



30 December 2020

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**Subject:** Appeal 407/2020 regarding licence OY07 FL0081

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. 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

Licence OY07 FL0081 for felling and replanting of 6.26 ha at Glenregan, Co Offaly was issued by the Department of Agriculture Food and the Marine (DAFM) on 26 June 2020.

#### Hearing

An oral hearing of appeal 407/2020 was conducted by the FAC on 08 December 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Appellants\*: [REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Luke Middleton & Ms Eilish Kehoe

#### Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by Department of Agriculture Food and the Marine (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 OY07-FL0081).

The proposal is for the clearfelling and restocking of a stated site area of 6.26ha at Glenregan, Co. Offaly. The project lands are in two plots separated by approximately 1km and are predominantly planted with

Sitka Spruce planted in 1981 and 1987. A document titled 'harvest plan and an Appropriate Assessment Pre-screening Report are submitted. Proposed restocking is with 100% SS (5.95ha) and 0.31ha of open space is provided for. Underlying soils are stated to be Peaty Gleys (63%), Peaty Gleys (Shallow) (19%), and various (18%). The site is predominantly steep. Cultivation would be with windrowing and mounding. The applicant submitted additional Appropriate Assessment Pre-screening Reports to the DAFM on 29 April 2020 and 7 May 2020.

The application was referred to Offaly County Council. In response the County Council state that the site is within the Slieve Bloom Mountains SPA, within an Area of High Amenity and classified as High Sensitivity Landscape, the western block is within a protected view, the site is close to the Camcor River and the risk of emissions should be mitigated against, and measures should be implemented to protect water quality.

The DAFM produced an Appropriate Assessment Report dated 15 June 2020 which was ecologically reviewed on 23 June 2020. This identified 11 Natura 2000 sites within a 15km radius. The following sites are screened out - Slieve Bloom Mountains SAC, River Barrow and River Nore SAC, Clonaslee Eskers and Derry Bog SAC, Island Fen SAC, Coolrain Bog SAC, River Nore SPA, Knockacoller Bog SAC, Dovegrove Callows SPA, River Shannon Callows SAC, and the River Little Brosna Callows SPA. The Slieve Bloom Mountains SPA was screened in for Appropriate Assessment.

The Report identified the qualifying interest of the Slieve Bloom Mountains SPA as the Hen Harrier, and the conservation objective - to maintain or restore the favourable conservation condition of the bird species listed as the special conservation interest. Potential adverse impacts considered relate to direct and indirect impacts, short-term and long-term impacts and operation impacts and these include noise, vibration, mechanical movement, artificial lighting etc. The Report states that the project lies within a Green Area for the Hen Harrier. In such areas, operations are to be restricted within the Hen Harrier season if the National Parks and Wildlife Service (NPWS) notifies the DAFM of a new Higher Likelihood of Nesting Area (HNLA) encompassing or intersecting the project lands. Site specific measures are proposed to protect the Hen Harrier. If any new Hen Harrier nest site is informed to the DAFM by the NPWS, the DAFM is to inform the applicant and amend the terms of the licence. An additional requirement recommended is for an irregular belt of broadleaves (minimum 3 rows) adjacent to the water body to enhance connectivity provided by the water body acting as a corridor and haven for the Hen Harrier species. In combination forestry plans and projects listed are: – 1 forest road, 1 private felling (144.73ha) and 19 Coillte felling since 2017. Following on from the Appropriate Assessment Report, the DAFM made a Determination that the proposed activity, individually or in combination with other plans or projects, will not adversely affect the integrity on any European site, in particular the Slieve Bloom 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 the specified mitigation measures.

The licence issued on 26 June 2020 and is exercisable until 31 December 2022. It is subject to standard conditions plus additional conditions relating to the protection of the Hen Harrier, planting of three rows of broadleaves adjacent to the edge of the aquatic zones setback along the Camcor\_10 waterbody, the protection of water quality and adherence to specified standards, guidelines and policies.



There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA, and there is a breach of Article 4(4) of the EIA Directive as the details of the whole project have not been submitted. On the same date as this application, a further four licence applications were lodged for the same Forestry Management Unit (FMU) totalling 46.69ha. All projects in this FMU should be considered in a coherent manner. Project splitting is not permitted. This licence and associated operations threaten the achievement of the objectives of the underlying waterbody. Clear felling has the capacity to impact on water quality. The Stage 1 and 2 assessments are not legally valid. The general public were not consulted under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination. 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. Licence conditions do not provide for the strict protection of Annex IV species. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. The site is within 120m of another site licensed or in the licensing process. Conditions must reference other sites within 120m and the relevant restrictions. There should be a condition that plans and works must be inspected by the Forest Service prior to, during and post works to ensure compliance. The licence should include stringent and enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response the DAFM state that this is not a project class covered by the EIA Directive. The DAFM applies a wide range of checks and balances in its assessment of an application in respect of the protection of water. Measures include setbacks adjoining aquatic zones, silt-trapping, damming of forest drains and creation of buffers. The DAFM determined that, based on objective information, the project either individually, or in combination with other plans or projects will not adversely affect the integrity of any European site. The public are entitled to make submissions/observations on the likely effects of the proposed development on the environment. The DAFM fully complied with the requirements of Article 6(3) of the Habitats Directive. It is a principle of law that unless the grant of a first statutory consent expressly exempts the holder of any obligation to obtain a second consent or adhere to any restrictions where set out by statute elsewhere, those obligations or restrictions apply. The Minister may, at any time, attach or vary conditions on a licence. There is no legal requirement to inform adjacent landowners of the intention to spray.

