

Forestry Division Statement to the Forestry Appeal Committee

FAC Reference	082/2022
File Reference	TFL00589120
Scheme	Felling
Species proposed	See felling licence application on file
Area	22.23 ha

Summary of application:

Date Submitted	17/11/2020
Date Application Advertised	09/12/2020
Referrals to referral bodies	County Council 18/12/2020 NPWS 18/12/2020
Responses from referral bodies	County Council 07/01/2021 NPWS 03/02/2021
Date Referred to Inspector	08/12/2020
Desk Assessment/Desk & Field Assessment	Field & Desk Assessment – Inspection Date 14/01/2022
Submissions Received	None
Appropriate Assessment Screening	Yes
Recommendation from Inspector	Approve With Conditions
Decision	Approved with Conditions
Date Decision Issued	05/07/2022
Date Decision Advertised	06/07/2022 & republished 08/07/2022

Administrative Comments:

The decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act.

The Department is satisfied that all criteria outlined in its standards and procedures policy have been adhered to in making a decision on the application. Please see the statement from the Inspectorate.

Further Administrative Comments:

1 *Alleged failure of due process –*

a) *Licence not published on the same day as issue* – There is no legal requirement to publish on the same day. The Department however, endeavours to publish as soon as possible following the issuing of a licence. At all stages, the licence

and application is available to view of the Forestry Licence Viewer. The short delay (over a weekend) is not unfair or unreasonable.

(b) *Failure of DAFM to fully support the licencing process* – The appellant makes reference to screening documents not being available. As no EIA or AA was deemed necessary this is not relevant. The on-screen decision here is just an administrative step and no relevant information is displayed. A Natura Impact Statement was not submitted here and therefore could not be put on the FLV.

The appellant makes claims about the entire licencing process being legally flawed. Such claims are not relevant to this case and or appropriate to these proceedings.

2. EIA screening

The appellant makes reference to afforestation licences. These are not relevant here to the appeal against granting the felling licence.

The appellant makes claims that the felling may have significant effects, but supplies no evidence of this. As part of the felling licence application, such matters are considered in any case.

3. *Licence conditions are not sufficiently precise to ensure intended protection* – The licence conditions considered as part of a felling application are widely accepted. The Department has a duty to ensure that the licence conditions, namely inspection of the site’s protective measures, are met. Providing timings of such inspections are not practicable.

The appellant expresses concern about the public road network. Such concerns should be expressed to the local council and are not relevant to an appeal against a Forestry Felling Licence.

The conditions regarding watercourses are well known and used extensively around the country. The Department stands over them and the document, ‘Standards for Felling and Reforestation’.

4: The harvest plan we have on file does not mention Frank Barrett, Inspector with DAFM. He has no connection with this application and never completed any work for it.

Name: Emmet O’ Fahy

Grade: AP

Date: 03/08/2022

Grounds of Appeal TFL00589120 Aghadunvane, Cloone, Kinlough

1. Undue process

Untimely publication of decision

The licence was issued on the 5th July 2022 but the decision was not first made know to the public until the 6th July. It was subsequently republished on the 8th July but with different location details.

The Aarhus Convention Compliance Committee https://unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_23-2113407E.pdf in

"Findings and recommendations with regard to communication ACCC/C/2015/131 concerning compliance by the United Kingdom of Great Britain and Northern Ireland Adopted by the Compliance Committee on 26 July 2021"*

Paragraph 129 states;

*"More generally, however, the Committee considers that a rule that the time frame for the public to challenge a decision is calculated from the date the decision was taken, and not the date when the decision became known to the public, is **manifestly unfair**. Moreover, it may create an incentive for public authorities not to make decisions under article 6 of the Convention promptly available, knowing that there will then be less opportunity for those decisions to be challenged."*

The delayed publication of the decision to award this licence within the already very narrow appeal window is 'manifestly unfair' and contrary to due process.

Error in the published details

When the licence was republished on the 8th July the Townland location was only identified as being in the single Townland of Kinlough. This is a serious error.

Inadequate public notice

The issue of accessibility of forestry licencing information was addressed in a case brought to the Court of Appeal in McCaffrey, (McCaffrey v Minister for Agriculture Food and Marine [2017] IECA 247).

At paragraph 39 the Court of Appeal noted that:

"unless one actually knew that one should look for a pending application on the Minister's website, the very fact of publication would be ineffective to ensure timely notice to persons who might otherwise be affected by the afforestation proposal."

