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29<sup>th</sup> January 2021

**Subject:** Appeals FAC 574 and 625/2020 in relation to licence OY08-FL0047

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and 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 the parties to the appeal.

#### **Background**

Licence OY08-FL0047 for felling and replanting of 12.57 ha at Barcam, Co. Offaly was issued by the DAFM on 17<sup>th</sup> July 2020.

#### **Hearing**

An oral hearing of appeals FAC 574/2020 & 625/2020, of which all parties were notified, was held by the FAC on 25<sup>th</sup> November 2020.

#### **In Attendance at Oral Hearing:**

Department Representative(s):

Mr. Frank Barrett & Ms. Eilish Keogh

Appellants:

[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway

Secretary to the FAC:

Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence OY08-FL0047.

The licence pertains to the felling and replanting of an area of forest on 12.57 ha at Barcam, Co. Offaly. The forest is currently composed of Sitka Spruce and replanting would be of Sitka Spruce with 5% open space. The slope of the site is described as predominantly steep 15 – 30 % and the underlying soil type is

described in the DAFM AAS Form as approximately (99%) & Podzols (Peaty), Lithosols, Peats (1%). The project is located in the Shannon catchment (100%), the Camcor\_Sc\_010 (100%) Sub-Catchment, and the Glenfelly Stream\_010 (100%) Waterbody (which has a Good WFD status 2013-2018). The application included maps, inventory data, a harvest plan and an Appropriate Assessment pre-screening report. The proposal was referred to Offaly County Council and NPWS. The Offaly County Council response was received on 14<sup>th</sup> January 2020 and contained information regarding the project location within the Slieve Bloom Mountains SPA, that it is in an area of high amenity and classified as high sensitivity landscape area, and that the subject lands are located within close proximity to a designated mountain walk. It also referenced the importance that every effort is made to implement measures that protect water quality, and ensure there is no negative impact on the water quality as a result of the development. The NPWS response was received on 4<sup>th</sup> February 2020, it noted the location of the project area within a Natura 2000 site: the Slieve Bloom Mountains Special Protection Area (SPA), (Site Code 004160) and that it is within a Hen Harrier Higher Likelihood Nesting Area (HLNA). It also set out that the Department (*Department of Culture, Heritage and the Gaeltacht*) is aware of recent works, relating to forestry activity, carried out within the Natura 2000 sites; Slieve Blooms Mountains Special Area of Conservation (SAC) (Site Code 000412) and SPA (Site Code 004160), namely the creation of a substantial ploughed fire break near The Cut and that some of these excavated fire break works have been carried out on land within the National Nature Reserve. The response advised that it is the Departments (Department of Culture, Heritage and the Gaeltacht) view 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 response stated that the Department (Department of Culture, Heritage and the Gaeltacht) had assessed the application (OY08-FL0047) and indicated that it "cannot recommend approval for this application".

The DAFM undertook and documented an appropriate assessment screening that found nine European sites (7 SAC & 2 SPA) within 15km, one of which (004160 Slieve Bloom Mountains SPA) overlaps with the project area. The likely zone of impact was extended to include a further three Natura Sites (004137 Dovegrove Callows SPA, 004086 River Little Brosna Callows SPA and 006410 River Shannon Callows SAC). It was found that appropriate assessment was required regarding 004160 Slieve Bloom Mountains SPA due to the location of the project within the Natura site and regarding 000412 Slieve Bloom Mountains SAC due to the proximity of the project to the Natura site. The screening found that appropriate assessment was not required regarding the other ten sites; 002162 River Barrow And River Nore SAC, 002332 Coolrain Bog SAC, 000859 Clonaslee Eskers And Derry Bog SAC, 002236 Island Fen SAC, 004233 River Nore SPA, 002333 Knockacoller Bog SAC, 002147 Lisduff Fen SAC, 004137 Dovegrove Callows SPA, 004086 River Little Brosna Callows SPA and 006410 River Shannon Callows SAC. The screening report provides the reasons for the screening decision reached for each of the Natura sites. An appropriate assessment report and determination was undertaken that had a final sign off on 9th July 2020 in the case of the Appropriate Assessment Report and the 10th July in the case of the Appropriate Assessment Determination. The Appropriate Assessment report reviewed the screening of the European sites and agreed with the conclusions reached in the screening. An Appropriate Assessment was then undertaken for the two sites screened in, 004160 Slieve Bloom Mountains SPA and 000412 Slieve Bloom Mountains SAC, with their special conservation and qualifying interests reviewed and mitigation listed if required, site specific measures were identified and stated that they were to be inserted as conditions of the licence



