



29<sup>th</sup> January 2024

**Subject:** Appeal FAC 005/2023 against licence decision TFL00262118

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and Marine. 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.

#### **Hearing**

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC 005/2023 was held remotely by the FAC on 6<sup>th</sup> December 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. John Evans, Mr. Iain Douglas & Mr. Luke Sweetman.  
Secretary 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, including a number of post-appeal submissions, the FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence TFL00262118. The reasons for this decision are set out hereunder.

#### **Background**

The licence decision in this case relates to an application for a felling licence at Gortnawaun, Co Leitrim. The application included a harvest plan, operational details and maps. The application is accompanied by a site location and site map / ortho map. Part 3 of the felling licence application sets out the trees proposed to be felled and Part 4 details the proposed replanting species. There are three versions of the felling licence application on the Forestry Licence Viewer (FLV) and the FAC noted that it is the third iteration, uploaded on the 09/01/2023, which aligns with the felling and replanting operations approved in general felling licence TFL00262118. The licenced area is composed of 100% Sitka spruce. Plot 1 (23.11ha) and Plot 2 (1.3ha) are to be clearfelled and Plot 3 (2.84ha) is approved for thinning only. The "Harvest Year" is listed as 2023. These details are reflected in the 'Felling Plot Details' document uploaded

to the FLV on the 28/03/2023. Schedule 3 of the felling licence requires Plots 1 & 2 to be replanted with 90% Sitka spruce at 2,500 stems per ha (s/ha) and 10% Additional Broadleaves at 3,300 s/ha.

The Harvest Plan (HP) indicates the use of a harvester and chainsaw as methods for felling. 'Reforestation' is said to be by pit planting, mounding and scrap mounding. The HP indicates that access is planned, and that aquatic zone and relevant watercourses are present and that there are peaty or peaty gley soils and that there are steep slopes. Proposed measures to protect social & environmental features & considerations are set out. The HP also states that harvesting and extraction will be carried out during spring/summer months when rainfall is low and that large amounts of brash will be available on site to keep extraction routes in good condition. The harvest direction is marked on the HP map as is the main extraction route within the site. It states that the risk of sediment runoff is very low due to the vegetation present in the aquatic zones, that temporary bridges will be used, that stacking areas are as marked on the HP map, that fuel and urea storage will be located nearby the stacking areas, that onsite supervision will be present during operations to ensure that felling, extraction and replanting operations are carried out appropriately and that all external hedgerows are to be retained. It is stated that ADB will be mainly planted adjacent to watercourses, dwellings and public road, that a 10 m buffer is to be created adjacent to the aquatic zones with 3 rows of ADB and that there will be 60m dwelling setback and 10m public road setback. The application materials set out that there is no forest road present and that a forest road is planned.

#### **Template AA Screening Form (26Nov18)**

On file is a Template AA Screening Form (26Nov18) which is dated 27/02/2019 and bears a date stamp 27 Feb 2019. It identifies and examines Cuilcagh – Anierin Ulands SAC. It screens out this European Site and concludes that an Appropriate Assessment is not required. It appears that this document relates to the original thinning-only project applied for in 2018.

#### **Appropriate Assessment Report (AAR) dated 3rd May 2022**

Also on file is an AAR dated 3<sup>rd</sup> May 2022 which is marked as being for clearfelling and reforestation project TFL00262118, at Gortnawaun, Co. Leitrim. It references that *'having arrived at the Appropriate Assessment Screening Determination (see file), it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on the following European Site, or uncertainty exists in this regard:*

➤ *Cuilcagh - Anierin Uplands SAC IE0000584'*. It records those matters taken into consideration including *'the initial application....'*. It states that *'A response from NPWS was received on 17/05/2019, in which no objection to the proposed project was made, and which included recommendations relating to the adjoining SAC and watercourses'*. At Section 4 this AAR sets out Mitigation Measures as below.

#### ***'In relation to Annex I habitats associated with Cuilcagh - Anierin Uplands SAC IE0000584:***

- *There is to be no machine entrance into, or access via, the adjoining Cuilcagh - Anierin Uplands SAC.*

- *No changes are to be made to the existing physical boundary between the project area and the adjoining Cuilcagh - Anierin Uplands SAC that might otherwise create new surface and subsurface pathways for water to flow from the SAC itself.*
- *An unplanted setback of 5 m is to be applied along the northern boundary of Plot 1 where the SAC lies adjacent.*
- *To enhance the protection of the SAC, five rows of broadleaves are to be planted (at 2 m x 2 m spacing) along the outer (i.e. upslope) edge of the associated water setback. This planting must not encroach into the prescribed water setback itself. Native species appropriate to the immediate site conditions and, where possible, of Irish provenance, are to be used for this purpose. These trees are to be maintained and protected from grazing.*
- *In relation to reforestation, adherence to the Environmental Requirements for Afforestation, particularly in relation to Section 3.7.2 (Fertiliser Application) and Section 3.7.3 (Vegetation management using herbicides and other methods).*

**The proposed works shall adhere to:**

- *Standards for Felling & Reforestation (v.Oct. 2019)*
- *Environmental Requirements for Afforestation (DAFM, 2016)*
- *Felling & Reforestation Policy (DAFM, 2017)*
- *Forestry Standards Manual (DAFM, 2015)'*

It is unclear to the FAC which screening exercise supports this version of AAR having regard to the dates and / or conclusions reached in the various screening reports on file.

**Appropriate Assessment Screening Report & Determination (AASRD 18/05/2022) dated 18<sup>th</sup> May 2022**

The FAC finds on file an Appropriate Assessment Screening Report & Determination (AASRD) dated 18<sup>th</sup> May 2022 for clearfelling and reforestation project TFL00262118, at Gortnawaun, Co. Leitrim as prepared by a consultant project Ecologist of Fehily Timoney & Company on behalf of the Department of Agriculture, Food & the Marine. This report identifies five Natura 2000 sites, two of which are within 15km of proposal area and three are beyond a 15 km radius. These five are set out below.

- Cuilcagh - Anierin Uplands SAC 000584 (adjacent)
- Boleybrack Mountain SAC IE0002032 (within 15km)
- Lough Oughter and Associated Loughs SAC IE0000007 (26.3km)
- Upper Lough Erne SAC UK0016614 (30.4km)
- Upper Lough Erne SPA UK9020071 (30.4km)

Cuilcagh–Anierin Uplands SAC was screened in and the other four sites were screened out. The FAC understands that this AASRD relates to the '2022' iteration of the application.

