



An Coiste um  
Achomhairc  
Foraoiseachta  
Forestry  
Appeals  
Committee

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April 16<sup>th</sup> 2021.

FAC REF: FAC 398/20.

Subject: Appeal in relation to Licence CE03-FL0197.

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

Felling Licence CE03-FL0197 was granted by the Department of Agriculture, Food and the Marine (DAFM) on June 26<sup>th</sup> 2020.

### Hearing

An oral hearing of Appeal FAC ref: 398/20 regarding the decision to issue the licence CE03-FL0197 was conducted by FAC on February 18<sup>th</sup> 2021.

### Attendees

FAC: Mr Des Johnson (Chairperson) Mr Pat Coman,  
Mr Dan Molloy.

Administrative Secretary: Mr Michael Ryan.

Applicant representatives: [REDACTED]

Appellant: [REDACTED]

DAFM: Mr Anthony Dunbar, Ms Eilish Keogh.

An Coiste um Achomhairc  
Foraoiseachta  
Forestry Appeals Committee

Kilminchy Court,  
Portlaoise,  
Co Laois  
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## 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 of the Minister regarding Licence CE03-FL0197.

The proposal is for the felling and re planting of 6.25ha in Aughrim, Ballycorban, County Clare. The site in two sections, is planted with 100% Sitka Spruce, the proposed re stock is 100% Sitka Spruce (5.94ha) with .31ha of open space provided. In line with details as provided by the DAFM, the soil type is blanket peats (74%) peaty gleys (5%) podzils (peaty) lithosols peats (19%) surface water gleys and ground water gleys (2%) and the slope is predominately moderate.

Approximately 500m to the north of the site, a stream rises and flows south intersecting the north western corner of block one, the stream exits the site briefly prior to flowing a distance of approximately 30m on the south western boundary of plot one. Continuing in a southerly direction, the stream travels approximately 3km prior to joining the Graney River. Following the confluence, the Greaney river travels approximately 5km further in a south easterly direction before flowing into Lough O Grady.

The applicant submitted an application pack which includes maps, a document titled 'Harvest Plan' and an Appropriate Assessment (AA) Pre Screening Report.

The DAFM referred the application to Clare Co Council and National Parks & Wildlife Service (NPWS). There is no record of a response from Clare Co Council. NPWS responded stating (in summary), the proposed area lies within a higher likelihood of nesting area previously referred to as Red Zone for the Hen Harrier, associated harvesting works could have negative impact on nesting during Hen Harrier (HH) nesting season.

## NPWS Recommendations.

- All felling work within HNLA should take place outside HH breeding season.
- If works are planned during HH breeding season, potential Breeding Habitat Assessment and possibly Breeding Survey required.
- Local Conservation ranger to be contacted four weeks prior to felling.

The DAFM carried out Appropriate Assessment screening on Natura 2000 sites within 15km of the proposal, the screening comprised of six SACs and two SPAs. The DAFM also produced an Appropriate Assessment Report (AAR) and an Appropriate assessment Determination (AAD) both dated June 19<sup>th</sup> 2020. The AAR and AAD were also reviewed by a second Forestry Inspector and a DAFM Ecologist.

As part of the AA Screening, the following sites were screened out for stage 2 AA.

Loughatorick South Bog SAC, Pollagoona Bog SAC, Slieve Bernagh Bog SAC

Glendree Bog SAC, Derrycrag Wood Nature Reserve SAC *due to the absence of a direct upstream hydrological connection and subsequent lack of any pathway hydrological or otherwise.*

Lough Derg (Shannon) SPA was screened out for reasons stating, *While there is a hydrological connection to the SPA, at >12km hydrological distance, no pathway of impact to the designated site is feasible given also the scale of the site, 6.25ha.*

Gortacarnaun Wood SAC was screened out *due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.*

Slieve Aughty Mountains SPA was screened in '*due to the location of the project within the Natura 2000 site*' it lists the qualifying interests as Hen Harrier and Merlin Falco Columbarius and conservation objectives for the Natura 2000 site examining the potential for adverse impact.