At the Oral Hearing, the DAFM referred to the procedures followed in the processing of the application leading to the making of the decision to grant the licence. It confirmed that the Appropriate Assessment Report and Determination had been completed and reviewed before the decision was made and were fully considered in the making of the decision. Responding to questions put by the Committee, the DAFM stated that an error had occurred in their procedures in that the site is now identified as being within a 'Red Area' for Hen Harrier and that the application should have been referred to the National Parks and Wildlife Service (NPWS). Asked how this could have been missed in the ecological review of the Appropriate Assessment Report and Determination, the DAFM stated that the ecologist would not

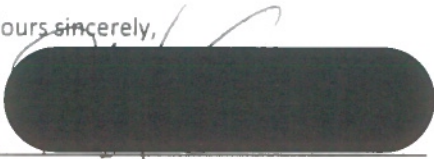
necessarily have been aware of this fact. The appellant stated that the Appropriate Assessment Report and determination appear to have been completed before the ecological review took place. The appellant stated that no 'greening up' requirement had been conditioned, and that this is an Area of High Amenity and High Sensitivity. There is a wet heath in the vicinity and this had not been considered for possible colonisation by conifers. There is also a hydrological connection to an alluvial woodland at a separation distance of approximately 2km and this had not been assessed for potential effects. The appellant stated that the misinterpretation of this area as a 'Green Area' for Hen Harrier when, in fact it is in a 'Red Area' is a fundamental mistake. Also, the firebreak called "The Cut" had not been included for in-combination effects. The applicants stated that the original Pre-screening Report had excluded all sites without a hydrological connection. Under further questioning by the Committee, the DAFM stated that errors existed in the Appropriate Assessment Report in respect of the necessity for mitigation measures because it had been understood that this was a Green Area for Hen Harrier.

The FAC identified the key issue in this case as relating to the procedures adopted by the DAFM in respect of Appropriate Assessment. In this regard, the FAC considered the information presented at the Oral Hearing and, in particular, the acknowledgement by the DAFM that a 'human error' had occurred in respect denoting the project lands as a 'Green Area' for Hen Harrier whereas, in fact, it is a 'Red Area' for the species. Significantly, the FAC noted that the DAFM accepted that the application should have been referred to the NPWS before any decision was made. The FAC also noted that the Appropriate Assessment Report stated that no mitigation was required, while the licence attaches conditions relating to mitigation measures in respect of the Hen Harrier. The DAFM screened out the Slieve Bloom Mountains SAC due to the 'insensitivity of the qualifying interests' of the designated site. The FAC notes that there is a direct hydrological connection from the eastern plot of the project lands to an alluvial forest (a qualifying interest of the SAC) at approximately 2km separation and that the western plot is on a steep slope and at a separation distance of approximately 600m from the alluvial forest. In these circumstances, the FAC is not satisfied that the SAC should have been screened out for Appropriate Assessment for the sole reason of the insensitivity of its qualifying interests. In light of this evidence, the FAC concluded that serious errors had occurred in the processing of the application by DAFM leading to its decision.

Briefly addressing the other written grounds of appeal, the FAC considers that the proposed felling and restocking does not fall within a class of development covered by the EIA Directive and, as such, the decision is not in breach of that Directive. There is no specific evidence to indicate that the proposed development would have a negative impact on water quality; in this regard the FAC noted that conditions are attached to the licence for reason of protecting water quality. No specific information has been submitted to the FAC to indicate the presence of wild birds or Annex IV species on the project lands and, in these circumstances, the FAC does not accept the requirement to attach specific conditions seeking the protection of wild birds or Annex IV species to the licence. The FAC considered that a 'greening up' condition should have been considered for inclusion as a licence condition. The FAC noted that the applicants inform Local Authorities of the intention to spray on an annual basis but that there is no legal requirement to inform adjoining landowners on an ongoing basis of the intention to spray.

The FAC considers that a serious error occurred in the Appropriate Assessment Report and Determination leading to the making of the decision to grant the licence, and that, in the particular circumstances of this case, the application should have been referred to the NPWS and any submission/observation received considered before the completion of the Appropriate Assessment and the making of the decision. As such, the FAC concludes that the decision should be set aside and remitted to the Minister to consult with the NPWS in the first instance before carrying out a revised Appropriate Assessment and making a new decision.

Yours sincerely,

A large black oval redaction covers the signature of Pat Coman.

Pat Coman, on behalf of the Forestry Appeals Committee