



[REDACTED]

5<sup>th</sup> February 2021

**Subject:** Appeals FAC581/2020 and FAC634/2020 regarding licence WW01-FL0096

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC, established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### Background

Felling Licence WW01-FL0096 was approved by the Department of Agriculture, Food and the Marine (DAFM) on 24<sup>th</sup> July 2020.

#### Hearing

An oral hearing of appeals FAC581/2020 and FAC634/2020 regarding the decision to issue licence WW01-FL0096, was conducted by the FAC on 12<sup>th</sup> January 2021. Attendees:

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Paula Lynch, Mr. Luke Sweetman
Secretary to FAC:	Mr. Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM Representatives:	Mr. Frank Barrett, Ms. Eilish Kehoe

## Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference WW01-FL0096).

The licence granted is for the clearfell and replanting of 15.78ha at Ballylow, Co. Wicklow. The species to be felled is 100% Sitka spruce across two sub-compartments planted 1984/85. The restock species at application are 98% Sitka spruce (14.69ha), 2% Birch (0.30ha) with 0.79ha open space retained. As per the DAFM information, the underlying soil type is approximately 51% Blanket Peats and 49% Podzols (Peaty), Lithosols, Peats. The slope is predominantly steep (15-30%). The project is located in the Liffey and Dublin Bay Catchment (100%), the Liffey\_Sc\_010 (100%) Sub-Catchment, the Ballydonnell Brook\_010 (1%) and the Ballylow Brook\_010 (99%) Waterbodies.

The Applicant submitted an application pack which included maps, inventory data, a harvest plan document and an Appropriate Assessment Pre-screening Report.

The DAFM referred the application to Wicklow County Council and Inland Fisheries Ireland (IFI). The County Council responded and provided background data for the project site, including that it was located in a Priority Area for Action under the River Basin Management and requested that the DAFM check water protection compliance during felling. The IFI response (dated 27<sup>th</sup> January 2020) was read onto the record at the Oral Hearing and listed recommended measures including adherence to the Forest Harvesting & the Environment Guidelines, the application of a 10m buffer along aquatic zones, the appropriate use of sediment traps, the monitoring of ground stability throughout operations, and a request to contact IFI personnel prior to commencing operations. Only one of the IFI's recommendations (regarding contacting their personnel) were transposed onto the licence and the County Council's request to check water protection compliance during felling was not included.

The DAFM carried out a Stage 1 Screening for Appropriate Assessment (AA) of 6 Natura sites (4 SACs & 2 SPAs) within 15km of the project site. All but two of these sites were screened out for Stage 2 AA. The Wicklow Mountains SAC was screened in due its proximity to the proposed development and the Wicklow Mountains SPA was screened in due to the proximity of the project site to potential habitat for

the species listed as the Special Conservation Interest (SCI) of this Natura site. The DAFM produced an AA Report (AAR) and AA Determination (AAD) (both dated 29<sup>th</sup> June 2020) which were reviewed by an external Ecologist and signed-off on 13<sup>th</sup> July 2020. The AAR includes the list of Natura sites screened out for AA, and the reasons for those decisions, and states that the DAFM has determined that there is no possibility of the felling and reforestation project having any significant effect, either individually or in combination with other plans or projects, on any of the screened-out European sites.

The AAR states that the DAFM has determined that there is a possibility of the project having a significant effect on the Wicklow Mountains SAC and the Wicklow Mountains SPA. The AAR lists the Qualifying Interests (QIs) and SCIs for both European sites and describes the required mitigations for each SCI/QI. These were included in the AAD. For the Wicklow Mountains SPA, mitigation measures are listed for the Merlin and the Peregrine. The Wicklow Mountains SAC has numerous QIs listed in Section 6.2 of the AAR with mitigations included only “required” in relation to the Otter.

The AAR includes a section on “In-Combination Effects” which lists the various planning websites consulted and an in-combination statement which states that “the DAFM deems 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”.

The licence issued on 24<sup>th</sup> July 2020 and is exercisable until 31<sup>st</sup> December 2022. It is subject to relatively standard conditions plus additional conditions: (h) regarding contacting the IFI prior to commencement of works, Conditions (i) – (k) are the site-specific mitigations from the AAD relating to the Merlin and the Peregrine, and Condition (l) lists a set of standards and guidelines which the proposed works shall adhere to. None of the site-specific mitigations regarding the Otter were included as licence conditions.