### **Appropriate Assessment Screening Report (AASRD 17/11/2022) dated 17<sup>th</sup> November 2022**

The FAC finds on file an Appropriate Assessment Screening Report & Determination as prepared by consultants for the DAFM. It bears the date of 17<sup>th</sup> November 2022. It states in section 1 that *'this screening for Appropriate Assessment has been undertaken to determine whether the proposed thinning, clearfelling and reforestation project under TFL00262118 (henceforth referred to in this document as 'the project'), individually or in combination with other plans and projects, is likely to have a significant effect on any European site (i.e. Natura 2000 sites), in view of the site's conservation objectives'*.

It sets out that the following sites have been identified for screening,

- Cuilcagh - Anierin Uplands SAC IE0000584 – marked as immediately adjacent to the project area.
- Boleybrack Mountain SAC IE0002032 – marked as c. 14.5 km northwest of the project area.
- Lough Oughter and Associated Loughs SAC IE0000007 – marked as 26.3 km east of the project.
- Upper Lough Erne SAC UK0016614 – marked as 30.4 km east of the project.
- Upper Lough Erne SPA UK9020071 – marked as 30.4 km east of the project.

Cuilcagh - Anierin Uplands SAC IE0000584 is screened in for Appropriate Assessment and the other four sites are screened out and the reasons for the screening conclusion reached for each site are recorded. An In-Combination report for felling proposed under TFL00262118 is included at Appendix A of the report. The FAC understands that this AASRD relates to the application for thinning and clearfell that gave rise to the issue of the licence by DAFM and which is subject to this appeal.

### **Appropriate Assessment Report (AAR) dated 17<sup>th</sup> November 2022**

Also on file is an AAR dated 17<sup>th</sup> November 2022 which is marked as being for thinning, clearfelling and reforestation project TFL00262118, at Gortnawaun, Co. Leitrim. It references the AASRD having screened in one European site. It records those matters taken into consideration. It states that *'A response from NPWS was received on 17/05/2019, in which no objection to the proposed project was made, and in which included recommendations relating to the adjoining SAC and watercourses'*. At Section 4 this AAR sets out Mitigation Measures as below.

*'In relation to Annex I habitats associated with Cuilcagh - Anierin Uplands SAC IE0000584:*

- *There is to be no machine entrance into, or access via, the adjoining Cuilcagh - Anierin Uplands SAC.*
- *No changes are to be made to the existing physical boundary between the project area and the adjoining Cuilcagh - Anierin Uplands SAC that might otherwise create new surface and subsurface pathways for water to flow from the SAC itself.*
- *An unplanted setback of 10 m is to be applied along the northern boundary of Plot 1 where the SAC lies adjacent.*
- *To enhance the protection of the SAC, five rows of broadleaves are to be planted (at 2 m x 2 m spacing) along the outer (i.e. upslope) edge of the associated water setback. This planting must not encroach into the prescribed water setback itself. Native species appropriate to the immediate*

*site conditions and, where possible, of Irish provenance, are to be used for this purpose. These trees are to be maintained and protected from grazing.*

- *In relation to reforestation, adherence to the Environmental Requirements for Afforestation, particularly in relation to Section 3.7.2 (Fertiliser Application) and Section 3.7.3 (Vegetation management using herbicides and other methods)'.*

In Section 5 it sets out that the potential for the project to contribute to an in-combination effect on European sites was considered by the Department of Agriculture, Food & the Marine and includes the following statement;

*'The proposed thinning, clearfelling and reforestation project TFL00262118 lies in a rural landscape in the townland(s) of GORTNAWAUN, Leitrim. It is within the River Sub-Basin Annadale Stream\_010, approximately 25% of which is under forest cover, which is greater than the national average of 11%. At 27.25 hectares, the proposed project is considered large in scale. The review of the DAFM Forestry Licence Viewer identified a number of forestry projects within the vicinity. These projects undergo environmental assessment, including AA screening and appropriate assessment (if necessary). As can be seen from the ortho photo, this forest adjoins an existing forest.*

*In the River Sub-Basin Annadale Stream\_010 over the last 5 years a number of developments have been or were in the process of being granted planning permission. These too undergo environmental assessment, including AA screening and appropriate assessment, if necessary.*

*It is concluded that there is no possibility that the proposed thinning, clearfelling and reforestation project TFL00262118, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Cuilcagh - Anierin Uplands SAC IE0000584 Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.*

*Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any adverse effect on the integrity of these European Sites.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the above European Site(s).*

*Note that this relates to the proposed activities under TFL00262118 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted.*

*In-Combination Statement completed on the: 15/11/2022'.*

This AAR states on page 3 states that it took into account the *'initial application, including.....'* and describes the application that was referred to the NPWS and Leitrim County Council as being the initial version.

#### **Appropriate Assessment Determination (AAD) dated 4<sup>th</sup> March 2023**

The FAC finds on file an AAD dated 4<sup>th</sup> March 2023 which states was prepared by a different consultant ecologist to that who prepared the AASRD and who is stated to be an Authorised Officer under the Forestry Act 2014 on behalf of the Minister for Agriculture, Food & the Marine. It is described as being for clearfelling and reforestation project TFL00262118, at Gortnawaun, Co. Leitrim. It states that documents / matters such as the initial application, all information submitted by the applicant, input from the District Inspector (including information following field inspection), submissions from 3rd parties, responses from consultation bodies, Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site available from National Parks & Wildlife Service ([www.npws.ie](http://www.npws.ie)) and relevant publications, scientific papers, guidelines and other information sources, where considered. This AAD refers to the Ministers Appropriate Assessment of the project in relation to the screened in European Site that being Cuilcagh - Anierin Uplands SAC and includes the mitigations as set out in the Ministers AAR.

#### **Appropriate Assessment Screening Report (AASR) bearing the date 28/03/2023**

The FAC finds on file an Appropriate Assessment Screening Report bearing the date 28/03/2023 and marked as certified on 08/03/2023. It states that the project comprises 27.28 hectares of felling & reforestation. This report identifies two European sites (Boleybrack Mountain SAC 002032 and Cuilcagh - Anierin Uplands SAC 000584). Both sites are screened out with a comment *'Other factors, As per AAD'* The report concludes that there is *'No likelihood of a significant effect on any European site, and Appropriate Assessment not required'*.

