



[Redacted]

9<sup>th</sup> December 2020

**Subject:** Appeal FAC400/2020 regarding licence CE03-FL0204

Dear [Redacted]

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

**Background**

Felling Licence CE03-FL0204 was approved by the DAFM on 26<sup>th</sup> June 2020.

**Hearing**

An Oral Hearing of appeal FAC400/2020 was conducted by the FAC on 19<sup>th</sup> November 2020.

Attendees:

FAC: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Bernadette Murphy, Mr. Luke Sweetman  
Secretary to FAC: Ms. Ruth Kinehan  
Appellant: [Redacted]  
Applicant representatives: [Redacted]  
DAFM Representatives: Mr. Frank Barrett, Ms. Eilish Kehoe

**Decision**

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to grant this licence (Reference CE03-FL0204).

The proposed project is for the clearfell and reforestation of an area of 19.77ha in Slieveanore, Co. Clare. The proposed felling is composed of 98.6% Sitka spruce with Lodgepole pine, Willow and several minor species comprising the remaining 1.4% canopy cover. The proposed restocking at application was 70% Sitka Spruce and 30% Lodgepole pine with an area of 0.99ha of open space retained. As per the DAFM's information the underlying soil type is 100% Blanket Peat. The slope is predominantly moderate (0-15%) and the habitat is predominantly WD4. The project site is in the Lower Shannon (25C) River Catchment and the Graney (Shannon)\_SC\_20 Sub-Catchment.

A Harvest Plan and Appropriate Assessment Pre-screening Report were submitted with the application. DAFM referred the application to Clare County Council and the National Parks & Wildlife Service (NPWS). Clare County Council did not respond. The NPWS response stated that the project site lies within the Slieve Aughty Mountains SPA and specifically, a Higher Likelihood of Nesting Area (HLNA) for Hen Harrier. It stated that the conservation objective of this European Site is to maintain or restore the

favourable conservation status of Hen Harrier and Merlin. The NPWS then made recommendations related to the timing of the proposed operations (outside of the Hen Harrier breeding season), notification of the local Conservation Ranger prior to felling to advise on Hen Harriers nesting in the area and avoiding the disturbance of nesting Hen Harriers. They further recommended that the DAFM should complete a Stage 1 Screening for Appropriate Assessment to determine if the proposed activity, on its own and in combination with other plans and projects, may have a significant effect on the European Site, in view of its conservation objectives.

The DAFM carried out a Stage 1 Screening for Appropriate Assessment, identifying 15 Natura 2000 sites (12 SACs and 3 SPAs) within 15km of the clearfell site. The following European sites were screened out for Stage 2 Appropriate assessment for various reasons which were detailed in the DAFM's Appropriate Assessment Screening Form; Pollagoona Bog SAC 002126, Loughatorick South Bog SAC 000308, Drummin Wood SAC 002181, Gortacarnaun Wood SAC 002180, Sonnagh Bog SAC 001913, Lough Cutra SAC 000299, Lough Cutra SPA 004056, Glendree Bog SAC 001912, Derrycrag Wood Nature Reserve SAC 000261, Pollnaknockaun Wood Nature Reserve SAC 000319, Lough Coy SAC 002117, Peterswell Turlough SAC 000318, Carrowbaun, Newhall and Ballylee Turloughs SAC 002293, Lough Derg (Shannon) SPA 004058. The Slieve Aughty Mountains SPA 004168 was screened in for Stage 2 Appropriate Assessment because the DAFM determined that there is the possibility that the proposed project will have a significant effect on the SPA due to the location of the project within the Natura site.