There are two appeals against the decision to grant the licence. In summary, the grounds of the first appeal contend that the Appropriate Assessment screening did not comply with “the decision of Finlay J in Kelly”. Under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. There has been no investigation as to whether the application site has complied with “the requirements of EU law”. The basic requirements of the NPWS have not been complied with. An issue raised in the appeal relating to the FAC is not a valid ground of appeal against a decision to issue a felling licence. In summary, the grounds of the second appeal state that there is a breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive. The licence is in a class of development covered under Annex II of the EIA Directive. On the same date that the application for this licence was

submitted a further two applications for clear felling licences were submitted for the same Forest Management Unit (FMU) totalling 30ha. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. The application has not described any aspects of the environment which are likely to be significantly affected. The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-2021. Inadequate consideration given to feedback from a consultation body. The Stage 2 AA determination is not legally valid. All of the mitigation measures included in the AAD have not been incorporated into the licence. A potential source of impact on a designated site has not been identified and consequently no mitigation has been proposed. DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the AAD. The AA In-Combination assessment is flawed as the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. Licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests. The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence.

In summary, the DAFM's response to the grounds of appeal states that the 15.78ha felling and reforestation project licenced as WW01-FL0096 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19)* (DAFM, 2019). An AA screening was carried out by DAFM for European sites within 15 km of the proposed development.

The DAFM identified the possibility of the project having a significant effect on a screened European site (i.e. the Wicklow Mountains SPA 004040 and Wicklow Mountains SAC 002122) and an AA carried out. The potential for the project to result in impacts on the SCIs of the Wicklow Mountains SPA and the QIs

of the Wicklow Mountains SAC was identified and site-specific measures to mitigate such impacts were described. The mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the SCIs of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAR and AAD statement ensure that the proposed project will not result in any adverse effect on any European Site. The DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AAR and AAD Statement for WW01-FL0096.

The potential for the proposed project to contribute to an in-combination impact on European sites was considered by DAFM. The DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (WW01-FL0096), either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the AAR and AAD Statement were attached as conditions of licence issued for felling and reforestation project WW01-FL0096. The DAFM stated that clearfelling and replanting already established forest areas do not fall within the specified categories of forestry activities or projects set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. Therefore a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. In the DAFM opinion the outputs from the FMU planning process undertaken by the Applicant and any resultant Business Area Unit (BAU) strategic plan should not be a material consideration in the DAFM's assessment *inter alia* of the potential environmental effect of the application. Amongst other reasons, this is because the FMU planning process and any resultant BAU strategic plan is not an obligatory statutory process, arising either from the legislation governing the operation of the company (the Forestry Act 1988 and the Forestry (Amendment) Act 2009) nor from the provisions for forest management plans set out in Section 10 of the Forestry Act 2014. Similarly, they do not constitute a plan or programme subject to the requirements of the SEA Directive, as transposed *inter alia* by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, as amended.

The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018)*. Critically, any felling licence issued is conditional on adherence to the *Interim Standards for Felling and Reforestation (DAFM, 2019)*, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. In relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The water-related eco-system services such a buffer delivers are described in the document *Woodland for Water: Creating new native woodlands to protect and enhance Ireland's waters (DAFM, 2018)*, with benefits further enhanced if accompanied by adjoining native woodland. Further setbacks are also required along relevant watercourses and water-related hotspots throughout the site, where present. Regarding consultations, referrals to statutory consultees, including IFI, National Parks & Wildlife Service (NPWS) and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. The DAFM is actively engaged in the WFD process, contributing proactively to the 2nd cycle and the 3rd cycle, the latter currently under development. Therefore, while referrals are an important part of the evaluation process, the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD. Standard procedures were followed in respect of issuing referrals and considering referral responses. A Stage 2 AA was carried out by the DAFM in respect of felling and reforestation project WW01-FL0096. The AA Screening Document, AAR and AAD are recorded on file. DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AAR and AAD statement for WW01-FL0096. Regarding opportunities for public participation in the decision-making process around applications for felling licences, under Part 6 of the *Forestry Regulations 2017 (S.I. No. 191 of 2017)* where the Minister for Agriculture, Food and the Marine receives such an application they are required to i) Publish a notice of the application, and ii) Inform the public that any person may make a submission or observation in writing concerning the application to the Minister within 30 days from the date of publication of that notice. The notification of such felling licence applications and details of the arrangements for public participation are published and readily accessible on the DAFM's website. In the making of a submission or observation concerning such applications, this includes the opportunity for members of the public to

make a submission or observation on the likely effect on the environment of the proposed felling activity. In regard to AA Screening and AA specifically, and the consideration, if appropriate, of the opinion of the general public in the making of a related determination under Article 6(3) of Habitats Directive –

a) Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making his or her decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6; and

b) Regulation 19(4) expressly requires the Minister when carrying out an AA of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6.