#### **Assessment for EIA Requirement**

Also on file is a report titled Assessment for EIA Requirement bearing the date 28<sup>th</sup> March 2023 and marked as certified on 8<sup>th</sup> March 2023 and which is stated to be based on a last spatial run 11<sup>th</sup> November 2022. The following commentary from the Inspector is included in the comment box at the end of the report. *'Regarding Q1 one plot 3 is thinning only. Regarding question 9 & 13, it is noted that the Forestry and Water Quality Guidelines have been replaced by the Standards for Felling & Reforestation, the Felling & Reforestation Policy and, if reforestation is involved, the Environmental Requirements for Afforestation.'*

#### **Leitrim Co Council Submission**

The application was referred to Leitrim County Council on 13<sup>th</sup> March 2019 having also been manually referred to the Council on 5<sup>th</sup> March 2019. The County Council response is dated the 11<sup>th</sup> March 2019 and includes that the site is within an Area of High Visual Amenity as per the County Development Plan (CDP) 2015 – 2021, that the Northern section of the lands adjoin an SAC and a proposed NHA, that the project area is in an area classified as having low capacity to accommodate forestry, that no preservation orders affect the site, that the site does not impact any recorded monuments, and suggests conditions of licence regarding information required on haul route, volumes, and bonding against road damage.

### **National Parks and Wildlife Service (NPWS) Submission**

The application was referred to the NPWS on 13<sup>th</sup> March 2019 who responded on 16<sup>th</sup> May 2019 and submitted that no felling operations should impact or interfere with the adjoining bog/heath habitats. The submission notes that there are watercourses in and adjoining the site and sets out that felling and re-mounding can be a considerable threat to watercourses, habitat and species. It also sets out that in the broadest sense there are no concerns or objections to thinning or clearfell while referencing that felling and re-mounding of afforestation lands on similar lands adjoining SAC further to the east in the Yellow River Catchment are the cause of significant pollution and degradation of the Yellow River in recent years, it raises concern for the quality and integrity of downstream watercourses and river habitats of this application site, and states that downstream waters support EU Annex Species Otter, Kingfisher, and White-clawed Freshwater Crayfish are also known to be salmonid trout nursery Streams. It states that an active programme of silt and sediment control / management, maintenance and monitoring must be agreed and installed before thinning or access roads are undertaken, The submission then goes on to mention what it describes as more general points of relevance which are provided in an appendix to the submission.

### **Appeal**

One third party appeal was made against the decision to grant the licence and was received by the FAC on 6<sup>th</sup> April 2023. The Notice of Appeal and full grounds of appeal were provided to the parties and are on file. The grounds are extensive and were considered in full by the FAC. In the interests of brevity, the grounds are summarised under the following headings.

1. Breach of Article 6(9) and / or Article 9 (4) of the Aarhus Convention regarding the timing of publication of the decision,
2. Inadequate and ineffective public notice in contravention of Article 6 (2) of the Aarhus Convention,
3. Licence conditions not adequate to ensure the reasons for the conditions will be satisfied,
4. The Application is not consistent with the Requirements of the Forestry Standards Manual,
5. The assessment under Article 6 (3) of the Habitats Directive is flawed,
6. Breach of the Climate Action And Low Carbon Development Act (2015) & Breach of Article 6 (6) of the Aarhus Convention,
7. Ireland has not correctly transposed the Birds Directive into National Law and the licence therefore cannot be considered to have been awarded consistent with the requirements of the Birds Directive,
8. The licence is not consistent with the Landscape Objectives and Forestry Policies of the Leitrim County Development Plan,
9. The application has not been assessed consistent with the requirements of Article 4 (1) of the WFD,
10. Screening under the EIA Directive is required for the initial afforestation of these lands,
11. No suitable means to extract timber / Project Splitting,
12. Lack of potential enforcement.

An oral hearing of the appeal has been requested by the appellant.

### **Response to Appeal from DAFM (Ecologist) to FAC dated 30<sup>th</sup> May 2023**

There is on file a report dated 30/05/2023 from a DAFM Ecologist in relation to appeal FAC 005/2023 against the issue of licence TFL00262118. It summarises and addresses grounds of appeal that it states are relevant to Ecology. In relation to the ground submitting that licence conditions are not adequate to ensure the reasons for the conditions will be satisfied the Ecology response states *'that Under the Wildlife Acts 1976 (as amended), it is an offence to willfully interfere with or destroy the breeding (or resting places) of protected fauna; e.g. breeding birds nests, badger setts, pine marten dens and red squirrel dreys'*.

In relation to the appellant's submission that the assessment under Article 6 (3) of the Habitats Directive is flawed the Ecology response states, *'The Appropriate Assessment Screening Report and Determination (AASD) provides details on the project, on the receiving environment e.g. waterbodies and the European sites within a 15km radius or greater if relevant. For each European site the qualifying interests (QIs)/special conservation interests (SCIs) are identified and the person screening the project examines, analyses and evaluates, in the light of the best scientific knowledge in the field, the nature of the proposed works (including associated operations and ancillary works) and location, the European site together with its QIs/SCIs and conservation objectives, and potential sources and pathways relevant to this European site.*

*Boleybrack Mountain SAC IE0002032 was screened out due to distance and no hydrological connection between the SAC and project area. The SAC is designated for aquatic QI Natural dystrophic lakes and ponds [3160] as well as terrestrial QIs: Northern Atlantic wet heaths with Erica tetralix [4010]; European dry heaths [4030]; Molinia meadows on calcareous; peaty or clayey-silt-laden soils (Molinion caeruleae) [6410]; and Blanket bogs (\* if active bog) [7130]. With a separation distance of 14.5 km between the SAC and project area, no hydrological connection and the nature of QIs (lake and terrestrial habitats) there can be no source receptor pathways for any significant effects on QIs of Boleybrack Mountain SAC IE0002032. The AASD, whilst it references to the Annex I habitat table, clearly states that the rationale for screen out is the separation distance of 14.5km and no hydrological connection'.*

In relation to the appellant's submission that the assessment under Article 6 (3) of the Habitats Directive is flawed, the Ecology response states *'DAFM takes the 'Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC' (Brussels, 28.9.2021 C(2021) 6913 final) into account when assessing applications as it is the most up to date guidance. The references in the template have not been updated.*

*In keeping with the above guidelines, Section 3 of the AAR (17/11/2022) identifies the potential adverse impacts for screened in European Site Cuilcagh - Anierin Uplands SAC IE0000584 and provides detailed mitigation to target the impacts identified'.*

In relation to the appellant's submission that the assessment under Article 6 (3) of the Habitats Directive is flawed the Ecology response states *'The AAR identified that the Qualifying Interests, 4030 European dry heaths, 7130 Blanket bogs (\*if active bog) and 8110 Siliceous scree of the montane to snow levels (Androsacetalia alpinae and Galeopsietalia ladani), may be adjacent to the project area. Consequently*



