



19th November 2024

Subject: Appeal FAC 088/2023 regarding DU02-FL0175.

Dear I

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 14A(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.

DECISION.

Having regard to the evidence before it, including the Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statements of Fact (SoF) provided by the DAFM, all materials on file, the notice and grounds of appeal, the post-appeal submissions and, in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence DU02-FL0175.

THE LICENCE.

Licence DU02-FL0175 is for felling (thinning) of 42.11 Ha. of forest, 75% of which is Mixed broadleaved woodland, 20% of which is Mixed broadleaved/conifer woodland and 5% of which is Conifer Plantation.

The application for the licence was submitted to the DAFM on the 24th of March 2023. A decision approving the licence was issued on the 15th of November 2023 subject to 38 Conditions including adherence to the mitigation measures set out in an Appropriate Assessment Determination (AAD) which was stated to be attached to the licence and a condition setting out archaeological and architectural heritage protection requirements.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC was held remotely on the 2nd of October 2024 which considered the appeal against the decision DU02-FL0175 as dated 11th November 2023. The FAC members present were:

Mr. Seamus Neely (Chairperson), Mr. Vincent Upton, Mr. Luke Sweetman and Mr. Iain Douglas.
Secretary to the FAC: Ms. Aedín Doran.

BACKGROUND.

The proposal consists of the felling (thinning) of 42.11 Ha. of broadleaved high forest, mixed high forest and conifer plantation high forest composed primarily of Beech, Oak, and to a lesser extent, Sycamore, Ash, Alder, Birch, Western Hemlock, European Larch, Japanese Larch, Lawson Cypress, Sitka

Spruce, Norway Spruce, Noble fir, Silver fir, Spanish Chestnut and other broadleaves, planted between 1850 and 2004. The thinning is for the purpose of Continuous Cover Forestry (CCF), a method of forest management which allows for the felling of trees in small coupes with the intention of allowing more light to reach the forest floor to support the natural regeneration of tree seedlings. This approach improves the growing conditions, available light and nutrients, for the remaining trees. The site is referred to as Massey's Wood or Massy's Wood.

The soils on the site are described as predominantly Peaty gleys and Podzols (Peaty), with some Mineral alluvial and Shallow brown earths/Grey brown podzols. The slope is described as Moderate (15% or less), sloping in a north-easterly direction. The habitat on the site is Mixed broadleaved woodland, Mixed broadleaved/conifer woodland and Conifer Plantation.

The site lies in the Liffey and Dublin Bay Water Framework Directive (WFD) Catchment and the Dodder_SC_010 Sub-catchment. The site is located within the Owenadoher_010 River Sub-Basin. The WFD River Waterbody Owenadoher_010 (Segment Ref. 09_341 the Jamestown River, (a 3rd Order stream) flows through the eastern section of the project area in a northerly direction. The Owenadoher_010 River Waterbody had Moderate Status in the period 2016-2021 and is identified as being At Risk in the WFD 3rd cycle. Forestry is not identified as a pressure on this river waterbody. The underlying groundwater body is the Kilcullen IE_EA_G_003 which was of Good status in the 2016-2021 monitoring period and is stated as being At Risk in the WFD 3rd cycle.

The application documents before the FAC included an Application Pack dated 24th of March 2023 consisting of an Application Form, Application Map, Location Map, Harvest Plan Map, Reforestation Maps and a CCF Management Plan for Massey's Wood. There was also an Appropriate Assessment Pre-Screening Report & NIS submitted as prepared by the applicant and both are dated: 20th April 2023. A separate undated Harvest Plan Map (pre-licence) was uploaded to the Forest Licence Viewer (FLV) on the 11th of May 2023.

The licence application was referred to South Dublin County Council (SDCC) and Inland Fisheries Ireland (IFI) on the 12th of April 2023. There is no record of a reply from either referral body.

The DAFM file on the FLV includes an Appropriate Assessment Screening Report & Determination (AASRD) dated 17/10/2023, an In-combination report for Felling and Reforestation project DU02-FL0175 dated 13/10/2023 (the FAC understands this is described as an appendix to the AASRD dated 17/10/2023), an Appropriate Assessment Determination (AAD) Report dated 08/11/2023, an In-combination report for Felling and Reforestation project DU02-FL0175 dated 17/10/2023 (the FAC understands this is described as an appendix to the AAD dated 08/11/2023), and an Archaeology Report dated 24/10/2023 and approved by the National Monuments Service 27/10/2023.