The DAFM subsequently produced an Appropriate Assessment Report, leading to an Appropriate Assessment Determination, both dated 18<sup>th</sup> June 2020, prior to the making of the decision to grant the licence. Both the Report and the Determination were subject to ecological review (dated 25<sup>th</sup> June 2020) and listed the Natura 2000 sites within 15km radius. The report identifies the Slieve Aughty Mountains SPA as being subject to possible effect due to the location of the project within the Natura site. The report concluded that there is no possibility of the proposed project giving rise to significant effects, alone or in-combination with other plans and projects on the other 12 SACs and 2 SPAs within 15km of the project site, in view of their conservation objectives. It was further determined that the proposed project would not adversely affect the integrity of these sites. Assessing the Slieve Aughty Mountains SPA, the report identifies the Special Conservation Interests as the Merlin and the Hen Harrier and the conservation objective for both species as *"to maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA"*. The report identifies potential impacts on both species as being disturbance / displacement resulting from excessive noise, vibration, mechanical movement or artificial lights associated with harvesting, timber extraction and mechanical ground preparation for reforestation. It also stated that activity restrictions will need to apply during the Hen Harrier breeding season.

The Appropriate Assessment Determination detailed site-specific measures designed to mitigate impacts on the SPA which were recommended to be inserted as conditions of the licence. The Determination concludes that the proposed development, "individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Slieve Aughty Mountains SPA, having regard to their conservation objectives, and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with specific mitigation to be attached as conditions to the licence."

The licence issued on 26<sup>th</sup> June 2020 and is exercisable until 31<sup>st</sup> December 2022. It is subject to standard conditions plus additional conditions relating to Hen Harrier and Merlin, contacting the NPWS prior to commencement of operations, landscape considerations, the protection of water quality and the environment, and adherence to specified standards and guidelines.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive. The DAFM has failed to carry out screening to determine the requirement for an EIA. On the same date that the application for this licence was submitted a further nine applications for clearfelling licences were submitted for the same Forest Management Unit totalling 115.48 ha. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. The application has not described any aspects of the environment which are likely to be significantly affected.

There is no evidence that the impacts on a nationally designated site or European Annex I Habitats in the vicinity have been adequately considered as part of the approval process.

The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-2021. Clearfelling has the capacity to impact on water quality, especially as the site is on a peat soil in a catchment with previous records of the protected Freshwater Pearl Mussel.

The Stage 2 Appropriate Assessment determination is not legally valid; the 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 general public were not given the opportunity to give opinions on the Appropriate Assessment Determination under Article 6(3) of the Habitats Directive.

The licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive.

The licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation (DAFM, 2019).

The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence.

The licence should include enforceable conditions regarding notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

The DAFM's response to the grounds of appeal, submitted in a written statement to the FAC, can be summarised as follows: clearfelling and replanting are not included as a class of development covered by the EIA Directive; the DAFM's standard procedures (including the issuing of referrals to statutory bodies) were followed in the processing of this felling licence application. Appropriate Assessment was carried out in respect of felling licence application CE03- FLO204; the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (DAFM, 2018), the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the Water Framework Directive; the DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the Appropriate Assessment Determination were attached as conditions of licence CE03-FLO204; in relation to seeking the opinion of the general public under Article 6 (3) of the Habitats Directive, the DAFM submits that the provisions of Regulation 19 (4) and Regulation 20 of the

Forestry Regulations 2017 (S.I. No. 171/2017) and any considerations and decisions made pursuant to them, fully concord with the requirements of Article 6(3) of Habitats Directive as regards public participation; it is a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply; DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements; under Section 17.4 of the 2014 Forestry Act, it is for the Minister at any time to attach or vary conditions to any licence granted; there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray.