Also, at paragraph 42 the Court held that

*"Elementary fairness required that persons potentially affected by such proposals – such as home-owners and land-owners living in the immediate vicinity – had timely and effective notice of such proposals, by, for example, something like a site notice requirement. Mere publication in itself – **and I stress these words** – of a notice of an application on the Minister's website would not suffice for this purpose."* (our emphasis)

The mere publication of details by the Department on its website is not sufficient to adequately alert the public, particularly those members of the public who may be directly affected, to its right to participate in the decision making process. The public should not have to routinely monitor specific webpages in order to be become aware of a felling licence application. This is not the case with applications for Afforestation or Forest Road applications where a local Site Notice is required.

The requirement for a site notice in respect of a felling licence is applicable under Regulation 4 of the Forestry Regulations only after the licence has been granted, as it merely informs the public that felling is taking place lawfully pursuant to a licence

The DAFM website remains the sole means of notifying the public of felling licence applications. Whatever the requirements of the Forestry Regulations, in our view, based on the comments of the Court of Appeal in

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McCaffrey, there is a very significant doubt as to whether public notification via DAFM's website constitutes effective public notice in accordance with Article 6 of the Aarhus Convention.

The same argument as above applies to the additional 30-day consultation on the AA undertaken for this licence.

This issue was flagged by Alice Whittaker in the draft Philip Lee Regulatory Review where she made recommendations.

The Department cannot rely on the FLV as a source of notification as it includes the following disclaimer

"While every effort is made to provide accurate information, the Department of Agriculture, Food and the Marine accepts no responsibility for any errors, omissions or any other inaccurate information that may be contained in these data. The Department of Agriculture, Food and the Marine accepts no liability for any loss, damage or inconvenience suffered by those using these data for any purpose whatsoever, as a result of any inaccuracy or error within. The Department cannot guarantee the accuracy of any information displayed, at any point in time."

The failure to ensure adequate public notification in line with Article 6 of the Aarhus Convention is a serious error in the process of awarding this licence.

Additional information provided outside of the public consultation window

Additional information was provided to support the assessment of this project (Revised Harvest Plan) outside of the original public consultation window. In order for the public to participate in the decision making process it must have access to relevant information at the appropriate time. This is another failure of due process.

2. Application deficiencies and issues

There is insufficient information in the application information made available to the public during the consultation stages of this project regarding how the forest development will access the public road network. This was identified by Leitrim County Council (LCC) on 11-12-21. There is no evidence of any additional information being provided to LCC or made available to the public as to how timber will be extracted from this site consistent with all required Standards.

The Revised Harvest Plan appears to include modifications made by a Frank Barrett. Is this the same Frank Barrett that is a senior Inspector with the Forest Service? If that is the case then we would ask the FAC to consider the appropriateness of a Harvest Plan that has been modified by a member of staff of the Department.

3 Access to the public road network

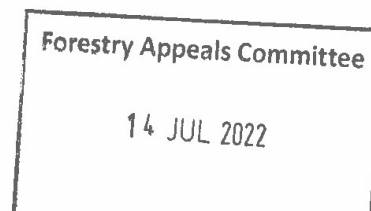
We would draw the FAC's attention to the email from LCC of 11-12-21. In that submission the Council raises issues with both the poor quality of the information provided to it by DAFM and the fact that plots 1, 2, 3, 4, 8 and 11 have no access to the public road network via forest roads

In a further submission on 21-12-21 LCC recommended that *"this forest development is not approved until Single Consent for access from forests onto the public road has been approved"*.

Based on information available to us there is no consented forest road within the project area.

We would point out, based on an examination of aerial imagery, that there is a forest road from plot 11 to the public road. This road passes through a pNHA (Kinlough Wood). Was this road constructed legally? The recommendations of the Ecology Report (not included in the licence conditions) would preclude the use of this road (and the pNHA in general) as a means of extracting the timber from this plot. How else can it be extracted?

DAFM should have required further information on this aspect of the project and the apparent failure to do so, particularly given the sensitivities of the site, represents a serious error in the processing of this application.



4. Inadequate protection of the environment

Hedgerows

The Revised Harvest Plan indicates that "*Extraction route will not break through existing hedgerows or stone walls on site, but instead, utilise existing gaps*". However, no existing gaps have been identified so it cannot be assured that the use of these gaps will not interfere with any other exclusion zones or setbacks.

Ecology Report

The recommendations of the Ecology Report have not been included in the licence conditions. A possible impact on Kinlough Wood pNHA cannot be excluded.

More detail is required before this project can be considered to have taken account of all the potential environmental impacts.

