



[REDACTED]

2<sup>nd</sup> July 2021

**Subject:** Appeal FAC 672/2020 relating to Licence TFL00196218.

Dear [REDACTED]

I refer to the 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.

#### **Licence**

The licence is for 28.89 Ha of clear-fell and reforestation in the townland of Foilduff (Jackson), Rearcross, Co. Tipperary. The application was submitted to the DAFM on 24/07/2018. One third-party submission was received on the licence application dated 02/09/2020. The licence was approved by the DAFM on 14/08/2020 with conditions including mitigation measures in respect of Qualifying Interests of the Hen Harrier and Salmonid species.

There is one appeal against the decision to grant the licence.

#### **Hearing**

The appeal was considered by FAC Members: Mr. Des Johnson (Chairperson), Mr. Luke Sweetman, Mr. Dan Molloy and Mr Iain Douglas on the 27<sup>th</sup> of May 2021.

#### **Decision**

Having regard to the evidence before it, in particular, the record of the decision by the DAFM, the notice and grounds of appeal, submissions made at the Oral Hearing and all other submissions and the considerations set out hereunder, the FAC has decided to set aside and remit the decision of the Minister regarding licence reference TFL00196218 at Foilduff (Jackson), Rearcross, Co. Tipperary.

#### **Background**

The forest was planted in 1989 comprising of Sitka spruce.

The Statement of Facts (SoF) by the DAFM Forestry Inspectorate dated 14/09/2020 indicates that the proposed clear-fell and reforestation was the subject of a desk assessment and a number of field inspections. An Appropriate Assessment (AA) Screening Form (26Nov18) dated 23/01/2019 describes the soil type underlying the site as being mainly gleys/highly modified peat & peaty podzols in nature. The slope is steep (15% to 30%)/very steep (>30%). The project area is crossed by and adjoins an aquatic zone.

The vegetation type(s) within the project area comprise semi-mature to mature conifer plantation with heath/bog habitat present

The AA Screening Form states there are two Natura 2000 sites, Slievefelim to Silvermines Mountains SPA (Site Code 00416) and the Lower River Shannon SAC (Site Code 002165) within 3Km of the proposed forest felling and reforestation. The AA Screening concludes that the project cannot be screened out and AA and a Natura Impact Statement is required. The reason stated is that the proposal has the potential to impact on salmonid species an Annex 1 habitat within the site and the significance of the area for the Hen Harrier, a Qualifying Interest of the Slievefelim to Silvermines Mountains SPA.

On 26/02/2019 the applicant was requested to submit a Natura Impact Statement (NIS) assessing the two sites identified in the AA Screening. The NIS was received on 14/07/2019.

DAFM carried out an AA Determination (AAD) dated 10/07/2020. The AAD examined 10 Natura 2000 sites within 15 Km of the proposed clear-fell/reforestation. 7 sites were screened out (Anglesey Road SAC 002125, Bolingbrook Hill SAC 002124, Glenstal Wood SAC 001432, Keeper Hill SAC 001197, Lower River Suir SAC 002137, Silvermine Mountains SAC 000939, Silvermine Mountains West SAC 002258). 3 sites were screened in (Slievefelim to Silvermines Mountains SPA 004165, Lower River Shannon SAC 002165 and Clare Glen SAC 000930).

The AAD concludes that, based on best scientific knowledge in the field, the felling and reforestation proposed under TFL00196218; individually, or in-combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Slievefelim to Silvermines Mountains SPA, Lower River Shannon SAC and Clare Glen SAC, having regard to their conservation objectives and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with specific mitigation measures to be attached as conditions to the licence.

An In-combination assessment carried out by the DAFM found that, individually, the project does not represent a source, or if so, no pathway exists for an adverse effect on any European site. Consequently, the DAFM deemed that there is no potential for the felling & reforestation to contribute to any such effects, when considered in-combination with other plans and projects.

The licence application was referred to Tipperary County Council, Inland Fisheries Ireland (IFI) and National Parks & Wildlife Service (NPWS). IFI responded on August 15<sup>th</sup> 2018 stating they had no major objections to the proposal, and that the site is located near the top of the Clare River which is an important salmonid spawning and nursery area. They also requested that ground conditions are monitored to avoid excess run-off and siltation. The NPWS drew the attention of the DAFM to the Hen Harrier Qualifying Interest (QI) in the Slievefelim to Silvermines Mountains SPA and Lower River Shannon SAC and referred to the obligations of the Minister, as competent authority, with regard to AA. No reply was received from Tipperary County Council.

