



30 April 2021

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FAC refs: 731/20 & 768/20

**Subject:** Appeal in relation to felling licence TY04-FL0050

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and the Marine (DAFM) in respect of felling licence TY04-FL0050.

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 the parties to the appeal.

**Background**

Felling licence TY04-FL0050 was granted by the Department on 28 August 2020.

**Hearing**

An oral hearing of appeals 731/20 and 768/20 was conducted by the FAC on 18 February 2021.

**Attendees:**

**FAC Members:** Mr Des Johnson (Chairperson), Mr Dan Molloy and Mr Pat Coman

**Secretary to the FAC:** Mr Michael Ryan

**Applicant representative:** [REDACTED]

**DAFM representatives:** Mr Anthony Dunbar and Ms Eilish Kehoe

**Appellant\*:** [REDACTED]  
[REDACTED]

**Decision**

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to vary the licence (Reference TY04-FL0050).

The proposal is for clearfelling and restocking of a stated site area of 16.79ha at Bauraglanna, Knockanroe, Co. Tipperary. The existing stock is 100% Sitka Spruce and the proposed stock is also 100%

Sitka Spruce. An area of 0.84ha of open space is provided for. The application documents include a 'Harvest Plan' and an Appropriate Assessment Pre-screening Report.

The DAFM undertook an Appropriate Assessment screening (AAS). This records the underlying soils as 95% Acid Brown Earths, Brown Podzolics, 2% Blanket Peats, 2% Lithosols, Regosols, 1% Surface Water Gleys, Groundwater Gleys. The site is stated to be predominantly steep (15-30%). The site is in the Shannon Catchment (100%), Newport (Tipperary)\_Sc\_010 (100%) Sub-catchment, the Newport (Tipperary)\_010 (100%) Waterbody. The AAS identified 9 Natura 2000 sites within a 15km radius. The following were screened out for Stage 2 Appropriate Assessment - Silvermines Mountains West SAC, Keeper Hill SAC, Bolingbrook Hill SAC, Clare Glen SAC, Lough Derg SPA and Glenstal Wood SAC. Lough Derg SPA was screened out for reason of separation distance and all the SACs were screened out for reasons of the absence of direct upstream hydrological connection and a lack of pathway for effects. Three Natura 2000 sites were screened in for Stage 2 Appropriate Assessment. The Slievefelim to Silvermines Mountains SPA, Silvermine Mountains SAC and Lower River Shannon SAC are screened in for reasons of possible effect due to the location of the project within the Natura 2000 site, proximity of the project to the Natura site and direct hydrological connectivity between the project site and the SAC. In-combination projects considered include dwellings and associated works, telecommunications mast (non-forestry), 3 forest roads, 2 private felling licences and 24 Coillte felling licences.

The applicants submitted a Natura Impact Statement (NIS), dated 13.08.2020. By way of introduction the NIS states that the project lands were planted between 1986 and 1989 with Sitka Spruce. The southern section of the site is within a Hen Harrier Red Zone. There is a first order stream, the Foilanna, a tributary of the Mulkear River, that lies 50m downslope and across a public road. The Mulkear River is part of the Lower River Shannon SAC 666m downstream. The Foilanna is hydrologically connected to the project lands by a watercourse (an old deep bog drain) which runs south-west along the south eastern boundary of the site for approximately 420m, before exiting the site in the south west corner, where it runs 200m along a pasture field boundary into the Foilanna Stream.

The NIS lists all Natura 2000 sites within a 15km radius of the project lands, their qualifying interests and conservation objectives and examines the possibility of significant effects. Sites screened out for Stage 2 Appropriate Assessment are Bolingbrook Hill SAC, Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, Lough Derg (Shannon) SPA, Lough Derg (Shannon) SAC, Silvermines Mountains West SAC and River Shannon and River Fergus Estuaries SPA. Reasons for the screening conclusions relate to absence of hydrological connection, separation distance greater than 200m, unacceptability of the project area for use by qualifying interests and the nature and scale of the proposed development, and assimilative capacity of intervening watercourses. The following Natura 2000 sites are screened in for Stage 2 Appropriate Assessment - Lower River Shannon SAC, Silvermine Mountains SAC and Slievefelim to Silvermines Mountains SPA. The Stage 2 assessment lists each of the sites, the qualifying interests and conservation objectives and examines the potential for adverse effects. Mitigation measures are recommended in respect of each of the Natura 2000 sites assessed. In considering in-combination effects the NIS refers to dwellings and associated works (non-forestry projects) and 30 Coillte harvesting licences (403.2ha). The River sub-basin has 58% forest cover, and the status is stated to be 'good'. The proposed development is not hydrologically connected to, or immediately adjacent to an aquatic zone. It is concluded that there is no potential for proposed development to contribute to any cumulative adverse effects on a European site when considered in combination with other plans and projects.