4. Licence conditions not adequate to ensure the reasons for the conditions will be satisfied

Licence condition (a)

This refers to a suite of Guidelines which are now 22 years old and should be considered obsolete and adherence to these imprecise and outdated guidelines is not sufficient to ensure *clarity and protection of the environment during harvesting and replanting of the felled area*.

It is our understanding that the Code of Best Forest Practice has been retired so we fail to see how it can be considered to form any part of the basis of an effective licence condition for the reason presented.

Licence Condition (h)

This condition refers to adherence to the measures set out in the Environmental Requirements for Afforestation (ERA). Since these Requirements have been amended by periodic circulars clarity cannot be assured in respect of good forest practice or protection of the environment during reforestation operations.

This licence condition requires the inspection and maintenance of protective measures "*periodically throughout operations*". The HydroFor project clearly indicates the necessity of monitoring and maintaining silt traps for 2 years or more after operations have ceased, therefore this licence condition cannot be considered adequate to achieve the purpose intended.

"The installation of silt traps before tree harvesting and their removal when sufficient vegetation cover has been re-established (2+ years post windowing) is a better approach, providing the traps are maintained correctly." HydroFor Report

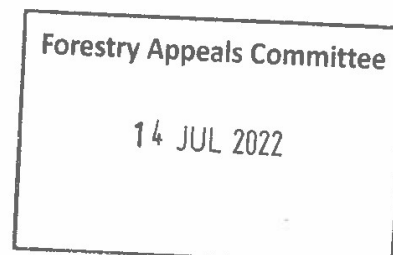
Inspection and maintenance of silt traps must extend beyond the period of operations.

The condition relating to contacting the Leitrim County Council Engineer prior to the commencement of operations does not ensure the reason for the condition which is to protect the public road network. The condition is not adequately reasoned as merely contacting the Engineer without any requirement to adhere to any conditions that the Engineer considers necessary does not ensure the intended purpose of the condition.

Licence conditions (h) and (a) contain potentially contradictory provisions – there is no clarity as to which takes precedence in such circumstances.

The recognition of a legal right to reasons, as a matter of natural justice, constitutional law, under the European Court of Human Rights, and in EU law, reflects and serves a range of important policy objectives. In summary, reasons enable a person to know whether there are grounds to challenge the decision; enable the decision to be effectively reviewed when challenged; encourage and support better administrative decision-making; and act as a promoter of transparency and a deterrent to arbitrary administrative action or malpractice.

The licence conditions for this project are not adequately reasoned.



5. EIA Screening

There is no evidence that an EIA Screening has taken place for this project. In the absence of such information it is not possible for the public to determine if the Screening is adequately reasoned. This is a serious error in the processing of this licence.

EIA Screening is required as this project involves an area of deforestation. Plot 7 (0.83 ha) which is currently indicated to be composed of 85% Sitka Spruce, 10% Larch and 5% broadleaves (contrary to the original specification at application CN23147) is at clear-fell to be left as Open Space. Plot 7 is physically distinct from the remainder of the project area being at a minimum distance of 70m.

The majority of the project area is part of a large contiguous area of plantations greater than 50 ha. There is no evidence that the projects to plant these lands, which were afforested between c. 1996 and 2001 were subject to EIA or AA screening. The EIA Directive and the Habitats Directive were in force at the time.

The proposed works are modifications to previously consented projects that should have been assessed in the context of EIA and AA but were not. EIA Screening is required where there is a modification to an existing project. In this case clear felling and re-stocking with a different species balance is a modification to the initial project which has the potential to have a significant environmental impact. To permit this licence without adequate EIA Screening would be to exacerbate the deficiency in assessment under the EIA Directive.

Inadequate ecological / environmental assessment

5.1 Article 12 of the Habitats Directive (Annex IV species)

The strict protection regime under Article 12 of the Habitats Directive is entirely separate to the Appropriate Assessment procedure under Article 6(3) of the Habitats regime, subject to separate rules and requirements. Forestry applications need to be screened not only for implications for European sites and their species, but also for the potential implications on the Annex IV (a) species known to, or likely to, occur within their natural range and the zone of influence of the proposed forestry activity.

There has been not been an adequate assessment of the potential impact on species listed in Annex IV of the Habitats Directive, particularly bats and otter.

"Protected animals and birds are protected wherever they are found in the wild. A system of strict protection entails a means of checking that protected species will not be affected in a prohibited manner by the proposed plan or project, regardless of distance from a designated area". Philip Lee Re

It is for the Minister to evidence that the necessary and adequate assessments have been conducted, not for us, as appellants, to provide evidence of bats or otter on this site and a possible impact. The burden of proof lies with the Minister to ensure that an adequate assessment has taken place – there is no evidence in the project documentation of any such assessment. This represents a serious error in the assessment of this application.