The applicant's Appropriate Assessment Pre-Screening Report identified 12 Natura 2000 sites within 15 km of the proposed felling ; Ballyman Glen SAC (Site Code 000713), Dalkey Islands SPA (Site Code 004172), Glenasmole Valley SAC (Site Code 001209), Knocksink Wood SAC (Site Code 000725), North Bull Island SPA (Site Code 004006) North Dublin Bay SAC (Site Code 000206), Poulaphouca Reservoir SPA (Site Code 004063), Rockabill to Dalkey Island SAC (Site Code 003000), South Dublin Bay and River Tolka Estuary SPA (Site Code 004024), South Dublin Bay SAC (Site Code 000210), Wicklow Mountains SAC (Site Code 002122), and Wicklow Mountains SPA (Site Code 004040).

On the basis that there is a downstream hydrological connection from the site to South Dublin Bay and River Tolka Estuary SPA, North Bull Island SPA and North Dublin Bay SAC the proposal proceeded to AA (Stage 2) The Natura Impact Statement (NIS) prepared by the applicant included an additional Natura 2000 site, the Wicklow Mountains SAC (Site Code 002122). The NIS identified mitigation

measures for each of the relevant Qualifying Interest(s) for the SACs and Special Conservation Interest(s) of the SPAs.

The DAFM AASRD identified 13 Natura 2000 sites (the same 12 as identified by the applicant and additionally Red Bog SAC (Site Code 000397) and screened in only the Wicklow Mountains SPA (Site Code 004040) as requiring AA due to the possible effect on potential habitat for Merlin (*Falco columbarius*) and the Peregrine Falcon (*Falco peregrinus*) both Special Conservation Interests of the Wicklow Mountains SPA.

The DAFM AAD of 08/11/2023 states that it took into account *inter alia* the DAFM AASRD and applicant's NIS and determined that, subject to the implementation of a detailed site-specific mitigation measure for Merlin (to be included in the licence), the proposed felling (thinning) by itself or in-combination with other plans or projects, will not adversely affect the integrity of any of the European Sites listed previously in the AAD, having regard to their conservation objectives. The AAD concluded that, based on the best scientific knowledge in the field, the proposed felling (thinning) would not adversely affect the integrity of any European site.

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 additional 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.

The file records that there was no third-party submission on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application. The grounds of appeal, in brief summary, are as follows:

1. There was no public notice as required by the Forestry Act 2014 and relevant regulations and that there was no effective public participation on the licence.
2. Post-permission surveys are required to determine whether a Derogation Licence is required which is contrary to EUCJ Case 463/20 Namur Est.
3. The surveys for bats carried out in 2019 are out of date and cannot be relied upon to determine whether a Derogation Licence is required and that the FAC cannot rely on them in reaching a conclusion of no significant effects on the environment or Natura 2000 sites and protected species.

- 4,5,6 The 2019 survey for otter (a Qualifying Interest of the Wicklow Uplands SAC) is out of date and not carried out in accordance with the NRA Guidelines on Ecological Surveying Techniques for Protected Flora & Fauna 2008
7. The FAC has no information to allow it to conclude that the proposed felling will not have a significant effect on otter or other Annex IV species.
8. That a derogation licence can only be granted for the purpose of protecting flora & fauna and not to facilitate a tourism development.

Attached to the main grounds of appeal were "Further Grounds and Links to documents and files to be included and used in this appeal."

