

FORESTRY APPEALS COMMITTEE



A Review and Report on the Operation of the Forestry Appeals Committee

Mr Seamus Neely, Chairperson 26 June 2023

Review and Report on the Operations of the Forestry Appeals Committee (FAC)

I am appointed Chairperson of the Forestry Appeals Committee having regard to Section 14A (as inserted by section 35 of the Forestry Act 2014 (No. 31 of 2014)) of the Agriculture Appeals Act 2001 (No. 29 of 2001), of the Forestry (Miscellaneous Provisions) Act 2020 (No. 15 of 2020), of S.I. No. 68 of 2018 Forestry Appeals Committee Regulations 2018 and of S.I. No 418 of 2020 Forestry Appeals Committee Regulations 2020. As Chairperson, I must ensure that the functions of the Forestry Appeals Committee are performed as efficiently and as expeditiously as may be consistent with fairness and natural justice.

As the appointed Chairperson of the FAC and having regard to the terms of my appointment and having completed one year in the role, I am duty bound to deliver the following report to the Minister for Agriculture Food and the Marine as a comprehensive review and report on the operation of the FAC, with relevant recommendations to the Minister.

Background

The Forestry Appeals Committee (FAC) was established under the Agriculture Appeals Act, 2001 as amended, to deal with appeals against decisions of the Minister for Agriculture, Food and the Marine in relation to forestry licences under the following headings:

- Afforestation,
- Tree felling,
- Forest road construction,
- Aerial fertilisation.

By way of brief background, the Agriculture Appeals Act 2001 introduced a statutory independent appeals provision in respect of entitlements to payments under the various Department of Agriculture, Food and the Marine (DAFM) schemes including the forestry grant and premium schemes. The Agriculture Appeals Act was amended through the Forestry Act 2014 to establish the independent FAC comprising a chairperson and other members (not being less than two) to hear and determine appeals against decisions made by the Minister or an officer of the Minister in respect of licences for afforestation, felling, aerial fertilisation, and forest roads. The FAC is legally separate and distinct from the functions of Appeal Officers and the Director of Agriculture Appeals under the Act and is a separate legal entity.

The Act was further amended by the Forestry (Miscellaneous Provisions) Act 2020 to allow, amongst other amendments, for the appointment of deputy chairpersons and for the FAC to sit in divisions of itself. To date and in addition to my own appointment, the Minister has appointed to the FAC a

number of appeals officers from the Agriculture Appeals Office, they being officers of the Minister, as well as ordinary members and deputy chairpersons who are not officers of the Minister.

My Role as Chairperson

As chairperson I must ensure the functions of the FAC are performed as efficiently and as promptly as may be consistent with fairness and with natural justice. As chairperson I must constitute such and so many divisions of the FAC necessary having regard to the workload of the committee and the availability of members, direct the assignment of committee members and appeals to each division so constituted (while having regard to any directive from the Minister under section 14D of the Act), and ensure that sufficient hearings are held to meet demand, with a consistency of approach across hearings.

In addition to the foregoing, I have been involved with the FAC's administrative staff in respect of the FAC fulfilling its publication obligations and ensuring the service provided by the FAC is of a high standard and meets the needs of all stakeholders within the parameters of the legislation under which the FAC functions. I have also ensured the availability of FAC members to liaise with the administration on the acceptability or otherwise of submitted appeals/grounds of appeal. There has been considerable workload arising from the judicial review challenges and required the preparation and agreeing of responses to grounds, consulting with Counsel, and taking final responsibility for FAC instruction to Counsel. I have also completed an interim report in September 2022 under my appointment as chairperson and have agreed and finalised the FAC annual report for 2022. I have conducted two stakeholder meetings during the twelve months, one with IBEC industry representatives and one with DAFM officials, both related to workload issues.

The resources available to me to fulfil my role include the administrative services provided by the Agriculture Appeals Office where a dedicated staff administer the receipt of appeals and appeal fee payments, all correspondences to and for the FAC, all notices of hearing schedules, the scanning and provision of access for the FAC to all appeal related documents using cloud based systems, the hosting of the online non oral and oral hearings and the processing of AIE and FOI requests.

Judicial Reviews and Legal Advice

During the year the FAC was respondent in six open judicial review proceedings with the High Court and during the year end of June 2023 two of these were closed, four remain open. Of those closed one was conceded and the appeal was remitted to the FAC for a new decision, the other case was struck out by agreement of the applicant.

The work of ordinary members / deputy chairpersons on judicial reviews, or in stakeholder engagement, is not currently compensated for and members have given of their own time to accommodate this element. In my interim report of September 2022, I undertook to monitor the extent of work arising, and in the 12 months period of the review there was in fact reduced requirements for engagement with legal counsel than during the first half of 2022. However, the engagement up until then was quite demanding of time and included preparation of replies to the grounds of judicial review and to the sworn affidavits. There is currently no meaningful way of

quantifying what might arise at future dates, but I consider it is important to ensure the systems are in place to ensure the FAC deputy chairpersons and members will be available to engage.

It is also important to note that during the period July 2022 to June 2023 there have been numerous requests for instruction by the CSSO (our solicitors) to the FAC during a very active 12 months and these have been proactively dealt with and have involved input from the members. It is also imperative that the FAC keep abreast of ongoing developments in the Courts, both national and European on matters relating to the Directives and we are currently putting access to training modules in place, and it is hoped this will assist to reinforce the lawfulness of the FAC's decisions. There is also a current request for legal advice, which is extensive and was developed over several meetings from October to December 2022 and has been subject to two meetings with advisory counsel from the AGO, each involving members of the FAC, and further meetings are expected.

Workload

Since the establishment of the FAC there has been a total of 1951 appeals received against decisions on 1307 licences. A significant backlog of appeals had developed prior to the commencement of the amendments from the Forestry (Miscellaneous Provisions) Act 2020 and were successfully worked through by the FAC throughout 2021 and early 2022. The following table sets out the number of appeals received in each calendar year from the commencement of the FAC legislation in May 2017 and the number of licence decisions that these appeals relate to.

	2017	2018	2019	2020	2021	2022	2023	Total
*Appeals received	34	197	489	874	149	201	7	1951
Licence decisions appealed	21	150	311	582	109	128	6	1307

**There can be more than one appeal against a licence decision of the Minister*

Of the above there are 1880 appeals closed relating to 1258 licence decisions, and the remaining 70 appeals which relate to 47 licence decisions remain open. Of these 17 licence decisions have a FAC appeal decision pending, also there are hearings currently scheduled for 6 licence decisions. Of the remainder, 11 are due for scheduling and 13 are waiting on replies to information requests.

There is currently a pause in licence decisions on grant related applications and this has clearly impacted on the level of appeals so far in 2023, appeal rates have generally been in the range of 2.4% to 2.8% of the number of licence decisions issued by the Minister, the higher rate has arisen in afforestation licence decisions. The general trend for individual appeals is 1.5 appeals per licence decision appealed against.

Fees for Appeals to the FAC

The amendments through the Forestry (Miscellaneous Provisions) Act 2020 allowed for the charging of a fee to appeal to the FAC. The fee prescribed under the Forestry Appeals Committee Regulations

2020 (S.I. 418 of 2020) is €200, which is set at a nominal rate, and must be lodged with each appeal to the administration section of the FAC. Currently the fee is only payable by bank draft, cheque or postal order as the FAC is not enabled to receive electronic payments. Presently the FAC administration has submitted an IT proposal to enable the making of online appeals and includes the online submission of the appeal fee. This facility when operational will enable the streamlining of the appeals process, improve efficiency and should also improve the appellant experience when lodging an appeal. Overall, it will greatly improve the exercise of the making of an appeal and enable the delivery of timely appeals to the FAC.