*mitigation measures were identified including ensuring no works encroach onto the SAC and unplanted setback and 5 rows of native species to be planted adjoining this setback. The Site Specific Conservation Objectives (2016) identified erosion as a threat to the blanket bog habitat’.*

*This element of the Ecology response also sets out that ‘There is reference to an unpublished report by O’Neill 2022 but no reference is provided. As the report is not available this limits DAFM’s ability to respond’.*

*In relation to the appellant’s submission regarding discrepancies the Ecology response states ‘The title of the AAD (04/03/2023) did not include the word ‘Thinning’, this is a clerical error. The AA screening Report and Determination and the AA Report both assess thinning as part of the project.*

*Section 3 of the AAD (first paragraph) clearly states “Fehily Timoney and Company, compiled an Appropriate Assessment Report (dated 03/05/2022) in order to assess the significant effects and implications of the project, individually and in combination.....” Reference to the AAR is made at the bottom of Section 3 under the heading ‘Additional information in relation to the Appropriate Assessment’.*

*In relation to the appellants submission regarding In-Combination the Ecology response states,*

*‘The In Combination Statement for the AASD should read:*

*It is concluded that there is no likelihood of the proposed thinning, clearfell and reforestation project TFL00262118 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in-combination with other plans and projects.*

*Therefore, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and projects.*

*Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).*

*Note that the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment.*

*The In combination for the AAR should read:*

*It is concluded that there is no possibility that the proposed thinning, clearfell and reforestation project TFL00262118, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: List of Screened In European Sites(s). Similarly, there is no likelihood of any residual effect(s) that might arise, which do not in themselves have an adverse effect, creating an adverse effect in-combination with other plans and projects.*

*Therefore, there is no potential for the proposed project to contribute to any adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.*

*Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any adverse effect on the integrity of these European Sites.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the above European Site(s).*

*Note that this relates to the proposed activities under TFL00262118 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted<sup>1</sup>.*

In relation to the appellant's submission regarding Forest Removal and its reference to 4.8 Forest Removal (DEFOR) where it submits that if this was a greenfield site it would not be considered suitable for afforestation and asking why it should be considered suitable for reforestation, the Ecology response states,

<sup>1</sup> *The Forest Service is responsible for the following:*

- *the administration, evaluation and processing of felling licence applications as required by the Forestry Act 2014;*
- *consultation with relevant competent authorities and statutory / non-statutory bodies (e.g. local authorities, National Parks & Wildlife Service, Inland Fisheries Ireland, National Monuments Service) where specific environmental sensitivities arise; and*
- *the setting of felling, preservation and reforestation conditions and the carrying out of subsequent compliance checks, to ensure compatibility with the principles of sustainable forest management and the protection of the environment*

*The Felling and Reforestation policy, Section 4 Reforestation objectives outlines a classification system that is designed to provide clarity regarding the objectives of the forest owner in relation to the subsequent rotation following clearfelling. It also sets out the standard requirements (silvicultural and other) the Forest Service will apply in relation to each objective. As part of its assessment of the felling licence application, the Forest Service will consider the suitability of the reforestation objective(s) being proposed, thereby informing decisions regarding referrals, the Appropriate Assessment Procedure, conditions to be attached,*

etc. NPWS referral response (16/05/2019) stated “in the broadest sense there would be little or no concerns or objectives to thinning or clearfelling” but expressed concerns in relation to water quality. The response from NPWS was considered in the assessment of this application’.

In relation to the appellant’s submission that Ireland has not correctly transposed the Birds Directive into National Law and that the licence therefore cannot be considered to have been awarded consistent with the requirements of the Birds Directive, the Ecology response states ‘Both the AASD and AAR were completed on the 17/11/2022. The DAFM has received yearly updates for many years 2022 of the high likelihood nesting areas (HLNAs) of breeding Hen Harrier. Please note that within the AA 15km radius, no SPAs designated for Hen Harrier were present.

In relation to Woodcock survey the information is not yet publicly available. Under the Wildlife Act, felling works can be undertaken during the breeding bird season’.

In relation to the appellant’s submission that the application has not been assessed consistent with the requirements of Article 4 (1) of the WFD, the Ecology response states,

‘The Harvest Plan submitted for this application (associated maps dated 31/03/2022) states that:

- Harvesting and extraction will be carried out during spring/summer months when rainfall is low. Large amounts of brash will be available on site to keep extraction routes in good condition.
- Proposed machinery will comprise of a harvester and a low-ground pressure forwarder Aquatic zones are present on site, no setbacks are present. \*Risk of sediment runoff is very low due to the vegetation present in the aquatic zones’.

#### **DAFM / Minister’s Statement (SOF) dated 16<sup>th</sup> August 2023**

The Minister provided a statement responding to the appeal which was provided to the parties. This statement which bears the date 16/08/2023 also includes a response to appeal grounds bearing the date 27/07/2023. It outlined the processing of the application, the issuing of the licence, the referrals made, responses received and the associated dates for these occurrences. The SOF also includes the following text in relation to Ecology.

- ‘AA Screening Form 27/02/2019
- Appropriate Assessment Report - 03/05/2022- prepared by Fehily Timoney on behalf of DAFM.
- Appropriate Assessment screening determination 18/05/2022 prepared by Fehily Timoney on behalf of DAFM. Made public 16/08/2023.
- Revised Appropriate Assessment Screening Report 17/11/2022-prepared by Fehily Timoney on behalf of DAFM.
- Appropriate Assessment Report 17/11/2022- prepared by Fehily Timoney on behalf of DAFM.
- Appropriate Assessment Determination 04/03/2023 prepared by Fehily Timoney on behalf of DAFM’.

The SOF also sets out the dates the application was referred to the Inspector and the associated certification dates. It also references 'Reinspection 06/04/2022 – Certified 11/11/2022' and 'Reinspection 15/11/2022 – Certified 08/03/2023'. It sets out that one submission was received and that 'Natura Site 1, 2 – Screen Out: no possibility of a significant effect on any Natura site and appropriate assessment is not required'. The SOF also sets out content numbered 1 – 6 and 8-12 in response to the appeal as follows.