- a. Project splitting, the felling licence should have preceded the planning permission and should have been part of the EIAR for that project.
- b. The Dublin City Otter Report of 2019 indicated increased otter activity in the Dodder Catchment.
- c. The comments of the SDCC Heritage Officer on LRD23A/0002 regarding out-of-date reports and IFI regarding risks to the Owenadoher/Dodder Catchment.
- d. A number of specified plans & projects have not been included in the cumulative assessment.
- e. Dublin Mountain Visitor Centre (DMVC) got planning permission without tree felling licences, Ballycullen/Oldcourt Local Area Plan (BOLAP) identifies additional tributaries, a vulnerable aquifer and 2 unauthorised dumps on Hellfire Mountain and that Woodtown Stream and rivers have been omitted from BOLAP.
- f. There has been no hydrology report on the effect of the proposal on the underground lake on Hellfire Mountain & Dodder Catchment
- g. Drains exiting the forestry have not been mapped to ensure there is no impact on the Dodder and the Natura 2000 site into which it flows, from pollution and siltation.
- h. There has been no assessment to minimise soil disturbance, to address carbon loss, sedimentation risk or nutrient loss.
- i. Four licences granted and currently on appeal (DU02-FL0148, DU02-FL0171, DU02-FL0174, DU02-FL0175) represent project splitting.
- j. Coillte has not disclosed that it is a partner in the DMVC.
- k. The applicant has not identified all National Monuments or Protected Structure in the site.
- l. Unauthorised works on-site have not been reported to the National Monuments Service.
- m. Tree removal within the curtilage of a National Monuments or Protected Structure will impact on their setting and as such requires planning permission.
- n. The impact of the proposal on a number of Annex IV species has not been assessed.
- o. There has been no hydrological assessment of the proposal on the Owenadoher Catchment.
- p. There has been no assessment of the cumulative impact of this licence and the three other licences on the natural & built heritage of the area, including iconic trees.
- q. The Felling licence should have been acquired before the EIAR for the DMVC was prepared and should have been considered as part of the EIAR.

Post-Appeal Submissions.

Post-appeal submissions were made by the applicant and appellant. All Post-appeal submissions were circulated to all parties. 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 by the parties in the grounds of appeal proper and responses to those grounds.

CONSIDERATION BY THE FAC.

At its sitting on the 2nd October 2024, the FAC had before it the full DAFM record of the decision as made available on the FLV, the Notice of Appeal Form, the grounds of appeal, the Statement of Fact

(SoF) provided by the DAFM, post-appeal submissions and all materials on file. The Appellant has suggested that not all the documents referenced in the Coillte and Ministerial correspondence for comment have been supplied to them and that all information pertaining to the need for such licenses by Coillte and their partners SDCC 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 on the FLV, is the same as is available to the appellant.

The FAC having reviewed all the documentation and submissions, including that of the appellant, considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal which is dated the 18th of June 2024 confirms the administrative details of the licence application. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

The SoF also contains a statement from the Forestry Inspectorate dated the 19th of June 2024 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and responses to a number the grounds of appeal.

Also on file is a response from the DAFM Archaeologist to the grounds of appeal relating to archaeology dated the 11th of June 2024.

GROUND OFS OF APPEAL.

The FAC considered the appellant's grounds of appeal under the headings, Public Notice & Public Participation, Bat & Otter Surveys & Derogation Licence, Annex IV Species & Article 5 of the Birds Directive, Project Splitting, Water Quality, and Archaeology. Appropriate Assessment and Harvest Plan & Other Matters.

Role of the FAC.

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 consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures.

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 does not extend to determining 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.

Public Notice & Public Participation.

This ground of appeal contends that there is inadequate and ineffective public notification of felling licences, in contravention of the Forestry Act 2014 and the Forestry Regulations 2017 (as amended) and is not compliant with the Aarhus Convention.

In considering this ground of appeal the FAC noted the comments of the Forestry Inspector dated the 19/06/2024 in the DAFM SoF that its chosen method of notifying the public of felling licence applications is through the FLV on its website.

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 FAC does not consider that the Forestry Act 2014 requires any additional notices to be made in relation to the application as suggested in the grounds.

The FAC concluded that the public was notified of the licence application through the FLV in accordance with the DAFM procedures and the provisions of the Forestry Act 2014 and Forestry Regulations 2017 and does not consider that an error occurred in relation to the making of the decision in relation to these grounds.

Bat & Otter Surveys & Derogation Licence.

The grounds contend that the surveys carried out for the Dublin Mountains Visitors Centre (DMVC) are out of date and no longer relevant and that new surveys are required if a derogation licence under Regulation 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 – 2021 is required.

The grounds contend that the application is predicated on the necessity to carry out surveys (post licence) 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, was predicated on the necessity to carry out post permission surveys.