Deputy Chairpersons and Members of the FAC

While all Appeals Officers are also appointed as members of the FAC, not all sat as members during the twelve months to end of June 2023. The following members served on the divisions of the FAC in during the 12 months period: -

Name	Status
Seamus Neely	Chairperson
Donal Maguire	Deputy Chairperson
John Evans	Deputy Chairperson
Myles McDonagh	Deputy Chairperson
Iain Douglas	Ordinary Member
Derek Daly	Ordinary Member
Luke Sweetman*	Ordinary Member
Vincent Upton*	Ordinary Member

**Appointed as Agriculture Appeals Officers and appointed as members of the FAC*

Divisions

Under the legislation the FAC may sit in divisions of itself which may be chaired by the chairperson or by a deputy chairperson. The primary legislation sets out that a quorum of the FAC must comprise of at least two persons being the chairperson or deputy chairperson and one other member of the FAC. Where a division of the FAC is composed of two persons, and the Committee cannot reach a unanimous determination of an appeal, the appeal is then required to be reconsidered by a division composed of three other persons. Also, where a division of the FAC includes the chairperson and one or more than one deputy chairperson, a deputy chairperson is considered to be a member of the Committee.

Through the 12 months to end of June 2023 the FAC has sat generally in four divisions of itself, and divisions have typically comprised three or four depending on the content of the appeal being heard. Hearings are scheduled once all information is received from the parties to the appeal and having regard to available workload and workload management. The FAC determines if an oral hearing is necessary and in the twelve months to end of June 2023, the FAC held 4 oral hearings.

FAC Sitting Days in the Twelve Months to end of June 2023

In the twelve months to the end of June 2023 the FAC has sat to hear appeals on 32 days, there was a pause in sitting days until mid-August 2022 as there had been no chairperson in place from end of April until late June and a period of 7 weeks was then afforded for scheduling of hearings following my appointment as Chairperson.

The number of hearing dates per member in the 12 months to end of June 2023 are set out below, there would in general be more than one appeal heard on each sitting day.

Name	Sitting Days	Hearings
Seamus Neely	10	17
Donal Maguire	6	12
John Evans	15	35
Myles McDonagh	7	9
Iain Douglas	21	49
Derek Daly	21	47
Luke Sweetman	15	33
Vincent Upton	16	40

The Construct of the FAC Divisions

As Chairperson I am conscious of the spread of expertise and experience required in dealing with appeals to the FAC and each division of the FAC is constructed with this in mind. The legislation under which the members are appointed does not specify a particular expertise. However, members are appointed by the Minister with the functions of the FAC in mind. I am satisfied that a broad range of experience exists among the current FAC membership that includes experience of:

- statutory appeals,
- appeal processing,
- affording fair procedures,
- understanding and deciphering what are often complex and detailed issues, and
- relevant EU Directives and the National requirements.

The FAC membership currently in place have a broad spread of technical knowledge including in relation to land use planning and in forestry, as well as an experience of administering and managing consenting processes generally and particularly in the areas of land use planning / forestry.

The continued assignment of two Agriculture Appeals Officers with forestry experience as appointed members of the FAC is in my view essential to the efficient and effective operation of the FAC and provides a resilience such that FAC work can be scheduled to meet the demands that arise over the course of time.

Other FAC Workload

Both FAC members who also work as Appeals Officers continuously liaise with the FAC administration and in each case conduct a first screen of new appeals following initial validity checks by the FAC administration. These checks by the FAC members can include a review of the grounds, any accompanying submissions/documents, especially with regard to validity, and matters found at issue may be raised with the Chairperson. These validity checks are highly valued and can safeguard against invalid appeals as well as ensuring appellants are correctly identified and that appeal grounds are clearly stated prior to any communication of the appeal to the DAFM.

Appeals Content – Increased Complexity

The complex nature of appeals has an impact on several KPIs for the FAC. In addition, the FAC's experience in dealing with judicial review cases requires a comprehensive approach to every appeal and especially regards to the EU Directives and associated requirements, even where these are not raised in the grounds of appeal. A sample of grounds of appeal received by the FAC during 2022 and the ensuing FAC decision on that appeal are inserted at Annex A, in the case the grounds mostly concerned the Habitats Directive and the case law surrounding 6(3) of that Directive. The FAC undertook a full review and issued a comprehensive decision.

The plan for the remainder of 2023

DAFM have indicated 550 licence decisions are currently pending during 2023 following approval of the new forestry programme, these coupled with other new decisions during the remaining part of 2023 could indicate more than 1,000 licence decisions. Please note there is a level of estimation in these figures. Based on these forecast numbers of licence decisions the remainder of 2023 could give rise to c 100 appeals against 65 licences, informed by the fact the bulk of what is pending concerns afforestation for which the appeal rate is higher than for other categories such as felling or roads. These potential appeal rates added to the body of work on hand pending hearings (70 appeals against 47 licences) will likely approximate to 170 appeals against 112 licences by year end. This body of work converts to 26 hearing days (considering 3 hearings per day).

Currently the schedule is to hear 6 non oral hearings in July. The FAC has 11 other licence decisions that it can schedule a hearing for, and it is hoped that they will also be heard August. The FAC is currently unable to schedule any more hearings as it is waiting on the Forest Service, DAFM to forward documents and statements on 13 licence decisions. Once these documents and statements are received the FAC would be able to hold another 13 hearings by the end of September. A time lag is provided from circulation of the DAFM statement and the holding of any hearing to allow for response. At the time of compiling this report there is uncertainty for the FAC in estimating workload and scheduling, this is due to an aberration in the flow of licence decisions on afforestation and forest road licence applications which are also grant aid applications. Also, there will likely be a spike in licence decisions once the current forestry programme receives EU approval.

FAC Membership

At the commencement of the FAC in February 2018 all in house appeals officers were appointed as members and served under the first and second chairpersons, under SI 68/2018 the maximum period of appointment for a member was set at 3 years but members could be reappointed. There has been no reappointment of those who were appointed members on 02 Feb 2018, their memberships of the FAC have apparently expired since February 2021.

As chairperson my appointment has recently been renewed and extends to 26 June 2025. In December 2020 a number of persons were appointed as FAC members under SI 418/2020, and these are listed in the paragraphs following with the relevant dates shown. These appointments were also for a maximum period of 3 years and with provision for reappointment. All are still within their valid term as FAC members until late 2023 and currently sit as members of the FAC.

Appeals Officers at the Agriculture Appeals Office: Vincent Upton & Luke Sweetman, both were appointed to the FAC in December 2020.

External members and deputy chairpersons: Myles McDonagh was appointed as a deputy chairperson on 28 October 2020, John Evans was appointed as a deputy chairperson on 08 October 2020, Donal Maguire was appointed as a deputy chairperson on 20 October 2020, Derek Daly was appointed as an ordinary member on 28 October 2020 and Iain Douglas was appointed as ordinary member on 01 February 2021.

Rates of remuneration

As chairperson the remuneration now includes a flat rate payment of €6,000 per year for the ancillary duties associated with the role. The sitting rates per appeal for the chairperson are as follows.

Oral hearing: €450
Papers only appeal: €400
Postponement – day of hearing: €300

For deputy chairpersons and for ordinary members there is currently no annual flat rate payment, and this is something that I will revisit in the recommendations section of this review and report.

The sitting rates per appeal for deputy chairperson are as follows.

Oral hearing: €420
Papers only appeal: €380
Postponement – day of hearing: €280

The sitting rates per appeal for an ordinary member are as follows.

Oral hearing: €350
Papers only appeal: €350
Postponement – day of hearing: €280

Please note that even though the sitting rate is set out per appeal it is the case that the sitting rate includes all related preparatory and post Committee meeting work required to be undertaken regarding an appeal and covers an appeal against a single application/Department decision regardless of the number of appellants even where third parties are involved. Also, please note there has been no fee claim from postponement on the day of hearing during the 12 months of this review and report.

The sitting rates have been fixed since the 2020 appointments and have had no adjustment for inflation or provision for review in respect of cost increases incurred by members for their time and commitments since then. Current inflation levels have been quite high, and this creates a risk of disincentivising the availability of members.

The Future

As Chairperson, I want to ensure the efficient, fair and timely resolution of appeals and I want the FAC to be both efficient and effective in its construct of divisions in achieving this, and to have available to it the best fit of expertise and resources to make legally sound decisions that will not be exposed to legal challenge.

The manner of remuneration afforded the members gives rise to no member or deputy-chairperson costs to the Minister other than when an appeal is being heard. This is considered an efficient remuneration system for the hearing of appeals but fails to compensate members for their additional involvement in judicial review cases. The dealing with judicial reviews can be a significant burden, can vary case by case, and currently is not compensated for, and while members have given of their time during the past 12 months there remains an unfairness in their being called upon for their time.