*'1. Approval issued on 28th March 2023 which was a Tuesday. The decision was then advertised on the next advertising day which was Wednesday 29th March 2023 which is standard practice, so the application was not delayed being advertised. The documents were made available online as soon as they were made public on the 28th March 2023. This meant there was time for members of the public to lodge an appeal. In addition, a copy of the approval letter issued to the submitters, including the appellant on 28th March 2023.*

*2. The appellant refers to the Department website being the sole means of notifying the public of felling licence applications. The appellant claims that this would be open to a legal challenge. Such claims are not relevant to this case and or appropriate to these proceedings. The Departments chosen method of advertising is by using our website and the onus is on an interested party to keep an eye on the website of there is a particular application that they wish to object to, the same way they would keep an eye on the newspaper if that was the Department chosen method of Advertising. The Department is not responsible for whether a person has access to the internet.*

*3. The conditions of the felling licence are satisfactorily clear and adhere to the requirements under the 2017 Forestry Regulations and 2014 Forestry Act. The granting of this felling licence does not exempt the holder from meeting any legal requirements set out under the Wildlife act or any other National and EU legal requirements. Regarding Inspectors conditions over which the certifying inspector has direct input; the protection of the public road network is not in the remit of the Department of Agriculture Food and the Marine. It is a condition of the licence to consult with Leitrim County Council regarding the haulage of timber from the licence area under whose remit the public roads fall. Under Roads Act Local Authority may prosecute where any person damages the public road.*

*4. Regarding the claim that information is missing from the application this is not correct, as per circular 12/2019 the Standards for Felling & Reforestation sets out the universal standards that apply to all felling (thinning and clearfelling), and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the Department under the Forestry Regulations, 2017 (SI number 191/2017). The Standards for Felling & Reforestation states;*

*"If fertiliser application is proposed, adhere to the following:*

- Only apply if needed, based on a soil analysis by an accredited laboratory. Match fertiliser type and application rate to specific plots.*
- Use granular formulations.*

- *Do not apply fertiliser within the water setback of an aquatic zone, or within 20 metres of the aquatic zone, whichever is greatest. Manual application only is permitted from this point back to 50 metres from the aquatic zone.*
- *Do not apply fertiliser within the water setback of all other water features.*
- *Do not apply fertiliser if heavy rainfall is predicted, or during heavy rainfall and / or high winds. Following heavy rainfall, commence application only after the site has dried out sufficiently for runoff not to pose a risk.”*

*It is a condition of the licence to adhere to the Standards for Felling and Reforestation and the Felling and Reforestation Policy.*

*The definition of a relevant watercourse as per the Standards for Felling and Reforestation has not been changed. The appellant may be referring an internal office note with regard field inspections and referring files to the ecology unit which removed the reference to “significant amounts” in its description of relevant watercourses.*

*In the interests of providing clarity for the FAC the site was visited on 26th of July 2023 the after a period of heavy and persistent rain. While some mapping and in particular historical mapping may show aquatic features and flow direction arrows these features are not always present on the ground. This is the case with the feature described by the appellants. There is no watercourse relevant or otherwise at the location indicated’.*

*(The SOF at this point includes a number of pictures that were stated to have been taken on 26<sup>th</sup> July 2023 whereas the licence is stated to have issued on 29<sup>th</sup> March 2023).*

*5. The AA Screening has been carried out in accordance with S.I.477 of 2011 (as amended) and S.I.191 of 2017 (as amended). The AA Screening determination concluded that the AA Screening for Bolebrack Mountain SAC 002032 & Cuilcagh - Anierin Uplands SAC 000584 were both Screened Out. For the purpose of compliance with the provisions of Section 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), on the basis of the foregoing determination DAFM has also determined that the project will not adversely affect the integrity of the European sites listed above.*

*6. With regard carbon and deforestation this a national policy issue and not in the control of the certifying inspector, licence was presented as a felling and reforestation licence and assessed on that basis.*

*8. Licence was certified on the 08th of March 2023, Leitrim County Development plan 2023 to 2029 had not been finalised or ratified at that point.*

*9. “Condition (J) Inspectors Conditions” These site specific conditions adequately apply the mitigation measures as a condition of approval to ensure the protection of water quality both on site and downstream from the project area. The research project HydroSED is ongoing so it would be premature to determine its outcome.*

*10. Regarding EIA grounds, this is a national policy issue and not in the control of the certifying inspector, standard operating procedures for felling licenses adhered to.*

*11. Forest road applications and felling are separate licencing processes there is no project spitting. A proposed forest road is clearly indicated on the harvest plan provided.*

*The application was screened and assessed on the basis that a forest road would be in place at harvesting. The undertaking of harvesting without the construction of the proposed road from a very practical sense is not feasible as there is no access or stacking space available. From a licencing perspective to proceed with harvesting without the road in place would likely be considered a material change and potentially invalidate the licence.*

*The licence application provided explicit detail on proposed timber extraction and stacking areas which was assessed during the certification procedure.*

*12. It is not standard procedure to require commencement notices on felling licences. DAFM carry out harvesting inspections on a regular basis these may be on foot of reports from members of the public or on an ad hoc basis with enforcement activities resulting from a number of these inspections’.*

#### **Consideration by the FAC**

The FAC in the first instance considered whether an oral hearing was required in this case and, having regard to the particular circumstances of the appeal, the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The FAC considered the contention in the grounds submitting a Breach of Article 6(9) and / or Article 9 (4) of the Aarhus Convention regarding the timing of the publication of the of the decision. The FAC finds that the DAFM statement in relation to this appeal sets out that the approval of licence TFL00262118 issued on 28<sup>th</sup> March 2023, which was a Tuesday, and that the decision was then advertised on the next advertising day which was Wednesday 29<sup>th</sup> March 2023. It also states that the documents were made available online as soon as they were made public on the 28<sup>th</sup> March 2023. The FAC noted that the advertising of the licence occurred on the next working day after its issue and concluded that this in itself did not constitute a failure of due process or a failure of fair procedures by the DAFM.

The grounds contend that there has been inadequate and ineffective public notice in contravention of Article 6(2) of the Aarhus Convention. The FAC finds that Article 6(2) refers to the public notification requirements where an Environmental Impact Assessment is being undertaken and not at the screening stage. One of the requirements is that the public is informed of the fact that a development is subject to such an assessment. The public clearly cannot be informed that a development is subject to an EIA before it has been decided that the development is to be subject to such an assessment. The FAC understands that the EU has transposed the Aarhus Convention through a number of Directives including the

Environmental Impact Assessment (EIA) Directive (2011/92/EU as amended by 2014/52/EU). The recital of the EIA Directives states,

*'Moreover, taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice'.*

This is reflected in the consultation requirements provided for under Article 6 which is required after the competent authority has determined that a development is to be subject to an EIA. The procedure adopted in this case provided for a public consultation period in keeping with the requirements of the Forestry Regulations 2017 (Statutory Instrument 191 of 2017).