if approved. The proposal's potential to contribute to in-combination effects on European sites was also considered, with various planning sites and DAFM internal records consulted, with other plans and projects in the general vicinity of the site listed. The licence issued on 17<sup>th</sup> July 2020 subject to thirteen conditions attached, which included those related to the mitigation of effects as outlined in the appropriate assessment report and determination statement.

The decision to grant the Licence is subject to two appeals. The grounds set out in the appeal received on 2<sup>nd</sup> August 2020 (FAC 574/2020) include; that the Appropriate Assessment screening did not comply with the decision of "Finlay J in Kelly", submitting that under the basic principles of EU law the decision is invalid as the Minister is being a judge in his/her case, that there has been no investigation as to whether the application site has complied with the requirements of EU law, that according to the heads of the new bill the Minister has assumed control of the FAC, and that the basic requirements of the NPWS have not been complied with. The grounds set out in the appeal received on 11<sup>th</sup> August 2020 (FAC 625/2020) include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project and that the application does not describe any aspects of the environment which are likely to be significantly affected, that the licence and its associated operations threaten the achievement of objectives set for the underlying waterbody under the River Basin Management Plan for Ireland 2018-21, that there has been inadequate consideration of feedback from a consultation body, that the Stage 2 AA determination is not legally valid, that the opinion of the general public has not been sought under Article 6 (3) of the Habitats Directive on the AA Determination, that the licence conditions are not written with sufficient precision or clarity to ensure compliance with the overall environmental regulatory framework, that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Birds Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, that the harvest plan is not consistent with the Interim Standard for Felling & Reforestation, that the licence should contain a condition requiring notification of commencement and conclusion of operations, that the licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works to ensure compliance, and that the licence should include conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In the statements to the FAC relating to the two appeals, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act and provided responses to the grounds of appeal. At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence and repeated its contention that the proposal did not constitute a class of development covered by the EU EIA Directive and that it did not constitute deforestation. The DAFM Representatives submitted that the application was processed following procedures and that the applicant had submitted a range of information, including maps, which were



considered in processing the application. They provided an overview of the processing including the issuing of referrals, the undertaking of an appropriate assessment screening, the appropriate assessment and appropriate assessment determination regarding the project. At the oral hearing, the appellant (in the case of appeal FAC 625/2020) contextualised the submitted grounds of appeal and made more specific reference to grounds numbered 5 and 6 therein regarding consideration of feedback from a consultation body and the Stage 2 AA determination. The appellant submitted that there had been an inadequate consideration of feedback from the NPWS and also submitted that it was his understanding that a protocol, as referenced at the hearing by the DAFM representative as operating between the DAFM and the NPWS with regard to the Hen Harrier when new nesting areas are discovered, is not a joint protocol between the two parties. When asked at the oral hearing whether the DAFM had any further comment to make on the grounds regarding the consideration of submissions from consultation bodies, its representative reiterated that DAFM had taken full consideration of submissions received from consultation bodies in this case. The applicant submitted an overview of the application. They contended that the proposal was not covered by the EIA Directive and also provided information on the site, its surroundings and associated operations.