5.2 Impact on a pNHA not precluded

The recommendations of the Ecology Report have not been transferred in to the licence conditions.

5.3 Impact on a protected species not precluded

We note that the Ecology Report (which appears to be based solely on a desk-based assessment) has not even referenced Otter which are qualifying interest of Lough Melvin SAC which is c 167m from the project site. There has been no field survey for otter.

6. Appropriate Assessment

An assessment carried out under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable

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scientific doubt as to the effects of the proposed works on the protected area concerned. DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question.

The AA Report appears to be based on a desk inspection only.

The report references a submission from LCC on the 18-1-22 but significantly omits to refer to the previous submissions including the one of the 21-12-21 which recommended the development not be approved until a Single Consent access has been approved. Such access would have needed to undergo its own AA and the lack of clarity regarding access to the public road network and what works will be required is a very significant lacunae in the AA of this project. The Report has also failed to identify the Forest Road through the pNHA.

The Harvest Plan is seriously deficient in terms of carrying out an Appropriate Assessment of this project, including;

- No Fuel Storage, Machine Maintenance location has been identified
- Location of temporary bridging points have not been identified
- Silt trap locations are stated only as being indicative rather than definitive

How can the ecologist have properly assessed this project in the absence of such information?
These are all lacunae in the Appropriate Assessment of this project.

AA mitigation only requires silt traps to be "monitored and maintained throughout operations". The possibility of post operation impacts is not addressed. This is a further lacuna in the AA.

We contend that the Forestry and Otter Guidelines (note Guidelines not Standards or Requirements) need to be implemented as far as is possible in advance of issuing an AA Determination.

"Harvesting (thinning and clearfelling).

Identify likely holt or couch sites within 50m of the watercourse. For example old trees, scrub, deadwood.

Avoid any mechanised operations within 50m of known holt or couch sites, where possible."

The lack of a site survey for the presence of otter is a further lacuna in the AA of this project. The mitigation for Otter does not include the timing of operations which are a source of potential impact, particularly given the proposed timing of the works. There has been no actual survey of the site in terms of the possible impact on otter.

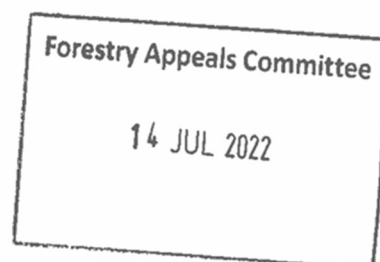
To issue an AA Determination on a project which indicates phased operations over a 10 year period with no intermediate assessment at the different stages of the project is not consistent with judgements of the European Court.

The judgment of the CJEU in Case C-164/17 Grace and Sweetman and other decisions of the CJEU emphasise that the competent authority must be certain that the plan or project will not have lasting adverse effects on the integrity of a European site. The necessary certainty is attained where no reasonable scientific doubt remains as to the absence of such effects. The necessary certainty must be attained by the date of adoption of the decision authorising implementation of the plan or project. This is a significant constraint on the ability of a decision-maker to grant consent today for activities which would only take place in an unspecified location or at an unspecified date in the future.

An AA cannot be regarded as 'appropriate' where updated data concerning the protected habitats and species is lacking. (C-43/10 Nomarchiaki Aftodioikisi Aitolokarnanias and Others).

In the absence of a requirement for periodic re-assessment the AA Determination cannot be considered to be made with the requisite degree of certainty.

The AA Screening Determination states;



"Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that there is no possibility of the thinning, clearfelling and reforestation project (TFL00674621) having any significant effect, either individually or in combination with other plans or projects, on any of the European sites listed below, for the reasons set out in the Screening Report."

The In combination effects section of the AAR is merely a list of projects; there is no actual assessment of in-combination possibilities.

We also note that no Forest Road applications relevant to this site are included in the in-combination.

An Appropriate Assessment and particularly an In-Combination assessment cannot remain valid for the 10 year period of this licence without some form of intermediate assessment. There is no reference to any such assessment in the Report or Determination.

There is far too much uncertainty regarding the operations required under this licence for the AA Determination to be valid.

7. Operability of the licence is not assured

It is unclear how plot 5 can be felled and timber extracted in a manner that is fully consistent with the required Standards.

The Revised Harvest Plan indicates that "*Extraction route will not break through existing hedgerows or stone walls on site, but instead, utilise existing gaps*". Since no existing gaps have been identified in the Plan the practicality and operability of this cannot be assured. What if the positioning of the gaps conflicts with other conditions to do with set-backs or exclusion zones?