Notwithstanding the above, the FAC is aware that the DAFM is on the record as stating that its position on clear-felling and replanting of an already established plantation forest is that it is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The FAC does not dispute this view and in that context, it is not immediately clear to the FAC why the DAFM considered it necessary to carry out a screening for EIA in this instance having regard to the position held by it on the matter. The FAC is setting aside the decision in this case and remitting it to the Minister for reasons described elsewhere in this letter and in that context the DAFM should clarify the need for a screening for requirement for EIA in this case or otherwise before a new decision is made on the application.

The FAC considered the contention in the grounds submitting that licence conditions are not adequate to ensure the reasons for the conditions will be satisfied. In this context the FAC noted the submission in the SOF wherein it states that *'The conditions of the felling licence are satisfactorily clear and adhere to the requirements under the 2017 Forestry Regulations and 2014 Forestry Act. The granting of this felling licence does not exempt the holder from meeting any legal requirements set out under the Wildlife act or any other National and EU legal requirements.*

*Regarding Inspectors conditions over which the certifying inspector has direct input; the protection of the public road network is not in the remit of the Department of Agriculture Food and the Marine. It is a condition of the licence to consult with Leitrim County Council regarding the haulage of timber from the licence area under whose remit the public roads fall. Under Roads Act Local Authority may prosecute where any person damages the public road'. The FAC also noted the response from the DAFM Ecologist in this connection wherein it states 'that Under the Wildlife Acts 1976 (as amended), it is an offence to willfully interfere with or destroy the breeding (or resting places) of protected fauna; e.g. breeding birds nests, badger setts, pine marten dens and red squirrel dreys'.*

The appellant submits that licence conditions are not adequate to ensure the reasons for the conditions will be satisfied. The FAC noted that the Forestry Act of 2014 makes several references to the inclusion

of conditions in a licence. The conditions that are referred to in the grounds of appeal relate to standards of good practice that are published and available on the DAFM website and to the requirements of the Local Authority as set out in its response to the referral of the licence application. On this basis the FAC is satisfied that conditions attaching to a licence are for the purposes of ensuring compliance on the part of an applicant or owner of lands on which a licence is granted, and that a basic understanding of forestry operations, including those relevant standards and circulars that may be in effect, can reasonably be assumed. The FAC is not satisfied that an error was made in the granting of the licence in relation to this ground of appeal.

The FAC considered the contention in the grounds submitting that the application is not consistent with the Requirements of the Forestry Standards Manual and noted the response of the DAFM to it in this connection wherein it states,

*'The Standards for Felling & Reforestation states;*

*If fertiliser application is proposed, adhere to the following:*

- *Only apply if needed, based on a soil analysis by an accredited laboratory. Match fertiliser type and application rate to specific plots.*
- *Use granular formulations.*
- *Do not apply fertiliser within the water setback of an aquatic zone, or within 20 metres of the aquatic zone, whichever is greatest. Manual application only is permitted from this point back to 50 metres from the aquatic zone.*
- *Do not apply fertiliser within the water setback of all other water features.*
- *Do not apply fertiliser if heavy rainfall is predicted, or during heavy rainfall and / or high winds. Following heavy rainfall, commence application only after the site has dried out sufficiently for runoff not to pose a risk.*

*It is a condition of the licence as issued in this case to adhere to the Standards for Felling and Reforestation and the Felling and Reforestation Policy'.*

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

The FAC considered the contention in the grounds generally regarding Appropriate Assessment and has noted the responses made to it by the DAFM in this regard. In particular the FAC noted the following content in the response from the DAFM Ecologist,

*'The title of the AAD (04/03/2023) did not include the word 'Thinning', this is a clerical error. The AA screening Report and Determination and the AA Report both assess thinning as part of the project.*

*Section 3 of the AAD (first paragraph) clearly states "Fehily Timoney and Company, compiled an Appropriate Assessment Report (dated 03/05/2022) in order to assess the significant effects and implications of the project, individually and in combination....." Reference to the AAR is made at the bottom of Section 3 under the heading 'Additional information in relation to the Appropriate Assessment'.*



*There was a typographical error in the AAD with 5m cited instead of 10m’.*

*‘The In Combination Statement for the AASD should read:*

*It is concluded that there is no likelihood of the proposed thinning, clearfell and reforestation project TFL00262118 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in-combination with other plans and projects.*

*Therefore, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and projects.*

*Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).*

*Note that the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment.*

*The Incombination for the AAR should read:*

*It is concluded that there is no possibility that the proposed thinning, clearfell and reforestation project TFL00262118, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: List of Screened In European Sites(s). Similarly, there is no likelihood of any residual effect(s) that might arise, which do not in themselves have an adverse effect, creating an adverse effect incombination with other plans and projects.*

*Therefore, there is no potential for the proposed project to contribute to any adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.*

*Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any adverse effect on the integrity of these European Sites.*

*Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the above European Site(s).*

*Note that this relates to the proposed activities under TFL00262118 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted’.*

The FAC finds from the extracts from the Ecologists response to it dated 30<sup>th</sup> May 2023 that the AAD made in relation to this application relied on the AAR dated 17<sup>th</sup> November 2022 which pre-dated the final iteration of the application being lodged. In any event the FAC would expect, that unless otherwise explained on the record, that the AAR being relied on is the one which has the most recent date. In that context and in addition to that above the FAC finds that licence condition requiring adherence with mitigation measures arising from the Appropriate Assessment Process states *‘Adhere to the mitigation measures set out in the attached Appropriate Assessment Report, dated 17<sup>th</sup> of November 2022’*. While it is normal that licence conditions normally require adherence with the AAD rather than the AAR the reference in the condition in this case does not necessarily constitute a significant error if the mitigations as set out in the AAD are as per those set out in the AAR. However, in this case additional content was added to the mitigations in the AAD, over and above those in the AAR dated 17<sup>th</sup> November 2022, and which are consistent with those set out in the older AAR dated 3<sup>rd</sup> May 2022 (which itself also predated the final version of the application being finalised). The additional requirements referenced above are as follows.

*The proposed works shall adhere to:*

- *Standards for Felling & Reforestation (v.Oct. 2019)*
- *Environmental Requirements for Afforestation (DAFM, 2016)*
- *Felling & Reforestation Policy (DAFM, 2017)*
- *Forestry Standards Manual (DAFM, 2015)’*

Notwithstanding that these are documents / policies that the project should be complying with in any event, it nevertheless represents a further error, in addition to those identified by the DAFM in those parts of the response quoted above. The FAC considers those errors identified in the In-Combination Assessment statement wordings to be serious. The FAC also noted that the AAR in its In-Combination statement relied on the benefit of mitigations at the time of writing on 17/11/2022 as if the AAD had already been made where it states,

*‘It is concluded that there is no possibility that the proposed thinning, clearfelling and reforestation project TFL00262118, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Cuilcagh - Anierin Uplands SAC IE0000584 Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects’.*

The FAC considered this to be a further error in the Appropriate Assessment process. Furthermore, the DAFM’s Appropriate Assessment process includes a document titled “Appropriate Assessment Screening Report” which was posted on the FLV on the 28/03/2023. This document, which bears a date after the

AAD, includes a further screening for AA. Two European sites, Boleybrack Mountain SAC Cuilcagh-Anierin Uplands SAC, are screened out for AA and the reason provided in both cases is “- Other factors, As per AAD”.