There are currently two members with a depth of forestry experience who also work as Appeals Officers making determinations of agricultural appeals under the Agriculture Appeals Act 2001 (as amended). During the past 12 months they have provided significant back up to the administration team and lead in assessing new appeals as well as providing support in the judicial review cases. Their work regards judicial reviews involves disseminating grounds, constructing replies for the FAC to such grounds, forming requests for legal advice is required and researching court decisions.

The FAC has a requirement for expertise in assessing grounds and evidence. While the FAC members have a broad spread of knowledge and expertise, especially regards the EIA Directive requirements and forestry, the FAC must also have available to it, expertise regarding the criteria that is subject to the EU Directives especially relating to the Birds and Habitats Directives and the Water Framework Directive. To support this, the FAC is to avail of legal training during summer 2023 on matters of environmental law in order to keep abreast of developments arising from Court decisions.

Changes to the FAC Structure

The FAC as currently constructed is meeting the needs of the appeals service it provides, in later Q2 of 2023 issues have arisen around the availability of members due to other work commitments, and while these are temporary it does signal a need for a wider pool of members to be made available. Also, the FAC has to date issued several decisions to set aside and to remit licence decisions back to the DAFM to a particular point in the application process, for example during the 12 months of 2022

there were 35 such decisions. In many cases these will again be progressed through the application process to a new licence decision and these new licence decisions can again be appealed to the FAC. During the 12 months period of this review there were 14 such licence decisions appealed to the FAC and to safeguard the FAC from any perceptions of bias I have endeavoured, where sufficient member resources allow, to have these appeals heard by divisions of the FAC comprised of members who had not heard the original appeal. I acknowledge this will not always be possible and can balance divisions having best regard to each case, in any event members are required to declare any conflict of interest in hearing an appeal, and I am careful to ensure the highest standard to ethics in all such cases. Having regard to the increasing complexity of appeals being submitted, evident from the example in the annex to this report, and the time involved in hearing and deciding the appeals, I am also conscious that there should not emerge an overreliance (and over burdening) of some FAC members in particular, and the availability of a wider pool of members would also serve to allay these concerns. In this context I will continue to monitor the situation regarding appeal numbers and will revisit the number and make-up of the divisions of FAC.

I am of the view that while the current FAC membership possesses the requisite range of expertise and experience to deal adequately with the appeals arising, a broadening of the membership would be desirable. This recommendation arises due to a temporary reduced availability of some current members due to other commitments, the need to avert perceived conflicts of interest where previous decisions of the FAC were to set aside and remit licence decisions back to the Minister for to correct significant errors or series of such errors and to make a new decision, and where that new decision is appealed against. In addition, new members bring fresh thinking and new expertise. I am also anxious that we begin to address gender balance in the appointments to the FAC.

Recommendations to the Minister

- A further two FAC members are recommended to be appointed, and that such appointments have regard to gender balance.
- Reason: To ensure expediency and efficiency in the operations of the FAC and to allow for the other commitments of current FAC members/Deputy Chairpersons. The additional members will serve to make available members who have not been involved in any earlier decisions of the FAC on applications that may have been appealed following new licence decisions after remittal, will further broaden the pool of knowledge, expertise and experience and serve to increase the robustness of the work of the FAC.
- While there exists a provision for the payment of a gratuity to myself as Chairperson for non-hearing related work arising during the time of appointment as Chairperson, I now recommend that there be a gratuity to the deputy chairpersons, having account of their expertise and experience, to incentivise their remaining available to the FAC and secondly to compensate for their non-sitting commitments especially regards legal challenges and stakeholder engagement. In addition, the fixed sittings rates take no account of inflationary pressures and increased costs associated and should be reconsidered with this in mind, this would further compensate the ordinary members.
- Reason: To ensure a proper reflection of workload that often goes beyond the significant content of the appeals before the FAC, and to ensure the members involved in decisions of

the FAC are fully available on related matters such as legal challenges, and to take account of inflationary impacts.

- The FAC needs available to it sufficient IT resources, firstly to achieve its ambition to receive online appeals and fees payments, and secondly to publish all appeal documentation and appeal submissions from the parties to each appeal.
- Reason: This will support the making of timely appeals where the current window is 14 days from the issuing of the licence decision by the Minister to the receipt of an appeal by the FAC, the publishing will serve to increase transparency and should also reduce the incidence of AIE requests.
- That bespoke training and updates be available to members as a matter of course, specifically in relation to matters that are core to the decisions under appeal, namely the EU Directives on Habitats, Birds, Water and EIA.
- Reason: Ensuring that decisions reflect the correct interpreting of the Directives and the latest related court decisions

Submission

I hereby submit this review and report to the Minister for Agriculture Food and the Marine on this date being one year following my appointment as chairperson of the Forestry Appeals Committee

Mr Seamus Neely

Chairperson of the Forestry Appeals Committee

26 June 2023

Annex A

Appeal Ref No 180 of 2022 – Grounds

The CJEU stated at 44 of Case 258/11 - "so far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned"

In reply to the declaration on the FAC notice of appeal at signing

I declare that the information contained in my appeal is true and accurate and that I have read and accept the rules governing the submission and processing of appeals by the Forestry Appeals Committee including Sections 14 A to 14F of the Agriculture Appeals Act, 2001, the Forestry (Miscellaneous Provisions) Act, 2020 and the Forestry Appeals Committee Regulations 2020.

The appellant inserted

"But do not accept they are in compliance with the relevant EU Directives and judgements of the CJEU"

The grounds of Appeal Ref No 180 of 2022 are continued in the following pages.

The Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity/ project on those European sites 'screened in' (as listed above) and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under [REDACTED] individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the following mitigation is implemented:

THE CJEU SET OUT THE TEST FOR THE APPROPRIATE ASSESSMENT IN CASE 259/11 AS AT 44

'So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.'

THE MINISTER FAILED TO MAKE PRECISE AND DEFINITIVE FINDINGS THAT THIS DEVELOPMENT WAS NECESSARY OR THE THAT IT WAS THE CORRECT PROCEDURE. THE ASSESSMENT WAS TO LIST SUITABLE CONDITIONS

In relation to invasives the following conditions apply:

- A. Good site hygiene will be used to prevent the introduction and spread of invasive species (e.g. rhododendron, Japanese knotweed). Thoroughly check and if necessary, clean, vehicles and machinery prior to entering and leaving the site. See <https://invasives.ie/resources/> for identification guides and further information. Reason: In the interest of the protection of the European site(s).

THIS CONDITION IS NOT A PRECISE AND DEFINITIVE FINDING. WHAT IS GOOD SITE HYGIENE? WHY IS IT RELEVANT?

B. To prevent the spread of freshwater invasive species and disease (e.g. Zebra mussel, fishhook waterflea, Crayfish Plague), ensure that any vehicles, tools and PPE directly involved in instream works and with a potential to come into direct contact with water, are clean (disinfected and dried) and free of soil/sand/gravel and plant debris before entering and leaving the site. Reason: In the interest of the protection of the European site(s).

THE NATURA IMPACT STATEMENT STATES THERE WILL BE NO INSTREAM WORKS. EVIDENCE THAT NO REGARD WAS HAD TO THE NATURA IMPACT STATEMENT

In relation to Merlin, the following mitigation is required, presented in the form of conditions to be attached to any licence

IT MUST BE BECAUSE THAT THERE WILL BE AN EFFECT?

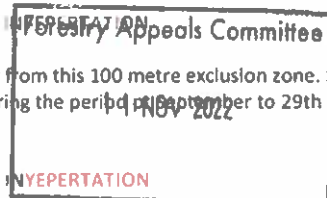
- A. No felling, thinning or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, in the following exclusion zones:

► within 100 metres of any external forest edge that has significant areas of moorland, heathland, peat bog or natural grassland within 500 metres of that edge; and within 100 metres of any internal forest clearing 1.0 hectare or greater in area and containing moorland, heathland, peat bog or natural grassland.

THIS CONDITION IS NOT COMPLETE, PRECISE OR DEFINITIVE. IT IS OPEN TO INTERPRETATION

Such operations can commence in sections of the project area furthest away from this 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive.

