plans and projects, will not have a significant effect on any European Site and that based on this information, the competent authority can determine that an appropriate assessment is not required.

#### **Further Information Request (FIR)**

A request for further information was issued by the DAFM on 06/06/2023 which stated that in screening the Coillte Clearfell 2023 - Batch 1 – Application – for archaeological issues the following two areas were found to overlap with the proposed SDCC Dublin Mountains Project (DMP) Visitor Centre at the Hellfire Club.

- DU02-FL0174 – Clear felling and replanting with a replanting objective of “Biodiversity”
- DU02-FL0175 – Continuous Forest Cover

It asked that the applicant clarify the relationship between the proposed TFL applications and the permitted development and how the proposed works are compatible with Condition No. 5 of the ABP grant of planning permission and to supply a copy of the revised Forest Management Plan required to be produced by SDCC in conjunction with the NPWS. The applicant responded to the request in relation to the felling licences and DU02-FL0171. The response provided a reply to the DAFM queries and provided additionally mapping and information related to the overall development. It would appear that the request and the response were not uploaded to the Forestry Licence Viewer at the time and are now displayed there marked with dates in June 2024.

#### **In-combination report for Felling and Reforestation project DU02-FL0174. (DAFM)**

There is an In-combination report for Felling and Reforestation project DU02-FL0174 on file, which is dated 13/10/2023 (the FAC understands this is described as an appendix to the AASRD dated 17/10/2023) and therefore appears to be the In-Combination report for the screened-out sites even though it predates the Screening report itself. It includes the following statement:

*“It is concluded that there is no likelihood of the proposed Felling and Reforestation project DU02-FL0174, 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. Note that those European Site(s) upon which, a likelihood of a significant effect arises when considering the project individually, are screened in and will be progressed to, and addressed in, Stage 2 Appropriate Assessment”.*

### **DAFM Appropriate Assessment Screening Report & Determination (AASRD) dated 17/10/2023**

An AA screening Report & Determination is to be found on file as prepared by a Forestry Inspector, Department of Agriculture, Food and the Marine and dated 17/10/2023 on behalf of the Minister. The screening report is titled 'Felling and reforestation project DU02-FL0174, at Killakee, Co. Dublin'. This AASRD states that in undertaking the screening for Appropriate Assessment, the following were taken into account:

- the initial application, including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer) and input from the District Inspector (including information following field inspection);
- responses from consultation bodies and submissions from 3rd parties;
- any subsequent supporting documentation received from the applicant;
- any other plan or project that may, in combination with the plan or project under consideration, significantly affect a European Site;
- any information or advice obtained by the Minister;
- Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site, available from National Parks & Wildlife Service ([www.npws.ie](http://www.npws.ie));
- available ecological and environmental information including aerial imagery, historical OS maps, DAFMs iFORIS system, QGIS and ArcGIS applications and data available at National Parks & Wildlife Service ([npws.ie](http://npws.ie)), EPA Maps, GeoHive, Data and maps ([gsi.ie](http://gsi.ie)), Biodiversity Maps ([biodiversityireland.ie](http://biodiversityireland.ie))
- any other relevant information.

The report also records that combined with the project details and site characteristics as summarised previously in the AASRD, there is sufficient information within the application and available from elsewhere to form a sound judgement regarding the likelihood of the project having a significant effect on a European site. It records considerations of nine European Sites namely, Wicklow Mountains SAC IE0002122 (1.9 km south of the project area), Wicklow Mountains SPA IE0004040 (2.0 km east southeast of the project area), Glenasmole Valley SAC IE0001209 (2.3 km southwest of the project area), Knocksink Wood SAC IE0000725 (8.3 km east southeast of the project area), South Dublin Bay and River Tolka Estuary SPA IE0004024 (10.4 km northeast of the project area), South Dublin Bay SAC IE0000210 (10.6 km northeast of the project area), Ballyman Glen SAC IE0000713 (11.4 km east southeast of the project area), Poulaphouca Reservoir SPA IE0004063 (13.0 km southwest of the project area), and Red Bog, Kildare SAC IE0000397 (14.8 km west southwest of the project area).