The DAFM made an AAD, having had regard to the NIS and its findings. The Determination differs from the NIS with the inclusion to add bankside mitigation for Otters with an increase in the setback zone from 20m to 25m. It is determined that *“Based on the best scientific knowledge in the field, the proposed development individually, or in combination with other plans and projects, will not adversely affect the integrity of screened in European sites, having regard to their conservation objectives, provided the recommended site-specific mitigations are implemented.* The mitigation measures relate to the following:

- Hen Harrier (Slievefelim to Silvermines Mountains SAC)
- Otter (Lower River Shannon SAC)
- Grasslands and Wet Heaths (Silvermine Mountains SA)
- Aquatic based species and habitats

The DAFM referred the application to the Local Authority, Inland Fisheries Ireland (IFI) and National Parks and Wildlife Service (NPWS). IFI responded stating some concerns but no specific objections. Measures should be taken to ensure no silt enters any watercourse and silt traps are maintained. There are steep gradients on the site. The river is an important Salmonid spawning river. If any watercourse is to be crossed it should be by either a clear span bridge or embedded culvert. IFI Limerick office to be contacted at least 1 month prior to the commencement of works. The NPWS responded with nature conservation recommendations. An Appropriate Assessment should be required for any works between 1 April and 15 August. 20% of the restocked site should consist of open space for foraging. The site is upstream of the Lower River Shannon SAC, and it is necessary to ensure that the proposal does not have a significant negative impact on water quality of the SAC downstream. Aquatic buffers zones and silt traps should be considered. Japanese Knotwood occurs along the road that bounds the eastern boundary of the site. There is a need to ensure that the proposal does not result in the spread of the species. It is recommended that a Biosecurity Plan be put in place. An appendix is attached – ‘General Points’.

The licence issued on 28.08.2020 and is exercisable until 31.12.2022. It is subject to standard conditions with additional conditions relating to water quality, invasive species, traffic safety, mitigation measures as per the Appropriate Assessment Determination, and adherence to specified Guidelines and Standards.

There are two appeals against the decision to grant the licence. The first contends that no EIA screening was ever carried out on this site when planted. It is necessary to establish if the planting was in accordance with the law. No Appropriate Assessment screening was carried out in accordance with the provisions of the Habitats Directive and implementing Irish law. The second contends that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. There is a breach of Article 4(4) of the EIA Directive. On the same date as this application was made a further application was made for the same FMU totalling 30.76ha. The application does not cover the whole project. Project splitting is not permitted. The licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan. There is a Moderately High Risk of landslides on this site. This would be exacerbated by clearfelling and has not been considered. The mitigation measures in the AAD are inadequate to ensure compliance with

Article 6(3) of the Habitats Directive or have sufficient precision or clarity. Residual effects from this project cannot be excluded. The Appropriate Assessment in-combination assessment is flawed. The opinion of the general public was not sought under Article 6(3) of the Habitats Directive. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation. Licence conditions do not provide for the strict protection of Annex IV species. Licence conditions do not provide for the protection of all wild birds during breeding and rearing season. There should be a standard condition requiring the licensee to notify the Minister at the commencement and conclusion of operations. There should be stringent and enforceable conditions regarding notification of appropriate bodies, groups and the public of the spraying of chemicals. There should be a condition requiring the Forest Service to inspect plans and works prior to, during and post works to ensure compliance.

In response, the DAFM state that the proposed development was subject to DAFM's Appropriate Assessment procedure (Nov. 2019). It was screened, and 2 SACs and 1 SPA were screened in for Stage 2 Appropriate Assessment. The Precautionary Principle was applied and site-specific mitigation measures were proposed for each of the screened in sites. There would be no adverse effect on any European site. In-combination effects were considered and there would be no cumulative adverse effects with other plans and projects. Potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and the implementation of the mitigation measures recommended. These mitigation measures were attached as conditions to the licence. The proposed development is not a category of development covered by the EIA Directive or national transposing legislation. The appellant has exercised his right to appeal. Felling and reforestation is not listed as a threat to the Silvermines Mountains SPA. The proposed development is consistent with national forest policy. The DAFM adhere to a wide range of checks and balances relating to the protection of water. There are operational measures applied to prevent direct or indirect impacts on water quality arising. It is a principle of law that, unless a primary consent expressly exempts the holder from an obligation to obtain a second consent or to adhere to any other restrictions on timing of activities or similar where such is set out by statute elsewhere, these other restrictions or obligations apply. The use of plant protection products (PPPs) is governed by Statutory Instruments. There is no legal requirement for a forest owner to notify adjoining land owners of the intention to spray.

