



19 November 2020

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Our ref: 086/2020

**Subject:** Appeal in relation to felling licence LM09 FL0042

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence LM09 FL0042.

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 LM09 FL0042 was granted by the DAFM on 05 February 2020.

#### Hearing

An oral hearing of appeal 086/2020 was conducted by the FAC on 17 November 2020.

#### Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan (sec)
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett & Ms Jade McManus

#### 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, including the response to a request for further information by the FAC, before deciding to set aside the decision to grant this licence (Reference LM09 FL0042) and remit for a new decision.

The project site comprises 4.22 ha at Pottore Co Leitrim for clear-felling of 100% Sitka Spruce in plots 7 (0.48 ha) and 8 (3.14), of 73% Sitka Spruce, 20% Lodgepole Pine and 7% Japanese Larch in plot 2 (0.23 ha), and of 65% Sitka Spruce, 25% Lodgepole Pine, 5% Japanese Larch and 5% Alder in plot 1 (0.37 ha) and replanting of the plots with 100% Sitka Spruce. Application sought 0.21 ha of open space. The proposal site is adjacent to a watercourse at southern tip per the application map. Per

the DAFM information, the underlying soil type is approximately 100% Peaty Gleys, the slope is predominantly Moderate (<15%), and the site is located within the Yellow (Ballinamore)\_010 (100%) river sub basin.

The application was accompanied by a pre-screening that identified one European site within 15km of the proposal, the Cuilcagh - Anierin Uplands SAC at 1652m distance and identified two licensed clear-fells within 1.5km totalling 0.81 ha as well as one planning permission as other plans and projects considered in-combination with the proposal.

There was a referral by the DAFM to Leitrim County Council and on 22 October 2019. The Council replied that the site is in a location with low capacity to accommodate forestry and objected to the replanting of the lands. The Council confirmed there are no monuments and no tree preservation orders involved for the site, and stated a transport scheme was required should the proposal go ahead in order to protect roads and that there is compliance with the best practice guidelines for forest and wildlife services, and the protection of water quality.

The DAFM undertook a screening for Appropriate Assessment on 04 February 2020 including two European sites (1) 00584 the Cuilcagh-Anierin Uplands SAC and (2) UK0016603 the Cuilcagh Mountain SAC and screened out the proposal for Appropriate Assessment. In a statement on the appeal the DAFM confirmed it relied exclusively on the applicant's in-combination statement when screening for other plans and projects. The DAFM completed a subsequent in-combination assessment on 06 February 2020, post the decision to issue the licence and included a substantial list of forest road, afforestation and felling licence projects, no details were included for any of the licences.

The licence was issued 05 February 2020 for felling and replanting of 4.22 ha, and included what are effectively the standard conditions (a) to (h) and an additional condition (i) stating that Leitrim County Council is to be contacted prior to the commencement of operations to discuss the haulage of timber from the site.

There is a single appeal against the licence, the grounds include that there has been a breach of Article 4 (3) of the EIA Directive 2014/52/EU as a number of criteria set out in Annex III do not form part of the FS screening assessment and have not been taken in to account, therefore this application should be referred back to the EIA screening stage. Also, the Appropriate Assessment screening determination is flawed and should be referred back to the national competent authority. This is because the screening determination states, *Due to the position of the project area downstream from the Natura site, and the subsequent lack of any hydrological pathway*, whereas there is hydrological connectivity between the development site and a designated site. In addition the grounds included that this site is in Hen Harrier breeding and foraging country and the licence documentation shows no evidence that any potential impact on this protected species has been considered, also Merlin are present in this area. The grounds also state the cumulative impact of forestry in this area is compromising European Annexed Habitat, and finally the licence impacts on a way-marked way which is not shown on the Felling Licence Application Map.



In response to the appeal, the DAFM submitted that because this involves the standard operational activities of clear-felling and replanting of an already established forest area, a screening assessment for sub-threshold EIA did not need to be carried out by the DAFM in this case and Article 4(3) of the Directive is not applicable. In addition, regards the Appropriate Assessment screening while there is an upstream connection to the Cuilcagh-Anierin Uplands SAC 000584 there is no downstream connection. Also, this licensed clear-fell and reforestation site is 1.7 km from the nearest designated SAC (the Cuilcagh - Anierin Uplands SAC), a site that is not designated for Hen Harrier or Merlin, the screening considered the Qualifying Interests of European sites within 15 km of the felling and reforestation project LM09-FL0041. The DAFM stated there was no requirement in this instance to refer this licence application to NPWS. Also, there is no change of land use or planting of additional lands or alternative lands proposed under the application, and the felling and reforestation is consistent with the DAFM Felling and Reforestation Policy document (2017). The DAFM also stated that way-marked ways were included on the discovery series maps submitted with the application, the trails within the area of the licence provide access to conifer forest properties and the application provided information on the applicant's practices related to "People and Material Assets" including signage and prohibitive notices in respect of felling activities. The DAFM stated that a number of the Qualifying Interests (QI) were truncated on the AA screening form for the proposal but all QIs were considered during the screening. A revised AA screening form was submitted which included all QIs of the screened European Sites. The DAFM confirmed that for consideration of in-combination effects of the proposed project, DAFM relied exclusively on the applicant's in-combination statement and subsequently carried out a separate in-combination assessment which is consistent with the licensee's in-combination statement.