The AA screening considers each site in turn and records a screening conclusion and reasons. The screening carried out by the inspector, which is dated 17/10/2023, concludes that an AA was required in relation to one European Site, namely, Wicklow Mountains SPA IE0004040. This report references an 'Appendix A: In-Combination Report for felling and reforestation proposed under DU02-FL0174' with the commentary 'See File'. The AASRD has an Appendix B which sets out a Bibliography and Relevant Literature. There is also an Appendix C which is described as a Screening Validation as carried out by a Consultant Ecologist on behalf for the Minister for Agriculture, Food and the Marine. While marked as an Appendix to the inspector's report the Appendix C is dated 07/11/2023.

### **County Council / Inland Fisheries Ireland (IFI) referrals**

The application was referred to South Dublin County Council and IFI on 12/04/2023 as part of a list of projects. There is no record of a response on file from the Local Authority or the IFI.

### **Licence**

The licence was granted with conditions and bears the date 15/11/2023.

### **Appeal**

One third party appeal was made against the decision to issue the licence and was notified to the applicant by the FSU 04/12/2023. The Notice of Appeal and full grounds of appeal were provided to the parties and the FAC. The grounds in summary include that:

- The Public were not notified of the application by way of public notice and that awareness of it was by happenstance when looking at the Forestry Licence Viewer.
- The application is predicated on the necessity to carry out post-permission surveys to establish whether there is a necessity for a derogation licence and contending that post consent surveys are incompatible with the requirements of Court of Justice Decision C 463/20 and the proposed question for reference to the same Court by Humphreys J. in *O'Donnell v An Bord Pleanala* (2021.251 JR).
- The FAC is obliged to reach, effectively, a conclusion of no significant effect on Natura 2000 sites / strictly protected sites and this is submitted equally in respect of the application of the EIA Directive and the Habitats Directive.
- The matter of obsolete survey data in the EIAR is also raised and expanded upon in the context of otter.
- There is no information before the FAC which could allow it to conclude that the Board could have concluded that there would be no significant effect on otter.
- That a derogation licence granted pursuant to Article 16(1)(a) of the Habitats Directive can only be granted for an activity aimed at protecting wild flora and fauna and conserving natural habitats and not for the purposes of facilitating a forest development which does not serve this purpose.
- The Notice of Appeal further submitted multiple links to survey data, reports and planning applications. It is also contended that the hydrology of the site has not been mapped to determine links to watercourses and that some developments may not have been legally compliant. It is submitted that there has been no assessment to minimise soil disturbance to address the risk of carbon loss and reduce any risk of sedimentation or nutrient loss.
- Applying for multiple felling licences is project splitting and contrary to EU Directives.
- The applicant has not identified all protected structures and national monuments within the site, that there are cumulative effects of project splitting that are being ignored, that a standing stone has been previously damaged.
- The application does not consider the impacts on a range of protected bird and mammal species and habitats.
- That there are a number of iconic trees on the site and that the forestry licences should have been acquired first and been considered as part of the overall Environmental Assessment.

### **Minister's statement (SOF)**

The Minister provided a statement responding to the appeal which was provided to the parties. This statement sets out the relevant processing dates for the application and that the project was desk assessed. The SOF states that there is public participation in the licencing process as evidenced by certain steps as below.

- 'The process begins once the application is received at which point it is uploaded to the Department's Forest Licence Viewer (FLV). Members of the public have full access to the FLV and can see the geographic location of any felling licence received by the Department in relation to their own location. This means that any member of the public can check the FLV for any harvesting activity in their area whenever they wish and as often as they wish. They can monitor their surrounding area to check for felling activity'.
- Applications when received are advertised on the DAFM's website where location information at a townland level is provided to assist the public in locating any felling licence application for any given month.
- Forestry stakeholders and members of the public have 30 days to lodge a submission on any applications falling within a Townland of interest. The application for DU02-FL0174 was advertised on the Departments website on the 12/4/2024 (here). There is no record of the Department having received a submission from the public in relation to DU02-FL0174. Once the 30 days has past the Department begins work on the licence application taking into account any submissions received. Members of the public have 14 working days in which to appeal the Ministers decision'.