The DAFM submits that these provisions, and any considerations and decisions made pursuant to them, fully comply with the requirements of Article 6(3) of Habitats Directive regarding public participation. The DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements. The site-specific mitigations identified in the AAR and AAD statement were attached as conditions of the licence issued for felling and reforestation project WW01-FL0096. It is a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply. It is the Minister that may at any time attach or vary conditions to any licence granted (see Section 17.4 of the 2014 Forestry Act).

The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products. There is no legal requirement for forest owners to inform adjacent land owners of their intention to spray. Regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

The FAC held an Oral Hearing on the 12<sup>th</sup> January 2021. The parties were invited to attend in person or to join electronically. There were two Appellants with separate appeals against this licence. One of the Appellants participated electronically while the other did not participate. The DAFM and the Applicant both participated electronically. The FAC sat in person and remotely at this hearing.

At the hearing, the DAFM detailed their approach to processing and issuing the licence application, that submissions had been received and that the project site had been field inspected (21<sup>st</sup> July, 2020) and desk assessed prior to the decision to grant the licence (24/07/2020).

The DAFM outlined how referrals to statutory consultees are automatically triggered according to interactions with certain spatial rules, and that this licence application had been referred to the IFI and Wicklow County Council. The IFI response was read onto the record by the DAFM. The DAFM confirmed that the AAR and AAD were completed and considered prior to their decision to grant licence WW01-FLO096. The Appellant argued that, although the AAR and AAD were completed on the same date, the ecological review did not take place until 14 days later. They stated that the mitigations for the Merlin, recommended by the AAR had no scientific basis and that the National Parks & Wildlife Service (NPWS) should have been consulted as they have previously stated that the Wicklow Mountains SAC is an important habitat for an increasing Merlin population. The Appellant referenced previous FAC decisions which stated the Appellant had provided no scientific evidence to support their claims of the inadequacy of licence condition (k). In this regard, the Appellant stated that Merlin *may* nest up to 100m in from the forest edge and that there was no scientific basis to rule that possibility out. They indicated that based on the date of sign-off it is unknown if the Ecologist agrees with the Merlin condition. The Appellant stated the FAC should request the Ecologist in question to attend Oral Hearings. They also stated that they had tried to convince the NPWS to attend an Oral Hearing but that the FAC may *require* somebody to attend to provide evidence. The Appellant questioned why there was no discretionary referral to the NPWS in this instance and stated that reason should be provided where discretionary referrals are not made. The Appellant stated that the risk that the replanting of this site with conifers poses to adjacent Annex 1 Habitats had not been adequately assessed. They stated that the AAR states there is no pathway for an impact and these habitats are not in the vicinity of the project site but that the potential colonization by conifers had not been assessed. The Appellant contended that the impact of the restocking of this site with Sitka spruce had not been assessed and that the planned restock species were not in the site's best interests. The Appellant indicated that the Ecologist who had reviewed the AAR and AAD was a hydrology specialist. They also indicated that the Merlin mitigation measures prescribed by the DAFM are their interpretation of the Ornithological expertise they had received, rather than an



accurate reflection of what that expert had said. The FAC asked did the Appellant have any scientific data to contradict the scientific basis for the Merlin mitigations, the Appellant stated that the Lusby report (2017) states that forestry operations are a risk to the Merlin. The FAC asked the DAFM why the site-specific mitigations related to the Otter, listed in the AAR and AAD, were not included as conditions on the felling licence. The DAFM stated that the site had been field assessed and that no relevant watercourses (RWCs) on-site. The DAFM stated that, based on a field inspection, it had considered that the mitigation measures relating to water quality and the Otter were not relevant in this instance and so were not included as licence conditions. They further stated that the majority of the recommendations of the IFI had not been included as conditions for the same reason.

