

23<sup>rd</sup> November 2020

**Subject:** Appeal FAC389/2020 regarding licence WW07-FL0151

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 (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 all parties to the appeal.

#### **Background**

Felling Licence WW07-FL0151 was approved by the DAFM on 25<sup>th</sup> June 2020.

#### **Hearing**

An oral hearing of appeal FAC389/2020 was conducted by the FAC on 10<sup>th</sup> November 2020.

Attendees:

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Luke Sweetman
Secretary to FAC:	Ms. Ruth Kinehan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM Representatives:	Mr. Frank Barrett, Ms. Eilish Kehoe

#### **Decision**

The FAC considered all of the documentation on the file, including application details, processing of the application by the 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 WW07-FL0151).

The proposed project is for the clearfell and reforestation of an area of 14.64ha in Aghavannagh (Ram) and Aghavannagh (Revell), Co. Wicklow. The proposed felling is composed of 94% Sitka Spruce, 5% Noble fir and 1% Japanese larch. The proposed restocking at application was 98% Sitka Spruce and 2% Birch with an area of 0.73ha of open space retained also. The underlying soil type at the project site comprises approximately 1% Lithosols, Regosols and 99% Peaty Podzols, Lithosols, and Peats. The slope is predominately very steep. The project is in River Catchment 10 Ovoca-Varty and the Avoca\_010 Sub-Catchment.

A Harvest Plan and Appropriate Assessment Pre-screening Report were submitted with the application. DAFM referred the application to Wicklow County Council and Inland Fisheries Ireland (IFI). Wicklow County Council did not respond with any specific observations. IFI's response stated that the site is within the Ow catchment; a Salmonid system which holds populations of Atlantic salmon, Sea trout and Brown trout. IFI also made reference to an Environmental Protection Agency (EPA) River Quality Biological Survey report from 2018. This EPA report for the River Ow at Station 0100 Aghavannagh

Bridge indicates an improvement in water quality between 2015 – 2018, after a consistent pattern of deterioration from 2009 – 2015. The report notes that the diversity of pollution-sensitive macroinvertebrate species indicated some improvement in water quality at Aghavannagh Bridge. IFI stated that reforestation may impact negatively on this recent improvement. IFI's response also noted the Eastern River Basin District Characterisation and Analysis Report in implementing the Water Framework Directive assessed the River Ow as being *probably at risk* of not complying with the criteria for good status due to diffuse pollution sources including afforestation unless measures are taken. IFI advised that the Ow has been identified as a Recommended Area for Action by the Midlands and Eastern Regional Water and Environment Committee because of its current ecological status requiring improvement. IFI stated they "do not consider that reforestation with conifers as proposed at this site is sustainable". IFI also provided a list of conditions that should be included with the felling approval. These were as follows; that all works be carried out in accordance with the Forestry Harvesting and Environmental Guidelines, IFI personnel should be notified by the Applicant/Contractor at least two weeks in advance of the commencement date, ground stability should be kept under constant review (the felling operation must not create unstable ground conditions or result in post-harvesting ground instability), and a request to provide IFI with a copy of DAFM's decision as issued.

The DAFM carried out a Stage 1 screening for Appropriate Assessment, identifying 4 Natura 2000 sites (3 SACs and 1 SPA) within 15km of the clearfell site. The Wicklow Mountains SAC and the Vale of Clara SAC were screened out due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. The Slaney River Valley SAC was screened out due to the location of the project area within a separate waterbody catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise. The screening determination concluded that there is a possibility that the proposed operations will have a significant effect on the Wicklow Mountains SPA due to the proximity of potential habitat for the species listed as the Special Conservation Interest of this Natura site. The qualifying interests for this designated site are the Merlin (*Falco columbarius*) and the Peregrine (*Falco peregrinus*).

The DAFM subsequently produced an Appropriate Assessment Report, leading to an Appropriate Assessment Determination, both dated 10<sup>th</sup> June 2020, prior to the making of the decision to grant the licence. The report, which was the subject of independent ecological review, listed the Natura 2000 sites within 15km radius but added European sites beyond 15km based on the identification of potential pathways for significant effect. The report identifies the Wicklow Mountains SPA as being subject to possible effect due to the location of the project within the Natura site. It was concluded that there is no possibility of significant effects alone or in-combination with other plans and projects on the following SACs – The Wicklow Mountains SAC, the Vale of Clara SAC and the Slaney River Valley SAC.