THIS CONDITION IS NOT COMPLETE, PRECISE OR DEFINITIVE. IT IS OPEN TO INTERPRETATION. WHERE IS THE DEFINITIVE MAP OF THE EXCLUSION ZONE?



Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for [REDACTED]

THIS IS A QUOTE FROM THE APPROPRIATE ASSESSMENT DETERMINATION FOR [REDACTED]

In relation to Hen Harrier, the following mitigation is required, presented in the form of conditions to be attached to any licence:

- A. The site of this project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1st March to 15th August, inclusive). However, if the Department of Agriculture, Food & the Marine (DAFM) is notified by the National Parks & Wildlife Service of a new Hen Harrier nesting site, and if the site of the project lies within or partially within 1.2 km of this location, the DAFM will inform the Applicant of this situation and will amend the terms of the licence, with immediate effect, to exclude potential disturbance operations from taking place during the Hen Harrier breeding season (1st March to 15th August, inclusive). (A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers.

THE SI IMPLEMENTING THE SPA STATES "IN ORDER TO ENSURE THE SURVIVAL AND REPRODUCTION OF THE SPECIES"

IT STATED IN ORDER TO ENSURE THE SURVIVAL NOT JUST THE BEEDING AS INTERPERED BY THE AUTHOR OF THESE CONDITIOND

Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance). Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for [REDACTED]

THAT IS A QUOTE FROM THE SITE SYNOPSIS, QUOTING I IS NOT COMPLIANCE.

In relation to Merlin and Hen Harrier, the following mitigation is required, presented in the form of conditions to be attached to any licence:

THEY ARE EQUIRED BECAUSE WITHOUT THEM THIS DEVELOPMENT MAY HAVE A SIGNIFICANT NEGITAVE EFFECT ON THE SPA.

- A. Retain existing scrub and areas of natural/ semi-natural habitat present within the project area. Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for [REDACTED]

THIS DOES NOT MAKE SENSE AS THIS DOCUMENT IS SUPPOSED TO BE THE APPROPRIATE ASSESSMENT DETERMINATION FOR [REDACTED]

- B. All forestry operations are restricted to within the boundary of the forest area. No machinery associated with harvesting or forwarding is permitted to operate within 10 metres of open habitats. No timber stacking in these areas or within machinery exclusion zones. Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA as per the Appropriate Assessment determination for [REDACTED]

Forestry Appeals Committee

17 NOV 2022

"NO MACHINERY ASSOCIATED WITH HARVESTING OR FORWARDING IS PERMITTED TO OPERATE WITHIN 10 METRES OF OPEN HABITATS" WHERE IS THE DEFINITAVE MAP OF THE OPEN HABITATS?

In relation to the protection of Old sessile oak woods with Ilex and Blechnum, the following mitigation is required, presented in the form of conditions to be attached to any licence issued:

- A. All forestry operations are restricted to within the boundary of the forest area. Excluding project access and exit, no machinery associated with harvesting, forwarding or reforestation is permitted to traverse within 10 metres of these habitats. No timber stacking in these areas or within machinery exclusion zones. Reason: In the interest of protecting the Qualifying Interest of the Derrycrag Wood Nature Reserve SAC as per the Appropriate Assessment determination for [REDACTED]

AS ABOVE

- B. Appropriate control of natural regeneration of non-native tree species will be undertaken where necessary
WHERE IS IT NECESSARY? THIS IS NOT A COMPLETE, PRECISE AND DEFINITIVE FINDING.
- C. Reason: In the interest of protecting the Qualifying Interest of the Derrycrag Wood Nature Reserve SAC as per the Appropriate Assessment determination for [REDACTED]
- D. As set out in the NIS, directional felling of conifer trees away from old oak woodland habitat, to avoid damage to native trees in the old oak woodland. Reason: In the interest of protecting the Qualifying Interest of the Derrycrag Wood Nature Reserve SAC as per the Appropriate Assessment determination for [REDACTED]

THIS IS THE APPROPRIATE ASSESSMENT DETERMINATION FOR [REDACTED] NO MAPS NO PRECISE AND DEFINITIVE FINDINGS.

- D. As set out in the NIS, where forest plantation displays many indicators of former old oak woodland habitat, manage under continuous cover forestry (CCF) management system. Reason: In the interest of protecting the Qualifying Interest of the Derrycrag Wood Nature Reserve SAC as per the Appropriate Assessment determination for [REDACTED]

THIS IS THE APPROPRIATE ASSESSMENT DETERMINATION FOR [REDACTED] NO MAPS NO PRECISE AND DEFINITIVE FINDINGS.

In relation to Otter and other aquatic features, the following mitigation is required, presented in the form of conditions to be attached to any licence issued:

- A. Apply a 10-metre wide exclusion zone alongside aquatic zone(s) and water-related hotspot(s) on site. No forwarding, processing or stacking is permitted within this 10 m exclusion zone. Trees outside machine reach to be felled manually by chainsaw operators. Felled trees to be winched out of the exclusion zone where appropriate and safe to do so, or removed by extended harvester arm, for subsequent snedding and processing outside the exclusion zone. Reason: To minimise disturbance and protect established habitat potentially used by the feature in the Lough Derg, North East Shore SAC as per the determination for [REDACTED]

WHERE AND WHAT ARE WATER-RELATED HOTSPOT(S) NO MAPS NO PRECISE AND DEFINITIVE FINDINGS.

- C. Do not remove or disturb any area of wet woodland or thick scrub on the site within 50 m of an aquatic zone or within 20 m of a relevant watercourse. Reason: To minimise disturbance and protect established habitat potentially used by the feature in the Lough Derg, North East Shore SAC as per the determination for [REDACTED]

WHERE IS THE AQUATIC ZONE AND WHAT MAKES A WATERCOURSE ELEMENT

- D. Silt traps must not be installed inside any water-related exclusion zone. Furthermore, if individual relevant watercourses run into areas of wet woodland or thick scrub within 50 m of the aquatic zone, the following applies: the most downstream silt trap within that relevant watercourse, NOW 2022, positioned upstream of this woody habitat and no closer than 15 m from it. Reason: To minimise disturbance and protect established habitat potentially used by the feature in the Lough Derg, North East Shore SAC as per the determination for [REDACTED]

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WHERE ARE THE WATER-RELATED EXCLUSION ZONES?
WHAT IS THICK SCRUB?

WHAT IS THIN SCRUB?

In relation to the protection of adjoining/ downstream aquatic based species and habitat, the following mitigation is required, presented in the form of conditions to be attached to any licence issued:

- E. Prior to the commencement of operations onsite, install silt traps at the locations marked on the Harvest Plan. Additional silt traps shall be installed, where required, along the channel of all relevant watercourses that are connected, directly or indirectly, to any aquatic zone. Silt traps must be of sufficient number and size to provide adequate retention time for the deposition of silt, with consideration of the weather and site conditions in the area. Silt traps to adhere to the specifications set out in Section 7 of the Standards for Felling & Reforestation (or acceptable alternatives). Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

WHERE ARE THEY REQUIRED? WHAT MAKES THEM REQUIRED

- F. Vegetation within relevant watercourses is to be left intact. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

WHY IS THIS INCLUDED AS THERE ARE NO WORKS IN THE WATERCOURSES?

- F. Locate timber stacking areas on flat terrain, avoiding slopes leading to aquatic zones or relevant watercourses. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

WHAT MAKES A WATERCOURSE RELEVANT OR NOT RELEVANT?

- G. Locate and orientate extraction racks so that they avoid water-related hotspots and do not become a pathway for silt and sediment to aquatic zones. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

- H. Brash and branch wood are to be utilised to create and maintain brash mats along all machine routes throughout operations. Extra brash will be applied to accommodate higher levels of machine tracking in specific areas such as main extraction racks, timber stacking areas, crossing points, areas where machines are required to turn or articulate, sloping ground, and where forwarding routes merge. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

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- N. Retain existing broadleaf trees present within the water exclusion zone, where safe to do so. Reason: In the interest of the protection of water quality and to ensure the protection of the European site(s) during harvesting operations.

WHERE ARE THE EXISTING BROADLEAF TREES?