The 10m exclusion zone around the northern boundary of plot 11 recommended in the Ecology Report (not transferred in to the licence conditions) would preclude extraction of timber from this plot via the existing forest road which appears to be the route indicated on the Harvest Map.

8. Inadequate protection for wildlife during the period of breeding and rearing

There is no general system of protection in Ireland for wildlife, including birds, during the period of breeding and rearing.

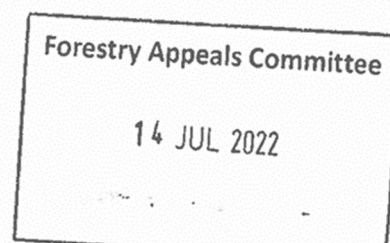
EU Directives are binding as to the results to be achieved but leave it to Member States to decide how best to achieve those results. EU Directives relevant to forestry regulation include the Environmental Impact Assessment (EIA) Directive, the Water Framework Directive, the Habitats Directive, and the Birds Directive.

Member States are required under the Birds Directive to have in place a general system of protection for all species of wild birds. This extends to the protection of their nests and eggs from deliberate damage or destruction. Irish National Law exempts forestry activity from the provisions of Section 40 and Section 22 of the Wildlife Act. Since there is no restriction in the licence as to the time of year that works can take place there is potential for the works to result in the deliberate damage or destruction of the nests and / or eggs of wild birds.

The legislative protection for wild birds killed or significantly disturbed in the ordinary course of forestry is vague under National law and "therefore challenging from a compliance and enforcement perspective" Whittaker (Draft Regulatory Review). The licence should include a specific condition to remove any vagueness.

We note the intention of the licensee to carry out works outside the flood risk season ("*late Spring is most suitable*"). There is a significant need for seasonal restrictions to operations in connection with this project.

9. Lack of potential for enforcement



The licence has been awarded for a 10 year period. We fail to see how DAFM can practically monitor / enforce the requirements of the licence over this period as it will have no knowledge of when works have been conducted over the 10 year period of the licence as there is no requirement on the licensee to notify DAFM of the commencement or conclusion of any stage of the works.

The scheduled Harvest Years have no legal basis they are merely indicative.

DAFM has an enforcement role under the Forestry Act but we fail to see how DAFM can implement that function in a practical manner in the absence of a requirement for notification as to when works are taking place. The public is entitled to be informed by public notice in advance of the duration of works but DAFM has not empowered itself to be notified.

Summary

It is our contention that DAFM has made multiple errors, including serious errors in the processing of this licence.

We wish to put it on the record, for the attention of both the FAC and DAFM that legislation that contains the possibility of a revolving door appeal system for forestry licences is not consistent with the legislative principle that Access to Justice must not be prohibitively expensive. There is no theoretical limit to the number of times that a licence can be remitted by the FAC back to DAFM; therefore there is no theoretical limit to the costs of Access to Justice as each appeal would cost 200 euros. It is our view that legislation which permits this situation as a possibility is contrary to European Law.

Save Leitrim would like to request an oral hearing of this case.

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Statement from Inspectorate.

Assessment Criteria	
Was the AA screening procedure at the time of approval applied? (Y/N)	Yes
What version of the AA procedure?	NOV19
Standard Operating Procedures applied? (Y/N)	Yes

Based on the information supplied by the appellant, do you recommend any change to the original decision?

(Tick as appropriate)

No change	<input checked="" type="checkbox"/>	Confirm recommendation to grant licence	<input type="checkbox"/>	Revise conditions of licence	<input type="checkbox"/>	Remit licence for reassessment	<input type="checkbox"/>	Revoke licence	<input type="checkbox"/>
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1.

2. While its not clear what the appellant is referencing regarding the claim a Mr Frank Barrett made modifications to a harvesting plan the appellant may be aware that the harvesting plans are template word documents which have been made available on various websites. These template documents would have been created and edited by various people before publication and “authors” may still be visible in document details.

3. Timber products from plots 1, 2, 3, 4, 8, & 11 would be brought to the forest road via a specialised forwarder which has been designed to move timber from stump to roadside, this is a standard practice in harvesting operations. Harvesting plan states “Proposed machinery will comprise of a harvester and low-ground pressure forwarder with a 14 tonne bunk capacity” for timber harvesting and extraction.

Use of forests roads is not precluded regarding the movement of timber out of plot 11.

It is not a requirement to map existing gaps in hedgerows on harvestings sites. Exclusion zones area are clearly set out in the AAD mitigations and the Standards for Felling & Reforestation.