### **Appeal**

There is one third-party appeal against the decision to grant the licence. There are 17 grounds of appeal summarised as follows:

- Breaches of the EIA Directive
- Breaches of the Habitats Directive
- Matters relating to the Water Framework Directive
- Matters relating to the conditions of the licence



- Matters relating to the Forest Standards and Guidelines

#### **Evidence before the FAC**

At the hearing the FAC had before it, in addition to the record of the decision, a SoF provided by the DAFM confirming the administrative details of licence TFL00196218 as outlined above and stating that the DAFM is satisfied that all criteria in its standards and procedures had been adhered to in the making of the decision on this licence application.

The FAC also had before it a SoF that was provided by the DAFM Forestry Inspectorate dated 14/09/2020 which confirmed that the site was Field inspected and desk audited on 21/01/2019 and stating that the relevant AA Screening procedure at the time was applied and that standard operating procedures were followed which found that a NIS was required from the applicant under Forest Service procedures. An AAD and an in-combination analysis was carried out by the DAFM.

#### **Consideration by the FAC**

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency (EPA), the Ordnance Survey of Ireland (OSI), the Forest Service, and other on-line services.

Aerial photography shows the site of the proposed clear-fell and reforestation almost entirely surrounded by conifer forest. The site slopes steeply from north to south.

The River Waterbody Annagh (Tipperary)\_010 forms the south-east site boundary of the site and has been assigned good water quality status in the 2013-2018 assessment period and is not at risk. While there is a direct hydrological connection between the forestry and Annagh (Tipperary)\_010, the licence conditions include compliance with, inter-alia, The Forestry and Water Quality standards and site-specific mitigation measures designed to prevent silt and sediment run-off from the site to sensitive watercourses.

The Annagh (Tipperary)\_010 is part of the Lower Shannon Catchment and is located in the Kileengarrif\_SC\_010 Subcatchment

The underlying groundwater body is Slievefelim IE\_SH\_G\_213, categorised as good and not at risk.

EPA mapping shows the soil type(s) of the site as Surface water Gleys, Ground water Gleys and Blanket Peat.

The proposed felling and reforestation is neither within a Natura 2000 site nor is it required for the management of a Natura 2000 site. The FAC has confirmed that ten Natura sites lie within 15km of the site area, as identified in the Inspector's Certification, NIS and AAD.

The FAC noted that the DAFM completed and recorded an AA and determined that the proposal itself and in-combination with other plans and projects would not significantly impact on any Natura 2000 Site subject to mitigation measures to be included in the licence.

The FAC noted that the site is in a Secondary Amenity Area identified in the North Tipperary Development Plan 2010-16 (as extended) and that the area within a 5km radius of the site is heavily forested.

The FAC considered the following matters as raised in the grounds of appeal:

#### **EIA Directive.**



In considering the appeal the FAC noted that the EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that Annex II contains a list of projects for which member states must determine whether or not EIA is required through the setting of thresholds, or on a case-by-case basis (or both). Felling and reforestation is not referred to in Annex I or Annex II. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to the afforestation involving an area of more than 50 hectares or afforestation below this parameter where the Minister considers such development would be likely to have significant effects on the environment. Furthermore the FAC noted that 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 FAC considers that the felling & reforestation of an existing forest does not constitute conversion to another type of land use and is not a class of development to which the EIA Directive or the transposing Regulations apply.

The DAFM considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects and determined that the project was not required to undergo the EIA process. Notwithstanding the conclusion that the proposed development is not a class of development to which the EIA Directive applies, the FAC noted that the DAFM considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects. Based on the information before it, the FAC concludes that the proposed development would not be likely to give rise to significant effects on the environment,

#### **Appropriate Assessment Screening.**

With regard to the Habitats Directive, the FAC noted that the applicant submitted a NIS examining for two Natura Sites, Slievefelim to Silvermines Mountains SPA and the Lower River Shannon SAC and that the DAFM had carried out an AAD, including an in-combination assessment. The FAC noted the procedures adopted by the DAFM in its AAD; screening, listing the qualifying interests and conservation interests for each site within the 15km radius of the development and assessment of the project design, location of the project and possible pathways to the designated sites listed. The FAC further noted that, in the case of seven of the Natura 2000 sites listed, the DAFM discounted the possibility of significant effects arising for the reasons stated above and that the DAFM screened in three sites, Slievefelim to Silvermines Mountains SPA, the Lower River Shannon SAC and Clare Glen SAC. The FAC noted that one of the sites screened in by the DAFM, the Clare Glen SAC, was not included in the applicant's NIS and has not been assessed in an Appropriate Assessment (Stage 2) Report by the DAFM.

