



21 January 2021

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**FAC ref: 571/2020 & 617/2020**

**Subject:** Appeal in relation to felling licence OY07 FL0079

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence OY07 FL0079.

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 OY07 FL0079 was granted by the Department of Agriculture, Food and Marine (DAFM) on 15 July 2020.

#### **Hearing**

An oral hearing of appeals 571/2020 and 617/2020 was conducted by the FAC on 17 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 representative: [REDACTED]

DAFM representatives: Mr Luke Middleton & Ms Eilish Kehoe

[REDACTED] did not attend

#### **Decision**

The 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 affirm the decision to grant this licence (Reference OY07 FL0079).

The proposal is for the clear-felling and replanting of 5.97 ha at Castletown and Glinsk, Co Offaly. Project site comprises 100% Sitka Spruce planted 1975 and 1978 and replanting is with 100% Sitka

Spruce. Application included a harvest plan document and a pre-screening report. Application sought 0.30 ha of open space. The underlying soil type is given as approximately Podzols (Peaty), Lithosols, Peats (100%) The slope is predominantly steep 15-30%. The project is located in the Lower Shannon catchment (100%), the Camcor\_Sc\_010 (100%) Sub-Catchment, the Camcor\_010 (100%) Waterbody.

The mapping evidence before the FAC shows the proposal site is within the Slieve Bloom Mountains SPA and contains no EPA watercourses, the Camcor River is c.180m south of the proposal and is within a section the Slieve Bloom Mountains SAC at that point. The Camcor River flows to the Little Brosna, which passes the Dovegrove Callows SPA c 23 km from the proposal, and then through the Little Brosna Callows SPA (a further 2.7 km) and the All Saints Bog and Esker SAC on its way to the Shannon River. The evidence before the FAC is that the proposal is within a Hen Harrier 'Red Zone'.

The application was the subject of desk assessment by the DAFM and the application was referred to Offaly County Council and the National Parks and Wildlife Services (NPWS). Offaly County Council replied on 14 January 2020 that the proposal is in an area of high amenity and high landscape sensitivity, there is a monument to north-west 'an upland castle site', and sought to ensure there is no negative impact on water quality. The NPWS responded 04 February 2020 with an assessment of the applicant's pre-screening of the proposal as provided with the application pack, and stated the compartment is wholly situated within the Slieve Bloom Mountains SPA, the Department is aware of recent works, namely the creation of a substantial ploughed fire break near The Cut. In addition, some of these excavated fire break works have been carried out on land within the National Nature Reserve. The NPWS reply included that it is the Department's view when considering the in-combination impacts of these works that, forestry activities in the Slieve Bloom Mountains SPA/SAC are impacting negatively on species and habitats of conservation concern - and for which the sites were designated. The NPWS continued that the Department has assessed the above referenced application, and as outlined above, cannot recommend approval for this application as the Appropriate Assessment (AA) screening is incomplete when excavated fire breaks are not mentioned or their effects on the designated sites adequately assessed.

The FAC notes that the pre-screen assessed by the NPWS was produced by the applicant at application and had recommended the proposal be screened out for AA and was not a screening conducted by the competent authority.

In processing the application the Department completed a Stage 1 screening for AA and identified Natura sites within a 15 km radius of the proposal as follows; 004160 Slieve Bloom Mountains SPA 000412 Slieve Bloom Mountains SAC 000859 Clonaslee Eskers And Derry Bog SAC 002162 River Barrow And River Nore SAC 002236 Island Fen SAC 002332 Coolrain Bog SAC 004233 River Nore SPA 002147 Lisduff Fen SAC.. The proposal was screened in for stage 2 AA due to likely significant effects on the Slieve Bloom Mountains SAC and Slieve Bloom Mountains SPA. An AA Report and an AA Determination were completed and both reviewed by an external ecologist on 10 July 2020.

Licence issued 15 July 2020 for felling and replanting of 5.97 ha, valid to 31 December 2022, and is subject to what are relatively standard conditions (a) to (g) and the additional conditions (h) to (l), these are set out in full on the licence with reasons.