An Oral Hearing was held at which the DAFM detailed the background to the processing of the application and the decision to grant the licence. It confirmed that an Appropriate Assessment Determination had been made, and its conclusions considered, prior to the decision to grant the licence. The DAFM stated that they had referred this application to Clare County Council and the NPWS. The NPWS responded with a set of nature conservation recommendations which were included in the conditions of the licence. The Appellant queried why the licence contained two conditions with conflicting date ranges during which operations should not take place. The DAFM indicated that condition (r) which relates to Merlin, excludes felling between 1st March to 31st August inclusive, within 100m of the forest edge, but that this condition was dependent on the spatial arrangement of the forest as it is only in effect where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland; or within 100 metres of a clearing in the forest of larger than one hectare. The DAFM stated that all conditions of the licence apply and are accumulative. The DAFM confirmed that the Hen Harrier condition (k) was taken from Appendix 21 of the Forestry Standards Manual and that condition (r), regarding Merlin, was a product of the DAFM's consultation with an Ornithologist. The Applicant stated that the requirements of the licence will be adhered to and inform how operations are carried out on site. The Appellant questioned whether condition (i) of the licence could be considered a mitigation measure. The Appellant stated that the proposed felling coupe size exceeded that recommended by the Code of Best Forest Practice – Ireland for a site located in a landscape sensitive area. The Appellant stated that the planned retention of 5% open space amounted to change of land use type and should therefore be subject to EIA screening. The Appellant argued that the potential for non-hydrological impact e.g. colonisation by Sitka spruce on a nationally designated site or European Annex I Habitats was not properly assessed, and that the NPWS response was overly focussed on bird species. The Appellant contended that the river sub-basin was a priority area for action, that it has a 'Good' status but that this is at risk from cumulative impacts of forestry developments. They also stated that, under the requirements of the WFD, where a project may cause deterioration in water quality, the public authority must refuse permission.

The Appellant further stated that the Appropriate Assessment did not take into account the impact on the Hen Harrier of the reforestation of the site with conifers and that deforestation of approximately 25,000 ha must occur across Hen Harrier SPAs nationally in order to arrest the decline of the species.

The Appellant argued that the Appropriate Assessment had not considered the impact of the development on Climate Change and therefore was incomplete and not legally valid.

The Appellant stated that a condition should be attached giving protection to wild birds during the nesting and rearing seasons and that national legislation did not provide this as various sections of the Wildlife Act 1976 were not fit for purpose and should be amended to align more closely with the EU Birds Directive (Directive 2009/147/EC). The Appellant stated that Articles 5 and 1 of the Birds Directive require EU Member States to protect all species of birds and not just those listed as protected species.

The Appellant stated that notification of spraying of chemicals on forest sites should be given to locals and neighbouring landowners in the interest of protecting wildlife, livestock and people's pets. The Applicant described the project site and stated that it sits on the edge of a larger block of c. 8,000 ha of forest land and that the site is served by an existing forest road. A tributary to the River Bleach bounds the site to the east and another tributary is located c. 45m to the northwest of the site. They stated that there was 28km hydrological distance between the project and the nearest European site. The Applicant stated that the open habitat next to the project is separated by 250m to the east and 190m to the south with screening from mature conifers in between this habitat and the clearfell area. The Applicant also stated that the concept of a 'Red Zone' for Hen Harrier meets the requirement to cater for the presence or absence of Hen Harrier as in the absence of a survey of the area, their presence is assumed.

Addressing the grounds of appeal, The FAC considered the Appellant's contention that the proposed development should have been addressed in the context of the EIA Directive. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine through thresholds or on a case by case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation (nor clearfelling) are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). At the Oral Hearing, the appellant argued that, based on the application submitted, the reforestation would leave a portion (5%) of the site as open space and that this would constitute a change of land use. The FAC considers that there is no basis for this argument as the licence issued is for the felling and replanting of 19.77ha for commercial forestry purposes and does not consent to any change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as contended in the grounds of appeal.

The Appellant stated that the impacts of the project on a nationally designated site or European Annex I Habitats in the vicinity have not been adequately considered as part of the approval process. The FAC considered the Applicant's statement that the open habitat next to the project is separated by between 190m - 250m of extant conifer forest. The FAC had regard to the fact that the DAFM had referred the licence application to the NPWS and considered their response in the processing of the licence. The FAC concluded that based on the evidence before it, it is not likely that the proposed development will have a significant effect on the habitat.