The grounds further contend that such post-appeal surveys are not compatible with EUCJ Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne* and *O'Donnell v An Bord Pleanála* Case 2021/251 JR. The FAC noted that both of these cases deal with Derogation from the Strict Protection for Animals set out in Regulation 54 of the Habitats Regulations for which the Minister for Housing, Local Government and Heritage is responsible.

The grounds refer to bat surveys carried out for the DMVC planning application and that they are out of date and refer to the information contained in Section 6.5.2.5 of the Final EIAR dated 23.12.19. The FAC noted that in Section 6.5.2.5 trees within 30m of the canopy bridge in Massey's Estate (otherwise known as Massey's Wood, the location of this licence) were surveyed and were categorised as having "Low" potential for bat roosting sites and that no bats were found in the bridges over the Glendoo Brook also within Massey's Wood, notwithstanding the number of "bat passes " and individual "Bat trees with bat potential" identified in Massey's Wood. The appellant has adduced no evidence that there are bat roosts within the area of licence DU02-FL0175 or has identified a reason as to how the felling of a managed forest as applied for and licenced might have a significant effect on the species.

The grounds refer to the Dublin City Otter Survey 2019 stating that the report indicates increased otter activity in the Dodder Catchment. The FAC noted that the area covered by the Dublin City Otter Survey 2019 was confined to inside the M50 Motorway some 1.5 Km north of the site. The appellant has adduced no evidence that otter is present within the area of licence DU02-FL0175 or has identified a

reason as to how the felling of a managed forest as applied for and licenced might have a significant effect on the species.

The appellant provides no convincing evidence to substantiate this claim nor explains how the proposal might have a significant effect on otter or bat species

The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. The FAC considers that Derogation Licences are the responsibility of the Minister for Housing, Local Government and Heritage and is therefore not a matter that falls within its remit under the Forestry Act 2014.

Annex IV Species & Article 5 of the Birds Directive.

This ground of appeal contends that FAC has no information to allow it to conclude that the proposed felling will not have a significant effect on otter or other Annex IV species nor have any of the surveys relied upon in the licence application given scientific certainty on the impact of the thinning on 11 key ecological receptors identified in the grounds by photographs. The FAC noted that the photographs were of fauna, habitats and flora.

The FAC noted that there is no convincing evidence submitted that any species protected under Annex IV of the Habitats Regulations 2011 (as amended) would be adversely impacted by the proposal. The FAC considers that the granting of a forestry licence does not relieve the recipient of their responsibilities under the Wildlife Acts to obtain a derogation licence where works undertaken may result in the deterioration or destruction of breeding sites or nesting places of Annex IV species, even where such destruction is not deliberate.

In relation to the appellant's stated ground of appeal that the DAFM procedures are not consistent with the requirement for providing a General System of protection commensurate with Article 5 of the Birds Directive and that the Wildlife Acts are themselves deficient in relation to Annex IV species and birds. The FAC noted that the Appellant has not substantiated these claims 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 might constitute a serious or significant error in itself as it has no real impact on the decision.

The FAC is not satisfied that an error was made in granting of the licence in relation to these grounds of appeal.

Project Splitting.

This ground of appeal contends that there has been "project splitting" (taken by the FAC as a reference to the EIA Directive) between the proposed felling and the Dublin Mountains Visitors Centre (DMVC) granted planning permission by An Bord Pleanála Ref: JA06S.JA0040. The appellant also refers to the separate licence applications DU02-FL0171, DU02-FL0174, DU02-FL0175 and DU02-FL0148 as constituting "project splitting".

Project splitting is predicated on a project being subject to Environmental Impact Assessment. The FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on

a case-by-case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish Forestry Regulations 2017 (as amended).

The proposal before the FAC is for 42.11 Ha of forest thinning for Continuous Cover Forestry, the FAC concluded that the felling of trees and natural regeneration as part of a forestry operation with no change in land use, does not fall within the classes referred to in the Directive, and is not covered by national regulations. The FAC is not satisfied that an error occurred in the making of the decision in this regard.

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. In the AASRD In-combination Report of 13/10/2023 the Minister did consider the cumulative impact of licences DU02-FL0171, DU02-FL0174, and DU02-FL0148 with DU02-FL0175 amongst a wide range of other plans and projects.

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 obtain 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 is not satisfied that an error occurred in the making of the decision in this regard.

Water Quality.