There are two appeals against the decision to grant the licence. The grounds of appeal include that the AA screening does not comply with *Finlay J in Kelly*, the decision is invalid as the Minister is being judge in his/her case, there have been no investigations as to whether the application site has complied with the requirements of EU law. An issue raised regard the FAC in the appeal is not a valid ground of appeal against a decision to issue a felling licence. The grounds also include that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA and a breach of Article 4(4) of the EIA Directive as the details of the whole project have not been submitted. There were four applications the same day for a total of 46.69 ha clear felling. The grounds contend that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody and states clear felling has the capacity to impact on water quality. The grounds also contend that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, the Stage 1 and 2 AAs are not legally valid and the Minister did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. The grounds include that 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 and the licence conditions do not provide for the strict protection of Annex IV species. The grounds contend that the licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations, that plans and works must be inspected by the Forestry Service prior to, during and post works to ensure compliance. Also, 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.

In response to the grounds of appeal the DAFM stated the 5.97 ha felling and reforestation project licensed as OY07-FL0079 has been subject to the DAFM's AA Screening procedure on European sites within 15 km from the project. Having reviewed the details of relevant European sites their special conservation interests / qualifying interests and conservation objectives, the DAFM identified the possibility of the project having a significant effect on the Slieve Bloom Mountains SPA and the Slieve Bloom Mountains SAC, identified on a precautionary basis. An AA was carried out and site-specific measures to mitigate against such impacts were described. The DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination statement.

The DAFM stated that regards Article 4(3) of the EIA Directive, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. DAFM also ruled out any breach of Article 4(4). Where the Minister for Agriculture, Food and the Marine receives such an application he or she is required amongst things to (1) Publish a notice of the application and (2) Inform the public that any person may make a

submission or observation in writing concerning the application to the Minister within 30 days from the date of publication of that notice. Regarding the opinion of the general public in the making of a related determination under Article 6(3) of Habitats Directive, Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making his or her decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6, and Regulation 19(4) expressly requires the Minister when carrying out an AA of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account *inter alia*, and if appropriate, any written submissions or observations made by the public under Part 6. The application area is made up of conifer woodland and is not hydrologically connected to an aquatic zone. Any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. In relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice, as provided for in S.I. 155 of 2012. There is no legal requirement to notify adjacent landowners.

The FAC held an Oral Hearing on 17 December 2020. The parties were invited to attend in person or to join electronically. One of the Appellants participated electronically while the other did not participate. The DAFM and the Applicant both participated electronically. The FAC sat in person at this hearing. At the hearing, the DAFM detailed their approach to processing the licence application, the referral responses received and the reasons for the additional licence conditions. The DAFM confirmed the AA Report and AA Determination were completed and reviewed by an external ecologist prior to any decision on the licence and the conditions of the licence include the mitigations from the AA. The DAFM read the NPWS response to the referral of the application and confirmed the AA contained reference to and assessment of the fire line. The DAFM confirmed the licence conditions (h), (i), (j) and (k) were as a result of the AA. The Appellant sought that the written grounds of appeal are considered where not revisited at the hearing. The Appellant stated the content of the NPWS submission differs from the AA statement in this instance as regards the firebreak, and a mention of the firebreak in the in-combination does not amount to an assessment. The Appellant contended the AA is deficient in this instance as there is alluvial wood proximate and there are multiple relevant watercourses, this is a steep site with peat soils, and there is potential for effects. Colonisation is a risk with Annex I Alpine Heath mapped by NPWS. Also, the longer-term impacts of reforestation have not been assessed in the AA. Alternatives to replanting should have been assessed. The date of review of the AA Report and AA Determination post-dates their date of completion. The Appellant contends regards Appendix 21 of the DAFM Forestry Standards Manual there is no agreed protocol between the NPWS and the DAFM concerning the Hen Harrier. The Applicants described the information submitted with the application including maps and details of





environmental and safety measures in a Harvest Plan which is for operational reasons. The Applicants set out that the proposal is on a south facing moderate slope, the northern point of the site has had wind-blow for some 25m in from the edge, there are two compartments involved. The applicants described that excess water would flow to west draining over some 300m of terrain prior to the watercourse. The Applicants stated there is no change of land use in the proposal. The Applicants confirmed to the FAC that licence OY07 FL0026 is felled and replanting is scheduled for the 3<sup>rd</sup> quarter of 2021.