Appendix 1

Summary of selected rulings (from the European Court of Justice (ECJ) and the Irish Courts) relating to Article 6(3) of the Habitats Directive

ECJ Case C-258/11, Peter Sweetman and Others v An Bord Pleanála

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=136145&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10649>

Text from ruling

Article 6(3) of [the Habitats Directive] must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

ECJ Case C-164/17, Edel Grace and Peter Sweetman v An Bord Pleanála

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=204392&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10649>

Text from ruling

Article 6 of [the Habitats Directive] must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

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Kelly -v- An Bord Pleanála [2014] IEHC 400

<http://www.courts.ie/Judgments.nsf/0/7A4764A297EF3FC080257D35004D2540>

Non-legal summary

The Irish High Court quashed a decision to grant planning permission for a wind farm for failing to comply with the European Habitats Directive on the grounds, *inter alia*, that An Bord Pleanála failed to carry out an assessment which: (a) identified, in light of the best scientific knowledge, all aspects of the development which would affect various local protected habitats; and (b) contained complete and definitive findings capable of removing all reasonable scientific doubt that the development would adversely affect the integrity of the habitats.

Kelly -v- An Bord Pleanála & anor [2019] IEHC 84

<http://www.courts.ie/Judgments.nsf/0/7599087E33F1C206802583A50058F9D4>

Non-legal summary

The Irish High Court did not find that Sustainable Urban Drainage Systems (SUDS) and other standards mandatory and best practice environmental measures can be considered in every screening for Appropriate Assessment. It is always necessary to analyse whether the measure, however described and whether or not it has another purpose, is proposed with the intention of avoiding or reducing a harmful effect on a European Site. If there is a source-pathway-receptor connection between the proposed development and the qualifying interest of a European Site and potential harmful effects have been identified, measures to avoid or reduce those effects must be excluded from the screening analysis.

Heather Hill Management Company clg & anor -v- An Bord Pleanála & anor [2019] IEHC 450

<http://www.courts.ie/Judgments.nsf/0/98BAA0F37143FFC280258423003FED1D>

Non-legal summary

The Irish High Court held that the Board had relied on a commitment to comply with 'best practice measures' during construction in order to minimise any emissions into the Trusky Stream, which was identified as being a potential pathway to the Special Protection Area (SPA) and Special Area of Conservation (SAC) in Galway Bay. The Court held that this commitment to comply with 'best practice measures' represented an avoidance or reduction measure that must be excluded for the purpose of reaching a screening determination.

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FAC decision on appeal 180 2022 as issued on 23 May 2023

Licence and Hearing

A tree felling licence [REDACTED] for the thinning of forest on an area of 103.7 ha at Clonco, Derrygill, Gorteeny and Looscaun, Co. Galway was issued by the Department of Agriculture, Food, and the Marine (DAFM) on 2nd November 2022. Having regard to the particular circumstances of the appeal, the Forestry Appeals Committee (FAC) considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC 180/2022 was held remotely by the FAC on 20th April 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Luke Sweetman, Mr. Donal Maguire & Mr. Derek Daly.

Secretariat to the FAC: Ms. Vanessa Healy.

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 MAFM to grant the licence [REDACTED]. The reasons for this decision are set out hereunder.

Background

The licence pertains to the thinning of forest on 103.7 ha at Clonco, Derrygill, Gorteeny and Looscaun, Co. Galway. The forest is currently predominantly composed of Sitka spruce, Lodgepole Pine, Scots pine, Japanese larch, Hybrid Larch, and Norway spruce, along with other conifer and broadleaf species. The application was accompanied by a location and felling(bio) map and a Harvesting Plan. The applicant's pre-screening Appropriate Assessment screening shows that the project area lies in the River Sub Basin(s) 2

LOWER VILLAGE TRIB_010 and WOODFORD (GALWAY)_030 and that soils are shallow gley soils both surface and ground. It states that gley soils are indicative of poor drainage mostly due to a high clay content. The slope is described as Gentle (15% or less) and the habitat is described as 92% WD4 (conifer plantation) and 8% WD2 (mixed broadleaved/conifer woodland). The application was made on 14th December 2018, was advertised on 19th December 2018, and was referred to the National Parks and Wildlife Service (NPWS) on 15th October 2021. The NPWS responded on 1st December 2021 with a submission that included the following.

'The Department of Housing, Local Government and Heritage notes that this application is within the Slieve Aughty Mountains Special Protection Area (SPA) (Site Code: 004168), and

adjoining Derrycrag Wood Nature Reserve Special Area of Conservation (SAC) (Site Code: 000261).

- *This Department recommends that plans/procedures should be put in place before work begins to ensure the protection of the adjacent SAC from damage, such as appropriate containment of chemicals and fuels, no storage of materials or machinery within the SAC, and containment of any possible run off from the development site. Machinery movements within the SAC should be limited to the existing road network.*
- *Woodford River water quality should also be taken into consideration, as the river is part of the Local Authority Waters Programme.*
- *Hairy wood ant (Formica Lugubris) nests may be present in the locality. Damage to any possible nests should be avoided where possible.*
- *Forestry best practice should be followed during all phases of operations.*
- *Invasive species, if present, should be managed appropriately as part of the forests management so as to avoid their spread'.*

Applicant's Pre Screening report dated 4th February 2021

There is a Pre Screening report from the applicant to be found on file dated 4th February 2021 which identified and examined fourteen Natura 2000 sites as below.

- Derrycrag Wood Nature Reserve SAC (000261)
- Lough Derg (Shannon) SPA (004058)
- Lough Derg, North-east Shore SAC (002241)
- Slieve Aughty Mountains SPA (004168)
- Barrougher Bog SAC (000231)
- Cloonmoylan Bog SAC (000248)
- Loughatorick South Bog SAC (000308)
- Middle Shannon Callows SPA (004096)
- Pollagoona Bog SAC (002126)
- Pollnaknockaun Wood Nature Reserve SAC (000319)
- River Shannon Callows SAC (000216)
- Rosturra Wood SAC (001313)
- Lower River Shannon SAC
- River Shannon and River Fergus Estuaries SPA 004077

This pre-screening exercise concludes that for the reasons set out in the screening, and having regard to all of the information contained therein, that it has been determined that the project will have direct, indirect or in combination effect(s) on four European sites (Derrycrag Wood Nature Reserve SAC (000261), Slieve Aughty Mountains SPA (Site Code: 004168), Lough Derg (Shannon) SPA (Site Code: 004058) and Lough Derg, North-east Shore SAC (Site Code: 002241)).

Applicant's Natura Impact Statement (NIS)

The applicant submitted a NIS dated 4th February 2021 described as being for Thinning projects [REDACTED] and [REDACTED], located in the vicinity of Derrygill, Gorteeny, Clonco, and Looscaun, Co. Galway. It sets out the qualifications of those involved in its preparation and the Legal Framework for NIS. It deals with the specific details for project [REDACTED] being for thinning, beginning at page 4 of the NIS. It sets out details of the project area, the habitat, with current stocking described as consisting mainly of conifer plantation forest (Sitka spruce) planted in 2004 and other species include Japanese larch, lodgepole pine and broadleaves. Derrycrag Wood Nature Reserve SAC, which includes old oak is stated to lie along the northern boundary of the site. The site location is said to fall within the Slieve Aughty Mountain SPA and that Cloonmoylan Bog SAC lies 1km west of the project site.

The Derrycrag stream (part of WOODFORD (GALWAY)_030) and another tributary is described as running along the northern boundary of the site into the Woodford River. It states that the Looscaun stream and the Oghilly stream run west-east along the eastern boundary of the site and also flow into the Woodford River. It states that the Gorteeny North Limb stream flows along the southwestern boundary of the site and directly into Lough Derg about 3km downstream. It states that as well as the bioclass area (in Compartment 56164E) within the site boundary there are further bioclass areas to the northwest and east of the site and that the target habitat for both these areas are oak. It states that the surrounding habitat includes heath, other woodland and agricultural land.

It states that the project involves thinning and that all harvesting operations, including thinnings, are carried out in accordance with the DAFM Standards for Felling and Restoration (2019). It states that thinning is undertaken to enhance the quality of a commercial crop of trees by removing or 'thinning out' poorer quality trees and that this also improves the growing conditions, available light and nutrients for the remaining trees. It states that thinning of the stand involves cutting lines of trees at intervals through the crop and that these 'line thinnings' can also be supplemented by selecting individual trees either side of the line or rack. Thinning operations are described as being carried out by specialised mechanical 'cut to length' Harvesters and Forwarders which are used to extract the logs to the forest road. It sets out that the first thinning involves cutting a system of lines or racks plus a light selection of poorer trees from between the racks and that generally, 1 in 7 rows are removed to create thinning racks which creates the infrastructure for subsequent thinning operations.