At the oral hearing the appellant stated the creation of open space is deforestation. Also, a Forestry Management Unit defines the project area and should have been considered in terms of assessment under the EIA Directive. The appellant stated he was familiar with the site, it is quite steep, there are relevant watercourses on site that are not mapped, there is a lot of bog in the surrounds and there are peaty soils there, and the proposal needs to be assessed in respect of the EIA Directive. Regards the Appropriate Assessment screening and the 1.5km proximity of the Cuilcagh-Anierin Uplands SAC which is renowned for being already heavily colonised by Sitka Spruce, there was no apparent consideration given to the potential of further colonisation, instead the SAC was screened out simply because of no downstream connection/ pathway. There is also a cumulative impact on bogland to the east of the proposal with colonisation by Sitka Spruce and a buffer of 200m is insufficient. Also, the Appropriate Assessment should be earlier in the process, in this instance the screening was done on the day the licence was issued. The appellant stated that a breeding pair of Hen Harrier was observed in the area in June 2020 and records were submitted to the Irish Raptors Study Group and the Golden Eagle Trust, but this information does not appear to be with the forest manager in this instance. The threat to the Hen Harrier from disturbance and activity is compounded by the colonising trees giving vantage point to predators of the Hen Harrier nests. The site should be treated as a red zone. Also, the appellant contended condition (i) of the licence is insufficient regards the way marked way, and the proposal needs a submitted transport scheme. The appellant also stated there had been an extensive fire in the area in April 2020. Also, the appeal was made prior to

awareness of the Hen Harrier nesting activity referred to. The appellant claimed he was unaware this licence was applied upon until the licence was issued.

The DAFM stated the application was desk assessed, assisted by using environmental constraint layers on IFORIS, and DAFM had sufficient information to assess the application and to issue the licence. The DAFM stated that there was no deforestation on the licence and open areas within the forest after felling and replanting would not be considered deforestation. DAFM stated that a screening for Appropriate Assessment was undertaken and the proposal was screened out. The DAFM confirmed they relied upon the applicant's in-combination statement when screening for any likely significant effects when considered in-combination with other plans and projects. The DAFM confirmed the last update from the NPWS of Hen Harrier nesting sites was in May 2020 and they had not been notified of a nest site in June 2020.

The Applicants described the information submitted with the application including maps and details of environmental and safety measures. They described the site as having no hydrological connectivity with a Natura site, it is a gentle southwest facing slope and the Yellow River is c. 22m to southwest and southwards and from this point the nearest European site is in excess of 25 km. The applicants stated they endeavour to prevent any interruption to a way marked way and if necessary would divert walkers. They contended that any open space would not constitute deforestation, there was no change of land use in this instance and forest management would continue to cover all the proposal site. The applicants stated they were not informed of any Hen Harrier nesting sites in or adjacent to this proposal and work closely with the NPWS, the statutory authority, on such things. Also, regards any risk of colonisation of the SAC there is c. 1.46 km to the Cuilcagh-Aneirin Uplands European site, the proposal is not within a designated site and has commercial forestry at all sides.

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. The EU 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 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 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 FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no conversion to another type of 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 set out for in the appeal.

Under Article 6(3) of the Habitats Directive, any 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 projects, having regard to the conservation objectives of that



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designated site. In this case, the DAFM undertook a Stage 1 screening for Appropriate Assessment in relation to Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site.

The FAC consider the NPWS are the relevant authority for notifications regards the Hen Harrier breeding activity, there is no verified evidence before the FAC of such activity. The FAC has noted the activity referred to by the appellant post dates the licence decision at appeal and the submission of the appeal in March 2020, and acknowledges the grounds of appeal referred to the site being in Hen Harrier breeding and foraging country while also acknowledging mature coniferous forest would not be a suitable breeding or foraging habitat for the species, and were nesting site/s confirmed by the NPWS, the responsible authority, they could have been considered regards disturbance etc.

Regards public use of the way marked way, the FAC is cognisant of the applicant's evidence at the hearing, and the DAFM's response on the appellant's grounds. The FAC is satisfied the way marked way is indicated on the application maps in this instance. Regards the grounds concerning colonisation of Annex I habitat, the FAC has noted the proposal is surrounded by other forestry and considers the proposal an unlikely source for such colonisation.

The evidence shows the qualifying interests were truncated on the DAFM Appropriate Assessment screening documentation, and the DAFM's evidence that all of the qualifying interests were in fact considered prior to issuing the licence. The FAC considered that while an error this was not a serious or significant error as there was no likelihood of any significant effects on the designated sites for the reasons given in the DAFM assessment. However, in respect of its screening for likely in-combination effects, the DAFM in the first instance concluded that because the project itself has no likelihood of significant effects on any of the European Sites it could not in combination with other plans and projects give rise to any likelihood of significant effects on a European site. This conclusion does not allow for the possibility of combined effects with other plans and projects giving rise to significant effects. Also, the DAFM statement sets out that DAFM relied exclusively on the applicant's in-combination statement before making its decision. The DAFM subsequently submitted to the FAC an in-combination document undertaken post licence decision on 06 February 2020 with listings of other plans and projects. These were significantly different from the details submitted by the applicant, including EPA licensed projects, afforestation and private felling projects, as well as additional felling projects. Having regard to the number and nature of forestry projects listed, and the fact the DAFM relied exclusively on the applicant's in-combination statement the FAC is satisfied that the failure of the DAFM to carry out its own satisfactory in-combination assessment prior to the granting of the licence constituted a serious error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of the DAFM should be set aside and remitted to the Minister to carry out a new Appropriate Assessment screening of the proposed development individually and in combination with other plans and projects, before making a new decision in respect of the licence.

Yours Sincerely

Pat Coman, on behalf of the FAC