In addressing the grounds of appeal, the FAC considered the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU Directive sets out a list of projects in Annex I 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 clear-felling) 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). The FAC considers the licence issued is for the felling and reforestation of 5.97 ha 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.

Regards the grounds of appeal relating to the AA screening and Article 6(3) of the Habitats Directive, the FAC considered the AA screening, the AA Report and AA Determination in this instance. The FAC considered that the procedures adopted in these were consistent with the requirements of Article 6(3) of the Habitats Directive and that the conclusions reached were sound. The proposal was not required to progress to a Stage 3 AA as the effects from the proposal were resolved by mitigation. The FAC noted that the recommended conditions, as contained in the AAD, had been incorporated into the licence granted as conditions. The FAC concluded that the proposed development, carried out in accordance with the mitigation measures recommended in the Determination and attached to the licence as conditions, would not adversely affect the integrity of any Natura 2000 sites, having regard to their conservation objectives and would not affect the preservation of any such site at favourable conservation status. The licence condition (h) applied regards the Hen Harrier has been reviewed by an external ecologist and there is no convincing evidence before the FAC that the good conservation status of the Hen Harrier will be disaffected by the proposal with the mitigations afforded in the licence conditions. The FAC notes the Alluvial woodland as mapped by the NPWS in the Conservation Objectives for the SAC are located by the Camcor River c. 400m from the proposal. The AA Determination states to “adhere to all water protection measures relating to exclusion zones, to silt and sediment control, cultivation, fertilisation, herbicide application, the location of on-

site storage depots and the disposal of waste. The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and environmental Requirements for Afforestation, December 2016 (DAFM, 2016). Contractors must apply and demonstrate sediment trapping measures at appropriate intervals. Geotextile silt traps should be installed in new and existing drains. Silt traps should be staggered along the length of the drain, and not only at the lower reaches towards outflows". The FAC is satisfied the licence conditions provide the necessary protections set out for the preservation of any such site at favourable conservation status.

In respect of the issue raised by the NPWS regards the fire-line. The FAC is satisfied this arose from the applicant's pre-screening document and not from the DAFM's screening or assessment. The FAC is satisfied the fire-line is considered in the AA Report, this fire line measures c. 920m in length and is 6656m from the project area for OY07-FL0079.

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 in addition to standard conditions, additional conditions are attached to the licence for reason of protecting water quality.

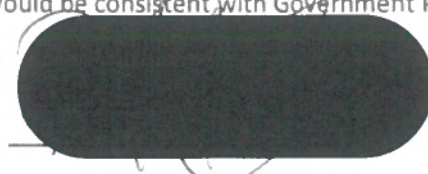
The FAC also noted that all works included in a Harvest Plan and carried out must comply with the terms of the licence. The FAC considered the grounds that the licence should contain a condition regards the commencement and the conclusion of works, and regards the inspection of works. The FAC noted that it is open to the DAFM to carryout compliance inspections after completion of works notwithstanding any condition to do so, and that the licence as issued is valid until 31 December 2022, and works may only proceed as permitted by the licence.

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 and for the animal species listed in Annex IV (a) of that Directive, the FAC observe that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the information before it, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

With regard any notification of certain parties in the case of any spraying of chemicals, the FAC notes 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) that all users of pesticide products registered for professional use must follow the principles of good plant protection practice. The FAC concludes there is insufficient basis on which to apply an additional condition 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



Pat Coman, on behalf of the FAC