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EIA Directive. In its statement to the FAC, the DAFM submitted that the standard operational activities of clear-felling and replanting already established forests areas are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred. In considering this aspect, the FAC notes that the EU 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 is 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 the 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 felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 12.57 hectares. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. Therefore, that FAC agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.



The FAC considered the contention in the grounds of appeal that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody (or waterbodies) under the River Basin Management Plan 2018-2021. In doing so, the FAC noted the content of the DAFM statement, which outlines the checks and balances applied during the 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* (2018). The FAC noted that the licence includes a condition in relation to water quality that was identified in the appropriate assessment report and determination. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the proposal. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality.

The FAC considered the contention in the grounds of appeal that in processing the licence OY08-FL0047 DAFM had taken inadequate consideration of feedback from a consultation body – in this case the NPWS as submitted by the appellant at oral hearing. In its consideration of this ground the FAC had regard to the submission of DAFM in its statement to the FAC wherein it set out that it had considered the information submitted by the Statutory bodies who provided referral correspondence in respect of this felling and reforestation project and that the in-combination assessment included in the AA Report includes a reference to the maintenance of a fire line at an area called “The Cut” which is located c. 6900 m from the project. While the FAC had not been satisfied, (based on the related ground in the two appeals, statements made to it by the DAFM, and contributions made at the oral hearing), that the DAFM had made a serious or significant error or a series of errors in its consideration of the NPWS submission, it (the FAC), in the interest of fair procedure under Section 14B(9) of the Forestry Appeals Act 2014 (as amended by the Forestry [Miscellaneous Provision] Act of 2020) wrote to the National Parks and Wildlife Service on 8<sup>th</sup> December 2020 in this connection and inter-alia invited the NPWS to:

- Make any observations on the conclusions of the DAFM screening report (attached to the letter) that the only Natura 2000 sites that should be assessed for Stage 2 Appropriate Assessment are the Slieve Bloom Mountains SPA and the Slieve Bloom Mountains SAC,
- Make any observations (as NPWS) feel appropriate on the points numbered 1 to 3 below (being points made variously by the DAFM, the appellants and the applicant),
  1. *The appellants asserted that in carrying out its Appropriate Assessment and subsequent Determination, the DAFM had failed to take into account the views of consultees, specifically in this instance the NPWS.*
  2. *The DAFM stated that the works referenced in the response from the DCHG in relation to the area known as “The Cut” were acknowledged and considered in the Appropriate Assessment under section 11.6 In-Combination Statement, and that the maintenance and upkeep of fire lines is not licenced by the DAFM. The licensed area is at a distance of 6901m from the fire line.*
  3. *The applicant stated that the works previously carried out in relation to fire lines were of an emergency nature, and were carried out at the direction of the Local Authority fire service.*



- Comment on the adequacy of the Appropriate Assessment and Appropriate Assessment Determination prepared by the DAFM (attached to the letter).
- Expand on the statement in the DCHG's response of the 2nd of April 2020 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", in the specific context of the licence application that is the subject of appeal.

The letter, a copy of which is placed on the public file relating to the licence, sought response within 28 days and advised that in the absence of a response within the specified period, the Forestry Appeals Committee may proceed to determine the appeal. No response to this request / invitation has been received by the FAC. Based on the information available to it in this connection, including the related grounds in the two appeals, statements made to it by the DAFM, and contributions made at the oral hearing, the FAC is not satisfied that a serious or significant error or series of errors was made by DAFM in its consideration of the submission from the NPWS in this case.