The FAC also noted that the DAFM AAR contained the following passage in relation to the submission from the NPWS, ‘A response from NPWS was received on 17/05/2019, in which no objection to the proposed project was made, and in which included recommendations relating to the adjoining SAC and watercourses’. The FAC considered that there were a number of matters raised in the NPWS submission particularly in relation to the replanting activity that might best have been addressed in a clearer manner in the Appropriate Assessment documentation.

The FAC considered the contention in the grounds of appeal that there is a Breach of the Climate Action And Low Carbon Development Act (2015) & Breach of Article 6(6) of the Aarhus Convention. The FAC noted the content of the response to it from the DAFM in the SOF in relation to this ground wherein it states that,

*‘With regard carbon and deforestation this a national policy issue and not in the control of the certifying inspector, licence was presented as a felling and reforestation licence and assessed on that basis.’*

While this response references the ground in question it does not in the view of the FAC materially / fully address the matter raised in the ground. As alluded to earlier this licence is being set aside and remitted to the Minister for reasons set out elsewhere in this letter and accordingly the Minister should address this matter in the processing of the remitted decision and before a new decision is made on the application.

The FAC considered the contention in the grounds that Ireland has not correctly transposed the Birds Directive into National Law and the licence therefore cannot be considered to have been awarded consistent with the requirements of the Birds Directive. The FAC noted the submission made to it in the DAFM Ecologists report wherein it states;

*‘Both the AASD and AAR were completed on the 17/11/2022. The DAFM has received yearly updates for many years 2022 of the high likelihood nesting areas (HLNAs) of breeding Hen Harrier. Please note that within the AA 15km radius, no SPAs designated for Hen Harrier were present.*

*In relation to Woodcock survey the information is not yet publicly available. Under the Wildlife Act, felling works can be undertaken during the breeding bird season’.*

The FAC considers that the transposition of an EU Directive is not a matter that is within its remit. In any event, the FAC is setting aside the decision in this case and remitting it to the Minister for reasons described elsewhere in this letter and in that context the DAFM should provide any reasoning it considers necessary to the matters raised in this ground of appeal before a new decision is made on the application.

The FAC considered the contention in the grounds that the licence is not consistent with the Landscape Objectives and Forestry Policies of the Leitrim County Development Plan. The FAC notes that the application was referred to the Local Authority who responded in correspondence dated 11<sup>th</sup> March 2019. The Council Response includes content on the location of the site within an Area of High Visual Amenity as per CDP 2015 – 2021, that the Northern section of the lands adjoin an SAC and a proposed NHA, that no preservation orders affect the site, that the site does not impact any recorded monuments, and that it is in an area classified as having low capacity to accommodate forestry but raised no specific objection to its replanting.

The FAC notes that the Leitrim County Development Plan (CDP) 2023-2029 was adopted by the Council on the 7<sup>th</sup> February 2023 and that the said CDP came into effect six weeks from the date of adoption, on 21<sup>st</sup> March 2023. The felling licence in this case is dated 28<sup>th</sup> March 2023. Separately the FAC notes that the Leitrim County Council website contains a note / notice that the Leitrim CDP 2015-2021 was extended by resolution to the 31<sup>st</sup> March 2023. The FAC finds that the Leitrim CDP 2023-2029 which, according to the planning legislation governing the making of development plans (and notwithstanding the confusion arising from the notice on the Councils website regarding the extension of the previous plan to 31<sup>st</sup> March 2023), was the plan in force at the time of the issue of the decision on this licence. The FAC also notes that this ground of appeal makes a specific mention of the date of the AAD relative to the transition from the previous CDP to the current. The FAC finds that the date of the AAD was 4<sup>th</sup> March 2023 and while this is after the passing of the resolution to adopt the new CDP it is before the date on which the new CDP came into effect.

In examining the new CDP the FAC finds that the site is located within policy area LCT 5. The FAC further finds that areas governed by LCT 5 policy are considered as having a very high sensitivity to commercial forestry and the sensitivity assessment includes existing commercial forestry. However, the Assessment of Sensitivity to Commercial Forestry in section 3.5.2 (of CDP) appears to deal only with new commercial forestry and section 3.5.2.1 (of CDP) in particular refers to southern side of Slieve Anierin as being "especially sensitive to further commercial forestry". This project is a thin, fell & replant application so visually in terms of the landscape sensitivity there will be no change in the long term since this forestry has already been accounted for in the sensitivity assessment. This Forestry application does not fall within the scope of the Planning & Development Act 2000 as this application is for a licence under the Forestry Acts. Having regard to all the circumstances in this case, the FAC considered that the DAFM has not erred in the making of this decision, as it relates to this ground of appeal.

The FAC considered the contention in the grounds that the application has not been assessed consistent with the requirements of Article 4(1) of the WFD. The FAC considered the response made to it by the DAFM in the SOF and including the Ecology Report wherein it points out that the harvest plan and maps submitted with the application noted the situation as it stood on the ground at the time the application was made which demonstrates that the DAFM was aware that this was the context within which the application would be assessed. The FAC finds that the DAFM AASRD dated 18<sup>th</sup> May 2022 at section 2 Table 3 on pages 5 and 6 records that,