An Oral Hearing was held on Thursday 18<sup>th</sup> February 2021. The FAC sat in person and remotely. The applicant, one appellant and DAFM representatives all participated remotely. The second appellant did not attend. The DAFM detailed the procedures followed in coming to the decision to grant the licence. It was confirmed that the DAFM assessment was desk based. The NIS was not solicited but was considered in reaching the AAD. The AAD had been independently reviewed and was taken into consideration by DAFM in reaching the decision to grant the licence. The in-combination assessment was dated 19.08.2020. The appellant referred to the NPWS referral response and stated that the recommendation of 20% open space had not been included in the licence. Restocking of the site had not been assessed. Consideration of the Hen Harrier should go beyond nesting behaviour. Would 20% open space on the site constitute a change of land use? The NIS states that Wet Heath in the Silvermines Mountains SPA is in danger of impact from conifers. The Appropriate Assessment did not assess the implications for Wet Heaths. The applicant stated that the site is on a south facing slope and surrounded by existing forestry and a public road. The site is generally very dry but has one aquatic area. Parts of the site are steep but other parts are moderately sloped. In response to FAC questions,



the DAFM was unaware for the reasoning for the NPWS requirement for 20% open space and stated that there was no such requirement in the Hen Harrier protocol agreed between DAFM and the NPWS. The independent ecologist who reviewed the AAD did not recommend such a requirement. The appellant stated that there is both Wet Heath and Dry Heath in the vicinity of the site. The Harvest Plan was not adequate and relied on a survey undertaken after the licence was granted. Haulage routes, watercourse and biodiversity zones should be clearly shown. The requirement for 20% open space was site-specific and the protocol did not cover everything it should. Colonisation could impact on the conservation status of an Annex I habitat through shading and subsequent change of ecology. There is a spring in the north-east corner of the site that connects to the Mulkear River and then to the Lower Shannon SAC.

Following the Oral Hearing, the FAC decided to request further information from the NPWS as follows:

1. Is there an agreed protocol between NPWS and DAFM under which the NPWS recommendation for 20% open space is made?
2. State the NPWS reasoning for the condition
3. State if the recommended condition is specific to the site the subject of the appeal.

In response, the NPWS stated as follows:

1. There is an agreed Protocol for afforestation which came into effect in 2012 and deals with recommendations for SPAs including the recommendation that 20% open space is made for Hen Harriers. The Department considers that this protocol could be applied to this site
2. The reason is to help increase the amount of foraging area available to Hen Harriers in SPAs in order to achieve favourable conservation status. As a lot of the areas being now proposed for clearfelling predate the SPA designation for Hen Harriers, and were planted about 40 years ago, the application of the Protocol would protect the Hen Harrier by providing more open space. If this was not in place it would not be viable for the Hen Harrier to use the area once the canopy closes over (about 10 years). Allowing open space provides for the natural regeneration of flora and fauna
3. The recommended condition is site specific but could also apply to other sites.

The FAC circulated the NPWS response to the parties and invited responses. The applicants responded as follows:

1. There will be c. 2.6 hectares or 15% of the project with open space following normal restocking when setbacks are accounted for
2. There are Coillte owned lands within the SPA to the northwest of the project within 1km totalling 14.14 hectares that are maintained as open space. This would constitute 84% of the size of the subject project.
3. While the project is within the SPA and has some overlap with a red area, consideration should be given to how productive it would be for the Hen Harrier to leave 20% open space in an area surrounded by mature productive forestry.

The DAFM responded that the NPWS publication 'Hen Harrier Conservation and the Forestry Sector in Ireland' refers to 20% open space for afforestation and not reforestation. The most appropriate

forum for deciding on changes to current practice is the 'HH Threat Response Plan', on which work is currently being carried out. DAFM recommends that FAC continues to implement the current Protocol between DAFM and NPWS until a revision of the Protocol is agreed.

The appellant responded that the response to item 2 emphasises that no Appropriate Assessment of the reforestation aspect of the proposed development was undertaken. If stocking can improve the viability of the species for which the site has been designated it follows that an Appropriate Assessment of reforestation is required as part of a complete Appropriate Assessment. At present the actual impacts of replanting on the conservation interests of the site are not considered and this is a deficiency. The Forestry Service practice of not referring projects within a Green Area within SPAs to the NPWS is flawed. The NPWS response indicates that a level of re-stocking may be required for other sites. All projects within SPAs must be referred to the NPWS for reason of obtaining scientific certainty.

