



[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

24<sup>th</sup> December 2020

**Subject:** Appeal FAC336/2020 regarding licence CK26-FL0049

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 CK26-FL0049 was approved by the DAFM on 19<sup>th</sup> June 2020.

#### **Hearing**

An oral hearing of appeal FAC336/2020 was conducted by the FAC on 26<sup>th</sup> November 2020.

Attendees:

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

#### **Decision**

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference CK26-FL0049).

The licence granted is for the clearfell and reforestation of 11.1ha in Rowls (Langford) South, Co. Cork. The species to be felled comprises 100% Sitka spruce, planted in 1986. The proposed restocking is 100% Sitka Spruce with open space of 0.56ha retained. The project site is within the river Blackwater 18\_01 Catchment, the Dalua\_SC\_20 Sub-Catchment and the waterbody Allow\_010 (99%) & Glashawee (Allow)\_010 (1%). As per the DAFM information, the soil type is approximately Peaty Gleys (31%) & Podzols (Peaty), Lithosols, Peats (69%) and the slope is predominantly moderate 0-15%.

The Applicant submitted documents titled Harvest Plan and Appropriate Assessment Pre-screening Report with the application.

The DAFM referred the application to Cork County Council and Inland Fisheries Ireland (IFI). There was no record of a response from IFI in the evidence before the FAC. Cork County Council responded on two

occasions; 30<sup>th</sup> January 2020 & 4<sup>th</sup> February 2020. In their initial response the Assistant Engineer for the area made the following observations:

- Loaded and unloaded Lorries shall exit and access the site via L-5009, L-1005 & L-1014 to the R578.
- The roadside drainage arrangement shall remain in place
- No mud or debris from the site shall be left on the public road
- This office shall be consulted if a new entrance to the site is to be recorded

The second County Council response was from the Area Planner and advised the Licensee to have regard to the Planning and Development Act (2000) as amended and the Planning and Development Regulations (2001) as amended. They also outlined the potential requirement for an Appropriate Assessment and planning permission, depending on the exact nature of the planned works.

The DAFM carried out a Stage 1 Screening for Appropriate Assessment, identifying 3 Natura 2000 sites (2 SACs and 1 SPA) within 15km of the clearfell site. Of these, the Blackwater River (Cork/Waterford) SAC was screened out due to "the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise". The Lower River Shannon SAC was screened out due to "the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise." The Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA was screened in for Stage 2 Appropriate Assessment because the DAFM concluded that there is a possibility for the proposed project to have a significant effect on this Natura site due to the location of the project within the SPA.

The DAFM subsequently produced an Appropriate Assessment Report, leading to an Appropriate Assessment Determination, both dated 9<sup>th</sup> June 2020, which were both considered prior to the making of the decision to grant the licence. Both the Report and the Determination were subject to review, and signed-off by, an external Ecologist (dated 12<sup>th</sup> June 2020). Table 1 in the Report shows the Appropriate Assessment screening recommendation made by the DAFM Inspector in relation to felling and reforestation project CK26-FL0049 and the results of the subsequent expert verification. However, the table does not contain any information in the section which shows the results of the expert review. As with the DAFM screening, the Appropriate Assessment Report screened out the two SACs and identified the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle 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 Natura sites within 15km of the development, in view of their conservation objectives. It was further stated that the proposed project would not adversely affect the integrity of these sites.

Assessing the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, the Report identifies the Special Conservation Interest as the Hen Harrier and the conservation objective for the species as "to maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA". Section 6.1 of the Report states that the project site is within a Hen Harrier "Green Area" which means potential disturbance operations can take place during the species' breeding season (1<sup>st</sup> April – 15<sup>th</sup> August, inclusive) and states that "no mitigation is required". However, this section goes on to detail how operations will be restricted within the Hen Harrier season if the National Parks & Wildlife Service (NPWS) notify the DAFM of a new Higher Likelihood of Nesting Area (HLNA) encompassing / intersecting the project.



Section 9 of the Report details the site-specific measures prescribed by the DAFM to mitigate potential impacts on the Natura site to be inserted as conditions of the licence. These are listed below:

- The site of this project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1<sup>st</sup> April to 15<sup>th</sup> August, inclusive). However, if the Department of Agriculture, Food & the Marine (DAFM) is notified by the NPWS of a new Hen Harrier nesting site, and if the site of the project lies within or partially within 1.2 km of this location, the DAFM will inform the Applicant of this situation and will amend the terms of the licence, with immediate effect, to exclude potential disturbance operations from taking place during the Hen Harrier breeding season (1<sup>st</sup> April to 15<sup>th</sup> August, inclusive). A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance.
- The proposed works "shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019).