The pNHA is not be accessed as part of project works. DAFM would like to acknowledge the Ecology report recommendations were not included with the conditions of the licence. The licence area falls entirely outside the Kinlough Wood pHNA. Approximately 30m of existing broadleaves act as a natural buffer between the felling area in plot 11 and Kinlough Wood pHNA.

Harvesting plan states 10m of open space and an additional 10m of broadleaved planting (5 rows) is to be planted at reforestation stage in plot 11.

The recommendations in the ecology report are incorporated into the existing plan as presented as well as existing buffers present on the ground.

4. DAFM contend that the licencing conditions as presented are clear well reasoned and follow standard operating procedures.

5. Regarding plot seven this plot is almost entirely within 60m of a line of dwellings a 60m setback will be installed and an additional 5 to 8 rows of broadleaves suited to the immediate site as per licence conditions to protect the visual and residential amenities of property in the vicinity, to prevent encroachment and isolation, the blocking of light and the curtailment of views in relation to dwellings and associated buildings.

Regarding EIA screening the licence was assess as a felling licence application.

DAFM would like to request an in person oral hearing for this appeal.

Name: Daniel Connaire

Role: Forest Inspector

Date: 25/07/2022

Response from DAFM Ecologist to Appeal

FAC Reference	082/2022
File Reference (CN / TFL)	TFL00589120
Scheme (if relevant)	Felling
Species proposed	See felling licence application on file
Area	22.23 ha

The project concerns a proposed felling and reforestation under TFL00589120. The project comprises [short description]. The grounds of appeal *relevant to ecology* are summarised and addressed below.

4. Inadequate protection of the environment

Hedgerows

The Revised Harvest Plan indicates that “*Extraction route will not break through existing hedgerows or stone walls on site, but instead, utilise existing gaps*”. However, no existing gaps have been identified so it cannot be assured that the use of these gaps will not interfere with any other exclusion zones or setbacks.

Ecology Report

The recommendations of the Ecology Report have not been included in the licence conditions. A possible impact on Kinlough Wood pNHA cannot be excluded.

More detail is required before this project can be considered to have taken account of all the potential environmental impacts.

DAFM Ecology Response:

Hedgerows

It is common practice for Harvest Plans to indicate the use of existing access through hedgerows/stone walls. In accordance with Section 9 of the *Standards for Felling and Reforestation* (DAFM, 2019), if this is not the case ‘*Where no gaps exist, crossing such features should be in documented crossing points only clearly identified on site maps*’.

Ecology Report

Once the ecologist sends the District Inspector (DI) the Appropriate Assessment Determination and Ecology Report, the ecologist is finished with the file. The District Inspector should have attached the recommended mitigation set out in the Ecology Report to the license.

It is unclear what is meant by ‘*more detail is required before the project can be considered to have taken account of all potential environmental impact*’. Both an Appropriate Assessment (AA) Screening Report (21/04/2022), AA Report (21/04/2022) and AA Determination (09/06/2022) were undertaken alongside the Ecology Report (21/04/2022). The AA considered potential impacts from project works on European Sites and the Ecology Report took into account potential effects on Kinlough Wood

pNHA (001415).

5.1 Article 12 of the Habitats Directive (Annex IV species)

There has been not been an adequate assessment of the potential impact on species listed in Annex IV of the Habitats Directive, particularly bats and otter.

DAFM Ecology Response:

Regarding Otter: an adequate assessment was undertaken within the Appropriate Assessment (AA) Screening Report (21/04/2022). Otter is a qualifying interest of Lough Melvin SAC IE0000428, which was screened in due to potential hydrological connections and the project being located within the foraging range of Otter. Mitigation was provided for the protection of Otter in the AA Report (21/04/2022) and AA Determination (09/06/2022). It was therefore deemed unnecessary to include this species in the ecological report.

The Ecology Report did not take into account bats for the following reasons:

1. The project was referred to the NPWS and they made no comments about any fauna/flora records.
2. The project comprises 21-23 year old WD4 Conifer plantation and 30 year old WD2 Mixed broadleaved/conifer woodland. Neither of these habitats provide optimal roosting or foraging habitat for bats.
3. The edges of the plantation are highly likely to be used by bats for commuting. Hedgerows are to be left in situ, enabling their continued use for this purpose. Furthermore, surrounding habitats comprising other forest stands and rough ground will also remain intact and will continue to be used for commuting, following the clearfell. There will therefore be no significant fragmentation of bat commuter routes.
4. Any loss of edge habitat (commuter routes) will be temporary in nature, as the reforested areas will provide edge habitat within a few years.