The NIS describes the thinning in conifer and broadleaf commercial species as being similar in operation involving the initial cutting of lines followed by the removal of selected poorer quality trees. It sets out that the harvesting operator cuts and processes each tree so as to create a brash mat from the branches and tops of the harvested trees along the rack and that this brash mat protects the ground from the operation of the Harvester and Forwarder. It states that the rack and brash mat will be maintained for future thinning operations. It shows that every effort is made to clear young conifers from stream buffer zones at 1st thinning stage and states that this will allow the buffer zone along streams to revegetate naturally. It states that non-commercial broadleaves are retained as much as possible and where safe to do so and that silt traps are installed in relevant watercourses to protect against potential runoff into aquatic zones. Any temporary water crossing points (as per DAFM 2019 guidance) are said to be removed when the operations are finished.

The NIS at section 2 examines the four screened in European Sites (Derrycrag Wood Nature Reserve SAC (000261), Lough Derg (Shannon) SPA (004058), Lough Derg, North-east Shore SAC (002241) and Slieve Aughty Mountains SPA (004168)) and assesses each individually, to assess the potential for adverse effects and to identify mitigation. Section 3 of the NIS sets out proposed mitigation for the project. At section 4 the NIS deals with 'Residuals' and at section 5 it sets out an In-Combination assessment and statement.

Appropriate Assessment (AA) Screening and Determination dated 20th September 2022

The DAFM undertook and documented a screening for AA dated 20th September 2022 which examines twelve European Sites together with their qualifying / special conservation interests, two of the sites (Derrycrag Wood Nature Reserve SAC IE0000261 and Slieve Aughty Mountains SPA IE0004168) overlap with the project area, and ten others are within 15km distance. The twelve sites are as follows.

- Derrycrag Wood Nature Reserve SAC IE0000261 (0 m from the project).
- Slieve Aughty Mountains SPA IE0004168 (0 m from the project).
- Cloonmoylan Bog SAC IE0000248 (1062 m from the project).
- Rosturra Wood SAC IE0001313 (1.7 km from the project).
- Pollnaknockaun Wood Nature Reserve SAC IE0000319 (1.8 km from the project).
- Lough Derg (Shannon) SPA IE0004058 (2.5 km from the project).
- Barrougher Bog SAC IE0000231 (4.4 km from the project).
- Loughatorick South Bog SAC IE0000308 (4.5 km from the project).
- Lough Derg, North-East Shore SAC IE0002241 (4.7 km from the project).
- Pollagoona Bog SAC IE0002126 (8.9 km from the project).

- River Shannon Callows SAC IE0000216 (10.9 km from the project).
- Middle Shannon Callows SPA IE0004096 (10.9 km from the project).

Derrycrag Wood Nature Reserve SAC IE0000261, Slieve Aughty Mountains SPA IE0004168, Lough Derg (Shannon) SPA IE0004058 and Lough Derg, North-East Shore SAC were screened in. All other sites (eight) were screened out. The reasons for the screening conclusions reached for each of the European sites examined are recorded in the documentation on file.

In Combination

There is a separate in-combination report / document on file as completed by the DAFM which has a statement included in it. It is dated 20th September 2022 and indicates that various online planning systems and datasets (including DAFM's Forest Licence Viewer) were consulted on the 20th September 2022 in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin LOWER VILLAGE TRIB_010 and WOODFORD (GALWAY)_030. It includes a project specific statement which has the following paragraph in it.

'It is concluded that there is no possibility that the proposed Thinning project [REDACTED], with mitigation measures set out in Section 4 of the AA Determination document, will itself, i.e. individually, give rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of any European Site(s), when considered in-combination with other plans and projects'.

Appropriate Assessment Determination (AAD) dated 24th October 2022

An AAD completed by an Ecologist on behalf of the Minister and dated 24th October 2022 is to be found on file. In relation to screened out European sites the AAD states that in concluding the AA screening, the Minister has determined that there is no likelihood of the thinning project [REDACTED] having any significant effect, either individually or in combination with other plans or projects, on any of the following European site(s), in view of their conservation objective, for the reasons set out:

- Cloonmoylan Bog SAC IE0000248: Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- Rosturra Wood SAC IE0001313: Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

- Pollnacknockaun Wood Nature Reserve SAC IE0000319: Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- Barroughter Bog SAC IE0000231: Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- Loughatorick South Bog SAC IE0000308: Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- Pollagoona Bog SAC IE0002126: Due to the location of the project area within a separate water body subcatchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.
- River Shannon Callows SAC IE0000216: Due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.
- Middle Shannon Callows SPA IE0004096: Due to the separation distance between the Natura site and the project.

The report also sets out that in concluding the AA screening, the Minister has determined that there is the likelihood of thinning project [REDACTED] having a significant effect, either individually or in combination with other plans and projects, on the following European Site(s), for the reasons described, in view of best scientific knowledge and in view of the conservation objectives of the European Site(s).

- Derrycrag Wood Nature Reserve SAC IE0000261: Possible effect due to the location of the project within the Natura site.
- Slieve Aughty Mountains SPA IE0004168: Possible effect due to the location of the project within the Natura site.
- Lough Derg (Shannon) SPA IE0004058: Possible effect due to the direct hydrological connectivity that exists between the project area and this SPA.
- Lough Derg, North-East Shore SAC IE0002241: Possible effect due to the direct hydrological connectivity exists between the project area and this SAC.

The AAD report at section 3 sets out that the Minister determined that an Appropriate Assessment of the activity proposed under [REDACTED] was required in relation to the above 'screened in' European sites. The AAD report states that for this reason, the applicant submitted a Natura Impact Statement (completed 04/02/2021) to facilitate the Minister carrying out an Appropriate Assessment. It states that Niall Phelan, acting on behalf of the DAFM, subsequently evaluated the submitted NIS, defined as "a report comprising the scientific examination of a plan or project and the relevant European Site or European Sites, to identify and characterise any possible implications of the plan or project individually or in combination with other plans or projects in view of the conservation objectives of the site or

sites, and any further information including, but not limited to, any plans, maps or drawings, scientific information or data required to enable the carrying out of an Appropriate Assessment".

The AAD report also states that:

'In undertaking the Appropriate Assessment of the likely significant implications and effects of the activity on European Sites, the following were taken into account:

- the initial application [REDACTED], including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer), responses from referral 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, adversely affect the integrity of a European Site;*
- if appropriate, any written submission or observation made by a consultation body or the public to the Minister in relation to the application under Part 6;*
- any Natura Impact Statement provided by the applicant on foot of a request by the Minister, or otherwise;*
- any supplementary information furnished in relation to any such report or statement,*
- if appropriate, any further information sought by the Minister and furnished by the applicant in relation to a Natura Impact Statement,*
- any information or advice obtained by the Minister,*
- any other relevant information.'*

The AAD report does not record that the information provided in the NIS was sufficient to derive appropriate conditions for a determination. The AAD report at section 4 states:

'The Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' (as listed above) and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under [REDACTED], individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the following mitigation is implemented'.