The Appellant's grounds of appeal stated that the project site is in a catchment with previous records of Freshwater Pearl Mussel but did not provide any specific evidence in this regard. The FAC observed that, as per the Environmental Protection Agency's website, the development is not within a Freshwater Pearl Mussel SAC Catchment and there is no evidence before the FAC of a Freshwater Pearl Mussel population downstream from the proposal. As such, there is no evidence before the FAC that the development is likely to have an adverse effect on any Freshwater Pearl Mussel population. The Appellant argued that the development could threaten the achievement of the objectives of the underlying waterbody or waterbodies and that the DAFM must refuse a licence where the proposed operation may cause deterioration in water quality. The FAC noted that, in addition to standard conditions attaching to the

licence for the reason of protecting the environment during harvesting and restocking, specific conditions (l), (m), (n), (o), (p) and (q) were attached in the interest of protecting water quality and the environment. Based on the information before it, the FAC considers that there is no reason to conclude that the proposed development executed in line with the conditions of the licence would give rise to an adverse impact on water quality.

The FAC considered that the DAFM had carried out a Stage 1 screening and Stage 2 Appropriate Assessment in accordance with the provisions of the Habitats Directive leading to the making of an Appropriate Assessment Determination before the decision to grant the licence was made. The recommendations of the Determination regarding the Hen Harrier and the Merlin were attached to the licence issued by the DAFM. Based on the information before it, the FAC is satisfied that the procedures adopted by the DAFM in reaching its Appropriate Assessment Determination are correct and in accordance with the provisions of the Habitats Directive. The FAC concluded that, subject to the implementation of the specific mitigation measures recommended in the Determination and adherence to the licence conditions, the proposed development, individually, or in combination with other plans or projects, will not have an adverse effect on the integrity of the Slieve Aughty Mountains SPA with regard to its conservation objectives. In this instance, the FAC accepts the conclusion of the DAFM that the proposed development, alone, or in combination with other plans or projects would not be likely to give rise to significant effects on any of the European sites that were screened out for Stage 2 Appropriate Assessment.

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

In regard to a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The Applicant indicated that, as a matter of course, inspections take place before any felling operations commence in order to determine any actions needed regarding the protection of birds nesting and rearing. The FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing on this site. Based on the information before it, the FAC concluded that a condition of the nature detailed by the Appellant should not be attached to the licence.

The FAC considered the Appellant's contention that the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. The FAC also considered the DAFM's response that the site-specific mitigations identified in the Appropriate Assessment Report and subsequent Appropriate Assessment Determination were attached as conditions of the licence issued (CE03-FL0204). Furthermore, the FAC notes that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in statute elsewhere. As such, the FAC considers that there is no convincing evidence to indicate that the proposed development would be likely to have an adverse impact on Annex IV species.

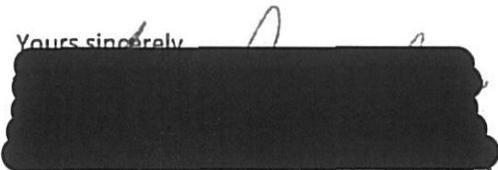
The FAC had regard to the Appellant's grounds that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). The FAC concluded that the Harvest Plan is, in fact, an operational plan for those carrying out the

works on the site, and that the Harvest Plan must adhere to the measures included by the DAFM in the licence issued.

The FAC had regard to the Appellant's statement that the licence should contain conditions relating to the commencement and conclusion of operations. The FAC noted the DAFM's system of inspecting a sample of licences issued in order to establish the Licensee's adherence to the conditions of those licences. The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. In this regard, the FAC noted the Applicant's statement that their standard procedure is to notify local authorities on an annual basis and provide them with a list of sites where the spraying of chemicals is planned, and for their contractors to erect temporary signage on sites where chemicals are being sprayed. On balance, the FAC concludes that the conditions attached to the licence issued by the DAFM are appropriate for, and proportionate to, the licenced development. As such, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,

  
Luke Sweetman on behalf of the Forestry Appeals Committee