The Applicant described the project site as having a north-east intermediate slope with open Heath to the north-east and forestry bounding its other sides. The Applicant stated their Environment Manager had visited the site on the 4<sup>th</sup> November 2020 and found it was 60% soft, 40% firm ground. They stated the site was c.200m from Ballylow Brook and that there were no RWCs leaving the site but that surface water was exiting the site to the north-east towards the Ballylow Brook across dense heath. The FAC queried why an inspection had not taken place prior the submission of the application being submitted, the Applicant stated that site visits can inform their plans and that it may have been more helpful to sequence it that way. The FAC queried the Appellant regarding their statement that the project site is adjacent to Annex I Habitat. The Appellant stated that there is a complex of Wet Heath/Dry Heath/Blanket Bog within the Wicklow Mountains SAC and that the NPWS Article 17 data details this. They also referred to the statements from the Applicant about heath to the north-east of the site. The DAFM confirmed, in response to a question from the FAC, that condition (I)(iii), which refers to the Hen Harrier, had been included in error.

The FAC had regard, in the first instance, to the grounds of both appeals relating to the AA process. The FAC noted that the DAFM undertook a Stage 1 AA Screening in relation to 6 Natura 2000 sites within a 15km radius of the project. The DAFM screened out 4 of these sites but concluded that the proposed project could potentially have a significant effect on the Wicklow Mountains SAC and the Wicklow Mountains SPA. Therefore, the project was screened in and an AA carried out. The potential for the project to result in significant effects on the SCIs/QIs of these Natura sites was identified on a precautionary basis and site-specific measures, identified by the DAFM to mitigate such impacts, were described. The DAFM stated that the mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the SCIs/QIs of the Natura sites from reaching favourable

conservation status, as per Article 1 of the EU Habitats Directive and the proposed development will not result in any adverse effect on any European Site. The potential for the proposed project to contribute to an in-combination impact on the Wicklow Mountains SAC and the Wicklow Mountains SPA was considered by the DAFM. This included the assessment of various forestry and non-forestry plans and projects within the vicinity of the proposed project. The DAFM concluded that there is no potential for the proposed works to contribute to any cumulative adverse effects. The FAC noted that the in-combination assessment found no plans or projects in the vicinity of the proposed development listed on any of the planning websites they consulted (the Department of Housing, Planning and local Government, An Bord Pleanála, the EPA,). The DAFM also found no other forestry projects in the vicinity except for c.9ha listed under Coillte felling licences (c.3ha in 2018 and c.6ha in 2021). The FAC is satisfied that, in this instance, the DAFM's assessment of the in-combination effects of the proposed development was sufficient. The FAC is satisfied that the procedures adopted by the DAFM in their completion of a Stage 1 AA Screening and the subsequent production of an AAR and AAD were consistent with the requirements of 6(3) the Habitats Directive and the FAC agrees with the conclusions reached at each stage. However, the FAC noted that the DAFM decided not to include the mitigation measures listed in the AAR and AAD in relation to the Otter as conditions of the felling licence. Based on the evidence before it, and in the particular circumstances of this case, the FAC considers the DAFM's failure to include the site-specific mitigations described in the AAR and AAD as licence conditions to be a significant error in the processing of felling licence WW01-FL0096.

The FAC considered the first Appellant's contention that "the basic requirements of the NPWS have not been complied with". The FAC took into account the DAFM's statement regarding the referral of licence applications to the NPWS and that this proposed project was not referred for consultation because the criteria for doing so were not met. Based on the information before it, the FAC considers that, specifically relating to referrals, the processes completed prior to issuing the decision have complied with the requirements of the Habitats Directive and that the DAFM exercised its discretion in respect of referrals.

Addressing the grounds of appeal of the second Appellant, the FAC had regard to the Appellant's submission that the proposed development should have been assessed in the context of the EIA Directive. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine through thresholds or on a case by case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation (nor clearfelling) 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). The Irish Regulations, in relation to forestry licence applications, require compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The FAC concluded that the felling and subsequent replanting, as part of a commercial forestry operation, with no change in land use, does not fall within the classes of development referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as contended in the written grounds of appeal.