- *Slope and aspect: 'The project area is very steep in the northernmost two-thirds (averaging 27% in the centre to 38% at the northern end) and steep (average ca. 16%) at the southern end. The project area has a southeasterly to southerly aspect. (Source: OS Discovery Map / European Digital Elevation Model (EU-DEM), version 1.1)',*
- *Surface hydrology on or adjoining the site: 'There are two aquatic zones adjoining the project area, the first of which (EPA Name: Drumrad 36; EPA Code: 36D55; Order: 1) flows along the western boundary of Plot 1. The second aquatic zone rises within the southern portion of Plot 1 and joins with the Drumrad 36 Stream ca. 1 km downstream of the project area. These streams provide the project with hydrological connectivity to Lough Oughter and Associated Loughs SAC, Upper Lough Erne SAC and Upper Lough Erne SPA via a hydrological distance of ca. 64 km. (Source: Orthophoto overlaid with EPA layer and 6 inch OS Raster / EPA Water Map / Harvest plan, dated 01/04/2022)',*
- *Sub-basin (using WFD ID code): Annadale Stream\_010 (100%), (Source: Water Framework Directive (WFD) catchments data package, July 2018, <https://gis.epa.ie/GetData/Download>).*
- *Sub-catchment: Yellow[Ballinamore]\_SC\_010 (100%), (Source: Water Framework Directive (WFD) catchments data package, July 2018, <https://gis.epa.ie/GetData/Download>).*
- *Catchment: Erne (100%), (Source: Water Framework Directive (WFD) catchments data package, July 2018, <https://gis.epa.ie/GetData/Download>).*

The FAC also finds that the said AASRD at page 7 sets out a list of the nearest EPA water courses together with the relevant segment code and EPA name where available and set out the ecological status under the WFD cycle then current. Maps are also set out in the AASRD showing water features. The AASRD also references the referral of the application to the Local Authority and the NPWS and the responses received. The FAC finds that this content is also contained in broadly similar format in the DAFM AASRD of 17<sup>th</sup> November 2022. The FAC also notes that the In-Combination assessment statement contained in the DAFM AAR of 4<sup>th</sup> March 2023 contained the following passage.

*'The proposed thinning, clearfelling and reforestation project TFL00262118 lies in a rural landscape in the townland(s) of GORTNAWAUN, Leitrim. It is within the River Sub-Basin Annadale Stream\_010, approximately 25% of which is under forest cover, which is greater than the national average of 11%. At 27.25 hectares, the proposed project is considered large in scale. The review of the DAFM Forestry Licence Viewer identified a number of forestry projects within the vicinity. These projects undergo environmental assessment, including AA screening and appropriate assessment (if necessary). As can be seen from the ortho photo, this forest adjoins an existing forest.*

*In the River Sub-Basin Annadale Stream\_010 over the last 5 years a number of developments have been or were in the process of being granted planning permission. These too undergo environmental assessment, including AA screening and appropriate assessment, if necessary'.*

In this context the FAC notes that the status of the waterbody concerned is recorded by the DAFM and that this is the context against which the application is assessed. It is further noted that the considerations made by the DAFM in its completion of the screening form to determine EIA requirement were clearly

articulated wherein it states that adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval will be sufficient to prevent any potential significant impact to aquatic zones and their Q value. It is noted that this screening form was based on a spatial run that postdated the AARSD of 18<sup>th</sup> May 2022 and just before the completion of the AASRD of 17<sup>th</sup> November 2022. The FAC also noted the qualification from the Inspector as provided in the comment box in the EIA screening form wherein it states that,

*'it is noted that the Forestry and Water Quality Guidelines have been replaced by the Standards for Felling & Reforestation, the Felling & Reforestation Policy and, if reforestation is involved, the Environmental Requirements for Afforestation'.*

The FAC finds that having consulted the Catchments.ie website on the day of the hearing of this appeal that the status of the ANNADALE STREAM\_010 waterbody is recorded as Good, and that the status is based on monitoring. The FAC also finds that the Catchments.ie website on the same day recorded that the said waterbody is not at risk for the 3<sup>rd</sup> cycle. The FAC notes that the licence as issued contained conditions in relation to the protection of water quality. Based on the information available to it and having regard to the nature, location and the conditions under which operations would be undertaken, and that the site was inspected, the FAC is not satisfied that the proposal poses a significant threat to water quality. Having regard to all the circumstances in this case, including the nature and scale of the project, the FAC considered that the 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 contention in the grounds that screening under the EIA Directive is required for the initial afforestation of these lands. The appellant has submitted that an Access to Information on the Environment request was made to the DAFM in May 2022 seeking records to lands afforested in the townland of Gortnawaun, Co Leitrim circa 1998, including any subsequent applications / approvals for felling, and roads. The grounds submit that no information related to the afforestation of the lands was provided. The submission also states that DAFM's private forest data layer shows part of the project as being forested. The current crop is stated in the application to be 29 years when thinning was planned in 2019. In any event, the FAC is setting aside the decision in this case and remitting it to the Minister for reasons described elsewhere in the letter and in that context the DAFM should provide any reasoning it considers necessary to the matters raised in this ground of appeal before a new decision is made on the application.

The FAC considered the contention in the grounds that there is no suitable means to extract timber / Project Splitting and noted the response from the DAFM in its SOF wherein it states that,

*'Forest road applications and felling are separate licencing processes there is no project spitting. A proposed forest road is clearly indicated on the harvest plan provided. The application was screened and assessed on the basis that a forest road would be in place at harvesting. The undertaking of harvesting without the construction of the proposed road from a very practical sense is not feasible as there is no*

*access or stacking space available. From a licencing perspective to proceed with harvesting without the road in place would likely be considered a material change and potentially invalidate the licence. The licence application provided explicit detail on proposed timber extraction and stacking areas which was assessed during the certification procedure’.*

The FAC notes that the application was referred to the Local Authority who responded in correspondence dated 11<sup>th</sup> March 2019. The Council response includes content in relation to access requirements for the site and drew attention to legislative requirements in this context. The Local Authority response did not raise any significant issue with the proposed operations, or the sequencing of consent applications required in this case and included suggestions to be addressed in conditions of whatever licence would issue. The FAC finds that the felling of trees on a commercial forest, and the construction of forest roads to accommodate same, require separate consents. The FAC further finds that the legislation governing same does not set out a sequential requirement for the making of such applications. Having regard to all the circumstances in this case, the FAC considered that the DAFM has not erred in the making of the decision as it relates to this ground of appeal.

The FAC considered the contention in the grounds regarding a lack of potential enforcement and noted the response made to it in the DAFM SOF wherein it states that,

*‘It is not standard procedure to require commencement notices on felling licences. DAFM carry out harvesting inspections on a regular basis these may be on foot of reports from members of the public or on an ad hoc basis with enforcement activities resulting from a number of these inspections’.*

The FAC considers that enforcement or potential enforcements are operational matters for the DAFM, are not part of the licencing process and therefore does not fall within its remit.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received, including a number of post-appeal submissions. The FAC is satisfied that a serious error or series of errors was made in making the decision in this case. The FAC is, thus, setting aside and remitting the decision to the Minister regarding licence TFL00262118 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to carry out a new Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and to address other matters raised in this letter, before a new decision is made.

Yours sincerely,

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Seamus Neely, On Behalf of the Forestry Appeals Committee.