The DAFM's Appropriate Assessment Determination states that they have "completed an Appropriate Assessment of potential impacts on those European sites 'screened in' and has made certain, based on best scientific knowledge in the field 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. 31 of 2020), that the activity proposed under CK26-FL0049, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161, 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 19<sup>th</sup> June 2020 for the clearfell and reforestation of 11.1ha and is exercisable until 31<sup>st</sup> December 2022. It is subject to standard conditions plus additional conditions relating to Hen Harrier, contacting IFI prior to commencement of crossing of any watercourses, haulage arrangements, 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. In summary, 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. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. The application has not described any aspects of the environment which are likely to be significantly affected.

The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-2021.



There was inadequate consideration by the DAFM of the potential cumulative impact on Freshwater Pearl Mussel (FPM).

The Stage 1 and Stage 2 Appropriate Assessment determinations are not legally valid.

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 should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations

The licence should include a condition that plans and works are inspected by FS prior to, during and post works to ensure compliance

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

The DAFM responded that clearfelling and reforestation are not categories of development covered by the EIA Directive. The licence contains measures aimed at the protection of water quality. The DAFM is actively engaged in the WFD process and is fully informed of its responsibilities regarding the achievement of the WFD objectives. The DAFM reviewed the details of the Blackwater River (Cork/Waterford) SAC 002170, including its Qualifying Interests (including FPM), the Inspector concluded that there is no possibility that this project will have a significant effect on this Natura site, due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise to the European site.

The DAFM identified the possibility of significant effects on screened European sites. An Appropriate Assessment was carried out and a Determination made. Site-specific measures prescribed by the DAFM were included as mitigation measures.

The notification of felling licence applications and details of the arrangements for public participation are published and readily accessible on the DAFM's website. In the making of a submission or observation concerning such applications, this includes the opportunity for members of the public to make a submission or observation on the likely effect on the environment of the proposed felling activity. It is a principle of law that unless the grant of a first statutory licence expressly exempts the holder of any obligation to obtain a second licence 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. The Minister may, at any time, attach or vary conditions to any licence. Users of Plant Protection Products must apply the principles of Good Plant Protection Practice. There is no legal requirement to inform forest owners or adjacent land owners of the 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 the Determination had formed the basis of the conditions attached to the licence (CK26-FL0049). The DAFM confirmed that they had referred the application to Cork County Council and IFI. The IFI response was read onto the record by the DAFM. The IFI response contained numerous recommendations relating to the protection of water quality including; contacting IFI Senior Fisheries Officer prior to commencement of works, varying extraction routes to prevent rutting and thus potential silt run-off, avoidance of aquatic buffer zones by machinery, storage of chemicals away from aquatic zones, continuous review of ground stability and the adherence to the Forestry & Water Quality Guidelines and the Forestry Harvesting & Environmental Guidelines. The DAFM stated that all of the



recommendations of IFI had been considered and the advised setbacks and requirement to contact IFI prior to commencement had been included as conditions on the licence. The DAFM stated that the Licensee's adherence to the relevant guidelines would already provide for many of the IFI's recommendations. The Appellant stated that the Appropriate Assessment did not have adequate regard to the location of the project site within a river Sub-Basin which drains to the Blackwater River (Cork/Waterford) SAC, for which FPM is a qualifying interest. The Appellant submitted that hydrological connectivity between the project site and this SAC must be assumed and could not be ruled out based on a desk assessment. They further stated that extreme weather events could result in an overwhelming flow of surface water which represents a source capable of a significant effect on the SAC. The Appellant queried why conditions related to water quality were necessary on the licence if there are no aquatic zones or relevant watercourses on site. The Appellant submitted that a 2015 Hen Harrier survey carried out by the National Parks & Wildlife Service (NPWS) had shown a c.15% decrease in breeding populations of Hen Harrier and that there is the prospect of significant further decline in the next decade due to the maturation of forest stands. They stated that the NPWS should have been consulted in relation to the Hen Harrier. They further submitted that the concept of a Hen Harrier Green Area did not preclude the presence of nesting Hen Harriers, only that it would be less likely. The Appellant stated that reforested sites can provide nesting habitat for Hen Harriers and that the harvesting of trees in the proximity of reforested sites represented a threat to Hen Harrier nests and that any risk to a nest would impact on the integrity of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The Appellant referenced the fact that the Appropriate Assessment Report stated "No Mitigation Required" in Section 6.1 and that no information was entered for the "Expert Review" field in Table 1. They queried whether any expert review had taken place. The DAFM stated that they were satisfied that the appropriate Hen Harrier procedure had been prescribed in this case.