The FAC concluded that the omission of an Appropriate Assessment (Stage 2) Report for the Clare Glen SAC and for which mitigation measures are proposed constitutes a serious error in the in the making of the decision.

The public consultation procedures set out in the Forestry Regulations 2017 (as amended) gives the Minister, as competent authority, an opportunity to obtain the opinion of the general public on the proposal. The FAC notes that the appellant availed of the opportunity to make a submission on the licence initially and subsequently appeal the decision of the Minister. In the circumstances of this appeal, the FAC found no reason to conclude that the DAFM had made a serious or significant error in the making of the decision.

With regard to the existing forestry the FAC notes that the area was planted in 1989, prior to the designation of Slievefelim to Silvermines Mountains SPA in 2011 and the Habitats Directive of 1992.



In considering the clarity of the mitigation measures contained in the AAD the FAC noted that condition (i) of licence TFL00196218 requires adherence to the harvesting and reforestation mitigation measures as outlined in pages 4,5 and 6 of the AAD of 10/07/2020. Mitigation 1 of the Harvesting mitigation measures requires the splitting of the project as the felling area is larger than permitted in the Standards 'for Felling and Reforestation 2019. No details are given as to the nature, amount, location and timing of the splitting of the project. The FAC also considers that the licence should contain the mitigation measures explicitly.

#### **EU Water Framework Directive.**

With regard to the appellant's view that the proposed felling & reforestation and associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. The FAC notes that while the WFD surface waterbody Annagh (Tipperary)\_010 adjoins the site forestry is not regarded as a threat to ground or surface waterbodies nor is forestry identified as a pressure in the WFD 3<sup>rd</sup> Cycle Assessment. Having regard to the nature, scale and location of the proposal and the conditions under which operations will be undertaken; the FAC considers that the proposed felling & reforestation does not pose a risk to the river waterbody or to water quality generally.

#### **Licence conditions relating to the protection animal and bird species.**

In relation to the ground of appeal that the licence conditions do not provide a system of protection of Annex IV species and wild bird species during the period of breeding and rearing consistent with the requirements of the Habitats and Birds Directives. The FAC note that the granting of a licence for a felling & reforestation does not exempt the holder from complying with any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to Annex IV species and wild bird species nesting or rearing on the proposed site. The FAC considered that the DAFM had completed a screening for AA and had undertaken a site inspection prior to making the decision. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant are not warranted.

#### **Additional Licence Conditions**

Regarding the conditions that the Appellant suggested should be attached to the licence relating to commencement and conclusion of operations, inspections and notification in the case of the spraying of any chemicals, the FAC noted 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 that the inclusion of the conditions relating to these grounds in the appeal in this case, was not required. Furthermore, the FAC noted that the spraying of chemicals is controlled through Statutory Instruments.

#### **Harvest Plan**

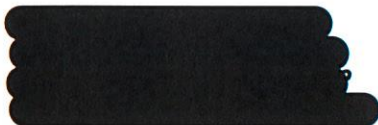
The FAC noted that the appellant did not substantiate how the Harvest Plan was not consistent with the requirements of the Interim Standard for Felling & Reforestation 2019. In any event, the FAC concluded that the proposed development would have to be carried out in strict accordance with the terms of the licence.

#### **Conclusion**

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and all other submissions. The FAC is satisfied that a serious error or series of errors was made in making the decision regarding licence TFL00196218 and that the decision should be remitted to the

Minister for the DAFM to undertake the following measures; (a) prepare an Appropriate Assessment (Stage2) Report on the Clare Glen SAC, (b) to set out in detail in the licence the nature, amount, location and timing of the splitting of the project referred to in mitigation measure 1 of the Harvesting mitigation measures and (c) to include the mitigation measures referred to in condition (i) of licence TFL00196218 as an attachment to the licence or as a schedule of individual conditions in the licence before a new decision is made.

Yours sincerely,

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Iain Douglas, On Behalf of the Forestry Appeals Committee