It was further determined that the proposed project would not adversely affect the integrity of these listed sites. Assessing the Wicklow Mountains SPA, the report identifies the qualifying interests as the Merlin and the Peregrine and the conservation objective for both species as "*to maintain or restore the favourable conservation condition of the bird species listed for this SPA*". The report identifies potential impacts as being the disturbance / displacement of the qualifying interests resulting from excessive noise, vibration, mechanical movement or artificial lights associated with harvesting, timber extraction and mechanical ground preparation for reforestation. Site-specific measures designed to mitigate impacts on the SAC were recommended to be inserted as conditions of the licence. Subject to the conditions recommended, the report concludes that the proposed project, individually, will not have an adverse effect on the Natura 2000 site. In terms of potential in-combination effects, the report notes that the clearfell site lies within the River Sub Basin Ow\_020. The River Sub Basin Ow\_020 has approximately 71% forest cover. The Appropriate Assessment Report's in-combination statement concluded that the proposed clearfell and reforestation project (with mitigation measures) will itself (i.e.

individually) not result in any residual adverse effect on the Wicklow Mountains SPA and associated Qualifying Interests and Conservation Objectives. It is concluded that, with the mitigation measures recommended, there is no potential for the proposed project to contribute to any in-combination effects on the Wicklow Mountains SPA and will not give rise to any adverse effect on the integrity of any European site, when considered in-combination with other plans and projects.

The licence issued on 25<sup>th</sup> June 2020 for the clearfell and reforestation of 14.64ha and is exercisable until 31<sup>st</sup> December 2022. It is subject to standard conditions plus additional conditions relating to requirements in relation to the Merlin and Peregrine, protection of water quality and adherence to specified standards and guidelines.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive. The DAFM has failed to carry out screening to determine the requirement for an EIA. On the same date that the application for this licence was submitted a further seven applications for clearfell licences were submitted for the same Forest Management Unit totalling 47.83ha. The proposed project is part of a much larger scheduled programme of works over a 5-year period. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. There is a requirement to consider the whole project. The application has not described any aspects of the environment which are likely to be significantly affected. The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan. The DAFM did not give adequate consideration to the feedback received from a Consultation Body. The general public were not given the opportunity to give opinions on the Appropriate Assessment Determination under Article 6(3) of the Habitats Directive. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation (DAFM 2019). 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. The licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence. The licence should contain a condition that plans and works must be inspected by the DAFM prior to, during and post-works to ensure compliance with all environmental conditions. The licence should include enforceable conditions regarding notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM contends that clearfell and replanting are not included as a class of development covered by the EIA Directive. The DAFM applies a wide range of checks and balances during its 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 (DAFM 2018). Felling licence WW07-FL0151 is issued conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM 2019). The DAFM is fully informed of its responsibilities regarding the achievement of the objectives of the Water Framework Directive. The DAFM carried out Stage 1 screening and Stage 2 Appropriate Assessment which recommended conditions regarding the protection of the Merlin and Peregrine; the Qualifying Interests of the Wicklow Mountains SPA. Subject to adherence to the requirements set out in the licence conditions, the DAFM concluded that the proposed development, alone or in-combination would not adversely affect the integrity of the Wicklow Mountains SPA. Notification of applications and details for public participation are published on the

DAFM's website. Regarding the consideration, if appropriate, of the opinion of the general public in the making of a determination under Article 6(3) of the Habitats Directive, the DAFM's procedures are fully in accordance with requirements. The DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information met DAFM requirements. The DAFM stated that it is a legal principle that if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions apply. The site-specific mitigations identified in the Appropriate Assessment Report and Appropriate Assessment Determination were attached as additional conditions of the licence issued for felling and reforestation project WW07-FL0151. It is the Minister that may at any time attach or vary conditions to any licence granted (Section 17.4 of the 2014 Forestry Act). There is no legal requirement for forest owners to inform adjacent landowners of their intention to spray.

At the Oral Hearing, the DAFM detailed the background to the processing of the application and the decision to grant the licence. It confirmed that an Appropriate Assessment Determination had been made prior to the decision to grant the licence. There had been no specific communication with the NPWS in this case. The condition attached to the licence requiring protection of the Merlin had been provided by external consultation with an Ecologist. The appellant stated that referral should have been made to the EPA seeking its views on possible implications for the Water Framework Directive. The appellant queried why 5% open space is applied for but the licence does not make provision for open space. The appellant stated an EIA screening was needed to assess the potential in-combination effect of the proposed project on the river catchment. A condition should be attached giving protection to wild birds during the nesting and rearing seasons. There was no public consultation in the DAFM Stage 2 assessment exercise, and such consultations would have been appropriate in this case. The appellant accepted that there is no legal requirement for notification in respect of the spraying of chemicals but stated that such notifications should be given in accordance with good practice. The applicant stated that it is its normal practice to inform local authorities on an annual basis of proposed spraying within their areas.

