



26th May 2023

Subject: Appeal FAC 180/2022 in relation to licence GY10-FL0120

Dear

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

Licence and Hearing

A tree felling licence GY10-FL0120 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 GY10-FL0120. 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)

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)
- Barroughter Bog SAC (000231)
- Cloonmoylan Bog SAC (000248)
- Loughatorick South Bog SAC (000308)
- Middle Shannon Callows SPA (004096)
- Pollagoona Bog SAC (002126)
- Pollnacknockaun 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 GY10-FL0120 and GY10-FL0150, 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 GY10-FL0120 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 brush 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).
- Pollnacknockaun Wood Nature Reserve SAC IE0000319 (1.8 km from the project).
- Lough Derg (Shannon) SPA IE0004058 (2.5 km from the project).
- Barroughter 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 GY10-FL0120, 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 GY10-FL0120 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.
- Pollnaknockaun 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 GY10-FL0120 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 GY10-FL0120 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 GY10-FL0120, 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 GY10-FL0120, 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.'

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 GY10-FL0120 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 GY10-FL0120 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 GY10-FL0120 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 GY10-FL0120, 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 GY10-FL0120 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 GY10-FL0120, 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 GY10-FL0120 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 GY10-FLO120 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 GY10-FL0120 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 GY10-FL0120, 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 GY10-FL0120, 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.'

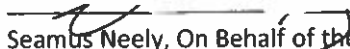
The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the AA of the implications 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 (GY10-FL0120) 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 GY10-FL0120. The FAC is therefore setting aside and remitting the decision regarding licence GY10-FL0120 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.

Yours sincerely,


Seamus Neely, On Behalf of the Forestry Appeals Committee