Section 6.1 of the AAR outlines the special conservation interests of Slieve Aughty Bog SPA004168; Hen Harrier Circus Cyaneus and Merlin Falco Columbarius with the objective *to maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA.* This section also describes the required mitigations for the qualifying interests. Section 8 describes the environmental management framework to be adhered to and Section 9 lists the 'site-specific' measures for Slieve Aughty Mountains SPA to be included as conditions on the felling licence

In relation to Hen Harrier the following mitigation measures are required.

- *This project overlaps with a High Likelihood Nesting Area relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, no potential disturbance operations(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive).*



- *A minimum of 3 rows of broadleaves adjacent to both water bodies will enhance connectivity provided by the water body acting as a corridor and haven for Hen Harrier prey species.*

In relation to Merlin the following mitigation measures are required.

- No Felling or other associated forestry operations are permitted within 1st March to 31st August inclusive within 100m of the forest edge.

The AAR also considered other plans and projects for any in-combination effects with the proposal on European sites. The following planning web sites were consulted: Clare Co Council, An Bord Pleanála, the EPA, as well as the County Development Plan and the DAFM's own internal records relating to forestry projects in the vicinity.

The DAFM in-combination statement concluded that this project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. This relates to the proposed activities under CE03-FL0197 only. Also, concluded that *the proposed felling and reforestation, with mitigation measures set out in Section 9, will itself (i.e. individually) not result in any residual adverse effect on the Slieve Aughty Mountains SPA 004168 and associated Qualifying Interests and Conservation Objectives*

The licence issued on June 26<sup>th</sup>, 2020 is exercisable until December 31<sup>st</sup>, 2022 and is subject to standard conditions plus additional conditions (H-R), in summary as follows.

(H) The local conservation Ranger should be contacted at least four weeks prior to felling.

(I) The proposed site lies within a Red (Breeding) Zone for Hen Harrier and as set out in the Forest Service Document, specific procedures agreed with NPWS apply to disturbance operations within SPA's designated for HH. Disturbance include felling, extraction to roadside, loading, cultivation for afforestation and reforestation, forest road construction, fencing and other operations deemed as creating a disturbance.

Regarding sites within or partially within a Red area, no disturbance to take place during HH breeding season (April 1<sup>st</sup> – August 15<sup>th</sup>).

(J) Plant a minimum of 3 rows of broadleaves adjacent to water bodies on east and west side of site.

(K) Aquatic zones setbacks should be installed and maintained at reforestation as specified in the Environmental Requirements for Afforestation (DAFM 2016).

(L) Machinery crossing of internal drains should be avoided.

(M) Historic mound drains with direct connectivity to relevant water courses or aquatic zones must be identified prior to commencement of operations. These pathways must be blocked.

(N) Water hotspots must be identified prior to harvesting and a clearly marked machinery exclusion zone of 10m must be established around them.

(O) Apply a 10m wide water exclusion zone along the edge of any aquatic zone on or adjoining the site. Machinery traffic and timber stacking are not permitted within this zone.

(P) Adhere to all water protection measures relating to water exclusion zones.

(Q) No felling or other forestry operations associated with this licence shall take place during the period March 1<sup>st</sup> to August 31<sup>st</sup> inclusive, within 100M of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland or within 100M of a clearing in the forest or larger than one hectare.

(R) The proposed works shall adhere to: Environmental Requirements for Afforestation December 2016, Felling & Reforestation Standards, Appendix 21 of the Forestry Standards Manual, Forest Harvesting & the Environmental Guidelines (2000), Forestry Standards Manual (2015), Felling & Reforestation Policy (2017).

There is one appeal against the decision to grant the licence. In summary the grounds of appeal contend.