5.3 Impact on a protected species not precluded

We note that the Ecology Report (which appears to be based solely on a desk-based assessment) has not even referenced Otter which are qualifying interest of Lough Melvin SAC which is c 167m from the project site. There has been no field survey for otter.

DAFM Ecology Response:

As Otter is a qualifying interest of Lough Melvin SAC IE0000428, a European Site, potential impacts to the species from project works was assessed in the AA and there was no need to include mitigation for this species in the Ecology Report. The AA is based on a desk study as well as contact with the District Inspector (as required). In the AA, the most conservative scenario is used (the project is within the foraging range of the species and therefore may be using the project's aquatic zones) and appropriate mitigation is incorporated into the AA Report and AA Determination. There is therefore no need to assess for Otter in an Ecology Report.

6. Appropriate Assessment

An assessment carried out under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned. DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question.

The AA Report appears to be based on a desk inspection only.

The report references a submission from LCC on the 18-1-22 but significantly omits to refer to the previous submissions including the one of the 21-12-21 which recommended the development not be approved until a Single Consent access has been approved. Such access would have needed to undergo its own AA and the lack of clarity regarding access to the public road network and what works will be required is a very significant lacunae in the AA of this project. The Report has also failed to identify the Forest Road through the pNHA.

The Harvest Plan is seriously deficient in terms of carrying out an Appropriate Assessment of this project, including;

- No Fuel Storage, Machine Maintenance location has been identified
- Location of temporary bridging points have not been identified
- Silt trap locations are stated only as being indicative rather than definitive

How can the ecologist have properly assessed this project in the absence of such information?
These are all lacunae in the Appropriate Assessment of this project.

AA mitigation only requires silt traps to be "*monitored and maintained throughout operations*". The possibility of post operation impacts is not addressed. This is a further lacuna in the AA.

We contend that the Forestry and Otter Guidelines (note Guidelines not Standards or Requirements) need to be implemented as far as is possible in advance of issuing an AA Determination.

The lack of a site survey for the presence of otter is a further lacuna in the AA of this project. The mitigation for Otter does not include the timing of operations which are a source of potential impact, particularly given the proposed timing of the works. There has been no actual survey of the site in terms of the possible impact on otter.

To issue an AA Determination on a project which indicates phased operations over a 10 year period with no intermediate assessment at the different stages of the project is not consistent with judgements of the European Court.

The In combination effects section of the AAR is merely a list of projects; there is no actual assessment of in-combination possibilities.

DAFM Ecology Response:

Regarding the LCCs reply on 21/12/2021: this was an oversight on the ecologist's part and was not omitted purposefully. However, it must be highlighted that in the more recent reply from the Council they do not highlight any problems.

Regarding Harvest Plan Deficiencies: Note that the Revised Harvest Plan Map received on 22/03/2022 indicates public roads and existing access tracks to be used for project works. The AA made the assessment based in part on the revised Harvest Plan.

- Fuel storage/machine maintenance: Whilst the Revised Harvest Plan Map (received on 22/03/2022) does not indicate specific locations for fuel storage/machine maintenance, it is stated on the Map that it will occur 50m from the aquatic zone. In addition, the AA provides mitigation regarding locating fuel storage/machine maintenance areas.
- Location of temporary bridging points: The Revised Harvest Plan Map (received on 22/03/2022) indicates the installation of a temporary crossing across the aquatic zone in Plot 11. This is noted and assessed in the AA Screening Determination and mitigation is provided in the AA Report and AA Determination.
- Silt trap locations: Yes, silt track locations are indicative, and this is best practice due to natural changes on site and weather at the time of works, allowing for better placement of silt traps if required. The AA Report provides further mitigation regarding the placement and use of silt traps on site.

Silt trap mitigation: The requirement in the AAD that silt traps are '*monitored and maintained throughout operations*' is in keeping with Sections 7 and 12 of the *Standards for Felling and Reforestation* (DAFM, 2019).

All mitigation used in the AA: Mitigation provided within the AA is in keeping with Forest Service standards and all mitigation used has been formulated by the Environment Section within the Forestry Inspectorate.

Otter: The AA is based on a desk study as well as contact with the District Inspector (as required). In the AA, the most conservative scenario is used (the project is within the foraging range of the species and therefore, the species may be using the project's aquatic zones) and appropriate mitigation is assigned in the AA Report and AA Determination. This is all in keeping with direction given by, and using mitigation formulated by, the Environment Section within the Forestry Inspectorate.

AA Determination for phased operations over a 10 year period: The ecologists has considered the most conservative scenario that proposed project works will have on European Sites and their qualifying interests/special conservation interests and provided mitigation to prevent such significant effects. Due to the nature of the project (an improved/intensively managed plantation that is to be reforested), changes to the ecological value of the project area itself will not change significantly over the next 10 years.