The FAC considered the Appellant’s submissions that the proposed project threatens the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 and that the DAFM did not have adequate regard to the feedback from IFI. The FAC noted the DAFM’s statement that they have included standard water quality guidelines in the licence conditions but, in the particular circumstances of this case, did not include all of the recommendations of IFI in the additional conditions to felling licence WW01-FL0096. The FAC considered that there is no mandatory requirement to always incorporate recommendations of a Prescribed Body into a licence decision. As stated previously, the FAC observed that the licence conditions do not contain the site-specific mitigations relating to the protection of water quality as described in the AAR and AAD. Based on the evidence before it, and in the particular circumstances of this case, the FAC concluded that the DAFM made a significant error in this regard.

The FAC had regard to the Appellant’s argument in the Oral Hearing that the Annex I Habitats of the Wicklow Mountains SAC were at risk of colonisation by Sitka spruce and this risk had not been adequately assessed. The FAC noted the NPWS’s Conservation Objectives document for this SAC states that the combined area of the following habitats covers 77% of the SAC: European Dry Heaths (13%), Northern Atlantic Wet Heaths with *Erica tetralix* (25%), Alpine and Boreal Heaths (1%) and Blanket bog (38%). According to the EPA website’s AA tool – the project site is c.170m from the Wicklow Mountains SAC at its closest point. The AAR states in relation to the variety of Heath habitats listed, that “this habitat has no pathway to and is not in the vicinity plot”. Regarding Blanket bog, the AAR states that “this habitat has not been mapped in conservation objectives (NPWS, 2017) but is unlikely in the vicinity of the plot”. The FAC observed that the NPWS Conservation Objectives document states that none of the Annex I habitats referred to are mapped for this SAC. However, these habitats combined constitute

c.77% of the SAC. Based on the information before it, in the particular circumstances as outlined above, and given the nature and scale of the proposed development and its proximity to the Wicklow Mountains SAC, the FAC is not satisfied that the conclusion reached by the DAFM in respect of these QIs was reached on the basis of the best available information relating to the QIs.

The FAC considered the Appellant's statements regarding the lack of scientific basis for the DAFM's mitigation measures for the Merlin. The FAC noted the Appellant's reference to the 2017 'Lusby report' (Breeding ecology and habitat selection of Merlin *Falco columbarius* in forested Landscapes) which found that, for the Merlin which were surveyed within forest plantations; 91.5% were located within 10m of the forest edge. The FAC observe that the DAFM's standard Merlin mitigation was developed with the input of an Ornithologist and the evidence before the FAC is that both this Ornithologist, and the Ecologist who reviewed the AAR and AAD considered an operational exclusion zone of 100m, in qualifying circumstances, as being sufficient to mitigate the potential disturbance of breeding Merlin populations. The FAC observe that the Appellant did not present any site-specific evidence to contradict this.

The FAC had regard to Article 6(3) of the Habitats Directive and its provisions for obtaining the opinion of the general public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. Having regard to the Appellant's grounds of appeal, the FAC concluded that there is no convincing reason for public consultation at this stage.

The FAC considered the Appellant's contention that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). The FAC concluded that the Harvest Plan is, in fact, a document outlining general environment and safety rules and that all of the licenced operations on site must comply with the conditions of the felling licence.

In regard to a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season and for the animal species listed in Annex IV (a) of that Directive, the FAC observe that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC considered the Appellant's grounds that the licence should contain conditions relating to the commencement, carrying-out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the Licensee's adherence to the conditions of those licences. Based on

the evidence before it, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. In this regard, the FAC noted there is no statutory basis to enforce the Licensee to inform individual landowners. The FAC observed the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No. 1107/2009 (concerning the placing of plant protection products on the market). Users of plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. On balance, the FAC finds that there is insufficient basis on which to apply a condition related to spraying as contended by the Appellant.

Based on the evidence before it, and in the particular circumstances of this case, the FAC concluded that the DAFM made a significant error by not including the site-specific measures recommended by the AAR and AAD as conditions of the felling licence WW01-FL0096. The FAC also concluded that the DAFM made a significant error by not sufficiently assessing the potential for the proposed development to have a significant effect on the Annex I Habitat QIs of the Wicklow Mountains SAC. In these circumstances, the FAC concludes that the decision should be set aside and remitted to the Minister to carry out a new AA screening of the proposed development regards Natura 2000 sites within a 15km radius, on its own and in combination with other plans and projects, and resulting from the screening conclusion, an AA if necessary, before making a new decision in respect of the licence.

Yours sincerely,

Luke Sweetman on behalf of the Forestry Appeals Committee