The report then goes on to detail the mitigation considered necessary for the project. In the penultimate and last paragraphs of the AAD report the following is stated:

'The basis for this AA Determination is as follows: This 103.7 ha (WD4 92%, WD2 8%) proposed thinning project is situated on a moderate 0-15% slope, and is underlain by Surface water Gleys, Ground water Gleys 60%, and Blanket Peats 40%. The project area consists mainly of plantation conifer forest Sitka spruce planted in 2004. Other species include Japanese larch, lodgepole pine and broadleaves. Derrycrag Wood Nature Reserve SAC, which includes old oak wood lies along the north boundary of the site with a small area of one compartment classed as a Bioclass area. The project is located within Slieve Aughty Mountains SPA. The project is located mostly (60%) within the WOODFORD (GALWAY)_0301 sub-basin (Ecological status: Good, WFD Risk: Not at risk). The remainder of the project (40%) is located within the LOWER VILLAGE TRIB_010 2 sub-basin (Ecological status: Good, WFD Risk: Review). The Derrycrag stream (part of WOODFORD (GALWAY)_030) and another tributary runs along the north boundary of the site into the Woodford River. This forms a hydrological connection with Lough Derg (Shannon) SPA ~2.7km downstream, and Lough Derg, North-east Shore SAC ~6.5km downstream. The Oghilly and Looscaun aquatic zones also rise in the eastern region surrounding the project, and ultimately merge with the Woodford (Galway) river downstream. The fourth aquatic zone is the Gorteeny North Limb aquatic zone that flows east along the southern boundary of the project. Otter is a qualifying interest (QI) feature of the aforementioned SAC. Freshwater Pearl Mussel (FPM) is also a QI of this SAC, and the project lies entirely within a "sensitive area" for this species, however there are no live, validated records of the species present within a distance of concern downstream.

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.' 8

The Licence

The licence issued on 2nd November 2022 and is subject to 11 conditions. Condition number 9 requires compliance with mitigation measures as set out in the AAD which is said to be attached.

The Appeal

There is a single appeal against the decision to grant the licence. The grounds of appeal (in summary) are as follows:

- that there is no evidence that there won't be an effect on the Middle Shannon Callows SPA,
- that there is no evidence in the files which have been made available to the public of the assessment of the NIS by the DAFM ecologist,
- that application material (including subsequent supporting information), responses from referral bodies and 3rd parties have not been made available to the public,

- that there is no evidence that regard was had to the NIS,
- in relation to AAD submission that the Minister has failed to make precise and definitive findings that this development was necessary or that it was the correct procedure,
- that the condition relating to site hygiene is not a precise and definitive finding,
- that the inclusion of a condition regarding the spread of freshwater invasive species submits that no regard was had to NIS which states that there will be no instream works,
- submits that the inclusion of a mitigation in relation Merlin means that there will be an effect,
- submits that the 100m exclusion zone.....is not complete precise or definitive,
- in relation to Hen Harrier / Merlin – submission that a condition restricting operations to within the forest area and not within 10m of open habitat should be accompanied with a definitive map,
- submission that a condition requiring the retention of scrub etc does not make sense,
- queries the use of a subjective requirement 'where necessary', queries what and where are 'water related hotspots', queries where are the water related exclusion zones, queries what is thick and thin scrub,
- queries where the silt traps required by condition are to be located and what makes them required, Queries what makes a watercourse relevant, queries where existing broadleaf trees are, queries whether the use of chemicals in the SAC and SPA has been assessed, queries what the 'distance of concern' is for FPM,
- Contends a conflict of interest as all the applicant's directors are appointed by the Minister as is all the FAC members.

DAFM Statement of Facts (SOF)

The DAFM provided an SOF to the FAC relating to the appeal and this SOF was provided to the parties. The SOF provided an overview of the processing of the application and the steps and dates involved. It is stated that the application was submitted on 14th December 2018 and advertised on 19th December 2018. In response to FAC 180/2022, it is submitted in the SOF that an AA was undertaken on the felling licence application [REDACTED] prior to the licence being issued. It submits that the application itself included an inventory of the stand to be felled, species, year planted, average tree size and yield class. It submits that a pre-screening report, NIS, location maps of the harvest site and a shapefile with the digitised area of the project was provided and that all of these are taken into account during the AA process. This shapefile, it states, allows spatial analysis by GIS to be carried out in relation to the harvest site and surrounding environmental layers such as SPAs, SACs, Hen Harrier designations and sub catchment boundaries and rivers. The DAFM statement to the FAC goes on to describe the AA screening process by the forestry inspector and states that in the case

of [REDACTED] four sites (Derrycrag Wood Nature Reserve SAC IE0000261, Slieve Aughty Mountains SPA IE0004168, Lough Derg (Shannon) SPA IE0004058 and Lough Derg, North-East Shore SAC IE0002241) were screened in on the possibility that there may be an effect.

The SOF sets out that having screened in [REDACTED] the Department proceeded to second stage AA and that from this exercise Niall Phelan on behalf of the Minister completed his assessment (in the form of an AA Determination) of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' and made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under [REDACTED], individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the mitigation as set out within the AAD were implemented.

The SOF states that information relating to this licence application was available on the Department's Forest Licence Viewer (FLV) during the 14-day appeal window and that this included the response from the NPWS, pre-screening report, NIS and harvest plan. It states that all documents submitted by the applicant are taken into account when assessed and that the AAD documents the decision of the ecologist based on his assessment of available information and that public and stakeholder participation is ensured throughout DAFM's licensing system it states that the process begins once the application is received at which point it is uploaded to the FLV and that 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. It states that applications are also advertised on the DAFM's website, and that forestry stakeholders and members of the public have 30 days to lodge a submission. The statement indicates that *'where the site is screened in for second stage appropriate assessment a Natura Impact Statement (NIS) is submitted by the applicant (if not already submitted) or where an NIS has not been prepared the Department will prepare an Appropriate Assessment Report (AAR)'*. In either case, it states, that the NIS or AAR is posted to the FLV and stakeholders and members of the public have a further 30 days to make submissions and that the opportunity to make submissions on these documents is also advertised on the Department's website and any submissions received are taken into account in preparing the AAD.

The SOF at point 8 sets out that the assessment carried out by the Department on the application for [REDACTED] and that the conditions that were applied to the licence were based on the following DAFM policies, procedures, guidelines and standards.

- Forests & Water Achieving Objectives under Ireland's River Basin Management Plan 2018-2021.
- Environmental Requirements for Afforestation, December 2016 (DAFM, 2016).

- Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019).
- Felling & Reforestation Policy (DAFM, 2017).
- Appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out the procedures regarding Hen Harrier and potential disturbance operations developed by the Forest Service of the DAFM and agreed by NPWS.
- Forestry Standards Manual (DAFM, 2015).
- Kerry Slug and Otter Guidelines.
- AA Procedure Guidance Note & iFORIS SOP for DAFM Forestry Inspectors

The SOF at points 9 to 12 sets out that experts within the Department with a scientific knowledge of the subject area involved developed the standard mitigations based on these documents and goes on then to list references and further related reading. At point 13 the SOF states that *'In Ireland, the spread and propagation of species listed in the Third Schedule of S.I. No. 477/2011 European Communities (Birds and Natural Habitats) Regulations 2011 to 2021 is an offence. Under Section 49 (2), save in accordance with a licence granted under paragraph (7), any person who plants, disperses, allows or causes to disperse, spreads or otherwise causes to grow in any place throughout the State, any plant which is included in Part 1 of the Third Schedule, shall be guilty of an offence. Under Section 50 it is an offence to transport a vector material listed in Part 3 of the Third Schedule except under licence. The granting of a felling licence does not exempt the holder from meeting any of these legal requirements.'*

At point 14 the SOF sets out that in the case of [REDACTED], the potential for the project to result in displacement of breeding Merlin was identified on a precautionary basis and that heathlands are vital hunting habitats for the species (Fernandez-Bellon & Lusby, 2011). It states that Merlin traditionally nest on-the-ground on heath, mountain, and blanket bog, but now predominantly nest in trees with a strong preference for conifer plantations (favouring older trees and often nesting within 10 m of forest edge). It states that breeding success is positively related to the proportion of suitable foraging habitat (heath, extensive grassland, bog, other open and semi-open habitats) within the breeding territory (Lusby et al., 2017). The SOF further sets out that in light of the bird's ecology regarding nesting and the requirement to avoid disruption that might interfere with breeding, the mitigation presented in the licence condition, was identified to avoid impact which is consistent with the recommendation set out in the applicant's NIS. It also states that given the area of forest cover within the SPA, the emergence of new edge trees elsewhere within the forest estate within the Natura site, and Merlin's lack of faithfulness regarding nest sites, any edge tree felling associated with this project and undertaken outside of the breeding season will not impact future nesting opportunities within the SPA. The SOF points out that the DAFMs

mitigations in relation to the Hen harrier are based on a protocol agreed with the NPWS and published in their 2015 report entitled 'Hen Harrier Conservation and the Forestry Sector in Ireland' and that the science underpinning this approach to protecting the Hen Harrier is referenced in this document. The SOF at point 16 sets out the criteria that can be used to define a relevant watercourse. The SOF at point 17 states that DAFM is satisfied that the licence conditions issued for [REDACTED] are necessary, relevant to the felling and reforestation project for which a licence has been sought and are enforceable, precise, and reasonable.