The grounds contend that there has been no hydrological assessment of the impact of the proposal on the Dodder catchment, a hydromorphological assessment of the Owenadoher Catchment and the impact of the proposal on water quality through siltation and sedimentation.

The FAC noted from the publicly available EPA website that the Owenadoher_10 river waterbody is "At Risk" with "Urban Run-off" listed as the Significant Pressure. The FAC noted that the project description does not indicate that any new drainage is proposed; that the proposed thinning is required to comply with the licence Conditions which include a 10m wide exclusion zone alongside aquatic zones; and a number of other Conditions designed to protect the aquatic environment.

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 of the Dodder and Owenadoher catchments. The FAC would understand from the DAFM Forestry Inspectorate submission that it is the general policy of the Minister to Condition felling licences to adhere to the DAFM Standards for Felling and Reforestation (2019) which provides specific measures related to the protection of water. The FAC noted however, that the licence at Conditions 32 and 35 requires the applicant to comply only with Section 8 of the Standards for Felling and Reforestation 2019 and no reason for the absence of the standards in their entirety has been provided. The FAC considers 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.

Archaeology.

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 one recorded monument 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 identified that the area of licence DU20-FL0175 contains a Recorded Monument/SMR site – a wedge tomb (DU025-022----) and two structures listed in the Recorded of Protected Structures (RPS) for South County Dublin – a section of the Military Road (RPS No. 385; NIAH No. 11221019) and the multi-roomed walled garden and other buildings and features associated with the former Killakee House (RPS No. 384; NIAH No. 11221018) and the conditions relate to operational setbacks and archaeological monitoring. The FAC further noted that the DAFM archaeologist report was endorsed by the National Monuments Service.

The grounds make general contentions regarding the treatment of a standing stone at a different location unrelated to DU02-FL175 and appear to relate to anti-social activities of members of the public. 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 4 specific archaeological and architectural heritage protection requirements which *"shall be fully complied with"*. Requirement 4 references the archaeological and architectural heritage protection report and illustrative map which contains 8 conditions which *"should be adhered to during the proposed works."* In the particular circumstances of this case, the FAC considered this to be a significant error as there is uncertainty as to whether the conditions set out in the report referenced as being attached to the licence are to be complied with or are included for *"further detail."* 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 FAC also noted the Archaeology Report on the FLV did not contain an *"illustrative map"*.

Appropriate Assessment.

The appellant contends that the AA Screening process is not compliant with law. Notwithstanding the fact that the appellant has adduced no convincing evidence that the AA Screening conclusion for licence DU02-FL0175 is deficient, as set out below the FAC has identified errors in the AA process and documentation.

Harvest Plan & Other Matters.

The appellant contends that the Harvest Plan submitted with the application is not to the requisite standard. 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.

The appellant contends that the stacking areas are located outside of the licence area, however this is not the case. Stacking areas are identified as being located alongside the existing forest roads within the site boundary. The appellant contends that the Harvest Plan mapping should be 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 licence application DU02-FL0175 included a number of maps at varying scales including 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.

In relation to recreational users the application mapping identifies forest roads and recreational trails, and the area is a commercial managed forest. The Standards for Felling and Reforestation 2019 address the matter of safety signage, and these Standards should be Conditioned as referred to below.

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

APPLICATION DOCUMENTATION.**Application Form, AA Pre-screening Report and NIS.**

In reviewing the documentation on file, the FAC noted that the application form submitted by the applicant states that the trees to be felled are located in the townlands of Cruagh, Jamestown (E.D. Whitechurch), Killakee Co. but that the applicant's AA Pre-screening Report and NIS refer to licence application DU02-FL0175 as being located in the townland of Dervgone, Co. Dublin which is different to those within which licence DU02-FL0175 is located and considers that this constitutes a serious error in both documents.

DAFM Appropriate Assessment Determination.

In reviewing the documentation on file, the FAC noted that at Section 3 of the DAFM Appropriate Assessment Determination on file as dated 8th November 2023 it is stated that the AAD took into account a number of documents, including the applicant's NIS, the DAFM AASRD, publicly available information from the NPWS and ecological and environmental information from a number of websites. The FAC further noted that the DAFM AASRD determined that the Wicklow Mountains SPA required Appropriate Assessment but that the applicant's AA Pre-screening Report had screened out that particular site for AA. The applicant's NIS examined potential impacts of the proposal on four different Natura 2000 sites: South Dublin Bay and River Tolka Estuary SPA, North Bull Island SPA, North Dublin Bay SAC and Wicklow Mountains SAC.