Addressing the written grounds of appeal, the FAC considered, in the first instance the contention that the requirements of the EIA Directive had not been met. The proposal is for clearfelling and restocking on a stated site area of 16.79ha as part of a forestry management operation. The FAC concluded that the proposed development does not fall within a class of development contained in either Annex I or Annex II of the Directive and is not a class of development covered by the Directive. Furthermore, the proposed development does not include works which, by themselves, would constitute a class of development covered by the Directive. In these circumstances, the FAC considered that the decision to grant the licence is not in breach of the EIA Directive.

The FAC considered the procedures followed by the DAFM in respect of screening for Appropriate Assessment. The DAFM considered nine Natura 2000 sites within a 15km radius. Six sites were screened out and reasons given. Three sites (2 SACs and 1 SPA) were screened in for Stage 2 Appropriate Assessment and reasons given. An NIS subsequently submitted includes a Stage 2 Appropriate Assessment for the following sites – Lower River Shannon SAC, Silvermine Mountains SAC and Slievefelim to Silvermines Mountains SPA. Qualifying interests and conservation objectives for the designated sites are listed and an examination of potential for adverse effects arising of the sites is carried out. In-combination projects are considered and mitigation measures are recommended.

The DAFM produced an Appropriate Assessment Determination (AAD). The AAD includes the mitigation measures recommended in the NIS but adds additional mitigation in respect of the Otter by increasing a setback zone from 20m to 25m. The FAC noted that the site lies within an SPA for which the qualifying interest is the Hen Harrier and partly overlaps with a 'Red Area' for the species. The FAC noted that the NPWS recommended that 20% of the site be left unplanted but that this was not included by way of mitigation included in the AAD or on the licence. The FAC sought further information in respect of the NPWS recommendation and further submissions from the parties in respect of this issue. This is detailed above in this report. On this issue, and based on the evidence before it, the FAC concluded that the licence granted should have included a condition requiring the provision of 20% open space for the reasons stated by the NPWS and that this was a significant error in the making of the decision. Otherwise, the FAC considered that the procedures followed by the DAFM are consistent with the requirements of Article 6(3) of the Habitats Directive, and that the conclusions reached are sound. This 20% unplanted area is part of the overall site to which the licence applies and, as such, the FAC concluded that it would not constitute deforestation or a change of land use on the project lands.



An appellant contends that the licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan, but no specific information is submitted to support this contention. The FAC noted that the underlying waterbody status is stated to be 'Good'. In these circumstances, and based on the information before it, the FAC concludes that there is no convincing reason to conclude that the proposed development would threaten the achievement of the objectives of the underlying waterbody.

It is contended that there is a Moderately High Risk of landslides on part of this site and that this would be exacerbated by clearfelling. No specific information is provided to indicate how the proposed development would be likely to have negative impacts in respect of landslides in the area. Reference to the GSI website indicates that a very small proportion of the project lands is classified as Moderately Susceptible and no landslide events are evidenced on the site. Based on the information before it, the FAC finds no reason to conclude that the proposed development would pose any significant risk in respect of landslides in the area.

The FAC noted that the Harvest Plan submitted is an operational roadmap for those carrying out the development and that, in any event, the conditions of the licence must be complied with in full.

*It is contended that the licence conditions do not provide for the strict protection of Annex IV species or for the protection of all wild birds during breeding and rearing season. No specific information is submitted giving details of the Annex IV species or wild bird species in their natural habitat on the project lands, or reasons given as to why the proposed development would threaten their protection. In these circumstances, the FAC finds no reason to require additional specific conditions to the licence. It is contended that the proposed development could impact on Wet Heath and Dry Heath in the vicinity of the site but no specific evidence is provided to indicate the likelihood or nature of any such impact. In these circumstances, the FAC finds this contention unsubstantiated.*

Compliance and enforcement of conditions attached to a licence are matters for the DAFM and there are legislative powers in respect of these functions. The FAC sees no convincing reason that additional conditions are required on the licence. The control of the spraying of chemicals is the subject of separate legislative provisions.

In conclusion, the FAC considered that there was a serious and significant error in the making of the decision by the DAFM by not including an appropriate condition in respect of the protection of the Hen Harrier as requested by the NPWS in its submissions. Accordingly, the FAC decided to vary the decision to grant the licence by requiring the addition of the following condition to the licence in this case:

*An area equivalent to 20% of the site shall be left unplanted and provided as foraging habitat for the Hen Harrier. Prior to the commencement of development, details of the area to be left unplanted shall be clearly delineated on a revised Bio Map and submitted for the written agreement of the DAFM. The development shall be carried out in accordance with the agreed revised Bio Map. Copies of the written agreement and the revised Bio Map shall be placed on the DAFM file relating to this licence.*

Reason: To provide for the necessary protection of the Hen Harrier on this site.

Yours Sincerely

A large black rectangular redaction box covers the signature area. A handwritten signature is visible above the redaction, and a small mark is visible below it.

Pat Coman, on behalf of the FAC