The FAC noted the content of the DAFM statement provided in relation to the contentions made in the two appeals in relation to the AA screening process (FAC574/2020), and the Stage 2 AA determination (FAC 625/2020). Under Article 6(3) of the Habitats Directive, a plan or project not directly connected with, or necessary to, the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case the proposed felling and reforestation project (OY08-FL0047) is not directly connected with or necessary to the management of any European Site. DAFM undertook a Stage 1 screening in relation to twelve Natura 2000 sites. The FAC examined publicly available information from the NPWS and EPA and identified the same twelve sites; 004160 Slieve Bloom Mountains SPA, 000412 Slieve Bloom Mountains SAC, 002162 River Barrow And River Nore SAC, 002332 Coolrain Bog SAC, 000859 Clonaslee Eskers And Derry Bog SAC, 002236 Island Fen SAC, 004233 River Nore SPA, 002333 Knockacoller Bog SAC, 002147 Lisduff Fen SAC, 004137 Dovegrove Callows SPA, 004086 River Little Brosna Callows SPA and 006410 River Shannon Callows SAC. Each site is considered in turn along with its qualifying interests and conservation objectives and the reasons for the screening conclusions. The DAFM concluded that an appropriate assessment should be undertaken in relation to the 004160 Slieve Bloom Mountains SPA and the 000412 Slieve Bloom Mountains SAC with other sites screened out. An appropriate assessment report and determination was prepared with ecological review, and mitigation measures were derived and incorporated into the licence conditions. The reasons on which the screening decisions were made are set out and recorded in the screening and AA reports for the project. The special conservation interests, conservation objectives, adverse impacts and the species-specific mitigation measures in relation to the SPA are described. Other plans and projects considered in-combination with the proposal are described including the works relating to the fire line at "The Cut" as referenced in the NPWS submission. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to



make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM determination concludes that;

*"the Department of Agriculture, Food & the Marine has determined, 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), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.*

*For the purposes of 42(16) of S.I.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any European Site."*

Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

The FAC noted the content of the DAFM statement in relation to the contention that the Licence conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of the development with the overall environmental regulatory framework. The FAC also noted the response of the applicant when queried at oral hearing as to the process it follows to ensure compliance with the conditions and requirements of a granted licence including the onsite briefings provided to contractors engaged to carry out works relating to the licence. Based on the information available to it, including submissions and clarifications made by DAFM and the applicant at the oral hearing, the FAC is not satisfied that the Licence conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures such that they will result in non-compliance of the project with the overall environmental regulatory framework.

Regarding the conditions that the appellant (FAC625/2020) suggested should be attached to the licence relating to protections for birds and in relation to animal species listed in Annex IV (a) of the habitats directive, the FAC had regard to the statement provided by DAFM and the confirmation that site-specific mitigations identified in the appropriate assessment report and determination were attached as conditions of the licence issued in this case. The FAC considered the existing legislative safeguards in place with regard to these species and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC agrees that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required. Regarding the conditions that the appellant (FAC 625/2020) suggested should be attached to the licence relating to commencement and conclusion of operations, and inspections, the FAC noted the response provided to it by DAFM and considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers

appropriate. The FAC is satisfied, based on the information available to it, including the information provided at the oral hearing by the applicant as to the process it follows to ensure that conditions of licence are complied with, and the information provided by DAFM, that the inclusion of the conditions as raised in these grounds of appeal in this case was not required.

The appellant's grounds submit that the harvest plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. The DAFM in their statement stated they considered the application and associated information submitted and deemed this information meeting DAFM requirements. The FAC find a harvest plan was provided with the application and concluded that it is a document outlining general environment and safety rules, that other accompanying documents outlined inventory and restocking details and that maps identified the proposal area, river waterbodies, designated sites and other features. The FAC is satisfied that the information submitted with the application is sufficient to inform the decision-making process in this case and that all of the licenced operations on site must comply with the conditions of the felling licence.

In relation to the appellant's grounds that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals, the DAFM in their statement outlined that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, which give effect to EU legislation on PPPs and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. They also set out that there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray, and gave reassurances as to the use of the PPP approved for use. Based on the information available to it, the FAC is satisfied that appropriate safeguards are in place with regard to the use of PPP in this particular case.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision, considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

Seamus Neely, On Behalf of the Forestry Appeals Committee