The SOF also states that during the preparation of the Statement of Facts it was noted that a 'Further Information Request' issued to Coillte seeking (a) clarification of the relationship between the TFL applications and the permitted development and how the proposed works are compatible with Condition No. 5 of the ABP grant of planning permission, and (b) a copy of the revised Forest Management Plan that was required to be produced by SDCC in conjunction with the NPWS, pursuant to Condition No. 5. It also states that this further information request had not been included on the FLV and this has now been rectified along with the response from Coillte.

Under the heading Presence of otter, bat populations within the felling licence project area the SOF states that the Department's decision to licence DU02-FL0174 was based on a detailed submission from the applicant, a third-party statutory referral process which included the Local Authority and Inland Fisheries Ireland and a public consultation process. It states that 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. In relation to otter, it states that there is no direct hydrological connection within the project area and references that there is no mention of otter at risk in the applicants pre-screening report or from third parties. It states that Bats and Otter in Ireland are protected under the Wildlife Act 1976 and subsequent amendments. In this regard, it states, that the following text, appears as a condition in the licence.

- The granting of a felling licence does not exempt the holder from meeting any legal requirements set out Wildlife Acts 1976 - 2010 which protects all wild animals in Ireland. Therefore, it is the responsibility of the landowner to ensure that where species are known to exist, on or near the project area and which are listed under the Wildlife Acts of 1976-2010, that these species are not impacted by the proposed forestry operations associated with this licence. Reason: Legal obligations under the Wildlife Act with regard to the protection of wildlife.

The SOF asserts that the above position is consistent with the Environmental Impact Assessment Report and NIS prepared for the Dublin Mountains Visitor Centre and that the issuing of the licences is also consistent with the planning decision to allow the development to take place including the felling of trees located within the boundaries of this application. It references that this planning permission by way of Section 6.9.3.3 of the EIAR provides for a pre-construction survey to identify if roosting has taken place since the 2019 surveys. It states that there are no mitigation measures in the EIAR for otter as *'No signs of otters were recorded on the site or within 500m upstream and downstream of the site.'*

In relation to the In-Combination Report the SOF states that *'DAFM's carried an In-combination assessment in relation to DU02-FL0174 on the 13/10/2023 at screening stage.....'* It sets out sources of information that were also examined in addition to forestry sources.

In relation to the protection of water quality the SOF states *'The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018). Critically, any felling licence issued is conditional on adherence to the Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. In relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt control measures, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. 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**

### **Applicant submission dated 10/07/2024**

The applicant made a post-appeal submission to the FAC dated 10/07/2024 setting out that this block (DU02-FL0174) was never replanted after clearfell in 2015 due to local consultation and operational issues and that the area is now regrowing with natural regeneration of Sitka spruce and dense vegetation. It states that the project will be a ground clearance operation that still requires a felling licence to remove the naturally regenerating conifers. The submission sets out that there are no hydrologically connected



European sites, that the reforestation Plan is 30% Birch, 30% Scots Pine, 30% Other Broadleaves all at 1,100 trees per hectare with the remaining 10% Open Space. It states that this site will be windrowed and manually planted.

It also states that            wishes to make a preliminary observation in relation to 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 and asserting that the aforesaid planning permission was the subject matter of an appeal to the High Court, where it was upheld (Hellfire Massy Residents v. An Bord Pleanála & Others) [2021] IEHC 424 and an appeal to the Supreme Court where the ABP decision was again upheld (Hellfire Massy Residents v. An Bord Pleanála & Others [2022] 2021:000126. The submission states that the Appellant, in Grounds 2, 3, 4, 5 and 6 of the appeal, references an EIAR in the planning application and surveys conducted for the planning application. The submission asserts that the arguments and grounds laid out are entirely irrelevant to the appeal of the Tree Felling Licence and that it should be noted by the FAC in their deliberations that the Appellant's arguments appear to relate to earlier decisions made by other regulatory authorities.