It is not clear to the FAC, in the absence of an Appropriate Assessment in the form of an NIS or a DAFM *Appropriate Assessment Report* (AAR) (a document prepared by or on behalf of the DAFM that fulfils the requirements of an NIS) what information the DAFM used to assess that the proposed thinning would not adversely affect the integrity of the Wicklow Mountains SPA subject to a specified mitigation measure.

The FAC considers that the DAFM reliance on an NIS that refers to an incorrect townland and the lack of an AAR constitutes a serious error in the processing of this licence application.

DAFM In-combination Reports.

In reviewing the documentation on file, the FAC noted that the AASRD In-combination assessment (Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project DU02-FL0175) it is stated that *"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 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'.

The FAC considers that it is not appropriate to consider potential "residual" effects of a proposed plan or project at the AA Screening stage. The FAC consider that this wording is ambiguous as it is not clear whether residual effects are being considered cumulatively in-combination with other plans and projects, or individually in-combination with other plans and projects, and that as a result it is unclear if the proper test has been applied.

In the context of undertaking a new AA screening the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion.

The FAC noted that the In-combination assessment for the AAD (Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project DU02-FL0175) referred to the objectives of the South Dublin County Development Plan 2016-2022 but that on the date the in-combination assessment was carried out (17/10/2023) the operative county development plan was the South Dublin County Development Plan 2022-2028 which came into effect on 3rd August 2022.

The FAC noted that the In-combination assessment for the AAD is titled *"Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project DU02-FL0175"* and that no Appropriate Assessment Report is on the FLV.

The FAC noted that the In-combination assessment for the AASRD is dated 13/10/2023 but that it refers to the AASRD dated 17/10/2023, further that the In-combination assessment for the AAD is dated 17/10/2023 and that it relies on the findings of the AAD itself which is dated 08/11/2023. In each case the In-combination assessments refer to reports which post-date the In-combination assessments. The FAC considered that an In-combination assessment cannot postdate the report to which it pertains.

The FAC considers that the lack of clarity in the wording of the In-combination conclusion, the use of an out-of-date county development plan and the sequencing of the In-combination assessments are serious errors in the processing of the AASRD and AAD of the licence application.

Licence.

In reviewing the documentation on file, the FAC noted that licence Condition 3 refers to and relies on DAFM Guidelines in relation to Water Quality, Biodiversity, Archaeology and Landscape however these Guidelines have not been attached to the licence. Furthermore Condition 35 of the licence refers to Section 8 of the *"Standards for Felling & Reforestation (2019)"* which are stated to be the *"universal standards that apply to all felling (thinning, clearfelling) and reforestation projects on all sites throughout Ireland"*. The FAC considers that reliance on only one section of the *"Standards for Felling & Reforestation (2019)"* when the standards contain other requirements relevant to the proposal is confusing and contradictory and therefore constitutes a serious error in the processing of this licence.

The FAC noted that Condition 12 of the licence states that *"only minor site level changes in the interest of environmental protection are permitted."*, the FAC also noted that the proposal was subject to Appropriate Assessment Stage 2 (NIS) which requires complete, precise and definitive findings and conclusions. The FAC considers that the wording of this Condition is insufficiently clear as to the meaning of the words *"only minor"* and therefore the words are open to a wide interpretation. The FAC considers that the lack of a consistent and objective interpretation of *"only minor"* that would ensure the implementation of the Condition for its intended purpose constitutes a serious and significant error in the making of the decision in this case.

CONCLUSION.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, the SoF submitted by the DAFM, and the additional submissions from all parties. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of significant or serious errors was made in the making of the decision in relation to licence DU02-FL0175. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence DU02-FL0175 to ensure that before a new decision is made the project is subjected to the Appropriate Assessment process such that the requirements of the law are met either through carrying out a new 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 having in place an Appropriate Assessment Report for the project should the findings of the screening require same, or have in place an updated NIS to address the errors identified by the FAC earlier in this letter. In making a new decision, the errors identified in the conditions should also be addressed.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee