



Irish Forestry Unit Trust

6<sup>th</sup> March 2026

**Subject:** Appeal FAC065/2024 regarding licence decision TFL01013024

Dear Sir/Madam,

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. The Agriculture Appeals Act 2001, as amended, and the Forestry Appeals Committee Regulations 2020 provide the statutory basis for the functioning and operation of the FAC.

#### **Hearing**

Appeal FAC065/2025 was considered by the FAC at a hearing held remotely on 9<sup>th</sup> February 2026. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas & 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 Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statement of Fact (SoF) provided by the DAFM, submissions made, all materials file, the notice and grounds of appeal and, in particular, the considerations described in this letter, the FAC has decided to set aside and remit the decision of the Minister regarding licence TFL01013024.

#### **Background**

The appeal relates to the decision of the Minister for Agriculture, Food and the Marine to grant a tree felling licence on 79.11 hectares at Coollegrean, Co. Kerry. The forest is currently comprised of mature, coniferous plantation containing Sitka spruce. The felling would occur across six plots and five time

periods. The application included operational and environmental information and a series of maps describing the land and features in the locality. The maps identify a network of drains on the site, the location of silt traps and aquatic zones that cross and adjoin the site. The application notes that the lands lie within an SPA designated for Hen Harrier. The lands would be replanted with a mixture of Sitka spruce (85%) and birch (15%).

The mapping shows the lands as being located in a remote rural area with a mixture of open and forest habitat and minor roads to the west and north of the site. Wind turbines are located to the west of the forest. There are houses marked on the roads to the west and north and setbacks are identified on the mapping. The maps include setbacks from relevant watercourses and aquatic zones. There are no recorded monuments on the site.

The application was referred to Kerry County Council, Inland Fisheries Ireland and the NPWS and each made a response. The County Council identified the lands as being within an SPA and SAC and recommended that an Appropriate Assessment screening be undertaken. It also noted the location of the lands in relation to settlements and requested the consideration of the hydrology of the site particularly in relation to replanting. The NPWS/DHLGH noted the location within the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (SPA) and submitted that Appropriate Assessment was required if the works were to take place between 1<sup>st</sup> March and 15<sup>th</sup> August and that a minimum 15% open space should be retained in the restock site. It also noted the proximity to Lower River Shannon SAC and that adverse impacts must be avoided and consideration should be given to aquatic buffers, silt traps etc. It further submitted that consideration must be given to Annex IV species outside of the designated areas, particularly otter. The submission was accompanied by a document of general observations from the NPWS in relation to forestry application referrals. The IFI submitted that it had no objection in principle to the felling but noted the site proximity to an important salmonid habitat and emphasised the need to the protection of water through silt mitigation and ongoing monitoring, controlling invasive species, ensuring ground stability and other measures. It was also requested that the organisation be notified and that the works adhere with good practice guidelines.

The DAFM undertook a screening for Appropriate Assessment and identified four European sites specifically that lay within 15km of the felling site, Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161, Lower River Shannon SAC IE0002165, Blackwater River (Cork/Waterford) SAC IE0002170, Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC IE0000365. The area and proximity to European sites is described and it is noted that the rivers crossing and proximate to the felling site comprise the Knockawinna waterbody which has a good status. Each European site is considered in turn with its interests and objectives and reasons are provided for the screening conclusion. Other plans and projects were considered in-combination with the proposal. The document was prepared by a Forest Inspector and is dated 28<sup>th</sup> March 2024. The screening records the following Determination,

#### ***Screened-Out European Sites***

*Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry*

*(Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that there is no likelihood of the Felling and Reforestation project proposed under TFL01013024 having any significant effect, either individually or in combination with other plans or projects, on any of the following European site(s), for the reasons set out in Part A: Screening Report:*

- *Blackwater River (Cork/Waterford) SAC IE0002170.*
- *Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC IE0000365.*

***As such, the project does not advance to the appropriate assessment stage in relation to these European Sites.***

#### ***Screened-In European Sites***

*Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that it cannot be ruled out, based on objective scientific information, that the Felling and Reforestation project proposed under TFL01013024 will have a significant effect, either individually or in combination with other plans and projects, on the following European sites, for the reasons set out in Part A: Screening Report:*

- *Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161.*
- *Lower River Shannon SAC IE0002165.*

***As a result, the project must advance to the appropriate assessment stage in relation to these European Sites.***

The DAFM went on to prepare an Appropriate Assessment Report, dated 9<sup>th</sup> April 2024, that considered each of the interests of the two screened-in European sites, potential adverse impacts and mitigations. In relation to Hen Harrier, the measures include temporal restrictions and the planting of native broadleaf species along the external north and east forest edge. In relation to the Lower River Shannon SAC, the measures focus on the protection of water quality. Other plans and projects are considered. The report concludes,

*It is concluded that the proposed Felling and Reforestation project under TFL01013024, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site(s) listed above. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects on these European site(s). No potential significant cumulative effects are predicted with the plans and projects listed in Appendix A.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. This relates to the proposed activities under this project only. Any subsequent forestry-related activity requiring*

*consent/grant aid shall be subjected to the DAFM Appropriate Assessment Procedure, including an in-combination assessment with the current proposal, prior to any future consent being granted.*

The AA Report and screening was published and open for a period of public consultation as the application had been previously. No submissions were made by members of the public.

The DAFM prepared an Appropriate Assessment Determination dated 21<sup>st</sup> May 2024 that outlines the screening and assessment process and specifies the measures requirement. The Determination concludes,

*Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effects on the integrity of any European site.*

The record also includes a document entitled "Project Description, Environmental and Social Considerations" in which the application is considered across a range of criteria. The document concludes that the application is not required to be subject to the EIA process.

The licence was granted on 17<sup>th</sup> June 2024 subject to conditions.

## **Appeal**

There is one third party appeal and the full grounds of appeal were provided to the parties. In brief summary the grounds submit that,

- The original afforestation was not in full compliance with European law. That an EIA was required when the land was planted and any failure in law is required to be rectified before the project can be licenced.,
- The EIA Screening Determination is not adequately reasoned in relation to responses recorded and there has been project splitting in relation to a forest road.,
- The assessment carried out under Article 6(3) of the Habitats Directive is deficient. The grounds raise a number of concerns including that the mitigations are standard and must be bespoke, no field visit was undertaken, it would not be possible for the ecologist to undertake so many assessments if they were bespoke. There is an absence of scientific references. The restocking of the site has not been assessed, the views of the NPWS were not properly considered, the use of toxic chemicals was not considered in relation to the SPA, colonisation of adjacent lands by conifers was not assessed, other plans and projects were not properly assessed and the wrong County Development Plan was considered.,
- There was inadequate and ineffective public notice in contravention of Article 6(2) of the Aarhus Convention. The public consultation process was not effective and the approach of the DAFM is inconsistent across different consent processes.,
- Licence conditions are not conditions, with specific reference to (f) and (g).,

- Access is not demonstrated and part of the extraction route include areas not within the project site and rights of way are not demonstrated.,
- Re-stocking on deep peat is inappropriate and contrary to Ireland's climate ambitions.,

The notice goes on to summarise the grounds and criticise the appeals process and requests an oral hearing.

### **Minister's statement**

Under 7(2) of the Forestry Appeals Committee Regulations 2020 (S.I. No. 418/2020), the Minister is required, in relation to each notice of appeal, to provide to the FAC,

*(a) a statement showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and*

*(b) information, documents or items in the power or control of the Minister that is relevant to the appeal.*

The DAFM provided a statement (SOF) providing an overview of the decision and responding to the appeal, a full copy of which was provided to the parties and considered by the FAC. As the parties were advised, the FAC relied on the record of the decision as provided by the Minister on the online Forestry Licence viewer (FLV). The statement submitted that the decision was issued in accordance with DAFM procedures, SI 191 of 2027 and the Forestry Act 2014, as amended, and sought to contest the grounds. In brief summary the DAFM submitted that,

- Prior to 2001 the Minister for agriculture had no role in applications for afforestation as the Local Authority was the consenting authority under the Planning and Development Act 1961. The EIA threshold for afforestation was 200 hectares in 1990-1992 and the projects outlined by the appellant were below the threshold. The grounds fail to particularise the claim or identify a clear point of EIA case law, identify any applicable point or principle under the relevant documentation, identified any other project proposed by the same applicant, supported their contention with evidence or expert opinion.,
- Clearfelling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within a specific category of project subject to the requirements of the EIA Directive.,
- DAFM disputes the assertion that there are lacunae in the AA process and outlines the approach adopted by the DAFM. The mitigations include measures that increase open space and will create a window of opportunities for breeding and foraging. An Appropriate Assessment was undertaken in relation to Hen Harrier and the SPA following DAFM procedures that were agreed with the NPWS. No submissions were made in relation to Hen harrier. The granting of a licence does not exempt the holder from meeting any legal requirements and it is the responsibility of the landowner to ensure species are not impacted. In relation to plant protection products (PPPs), these are governed by a number of statutory instruments and good practice guidance. Where employed, application is by hand and in a very targeted manner and users must be professionally

trained and cannot be used close to watercourses. The mitigations include measures in relation to the use of PPPs.

- The DAFM rejects the grounds that relate to public participation. The public consultation process adopted by the DAFM meets any obligations that might arise under the Aarhus Convention. An overview of the DAFM process is provided. That the DAFM provides for public consultation in relation to applications and, additionally, in relation to Appropriate Assessments and that information is published on the Forestry Licence Viewer (FLV). That the DAFM position is that the proposal was not a form of development that was subject to the EIA Directive. That the disclaimer on the FLV is appropriate and the FLV has been used by a range of individuals since its creation.
- The licence conditions referred to are legal duties with which the licence holder must comply.
- Forest Service guidelines in relation to peat do not prohibit replanting and the carbon balance differs between afforestation and replanting. In the absence of a condition in relation to replanting, the most likely outcome is that the forest would regenerate naturally. The grounds provide no basis to conclude that the licence contradicts climate change policy.,
- DAFM see no ground to dispute that the applicant has access to their property and the appellant has provided no information to suggest that the landowner has no legal access.,
- The grounds in relation to the appeals process do not relate to decisions of the Minister and the submissions in relation to the appeals process are contested.

#### **Further submissions**

The notice of appeal and the DAFM statement were provided to the parties and no further submissions were received.

#### **Considerations of the FAC**

At its sitting on the 9<sup>th</sup> February 2026, the FAC had before it the full DAFM record of the decision as made available on the Forestry Licence Viewer (FLV), the Notice of Appeal Form and grounds of appeal, the Statement of Fact (SOF) provided by the DAFM, and all materials on file. As the parties were notified, the FAC referred to the record of the decision as is made available on the publicly available Forestry Licence Viewer (FLV).

The FAC considered in the first instance the contention that the original afforestation was not in compliance with European law and that the DAFM cannot award a felling licence where they cannot evidence that the original afforestation of the lands was carried out in full compliance with the law. The grounds refer to “afforestation licence applications WP4277, OP4024 (12.93 ha) and OP1949 (2.5 ha)” and suggest that there was project splitting and that as the total area exceeded 50 hectares an EIA was mandatory.

The DAFM submitted that prior to 10<sup>th</sup> December 2001, the Minister had no role in applications for afforestation and that the consenting authority was the Local Authority and afforestation fell within the remit of the Planning and Development Act 1963 and that the threshold in 1990-1992 was 200 hectares. The statement goes on to claim that the grounds contain a number of shortcomings.

The FAC considered that the appellant had submitted no evidence to substantiate any of their claims regarding the planting of the lands. Furthermore, the grounds have not alleged that any significant effects on the environment have arisen since the planting of the lands. In relation to alleged "project splitting", according to the appellant the plantings took place ten or more years apart and the appellant has not claimed that the same person undertook both plantings. The FAC does not consider that there is any reason to consider that the Applicant had engaged in "project splitting" or had sought to avoid any regulatory requirement.

In relation to the 50 hectares threshold, the FAC would not consider that simply because two or more areas of forest were proximate to each other and constituted an area of greater than 50 hectares that an EIA would be mandatory. While the consideration of cumulative effects is required, the potential effects arising from afforestation would relate to both the change in land use and the specific operations that are entailed in the process many of which are of a temporal nature. Accordingly, it would not be reasonable to just assume that as a location has forests that together make up an area of 50 hectares that an EIA is required or that significant effects on the environment would arise without considering the characteristics of the forests themselves and the likelihood of such effects. The grounds allege that the afforestation of an area totalling 15.53 hectares occurred in 2002 but, even if this was to be considered as a single project it would still be below the established threshold for mandatory EIA.

The legislative regime has changed considerably at both EU and national level since the lands were afforested, based on the years identified by the Appellant. As noted by the DAFM, there have been changes in competent authorities and thresholds since the original planting years as identified by the Appellant. There have also been changes in the nature of the developments specified in the Annexes of the EIA Directive during this period and in relation to screenings and information provision.

The function of the FAC is to determine appeals concerning certain decisions of the Minister for Agriculture, Food and the Marine made under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. This legislation does not provide powers to the Minister to undertake the actions identified in the grounds and the challenge is in effect against Ireland's transposition of the EU EIA Directive. The FAC does not consider that making a determination on the transposition of the Directive by Ireland falls within the remit of the FAC.

The FAC was not satisfied that a serious or significant error or a series of errors was made in the making of the decision or that the decision was made without complying with fair procedures in relation to these grounds.

The grounds go on to contend that the EIA screening is not adequately reasoned and makes references to project splitting. The grounds note the responses recorded in relation to two questions on the record of the decision. The grounds question the process and submit that the determination is not adequately reasoned. The DAFM position is that the clear-felling and replanting of an already established plantation

forest is a standard operational activity and does not involve an activity or project that falls within the scope of the EIA Directive.

The grounds make reference to a forest road. The decision before the FAC is in relation to the tree felling licence TFL01013024 and not a licence for forest road works. The Agriculture Appeals Act 2001, as amended, provides for the appeals system and the appellant is not entitled to initiate a second, out-of-time appeal against a different decision as part of their appeal against TFL01013024.

The Forestry Regulations 2017 provide for the undertaking of screening for EIA and EIA in relation to forest road works. The grounds refer to the threshold of 2,000 metres applying to “the most benign of locations and circumstances” but the threshold is common across all such developments. The grounds do not allege that the forest road has been determined to be legally deficient by any authority, was based on a legally deficient decision, other than a general reference to project splitting, and have not submitted any reason or evidence in relation to significant effects on the environment that the Appellant considers to have arisen as a result of the forest road.

In relation to the Appellants further accusation of project splitting, the undertaking of forest road works does not rely on TFL01013024 and the forest road, by its nature, would serve a number of functions and activities. The FAC again considered that there is no reason to consider that the Applicant had engaged in “project splitting” nor had sought to avoid any regulatory requirements.

The EU EIA Directive (*Directive 2011/92/EU* as amended by *Directive 2014/52/EU*) defines an Environmental Impact Assessment (EIA) and identifies, in the Annexes, the projects which are required to be subject to EIA. The Directive sets out in Annex I, a list of projects for which Environmental Impact Assessment (EIA) is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation, nor any other class of development related to the proposal under appeal, are referred to in Annex I. Annex II contains a class of project specified as “initial afforestation and deforestation for the purpose of conversion to another type of land use” (Class 1 (d) of Annex II) and “Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.” (Class 13 (a) of Annex II).

The Irish Forestry Regulations 2017, 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 threshold where the Minister considers such development would be likely to have significant effects on the environment. The Forestry Regulations 2017 do not provide for the Minister to undertake an EIA in relation to a tree felling licence application. In this instance, the application is for the clearfelling of trees in a managed plantation that and would be replanted, with no change in land use, and does not constitute afforestation or deforestation for the purposes of land use change or any change or extension to an existing project. The operations are of a standard nature in the context of ongoing forest

management in Ireland and the standards of the DAFM. The FAC does not consider that there was a requirement to undertake a screening for Environmental Impact Assessment or an Environmental Impact Assessment in processing the tree felling application. The FAC correspondingly considered that the document referred to in the grounds and entitled *Project Description, Environmental and Social Considerations* was an EIA screening for the purposes of the Forestry Regulations 2017.

However, it is clear that the DAFM have adopted a specific procedure to assess such felling licences that requires consideration of a range of factors some of which may serve a purpose beyond the EU EIA Directive. It is also clear that in this instance procedural errors occurred in that the DAFM was required to provide further reasons where certain responses were recorded and that this did not occur. The DAFM did not contest that the errors had occurred. For reasons outlined separately the FAC was satisfied that serious errors were made such that the decision should be set aside and remitted to the Minister and in making a new decision, the FAC considers that the errors that occurred in the *Project Description, Environmental and Social Considerations* procedure should be rectified.

The FAC was satisfied that a series of errors was made in the making of the decision in relation to these grounds in that the procedure of the DAFM was not completed.

The grounds go on to submit that the assessment carried out under Article 6(3) of the Habitats Directive is deficient. The grounds raise a number of concerns including that the mitigations are standard and must be bespoke, no field visit was undertaken, it would not be possible for the ecologist to undertake so many assessments if they were bespoke. There is an absence of scientific references. The restocking of the site has not been assessed, the views of the NPWS were not properly considered, the use of toxic chemicals was not considered in relation to the SPA, colonisation of adjacent lands by conifers was not assessed, other plans and projects were not properly assessed and the wrong County Development Plan was considered.

The DAFM in response contested the grounds and submitted a description of the process. They submit that the replanting of the site was assessed and make reference to the potential use of developing forest by the Hen harrier. It is submitted that there is an agreed procedure as outlined in the publication "Hen Harrier Conservation and the Forestry Sector in Ireland" and the procedure is outlined. In relation to the use of plant protection products, the DAFM submitted that the use of such products is regulated by law and was assessed as part of the Appropriate Assessment.

Article 6 of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora states,

*3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall*

*agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

The Forestry Regulations 2017, as amended, 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.*

*(2) Subject to paragraph (8), if following an assessment in accordance with paragraph (1), in the opinion of the Minister the proposed development is likely to have a significant effect, either individually or in combination with other plans or projects, on a European site, or the Minister is unable to determine the likely effects of the proposed development on a European site, at any time following the application for the licence the Minister may require the applicant by notice in writing to furnish a Natura Impact Statement and the applicant is to furnish the statement within the period specified in the notice.*

The European Communities (Birds and Natural Habitats) Regulations 2011, as amended, require that where an Appropriate Assessment is considered to be necessary that the public authority shall carry out a public consultation and publish a notice of the proposal in a manner to be determined by the public authority.

The FAC considered that the Appellant's position is that the forest is not a suitable habitat for the species and that the land should be converted to another habitat and that the replanting threatens the SAC. However, this is not the application that was made to the Minister for Agriculture. The application to the Minister for Agriculture was for a tree felling licence. The Minister has published Standards for Felling and Reforestation which provide for the Minister to regulate replanting to a certain extent but the FAC do not consider that there are any provisions for the Minister to require the permanent deforestation of lands and the conversion of the lands to another habitat.

The grounds submit that there is no obligation in law to re-stock the site but the Minister in making a decision on a tree felling licence application would have to have regard to their own policies and broader government policies including those related to the protection of forests and Climate Change. The proposal, as applied for, included the replanting of the lands which is standard practice in commercial forestry and does not involve a change in land use. If the Minister did not condition the replanting of the site the applicant could likely replant the land without further conditions or could leave the trees in place and not fell it. In order to bring about the Appellant's suggested outcome, the landowner would need to deforest

the land permanently and take active and ongoing measures to attempt to create the different habitats identified in the grounds.

The grounds do not engage meaningfully with the conservation objectives of the site which include objectives in relation to the "Age structure of forest estate". The Appellant has not claimed to have any environmental or ecological expertise nor to have engaged such an individual. The grounds also make a number of claims that are unsubstantiated and unevidenced. The scientific paper that forms part of the basis of the submission relates to a study involving the administration of pesticides at sub-lethal doses to house sparrows (*Passer domesticus*). As the paper notes, the study relates to agricultural practices including the potential for food crops to be sprayed which would in turn be consumed by birds, as well as potential for contaminated arthropods and other sources. There are clear and obvious difference between the use of pesticides in agriculture and forestry. Of particular relevance would be the fact that forestry does not involve the planting of a food crop, such as a grain crop, and that pesticide use is limited in forestry to the establishment phase over a rotation of 30 to 40 years whereas pesticides may be used in agriculture on a much more regular basis, and that, where employed, pesticide use in forestry involves dipped plants and/or spot spraying as opposed to broadcast or more widespread spraying commonly employed in tillage agriculture. In addition, neither the submission nor the grounds provide a clear basis for concluding that the use of pesticides in the required regulated manner might have a significant effect on the SPA having regard to the conservation interests of the site. As noted in the DAFM statement and the licence conditions, pesticide use is regulated in Ireland and the granting of the licence does not remove any obligations on the licence holder or their agents to adhere to such regulations.

The measures specified in relation to Hen harrier are clear and restrict operations to be undertaken outside of the period of 1<sup>st</sup> March to 31<sup>st</sup> October to avoid disturbance. As the Appellant notes, mature plantation forest is not considered to be suitable habitat for the conservation interest.

In relation to the general approach adopted by the DAFM, the FAC has previously made a determination on this matter based on a report by an independent ornithologist and this report<sup>1</sup> is available on the website of the Agriculture Appeals Office.

The grounds submit both in relation to the SPA and SAC that it should be assessed whether the lands should be converted to another land use. The FAC considered that the primary objection of the appellant in this regard related to the overall designation and management of the European site which the FAC does not consider to fall within the licencing powers of the Minister for Agriculture, Food and the Marine under the Forestry Act 2014 and the Forestry Regulations 2017. The FAC was not satisfied that the Minister had erred in the making of the decision in relation to this aspect of the appeal.

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<sup>1</sup> Ornithological Opinion on conditions attached to appealed felling licences, specifically relating to the protection of the Hen Harrier and/or Merlin. Report to the Forestry Appeals Committee. Dr. Alan Fielding. 2nd December 2021

The grounds contend that the Minister had considered the incorrect County Development Plan in undertaking the assessment and considering the potential for effects to arise in-combination with other plans and projects. This was not contested by the DAFM.

The FAC examined the record and found that the “Kerry County Development Plan 2015-2021” is referred to in both the screening and assessment. The FAC understands that at the time the screening and assessment were made that a new County Development Plan was in effect. The FAC would consider that such a plan should be considered as part of the process and that referring to the incorrect plan was an error in the making of the decision.

Furthermore, the FAC considered that there are lacunae in a number of instances in the screening and assessment. The FAC noted that the following was recorded in the AA Report,

*Freshwater Pearl Mussel Margaritifera margaritifera*  
*The project area is located in a Margaritifera sensitive area but no live, validated records were observed within a distance of concern to the proposed works.*  
*Therefore, while no adverse impact is anticipated, adherence to conditions is recommended, considering in combination pressures and FPMs obligate host-dependent phase with salmonids (Taeubert & Geist, 2017).*

A number of habitats associated with the conservation interests of the SAC are mapped in relation to this species but the assessment makes no reference to this or to the source of information relied upon to state that the area is a Margaritifera sensitive area. It is further stated that there are no live, validated records observed within a distance of concern but does not state what is considered to be the distance of concern. The assessment also fails to address whether the felling might impact on the restoration of the species in a situation where the area is described as sensitive. The FAC considered that there were lacunae in the assessment on that basis.

The FAC further noted that in relation to 1130 Estuaries, 1160 Large shallow inlets and bays, 3260 Water courses of plain to montane levels with the Ranunculion fluitantis and Callitriche Batrachion vegetation, and 1140 Mudflats and sandflats not covered by seawater at low tide it recorded in relation to mitigations,

*Adherence to stated measures and guidance is recommended.*

The FAC would consider this to be an error in that the required measures should be clearly specified and the test is not what should be recommended but what measures are considered necessary to ensure that no adverse impacts on the European site will arise.

The FAC was satisfied that a series of errors was made in the making of the decision in relation to these grounds in that the procedure of the DAFM was not completed.

The FAC considered the grounds that there has been inadequate and ineffective public notice in contravention of Article 6 (2) of the Aarhus Convention. The grounds reference comments of the Court of Appeal in McCaffrey (McCaffrey v Minister for Agriculture Food and Marine [2017] IECA 247), a regulatory review and a decision of the Aarhus Convention Compliance Convention. The grounds refer to the fact that an appropriate assessment was undertaken and that submit that Article 6(2) of the Aarhus Convention is therefore relevant. The grounds note that the application was subject to an Appropriate Assessment.

The DAFM rejects the assertions and submits that the grounds go beyond the remit of a forestry licence appeal, that the Minister for Agriculture, food and the Marine is not the minister responsible for Ireland's compliance with the Aarhus convention and that the Convention is not directly legally applicable. It is further submitted that any obligations that might arise under the Aarhus Convention and EU law are met through its procedures, which are outlined.

The FAC understands the "Aarhus Convention" to be a reference to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The FAC understands the Aarhus Convention to be a convention under the UNECE and that it does not form part of domestic legislation as such. The Aarhus Convention has been transposed through a number of pieces of EU legislation, including the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU).

As previously noted, the EU EIA Directive defines an Environmental Impact Assessment (EIA) and identifies the projects which are required to be subject to EIA in the Annexes of the Directive. As previously described the Forestry Regulations 2017 do not provide for the Minister to undertake an EIA in relation to tree felling licences and the FAC considered that the application in this instance did not involve a form of activity that falls within the EIA Directive. The grounds reference a Court of Appeal decision that relates to an afforestation licence and is dated from a period prior to the current Forestry Regulations and the procedures of the DAFM, including the availability of the Forestry Licence Viewer.

The application was subject to two periods of public consultation. The Appellant has not claimed that they were disadvantaged but instead makes reference to the public generally being denied the opportunity to participate. As a matter of public record, the Appellant has taken multiple appeals in relation to forestry licence decisions and would be aware of the consultation process adopted by the DAFM. The Appellant submits that they are appealing "the fundamental principle that the DAFM's process for informing the public of its right to participate in the application process is deficient in law".

The FAC considered that the grounds in the main amounted to a challenge in relation to the legality of the government policy and Ireland's transposition of EU Directives and that making such a determination would not fall within the remit of the FAC.

The FAC was not satisfied that a serious or significant error or a series of errors was made in the making of the decision or that the decision was made without complying with fair procedures in relation to these grounds.

The grounds submit that licence conditions (f) and (g) are not conditions but rather explanations regarding legal duties, are unenforceable, and should be removed. The DAFM submit that the conditions relate to legal duties that must be complied with and are conditions on the licence.