- Regarding Point 1 of the Appeal the submission states that it is standard practice to advertise felling licence approval through the DAFM Forestry Licence Viewer. In relation to points 2 and 8 in the grounds relating to a Derogation licence it states that DU02-FL0174 is not designated as a known location for any Annex IV species of the EU's Habitats Directive and as such the felling licence did not include a condition to carry out pre-operation surveys for any species. It also states that other studies conducted at this site arising from the proposed Dublin Mountains Visitor Centre do not foresee that this project will interfere or disturb any protected species, therefore it is not a requirement to seek a derogation licence at this stage (prior to the felling license approval).
- In relation to point 3 in the grounds regarding Bats the submission states that there is no bat designation (SAC) in the area or in close proximity to this proposed felling area which has resulted in no bat related conditions on the felling licence and that previous survey findings have not identified the presence of any bat roosts or any man-made features/trees with high bat roost potential. It also states that although previous survey findings have not identified any bat roosts within the footprint of DU02-FL0174, as part of the development works associated with the proposed Dublin Mountains Visitor Centre and as specified in the corresponding ecological reports, there will be an ecological assessment conducted on site prior to forest operations, which will take on board the findings of previous ecological surveys conducted on this site, and appropriate mitigations will be implemented, where required.
- In relation to points 4 to 7 regarding Otter the submission states that there are no otter related conditions on the Felling Licence as there is no hydrological connectivity to an SAC where Otter is a Qualifying Interest and that there is no possibility for direct effects on otter as no watercourse features have been identified within the footprint of DU02-FL0174.
- In relation to Further Grounds Point 1 and Point 8: Project Splitting the submission states that the standard approach is to apply for a felling licence from DAFM (under a separate consenting



process) after receipt of planning permission by the local authority and that for the purposes of legal certainty, the DAFM require a Grant of Planning Permission Declaration from the relevant County Council in respect of the proposed forestry operations prior to granting the licence. It states that every felling licence application has a different harvest type and reforestation plan, and therefore, it is a requirement of DAFM to submit a separate felling licence application to reflect these objectives.

The submission sets out that the cumulative impact assessment looks at this application DU02-FL0174, in conjunction with the three other projects (DU02-FL0148 Clearfell and replanting with broadleaves species and Scots pine, DU02-FL0171 Clearfell and no replanting, and DU02-FL0175 Continuous Cover Forestry).

- In relation to Further Grounds Point 2: Otter the submission states that Dublin city otter report is not directly relevant to DU02-FL0174 due to the absence of suitable otter habitat (aquatic zone/streams) or hydrological connectivity to suitable otter habitat.
- In relation to Further Grounds Points 3 and 4: Taylors Lane/In-Combination Report the submission sets out that this issue will be addressed by DAFM in their response to the FAC appeal.
- In relation to Further Grounds Point Points 5 and 6: Hydrology and Drainage the submission sets out that An Appropriate Assessment report was completed by ' ', submitted to DAFM, that identifies and assesses hydrological connections and potential impacts of forest operations. As part of the felling licence application process and as standard practice the footprint of DU02-FL0174 was subject to a field survey to collect, record and verify the presence of aquatic zones and relevant water courses on site. It states that no relevant watercourses nor aquatic zones have been identified within DU02-FL0174, therefore there is no hydrological connectivity to surface water in the surrounding environment. It also said that given the nature of the proposed operations, there are no ground works proposed as part of these forestry operations and as such there is no potential pathway for an effect on groundwater systems.
- In relation to Further Grounds Point 7: Soil and Tree Growth the submission states that all operations on this site will be conducted in adherence to the Felling Licence conditions and that furthermore, there are no drainage nor cultivation (ground preparation) operations proposed as part of the felling licence application.
- In relation to Further Grounds Point 9: Landowner the submission sets out that ' ' is the owner of the land and forest crop at DU02-FL0174 and has therefore submitted this felling licence application to DAFM.
- In relation to Further Grounds Point 10: Archaeology the submission sets out that this site has been assessed by the DAFM-FS Archaeologist and has ensured that conditions are included in the Licence for the protection of all archaeological features on site. It also references 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.
- In relation to Further Grounds Point 11: Birds and Habitats the submission sets out that as part of the felling licence application the applicant has undertaken an appropriate assessment to assess potential impact on designated species and habitats within the Natura 2000 network and that as

part of ; environmental risk assessment process, the site will be assessed prior to operations, incorporating other existing survey data, and appropriate mitigations will be implemented accordingly where required.

- In relation to Further Grounds Point 12: Hydromorphological Assessment the submission sets out that a hydromorphological assessment is not relevant in the case of DU02-FL0174, due to the absence of water features and that no surface water connectivity has been identified between DU02-FL0174 and the Owendoher Catchment.
- In relation to Further Grounds Point 13: Iconic Trees and Amenities the submission sets out that the Massy's Estate "Woodland & Nature Trail" booklet produced by the Dublin Mountains Partnership references a number of tree species that can be seen within the property and in some cases refers to specific individual trees, this is relevant to property of – therefore not relevant to DU02-FL0174.
- In relation to Further Grounds Point 14: EIA the submission sets out that the standard procedure is to get planning permission before applying for a felling licence, as outlined above.

#### **Appellant submission 12/07/2024**

The Appellant made a submission by email dated 12/07/2024 following circulation of the appeal documentation and the Statement from the Department. The submission refers to correspondence received from the FAC dated the 20/06/2024 pertaining to the appeal. The submission noted that the FAC correspondence states a reply is required within 21 days of the 20/06/2024 and sought clarification on the deadline for submissions and referenced a query in this connection by way of voicemail which is referenced as not having been responded to. An extension of time to make a submission was sought by the appellant and this was acceded to. It is set out in the submission that there are a total of 5 appeals and referenced DU02-FL0148 and DU02-FL0190. The submission also referenced the submission made by the applicant that had been sent to the appellant affording an opportunity to respond. A request was made to afford the right to study the applicant's letters before any comment is made on the on the Department's Statement to the FAC.

The submission asserts that the licenses and the process to grant them is contrary to the FSC INTERIM FOREST STEWARDSHIP STANDARD FOR IRELAND (in particular Principle 4) and includes the web addresses <https://connect.fsc.org/document-centre/documents/resource/360> and <https://connect.fsc.org/document-centre/documents/retrieve/9c4c52a8-042b-49b4-aece-bf41df07748d?mode=view#viewer.action=download> and states that this forestry certification standard comes in to force on the 15/07/2024.

The submission contends that the In Combination Assessment is deeply flawed and the Department has failed to note the omissions of pertinent detail (including trails, watercourses, heritage structures including monuments) on the maps. It states that the In Combination Assessment is not the same thing as a Cumulative Impact Assessment.

The submission also contends that the response to the appeal by the Department does not address the appellant's concerns and grounds and submits that there are multiple legal and procedural errors by DAFM in assessing and awarding a felling license, including inadequate environmental assessments, failure to protect wildlife and public interests, and insufficient public notification processes. The submission contends that the overall contention is that these shortcomings render the license inconsistent with European and national laws and submits that a refund of the appeal fee is made and seeks improvements in DAFM's decision-making processes.

Comments are made (in summary) as follows;

- It is not clear whether compliance of the original forestry permission has been complied with from the documentation available and indicators on the ground is that Coillte have not complied with the original license and that unauthorised works have taken place. It is not clear whether the original license granted was in compliance with all the statutory obligations & in particular EU Law.
- Non-compliance with Habitats Directive: Assessments under Article 6(3) of the Habitats Directive must be comprehensive and precise and this has not happened here. The Department of Agriculture, Food, and the Marine (DAFM) cannot lawfully issue a license without ensuring the proposed development will not harm any European sites. The AA Screening process used is deficient, as illustrated by inconsistent determinations by different officials without a clear validation process. DAFM's approach is flawed and contradicts the precautionary principle, especially concerning the Wicklow Mountains SPA and potential impacts on bird species like the Merlin and Peregrine Falcon.
- Harvest Plan Standards: The Harvest Plan should be scaled at a minimum of 1:5000, but even this is deemed insufficient for the small project area. The plan lacks important details, such as haulage direction and nearby dwellings, making it inadequate for proper assessment.
- Protection for Recreational Trail Users: The Montpelier Loop Recreational Trail and all the trails that the public uses are not properly shown on maps, and there is no assessment of the project's impact on trail users. The license lacks safety conditions to protect public trail users during timber extraction, which is a serious oversight.
- Unenforceable License Conditions: Conditions 10 and 11 in the license merely reiterate legal responsibilities rather than imposing enforceable conditions.
- Inadequate Public Notice: DAFM's reliance on its website for public notification of felling license applications is inadequate and not compliant with Article 6(2) of the Aarhus Convention. There needs to be more effective notification methods, such as local site notices, to ensure public awareness and participation.
- Rights of Way and Access by third parties have not been identified nor the impact of such works on their entitlements have been communicated to these parties.
- Inconsistent Wildlife Protection: Ireland lacks a general system of protection for wildlife, particularly birds, during breeding periods as required by the Birds Directive. National law exemptions for forestry activities mean the license does not ensure the protection of nests and eggs, making it inconsistent with European Law.

- **Lack of Assessment for Annex IV Species:** There has been no assessment of the impact on Annex IV species (e.g., bats and otters) as required by Article 12 of the Habitats Directive. The responsibility lies with the Minister to conduct these assessments, but no evidence of such evaluations exists in the project documentation.

#### **Appellant submission 19/07/2024**

The appellant made a follow up submission dated 19/07/2024 which indicated that the comments made in the email dated 12/07/2024 apply to all four appeals (DU02-FL0171, DU02-FL0174, DU02-FL0175 and DU02-FL0148) and should be noted and included for consideration as such. The submission also referenced a fifth appeal (relating to DU02-FL0190) and referenced that another party (WID) have also submitted an appeal for same. The comments/grounds of appeal made by WID in the appeal were included in the submission. The appeal grounds in relation to the fifth referenced appeal were also attached. The submission referenced that further licenses have been granted and indicated that they had not been aware of them.

The submission contends that the Minister's Response has failed to take onboard the impact of all these licenses cumulatively and failed to use Ministerial discretion to seek third party opinions such as prescribed bodies and that no precautionary principle has been applied. It contends the Local Authority's opinion as sought through a referral cannot be deemed to be independent as it contends that they have a vested interest in the licenses being permitted (JA0040) and indicating that the applicant and the Local Authority are co-applicants in respect of JA0040 and that the documents in the planning file confirm this. It also asserts that some of the license conditions are unenforceable, and that the In Combinations reports submitted are deficient.

The submission contends that the appellant has received a response from the applicant that would indicate that the applicant knows what the FAC are going to state in their decision. The appellant submits that they have not had sufficient time to make a comment on the applicant responses as supplied by the FAC to them. The submission contends that not all the documents referenced in the Coillte & Ministerial correspondence for comment have been supplied to them. The submission seeks access to all information (pertaining to the need for such licenses by [redacted] and their partners [redacted]) and any other parties in this process have access to before they can make a complete response. The submission expresses concern at the alleged omission of information, the accuracy of documentation and mapping and the alleged poor assessment which it submits hardly denotes scientific certainty being adhered to and employed and no evidence of the precautionary principle.

The submission sets out that the appellant understands that the licenses may have a set duration, but the planning permission does not have a set duration of years and submits that this is contrary to the EIA Directive as is the project splitting nature of the umbrella group of licenses being sought by the applicant and the Local Authority.

### **Treatment of Post Appeal Submissions**

The FAC notes that post-appeal submissions were made by the applicant, appellant and the DAFM. In the interest of clarity and for the avoidance of doubt, in considering the post-appeal submissions (and associated e-mail correspondence), the FAC had regard only to those matters it deemed to be an elaboration or clarification of points raised in the grounds of appeal proper and responses to the grounds from the parties.

### **Considerations of the FAC**

The FAC considered all of the submissions and material provided to it by the parties, including the record of the decision and as alluded to above had regard only to those matters it deemed to be an elaboration or clarification of points raised in the grounds of appeal proper and responses to the grounds from the parties. As the parties were informed, the FAC considered the documentation related to the decision as provided by the Minister on the publicly available Forestry Licence Viewer. The Appellant has suggested that not all the documents referenced in the [redacted] and Ministerial correspondence for comment have been supplied to them and that all information pertaining to the need for such licenses by [redacted] and their partners [redacted] and that any other parties in this process have access to, should be made available to them. In the interest of clarity, the FAC confirms that the file record relating to the licence under appeal in this case, as is available to the FAC, is the same as is available to the appellant.

The FAC considered whether an oral hearing was required in the case of this appeal and having regard to the particular circumstances of the appeal the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The FAC considered the grounds of appeal 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 the planning permission application or the decision of An Bord Pleanála. Furthermore, the FAC understands its remit not to extend to making 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 the 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 on 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 Forestry Licence Viewer (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 FLV records the application as being published on 05/04/2023. The DAFM go on to state that the application pack was advertised on 12/04/2023 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 would understand its remit not 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 felling licence DU02-FL0174. The Appellant also makes submissions in relation to impact on otter but 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 grounds go on to make some general references to otter and bats and refer to Massey's wood. Massey's (also referred to as Massy's in some documents) wood comprises a different area and application to that under appeal FAC 087/2023. Licence DU02-FL0174 relates to an area of naturally regenerating forestry post an earlier felling and is a habitat type not 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 as it relates to these grounds.

The Appellant in a post appeal submission in effect goes on to claim that the Wildlife Acts are themselves deficient in relation to Annex IV species and birds but does not substantiate this and the FAC does not consider its remit to 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 in itself might constitute a serious or significant error as it has no specific 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 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. The FAC would understand that submitting 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 Minister did consider plans and projects in-combination with the proposal in the Appropriate Assessment screening. The FAC is not satisfied that an error occurred in the making of the decision in this regard.



The grounds make further submissions in relation to the planning process and the views of the Heritage Officer and Inland Fisheries Ireland but these related to the planning application. The tree felling application was referred to the local authority and Inland Fisheries Ireland and neither made any submission. While it is well known that tree felling can have a negative impact on water quality this is dependent on a number of factors including the nature of the works, including any good practice measures, its location and the status of any waterbody that might be impacted. In this case 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, while the conditions make some reference to the Standards, the FAC would understand that adherence with the Standards for Felling and Reforestation (DAFM, 2019) have not been included in the conditions and no reason for their absence has been provided. The FAC would consider this to be a serious error 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. The application identified two recorded monuments within the site boundary. The application was considered by a DAFM Archaeologist who prepared a report and recommended specific conditions be attached to the licence and the licence was issued with the conditions attached. The report identifies the monuments as a standing stone and enclosure and the conditions relate to operational setbacks and archaeological monitoring. The grounds make general contentions regarding the treatment of a standing stone but these appear to relate to anti-social activities of members of the public. The grounds make further reference to Massey's wood which is a different location. 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. While the FAC is not satisfied that a serious or significant error was made in relation to these grounds it notes that condition number 13 in the licence sets out specific archaeological and architectural heritage protection requirements which shall be fully complied with while also referencing that the archaeological and architectural heritage protection report and illustrative map are attached for further details. The FAC considers that this 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 Minister should take the opportunity to resolve any ambiguity that might arise from the wording in condition number 13 when making a fresh determination on the licence application.

The grounds make a number of general references to the EIA Directive. In considering this aspect, the FAC notes 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 and replanting of trees. 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 separate 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 in the appeal relating to Appropriate Assessment (AA) and related matters. The Forestry Regulations 2017 provide,

*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 Appropriate Assessment.

The application was accompanied by a pre-screening document that provided information in relation to the proposal and European sites. The FAC noted that this document referred to the incorrect townland (Kilakee). However, in the context of the overall details of the application and extensive mapping, the voluntary nature of the submission, and the details contained in the Minister's notice it was considered that this was a minor typographical error.

The FAC finds that the DAFM recorded a screening for Appropriate Assessment (AASRD) and concludes that an Appropriate Assessment was required in relation to one European Site, namely, Wicklow Mountains SPA IE0004040. The FAC also finds that there is also an Appendix C in the AASRD which is described as a *Screening Validation* as carried out by a consultant Ecologist, Envirico Ltd on behalf for the Minister for Agriculture, Food and the Marine.

While marked as an Appendix to the Inspector's report (AASRD) the Appendix C is dated 07/11/2023 and overturns the inspector's screening conclusion for Wicklow Mountains SPA IE0004040. The FAC finds that this represents a serious 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 is suggesting to be the actual screening conclusion as an Appendix to the primary document. 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 does not consider that there is any reason for such an approach to be employed and that it introduces a significant lack of clarity to the document. Furthermore, the Appendix C is dated 07/11/2023 and an Appendix cannot postdate the report it is attached / appended to which in this case is 17/10/2023. The FAC considers that this sequencing error is significant as it is fundamental to the processing of the Appropriate Assessment of the proposal. The FAC further finds that a reliance is made in the In-Combination assessment on file (which the FAC understands is for screened out sites which is dated 13/10/2023) on the DAFM AASRD which itself is dated 17/10/2023. The FAC further finds that this represents a further sequencing error in that the In-Combination Assessment Report cannot rely on an AASRD that postdates it. The FAC considers that this further sequencing error is significant as it is also fundamental to the processing of the Appropriate Assessment of the proposal.

Notwithstanding the sequencing error in relation to the In-Combination Assessment and the DAFM AASRD the FAC finds that there is no In-Combination assessment for the site previously screened in by the inspector (Wicklow Mountains SPA IE0004040) as the screening conclusion of the Inspector was overturned by the consultant ecologist sometime after the In-Combination assessment was completed according to the date on same. The FAC finds that this represents a further error in the processing of the application in so far as Appropriate Assessment of the project is concerned.

Also in relation to In-Combination assessment the FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and an Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. Notwithstanding the serious error identified by the FAC in relation to the sequencing errors addressed earlier in this letter, it appears to the FAC that it is not clear that the wording in the In-Combination statement relating to the screened out sites demonstrates that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as the wording refers to

consideration on the basis that there is no likelihood of 'residual effect(s)' that might arise, which are not significant in themselves, creating a significant effect in combination with other plans and projects.

In the FAC's view, the reference to 'residual effects' in the In-Combination report / assessment on file dated 13/10/2023, that appears to deal with the screened-out sites, (notwithstanding the sequencing error referenced above) creates confusion as it is not clear what effects are being referred to in this instance and there is no explanation as to what gives rise to these effects such that they can be described as being 'residual'. The FAC would understand that the term residual is generally used in the context of what remains after an action is undertaken. In the context of Appropriate Assessment (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 Appropriate Assessment entitled 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.

The Appellant submits 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 application mapping identifies forest roads and recreational trails and the proposal is within a wider area of commercially managed forest. The Standards for Felling and Reforestation address the matter of safety signs and 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 does not consider that the Minister has established an exact legal standard as suggested by the Appellant. The Application included a number of maps relating to DU02-FL0174 at varying scales including at 1:10,000, 1:6,001, 1:5,000, and 1:2,101. The FAC does not consider that there is any reason to conclude that the application was deficient in relation to these grounds.

The FAC further finds that the iteration of the County Development Plan (South Dublin County Development Plan 2016-2022) has been superseded by a new plan (which was in force at the time the In-Combination Assessment was completed i.e. 13/10/2023) that being 'The South Dublin County Development Plan 2022-2028' which was made on 22/06/2022 and came into effect on 03/08/2022. The FAC considers that this represents a further error in the processing of the application in this case.

The DAFM has stated that 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 FLV records the application as being published on 05/04/2023. The DAFM go on to state that the application was advertised on 12<sup>th</sup> April 2023 and the public could make submissions for a period of 30 days. In the case of this application the FAC notes that the further information sought by the DAFM from the applicant (06/06/2023) and the subsequent response was not made available on the FLV until after the appeal was submitted. The FAC finds that this represents a further error in the processing of the application as the DAFM has not adhered to its own requirements in this connection.

Based on the evidence before it, as outlined above, the FAC is satisfied that a series of significant or serious errors was made in the making of the decision to issue DU02-FL0174. The FAC is thus, setting aside the decision and remitting same to the Minister in accordance with Section 14B of the Agriculture Appeals Act 2001 as amended, to carry out an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and to address the other issues identified previously in this letter before a new decision is made on the application.

Yours sincerely,

 Seamus Neely

On Behalf of the Forestry Appeals Committee