In combination: An In-combination Assessment is provided in Appendix 2 of the AA Screening Determination and Appendix 1 of the AA Report. The assessment details various online planning systems and datasets (including DAFM's Forest Licence Viewer on the 23/02/2022) used in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Kinlough_010, Drowes_010. In addition, Section 6 of the AA Report discusses in-combination effects.

7. Operability of the licence is not assured

It is unclear how plot 5 can be felled and timber extracted in a manner that is fully consistent with the required Standards.

The Revised Harvest Plan indicates that "*Extraction route will not break through existing hedgerows or stone walls on site, but instead, utilise existing gaps*". Since no existing gaps have been identified in the Plan the practicality and operability of this cannot be assured. What if the positioning of the gaps conflicts with other conditions to do with set-backs or exclusion zones?

The 10m exclusion zone around the northern boundary of plot 11 recommended in the Ecology Report (not transferred in to the licence conditions) would preclude extraction of timber from this plot via the existing forest road which appears to be the route indicated on the Harvest Map.

DAFM Ecology Response:

Plot 5: The revised Harvest Plan Map indicates existing access tracks in relation to Plot 5. The AA report provides mitigation to ensure that the plot which is bisected by an aquatic zone is harvested sensitively i.e. a 10m exclusion zone is to apply (ruling out machine access or storage of materials) with trees outside the harvesting machine's reach to be manually felled and winched out.

Use of gaps in hedgerows/stone walls: Please see reply to point 4 (Hedgerows) above.

Plot 11: While a 10m setback is to be provided where the boundary of the project meets the pNHA, the Ecology Report failed to state that the existing access track could be used for access/extraction purposes. In addition, where the Ecology Report recommended that '*The pNHA is not be accessed as part of project works*', it failed to specify that this did not include the use of the existing access track. The site synopsis for the pNHA states that the proposed national site is in decline due to its present use/management and is of local importance. Therefore, the use of the existing access track will not have a significant effect on the habitats of the pNHA.

8. Inadequate protection for wildlife during the period of breeding and rearing

There is no general system of protection in Ireland for wildlife, including birds, during the period of breeding and rearing.

EU Directives are binding as to the results to be achieved but leave it to Member States to decide how best to achieve those results. EU Directives relevant to forestry regulation include the Environmental Impact Assessment (EIA) Directive, the Water Framework Directive, the Habitats Directive, and the Birds Directive.

Member States are required under the Birds Directive to have in place a general system of protection for all species of wild birds. This extends to the protection of their nests and eggs from deliberate damage or destruction. Irish National Law exempts forestry activity from the provisions of Section 40 and Section 22 of the Wildlife Act. Since there is no restriction in the licence as to the time of year that works can take place there is potential for the works to result in the deliberate damage or destruction of the nests and / or eggs of wild birds.

The legislative protection for wild birds killed or significantly disturbed in the ordinary course of forestry is vague under National law and "***therefore challenging from a compliance and enforcement perspective***" Whittaker (Draft Regulatory Review). The licence should include a specific condition to remove any vagueness.

We note the intention of the licensee to carry out works outside the flood risk season ("*late Spring is most suitable*"). There is a significant need for seasonal restrictions to operations in connection with this project.

DAFM Ecology Response:

Protection of breeding birds: Section 40 of the Wildlife Act 1976, as amended by Section 46 of the Wildlife (Amendment) Act 2000, restricts the cutting, grubbing, burning or destruction by other means of vegetation growing within uncultivated land, hedges or ditches during the breeding bird season. However, there are exceptions to this, and the prohibition does not apply in the ordinary course of forestry, which is taken to include felling works. In addition: i) appropriate breeding habitat for birds is generally limited to perimeter trees and existing hedgerows and treelines, and hedgerows/treelines will not be removed; and ii) whilst felling works can be undertaken during the breeding season, this does not allow for the willful destruction of observed bird nests.

Works and flood risk season: The project is not located within a flood risk area (see Section A of the AA Screening Report) and the AA Report and AA Determination include the following mitigation: *'Machine operations must cease during and after periods of rainfall sufficiently heavy to result in the loss of nutrients and / or the mobilisation of sediment, fine organic matter and debris into receiving waters. Ground conditions must be monitored during rainfall, and records of such monitoring and of any resulting operational adjustments and postponements must be kept for possible inspection. For information, forecast details for the nearest meteorological station can be found on the Met Éireann website www.met.ie'.*

Signed: Shannon O Donnell

Date: 22/07/2022