- There is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA.
- There is a breach of Article 4(4) of the EIA Directive. On the same date as this application was made a further 9 applications were made for the same FMU totalling 115.48ha. The application does not cover the whole project. Project splitting is not permitted.
- There is no evidence that the cumulative impact on a nationally designated aquatic site has been adequately considered as part of the approval process
- The licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan. The site is on peat soil in a catchment with previous records of FWPM.
- The Stage 1 and Stage 2 AA Determinations are not legally valid
- The opinion of the general public was not sought under Article 6(3) of the Habitats Directive
- Licence conditions do not provide for the protection of all wild birds during breeding and rearing season
- The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation
- There should be a standard condition requiring the licensee to notify the Minister at the commencement and conclusion of operations



- The licence should include stringent and enforceable conditions regarding notification of appropriate bodies, groups and the public of the spraying of chemicals

The DAFM have provided a written statement in response to the grounds of appeal (Summary of)

- While a provision within the Act does impose an obligation on the Minister to grant a Tree Felling Licence with or without conditions or to refuse and also consider whether the performance of that function also requires carrying out screening for EIA or the carrying out of an EIA, that statutory obligation is discharged when it is identified that the application in question does not involve activity that falls within specified categories of forestry as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001 as amended in Reg 13(2) of the Forestry Regulations 2017 and where in relevant national mandatory thresholds and criteria for EIA are also prescribed. Article 4(3) of the EIA Directive requires that when a Competent Authority in considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, 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 Articles 4(3), 4(4) and 4(5) of the Directive are not applicable.
- 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 (2018). 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. Critically, 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. The DAFM is fully informed of its responsibilities regarding the achievement of objectives under the Water Framework Directive (WFD).

- CE03-FL0197 has been subject to the DAFM's AAS procedure. Following the completion of an AAR and AAD, 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 AAR and AAD Statement for CE03-FL0197, the DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site.
- Regarding opportunities for public participation in the decision-making process around applications for felling licences, under Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) where the Minister for Agriculture, Food and the Marine receives such an application he or she is required amongst things to: Publish a notice of the application; and 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. In the making of a submission or observation concerning such applications, this includes the opportunity for members of the public to make a submission or observation on the likely effect on the environment of the proposed felling activity. In regard to Screening for Appropriate Assessment and Appropriate Assessment specifically, and the consideration, if appropriate, of the opinion of the general public in the making of a related determination under Article 6(3) of Habitats Directive –a) Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making of 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 b)
- It's a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply.
- The site-specific mitigations identified in the AA report and AA determination statement were attached as conditions of the licence issued for felling and reforestation project CE03-FL0197.
- DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirement.
- It is the Minister that may at any time attach or vary conditions to any licence granted (Sec 17 .4 of the 2014 Forestry Act).



- 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 (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products. There is no legal requirement for forest owners to inform adjacent landowners of their intention to spray.

The FAC held an oral hearing on February 18<sup>th</sup>, 2021, all parties were invited to attend and participate. The FAC sat in person and remotely and the DAFM, the appellant and the applicant participated remotely.

At the hearing the DAFM set out processing procedures undergone in issuing the licence, that there were referrals to National Parks and Wildlife (NPWS) who replied on Jan 22<sup>nd</sup>, 2020 and Clare Co Council (no response received).

As part of FAC questioning the DAFM were asked if the AA report and the AA Determination report were reviewed by an Ecologist, the DAFM replied 'yes'.

Clarification was also sought from the DAFM if the site was in a red zone for Hen Harrier, the DAFM responded stating 'Yes'. The DAFM were also asked by FAC if they were aware why the NPWS inserted a condition of four weeks notification prior to commencement of operations on site and if NPWS had issued this request previously in relation to other referrals, the DAFM informed the FAC that they were not aware as to why NPWS requested four weeks notice and they could not recall a similar request previously.

The appellant, Mr Neil Foulkes stated, the site should have been visited by an Ecologist, that Lough O Grady to the south of the site is a silt trap as a result of afforestation and that the build up of silt and other deposits is affecting the ecology of the lake and queried what may be running into Lough Derg through Lough O Grady as a result of afforestation. The appellant also stated there is nothing in the licence to say works on site should be stopped during wet weather.

Responding to FAC questions, the appellant stated he did not have scientific evidence available to him in support of his claim that Lough O Grady is a silt trap as a result of afforestation. Responding to further questions from the FAC as to what the appellant expects the DAFM to provide in relation to



Lough O Grady, the appellant stated 'there needs to be an assessment carried out of Lough O Grady. Asked by the FAC if the concerns in relation to Lough O Grady and Lough Derg were based on assumptions, the appellant stated, 'yes, that is the way the law is framed'.