The FAC reviewed the conditions and found that they related to SI 477 of 2011 and the Wildlife Acts. In the conditions, it is stated that the granting of the licence does not exempt the holder from obligations that might arise under that legislation. The FAC would agree with the Appellant that the conditions are not what would generally be understood to be licence conditions as they are stated to relate to obligations under other legislation, which the Minister for Agriculture may not be responsible for enforcing, and simply state that the granting of the felling licence does not exempt the holder from meeting obligations under that other legislation. However, the FAC did not consider that the inclusion of such conditions would have any impact on the decision itself such that it might be considered of be of any seriousness or significance.

The FAC was not satisfied that a serious or significant error or a series of errors was made in the making of the decision or that the decision was made without complying with fair procedures in relation to these grounds.

The grounds submit that access is not demonstrated, that parts of the extraction route are not within the project site and that rights of way over these areas are not demonstrated. The DAFM submitted that it had not basis to conclude that the applicants do not have access and the grounds provide no information to suggest that the landowner has no legal access.

The FAC noted that the application as submitted identifies extraction and haulage routes, some of which will be subject to a separate licencing process, that meets an existing road network. The FAC considered that the appellant had not submitted any evidence or substantiated their claims in any real way. The FAC considers that the granting of the licence does not exempt the licence holder from meeting other legal requirements and that, furthermore, it does not provide any additional rights to property that the licence holder did not already enjoy.

The FAC was not satisfied that a serious or significant error or a series of errors was made in the making of the decision or that the decision was made without complying with fair procedures in relation to these grounds.

The grounds submit that the re-stocking of the lands should not be permitted as the area is on "*blanket (deep) peat*", that the afforestation of the lands would not be approved and that the replanting is inappropriate and contrary to Ireland's climate ambitions. The DAFM contest the grounds submitting that it is the competent authority for issuing forestry licences and that the application does not contravene current Forest Service Guidelines. It submits that the carbon balance of afforesting deep peats for the first time differs from the restocking of an existing forest where the drainage and micro-climate has been altered for many decades. It further submits that were the Minister not to place conditions on the

restocking of the lands than the most likely outcome would be the natural regeneration of the site in an uncontrolled manner and that the grounds provide no basis for concluding that the licence contradicts climate change policies.

The FAC considered that the grounds are not substantiated or evidenced in any meaningful way. The appellant has not claimed to have any environmental expertise nor to have engaged such an individual to prepare a basis for the contentions made in the grounds. As noted by the DAFM, the emissions and removals of greenhouse gases at restocking and beyond is different to those related to the process of afforestation, particularly if drainage was being implemented for the first time at planting stage. The imagery on file suggest that the forest is located in a landscape that has been subject to management and drainage in relation to a range of activities and the grounds provide no basis as to how the lands might be rewetted or if such an approach was suitable in this instance or how the Minister for Agriculture might bring that about in the context of the licencing process. The accounting procedure of emissions and removals of greenhouse gases in relation to the land use sector treats deforestation in a punitive manner and the deforestation of the lands would not be likely to be in keeping with Ireland's emission reduction targets, even if the Minister for Agriculture was empowered to bring such an outcome about.

The FAC was not satisfied that a serious or significant error or a series of errors was made in the making of the decision or that the decision was made without complying with fair procedures in relation to these grounds.

The FAC considered the full appeal and submissions made, the record of the decision and all relevant material. Having completed its deliberation, the FAC was satisfied that a series of errors was made in the making of the decision. Therefore, the FAC is setting aside and remitting the decision of the Minister for Agriculture, Food and the Marine in relation to the granting of licence TFL01013024 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new screening for Appropriate Assessment and Appropriate Assessment, as required, and to correctly complete its *Project Description, Environmental and Social Considerations* procedure.

Yours sincerely,

  
Vincent Upton on behalf of the Forestry Appeals Committee