Addressing the grounds of appeal, The FAC considered the appellant's contention that the proposed development should have been addressed in the context of the EIA Directive. The 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 (nor clearfelling) 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). At the Oral Hearing, the appellant argued that, based on the application submitted, the reforestation would leave a portion (5%) of the site as open space and, as such, would constitute a change of land use. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation of 14.64ha and does not consent to any change of land use. The FAC further considers that the proposed felling is for the purposes of producing timber for commercial purposes and that there is no convincing evidence that the purpose of



the proposed felling is a change of land use. Small unplanted areas within the site would be ancillary to the forestry land use on the site. 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.

The appellant argued that the licence and associated operations could threaten the achievement of the objectives of the underlying water body and questioned why no referral had been made to the EPA. The appellant also argued that the DAFM had not given adequate consideration to the feedback received from IFI. The FAC noted that, in addition to standard conditions attaching to the licence for reason of protecting the environment during harvesting and restocking, specific conditions (j), m), n), o), p), q) and r) were inserted in the interest of protecting water quality and the environment. The FAC noted that mandatory referral is not a requirement in this case. Based on the information before it, the FAC concludes that there is no reason to conclude that the licensed development would give rise to adverse impacts on water quality.

The FAC noted that the DAFM had carried out a Stage 1 screening and Stage 2 assessment in accordance with the provisions of the Habitats Directive leading to the making of an Appropriate Assessment Determination before the decision to grant the licence was made. The assessment and the Determination had both been subject to independent ecological review and the recommendation of the Determination in respect of specific conditions to be attached to the licence relating to the protection of the Merlin (condition l)) and Peregrine (conditions i) and k) were incorporated into the licence issued by the DAFM. Based on the information before it, the FAC is satisfied that the procedures adopted by the DAFM in reaching its Appropriate Assessment Determination are correct and in accordance with the provisions of the Habitats Directive. The FAC concluded that, subject to the implementation of the specific mitigation measures recommended in the Determination, the proposed development individually, or in-combination with other plans or projects will not have an adverse effect on the integrity of any European site, having regard to their conservation objectives.

The FAC considered the appellant's contention that the harvest plan submitted by the applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM 2019). The FAC concluded that the submitted Harvest Plan is, in fact, an operational plan for those carrying out the works on the site, and that the Harvest Plan cannot include any measures not permitted by the licence granted.

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, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to the felling licence. The applicant indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

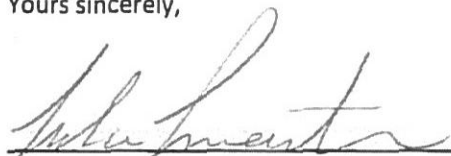
The FAC considered the appellant's contention that the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. The FAC also considered the DAFM's response that the site-specific mitigations identified in the Appropriate Assessment Report and subsequent Appropriate Assessment Determination were attached as conditions of the licence issued (WW07-FL-0151). Furthermore, the FAC notes that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in statute elsewhere. On balance, the FAC considers that there is no convincing evidence to indicate that the proposed development would be likely to have an adverse impact on Annex IV species.

The FAC considered the appellant's statement that the licence should contain standard conditions requiring the licensee to notify the DAFM upon commencement and conclusion of operations and that the works must be inspected by a DAFM Forestry Inspector prior to, during, and post-completion, to ensure compliance with environmental conditions. The FAC also considered the DAFM's response during the oral hearing that the licensee has a legal requirement to adhere to the environmental conditions attached to the licence and that their Inspector's carry out a sample of follow-up inspections to check on the utilisation of the licence. On balance, the FAC concluded that it is not necessary to include additional licence conditions regarding notification to DAFM and monitoring of the licensee's operations as outlined by the appellant.

The FAC also considered the appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of appropriate bodies, groups and the public concerned in the case of any spraying of chemicals. The FAC considered the applicant's evidence during the oral hearing that their standard procedure is to notify local authorities on an annual basis and provide them with a list of sites where the spraying of chemicals is planned. The FAC also noted the applicant's statement that temporary signage is erected on sites where chemicals are being sprayed. Based on the information before it, the FAC concludes that there is insufficient basis on which to apply a mandatory requirement for notification as outlined 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,

A handwritten signature in dark ink, appearing to read 'Luke Sweetman', written over a horizontal line.

Luke Sweetman On Behalf of the Forestry Appeals Committee