The Applicant described the project site as adjoining a large forest area and stated that, following a field inspection by their Environmental Manager on 27<sup>th</sup> October 2020, there are two relevant watercourses in the south-east of the site. These were described as wet areas with sections of windblown trees. The Applicant stated that their Environmental Manager described the vast majority of the site as dry underfoot. They agreed that water may leave the site intermittently (following rainfall events) but that this would be via a well vegetated drain or ditch in the south-east corner which was on a gentle slope and that this was not a permanent water feature. The Applicant stated that no watercourse will be crossed on the site and that the water "hotspot" in the south-east will be avoided. The Applicant submitted that the project site was in a Green Area for Hen Harrier and that there would be ongoing engagement with the NPWS regarding the need for any time restrictions of potential disturbance activities.

Addressing the grounds of appeal, The FAC had regard to the Appellant's submission that the proposed development should have been assessed in the context of the EIA Directive. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine through thresholds or on a case by case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation (nor clearfelling) are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The FAC concludes that the felling and subsequent replanting, as part of a commercial forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and



similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as contended in the grounds of appeal.

The Appellant submitted that the development could threaten the achievement of the objectives of the underlying River Sub-Basin and that the DAFM must refuse a licence where the proposed operation may cause deterioration in water quality. The FAC noted that specific conditions (h), (j), (m), (n), (o), (p), (q) and (r) were attached in the interest of protecting water quality and following consideration of IFI's response. The FAC had regard to the Appellant's grounds that the project site is within a FPM SAC Catchment area (the Munster Blackwater – Allow) and that the DAFM did not give adequate consideration to the potential cumulative impacts of the project on the FPM, a Qualifying Interest of the Blackwater River (Cork/Waterford) SAC. The FAC noted that the application was desk assessed by the DAFM, that no relevant watercourse had been identified using the available ortho-photography, and that the Blackwater River (Cork/Waterford) SAC had been screened out for Stage 2 assessment due to "the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise". The FAC considered the Applicant's statement that, following a field inspection in October 2020, two relevant watercourses were identified in the south-east of the site and that water would exit the site intermittently following rainfall events. In these circumstances, the FAC concludes that, in the absence of a satisfactory screening having regard to the relevant watercourses the FAC considers the precautionary principle should apply in this instance.

The FAC noted that the DAFM had carried out a Stage 1 screening and Stage 2 assessment in accordance with the provisions of the Habitats Directive leading to an Appropriate Assessment Report which resulted in the making of an Appropriate Assessment Determination before the decision to grant the licence was made. The Report before the FAC contained a number of errors in the form of contradictions (where Section 6.1 states "no mitigation required") and missing information (the expert review section of Table 1) but it does, in fact, contain site-specific mitigation measures in relation to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and was reviewed, and signed-off by, an external Ecologist. The Appropriate Assessment Determination contains the mitigation measures which were prescribed in the Report and these were attached as conditions (l) and (s:b) on the licence (CK26-FL0049). Based on the evidence before it, the FAC concludes that a number of errors occurred in the production of the Appropriate Assessment Report. In this instance, the FAC did not consider these errors to be of a serious or significant nature due to the fact that they did not affect the outcome of the Appropriate Assessment process as the relevant mitigation measures were attached to the licence issued by the DAFM.

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

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. 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 had regard to the Appellant's statement that the licence should contain conditions relating to the commencement and conclusion of operations. The FAC noted that the DAFM inspect a number 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 that the use of pesticides is governed by the European Communities (Sustainable Use of Pesticides) Regulations 2012 (S.I.155/2012) and European Communities (Plant Protection Products) Regulations 2012 (S.I. 159/2012) and that all users of pesticide products registered for professional use must follow the principles of good plant protection practice. On balance, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In the circumstances outlined above, the FAC concludes that the presence of relevant watercourses in the project site is an important factor that should have been considered in the screening of this site for the possibility of significant affects on the Blackwater River (Cork/Waterford) SAC and the failure to do so represents a significant error in the DAFM's processing of this licence application. Therefore, the FAC concludes that the decision of the DAFM should be set aside and remitted to the Minister to carry out an assessment of the proposed development on Natura 2000 sites on its own and in combination with other plans and projects, before making a new decision in respect of this licence (CK26-FL0049).

Yours sincerely,

A large black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on behalf of the Forestry Appeals Committee