Consideration by the FAC

The FAC considered the contention in the appeal grounds that there is a conflict of interest in this case as all the applicant's directors are appointed by the Minister as are all the FAC members. Other than outlining matters relating to the appointment of members of the FAC and the applicant's directors, there was no evidence presented to substantiate the claim nor was there evidence presented of a deficiency in this regard. The FAC operates under the Agriculture Appeals Act 2001 as amended and as required by the legislation, is independent and impartial in the performance of its functions. Regulation 3(7) of the Forestry Appeals Committee Regulations 2020 requires members of the FAC, where they believe that their participation would give rise to the perception of any potential conflict of interest, to disclose this to the parties to an appeal. The members of the FAC did not consider that such an action was required in this instance.

The FAC finds that the project lands in this case lie within the LOWER VILLAGE TRIB_010 and the WOOFFORD(GALWAY)_030 River Sub-Basin. The LOWER VILLAGE TRIB_010 has a good status assigned for the 2016-21 assessment period and the WOOFFORD(GALWAY)_030 has a moderate status assigned for the 2016-21 assessment period. The proposal is for the thinning of the forest without clearfelling. Based on the information available to it and having regard to the nature, location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality. The FAC considered that DAFM has not erred in the making of the decision in this case, as it relates to the protection of water quality, the requirements of the Water Framework Directive and related matters and as referenced in the grounds of appeal.

The FAC considered the grounds of appeal relating to the AA of the project and related matters (including the contention that there is no evidence in the files which have been made available to the public of the assessment of the NIS by the DAFM ecologist), and considered the procedures undertaken by the DAFM in respect of the provisions of the Habitats Directive. The FAC finds that the DAFM considered the NIS as submitted by the applicant and made specific reference to it in the DAFM AAD wherein it states,

'Accordingly, the Minister determined that an Appropriate Assessment of the activity proposed under [REDACTED] was required in relation to the above 'screened in' European sites. For this reason,

The applicant submitted a Natura Impact Statement (4/2/2021) to facilitate the Minister carrying out an appropriate assessment. Niall Phelan, acting on behalf of the DAFM, subsequently evaluated the submitted NIS, defined as "a report comprising the scientific examination of a plan or project and the relevant European Site or European Sites, to identify and characterise any possible implications of the plan or project individually or in combination with other plans or projects in view of the conservation objectives of the site or sites, and any further information including, but not limited to, any plans, maps or drawings, scientific information or data required to enable the carrying out of an Appropriate Assessment".

The FAC finds that the DAFM has not indicated that it has adopted the NIS as submitted nor has it indicated the sufficiency or otherwise, having assessed it, to fully inform an AAD relating to the project. In so far as the DAFM carried out its own AA Screening of the likely effects of the project on European Sites and similarly carried out its own AAD of the project then the FAC considers that it follows that the NIS as submitted was not adopted by the DAFM as it relates to these two steps in the process. That being so the FAC would understand that there should be a separate DAFM Appropriate Assessment Report relating to the likely effects of the project on European Sites and that this should have been available for public consultation for 30 days in advance of the making of the Appropriate Assessment Determination.

The FAC notes the content of the DAFM SOF wherein it states that *'Having screened in [REDACTED] [REDACTED] the Department proceeded to second stage AA. From this exercise Niall Phelan on behalf of the Minister completed his assessment (in the form of an AA Determination) of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' (as listed above) and made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under [REDACTED], individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the mitigation as set out within the AAD were implemented.'* This would suggest that the DAFM AAD led directly from the DAFM Appropriate Assessment Screening exercise as there is no reference to an Appropriate Assessment Report having been published in advance of the Determination being made. The FAC also noted that the DAFM AA screening post-dated the applicants NIS and therefore the FAC expects, that unless expressly stated, that the DAFM AAD relied on the screening undertaken in the most recent report which in this case was the DAFM AA screening. The FAC considered that in the context of the above (absence of adopting applicant's NIS or the availability of an AAR) the DAFM has erred in its processing of the licence in so far as AA is concerned and that this constitutes a significant error.

The FAC finds that there is a separate in-combination report / document on file as completed by the DAFM which has a statement included in it. It is dated 20th September 2022 and indicates that various online planning systems and datasets (including DAFM's Forest Licence Viewer) were consulted on the same date in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin LOWER VILLAGE TRIB_010 and WOODFORD (GALWAY)_030. It includes a project specific statement which has the following paragraph in it.

'It is concluded that there is no possibility that the proposed Thinning project [REDACTED], with mitigation measures set out in Section 4 of the AA Determination document, will itself, i.e. individually, give rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of any European Site(s), when considered in-combination with other plans and projects'.

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 in the AA of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. The FAC considers the conclusion stated above to be an error as it suggests that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which in-combination with other plans and projects could result in a significant effect on a European site. The FAC would also understand that after concluding that the project itself would not have a significant effect on a specific European site, the DAFM should also consider other plans and projects and determine whether the project in-combination with other plans could have a significant effect. The FAC considered that this constitutes a further significant error in the processing of the application.

The FAC considered the contention in the grounds of appeal that application materials (including subsequent supporting information), responses from referral bodies and 3rd parties have not been made available to the public. The FAC in its consideration of this ground of appeal noted the response to it from the DAFM wherein it states that information relating to this licence application was available on the Department's FLV during the 14 day appeal window and that this included the response from the NPWS, pre-screening report, NIS and harvest plan. It also stated that all documents submitted by the applicant are taken into account when assessed and that the AAD documents the decision of the ecologist based on his assessment of available information. The FAC further finds that the DAFM's SOF gives a summary of how public and stakeholder participation is ensured throughout DAFM's licensing system and indicates that the process begins once the application is received at which point it is uploaded to the FLV and that 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. It also states that applications are also advertised on the DAFM's website. It goes on then to describe how forestry stakeholders and members of the public have 30 days to lodge a submission on an application and that once a submission is made, the individual making the submission receives documents in relation to the forestry licence application. Following the passing of the 30 days consultation it states that the Department begins work on the licence application taking into account any submissions received. It indicates that where a site is screened in for second stage AA an NIS is submitted by the applicant (if not already submitted) or where an NIS has not been prepared, the Department will prepare an Appropriate Assessment Report (AAR). In either case the NIS or AAR is said to be posted to the FLV and stakeholders and members of the public have a further 30 days to make submissions. The FAC finds that this application [REDACTED] was submitted on 14th December 2018 and that this predated the launch of the Forestry Licence Viewer (FLV) which occurred in early 2021. In that context the FAC considered that the full extent of the description of the public and stakeholder participation throughout DAFM's licensing system as set out in point 6 of the statement made to it by the DAFM in response to appeal FAC 180/2022 is not fully relevant to this application which was submitted considerably in advance of the launch of the FLV. The FAC further finds that several of the documents making up the file on this licence application including the harvest plan, NPWS referral and response, archaeology map, AA Screening Form, AA Determination and In-Combination report and Statement are marked as being uploaded to the FLV on 2nd of November 2022 (ie the date the licence in this case issued). The FAC finds that this does not meet the standards that the DAFM has set for itself in relation to publication of documents during the consideration of an application for a licence such as in this case. The FAC considered this to be a significant error in the processing of this application.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence [REDACTED]. The FAC is therefore setting aside and remitting the decision regarding licence [REDACTED] to the Minister to carry out a new screening and AA of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, before a new decision is made. The FAC noted that the NIS submitted for the application described the current stocking of the project area as consisting mainly of conifer plantation forest (Sitka spruce) planted in 2004 and that other species include Japanese larch, lodgepole pine and broadleaves. The FAC also noted that the original application quoted the years that plantation occurred as being variously 1988, 1989, 1993, 1997, 1998, 1989 and 2007 with only a lesser number of parcels being quoted as planted in 2004. As there appears to be a discrepancy between the years of planting as between the two accounts referenced above the FAC considered that this is a matter that should be clarified before a new decision is made.

End