Mr Nicholas Egan on behalf of the applicant stated, the site is located on a gentle south west facing slope and because of the fact that there was no change in land use, the proposal was not considered for EIA. The applicant also stated, the site manager walks the site with the contractor in advance of harvesting operations and that signs are erected informing the public when works are about to commence, the local authority is also informed in advance of spraying and use of chemicals on site.

In addressing the grounds of appeal, the FAC considered, in the first instance, the appellants 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 EIA is required. Neither afforestation nor deforestation 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 assessment under 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 considers that the felling of trees, as part of a clear-felling and replanting 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 FAC considers the licence issued is for the felling and reforestation of 6.25ha 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.

The FAC considered the appellants grounds of appeal relating to the contention that, there is no evidence that the cumulative impact on a nationally designated aquatic site has been adequately considered as part of the approval process and the appellants further contention at the oral hearing that silt from the proposed application site has the potential to flow downstream into Lough O Grady resulting in the lake becoming a silt trap.

The FAC noted conditions attached to the licence relating to planting of broad leaves adjacent to water bodies, the installation of aquatic zone setbacks as specified in Environmental Requirements for Afforestation document (condition K), identification of water hotspots and 10m setbacks from water

hotspots, applying a 10m wide water exclusion zone along the edge of any aquatic zone on or adjoining the site and adherence to water protection measures relating to water exclusion zones, silt and sediment control as set out in Standards for Felling & Reforestation (DAFM 2019). The FAC are satisfied having regard to downstream distance and the nature and scale of the proposal that compliance with the conditions attached to the licence will protect aquatic connections, the Graney river and Lough O Grady from operations considered to take place on the site.

The FAC considered the grounds of appeal relating to the potential of the proposal impacting on water quality. Following consideration, the FAC noted the inclusion of additional specific conditions for the protection of water quality, condition **J, K, L, M, N, O, P, R** and the requirement of the licensee to adhere to the Forestry and Water Quality Guidelines, condition **A**. Based on the information before it, the FAC is satisfied there is no convincing evidence that the proposed development would result in a negative impact on water quality.

Regarding Stage 1 and Stage 2 AA determinations, the FAC observed that the DAFM carried out an AAS of Natura sites within 15km pursuant to Article 6.3 of the Habitats Directive. The potential for significant effect was identified regards the Slieve Aughty Mountains SPA and Stage 2 AA was carried out. The DAFM produced an AAR (which included an in-combination assessment) and AAD, both of which were reviewed by an Ecologist, the site-specific mitigation measures described therein were attached as conditions of the licence issued. The FAC is satisfied that the procedures following in the Stage 1 screening and Stage 2 Determination were consistent with the provisions of Article 6(3) of the Habitats Directive and finds no convincing reason to doubt the conclusions reached

The FAC had regard to Article 6(3) of the Habitats Directive and its provisions for obtaining the opinion of the public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. The FAC concluded that there is no convincing reason for public consultation at this stage.

The contention that licence conditions do not provide for the protection of all wild birds during the breeding and rearing season is not supported by any specific evidence of the presence of wild birds on the project lands or reasons why the proposed development would threaten their protection. No specific evidence has been submitted in respect of the presence of Annex IV species or reasons why the proposed development would threaten their protection. In these circumstances, the FAC concludes that the inclusion of additional conditions to the licence would not be warranted. Compliance with, and enforcement of conditions are matters for the DAFM who have the required legislative powers.



The FAC considered the appellant's contention that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Standards for Felling and Reforestation (DAFM, 2019). The FAC concluded that the Harvest Plan is, in fact, a document outlining general Environmental and safety rules and that all the licenced operations on site must comply with the conditions of the felling licence.

The FAC considered the appellant's submission that licence conditions should require the Licensee to notify the DAFM at commencement and conclusion of operations. The FAC concluded that the enforcement of the licence conditions is a matter for the DAFM and additional conditions of the nature described by the Appellant should not be attached to the licence.

The spraying of chemicals is governed by way of statutory instrument and the FAC sees no convincing reason for the inclusion of specific conditions attached to the licence in this regard.

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 satisfied that there is no serious or significant error or series of errors in making the decision and the decision was made in line with fair procedures.

In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely



Dan Molloy, on behalf of FAC

