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23 June 2021

Subject: Appeal FAC 869/2020 regarding licence LS01-FL0080

Dear M [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 14A (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 Application

Licence LS01-FL0080 is for the clear-felling and reforestation of 10.09 hectares at Glendine, Gorragh Upper, Co Laois, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 11th of December 2020 with conditions. The species to be felled are Lodgepole Pine and Sitka Spruce. Replanting is proposed with the following species: 30% Sitka spruce, 70% Lodgepole pine - South Coastal, with an open area of 1.01 hectares. It is stated that due to inherent levels of soil fertility, no fertiliser application is required to promote the establishment and growth of newly planted trees. If deemed necessary following an appraisal of the project area herbicide (glyphosate) will be required to manage competing vegetation through manual spot spray application, to encourage rapid tree growth and to reduce trees losses through completion.

Hearing

A hearing of appeal FAC 869/2020 of which all parties were notified, was held by a division of the FAC on 3 June 2021.

In attendance

FAC Members:	Mr Des Johnson (Chairperson), Mr Seamus Neely, Mr Derek Daly and Mr Dan Molloy
Secretary to the FAC:	Mr Michael Ryan

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence FL01-FL0080.

Background

The project area is made up of six non-contiguous sub-compartments comprising Lodgepole pine and Sitka spruce, planted between 1950 and 2001 forming a closed canopy over the entire project area and the habitat is WD4. The site forms part of a larger area of forestry. The project area was the subject of a fire which has burned much of the forest area including the project area.

The site is described as having a predominant soil composition of blanket peat with 59% Blanket Peat and 41% Peaty Gleys, podzols, lithosols (Podzols (Peaty), Lithosols, Peats with some outcropping rock. In relation to slopes it is described as gentle (15% or less) in an easterly direction in sub compartments 3, 3 (two plot 3 indicated on the maps), 5 and 10 and in a south easterly direction in sub compartments 10 and 11.

An Appropriate Assessment pre-screening report dated the 30th of September 2020 was submitted by the applicant as a follow on to the application form and mapping. It is indicated that there are no aquatic zones present within the project areas. A relevant watercourse is stated to flow through the southern portion of sub-compartment 5, and another relevant watercourse flows adjacent to its southern boundary, in an easterly direction towards an aquatic zone, the Gorragh River (order 2). Sub-compartments 3, 3 and 10 are located on a slope that varies from approx. 450 metres down to 360 metres in an easterly direction towards an aquatic zone, the Gorragh River. Sub-compartments 10 and 11 are located on a slope that varies from approx. 430 metres down to 390 metres in a south easterly direction towards the Gorragh River.

The Gorragh River continues in a northerly direction, merging with the Clodiagh [Tullaghmore] River (order 3), which is designated approx. 19km (at the closest point) downstream for the Charleville Wood SAC. The Clodiagh [Tullamore] River continues flowing north west before turning south, where it merges with the Brosna River (order 6) which is designated for the River Shannon Callows SAC and the Middle Shannon Callows SPA approx. 59km (at the closest point) downstream of the project area.

The Appropriate Assessment pre-screening report submitted by the applicant also identifies that the project area is located within the Slieve Bloom Mountains SPA (Overlap of 10.9 ha) and in sub-compartment 10 is bordered to the west by the Slieve Bloom Mountains SAC (Overlap of 0.21 ha). It is however indicated that no SAC habitat is present within the project area, and all activity will be directed away from adjoining SAC habitat and towards the forest road.

The report which included an assessment of other plans and projects determined that the project will have direct, indirect or in combination effects on three European sites, namely Charleville Wood SAC (000571); Slieve Bloom Mountains SAC (000412) and Slieve Bloom Mountains SPA (004160) and concluded that the project should proceed to Appropriate Assessment (Stage 2). All other sites were screened out for reasons which include an absence of hydrological connection between the project site and the Natura site, the particular terrestrial nature of the qualifying interest and habitat, and separation distance of the Natura Site from the project area.

The Applicant also provided a Natura Impact Statement (NIS) for a project comprising four projects subject to separate licence applications which includes the current appeal LS01-FL0080 10.09 hectares and LS01-FL0079 6.54 hectares, LS01-FL0083 38.48 hectares and LS01-FL0084 22.37 hectares, located in the vicinity of Glendine, Gorragh Upper, Scarroon, Co. Laois in which the qualifying interests and conservation objectives for each designated site are listed, there is an examination of potential threats and considers other plans and projects. Site specific mitigation measures are recommended relating to exclusion zones for machinery, silt and sediment control during felling and reforestation, extraction

and removal of felled timbers, brash management, reforestation, chemical use, and monitoring and contingency planning. Forest operations will be restricted to within the boundary of the existing forest area and not to extend into an adjacent European site and limiting the period of operations to protect identified QIs and species. The NIS concludes

It is objectively concluded, in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge.

DAFM Assessment

The proposal was referred to Laois County Council and no response was received. The proposal was referred to NPWS on the 6th March 2019 and the response dated the 14th June 2019 noted that the location of the proposed development is situated in a location likely to impact on the Natura 2000 site: the Slieve Bloom Mountains Special Protection area SPA, 004160. In order to mitigate against any potential impacts to these sites the response recommended conditions to be attached to any grant of permission that may issue and as the area is within a Hen Harrier Red Zone sets out that works should take place from August 15th to March 31st and if works are to take place outside these dates, then an Appropriate Assessment Screening should be carried out as per Forest Service guidelines. The proposal was also referred to Inland Fisheries Ireland (IFI) with a response indicating no objections and conditions are recommended.

The DAFM undertook a screening for Appropriate Assessment dated the 6th October 2020 and identified sites within 15km of the proposal and other sites beyond this radius where a potential source pathway receptor was identified. Each site is considered in turn with its qualifying interests, special conservation interests and conservation objectives and reasons are provided for the screening conclusions. The DAFM screening considered that four sites should proceed to Appropriate Assessment. The DAFM recorded an Appropriate Assessment Determination (AAD) which refers to the screening process and the NIS submitted. The AAD screened out the River Shannon Callows SAC IE0000216 due to the scale and nature of the activity, the large downstream hydrological distance (> 55 km) separating the project and the Natura site, with sufficient volume and surface area for settlement, dispersion and dilution of any possible nutrient sediment or siltation residue from the site. It describes a number of mitigation measures to be implemented through the licencing process in relation to the protection of adjoining / downstream aquatic based species and habitat and is presented in the form of conditions to be attached to any licence issued.

The conditions recommended in the AAD are consistent with the recommended conditions in the NIS by the application of appropriate water quality protection measures including defined setbacks; the planting of species; retention of existing broadleaves; provision is also made in relation to identified water hot spots; the exclusion of machinery from the identified exclusion areas and operational procedures in relation to the use of machinery. Measures are also outlined in relation control of sediment and the use of fertiliser. Measures have also been set out for the protection of the Hen Harrier species. Measures by way of conditions are also outlined in relation to the protection of blanket bogs and wet heaths. The AAD concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that

no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The DAFM also carried out an In-Combination report with a date of the week of the 5th October 2020 which was included on the file. It states that this project lies in a rural landscape in GLENDINE, GORRAGH UPPER, County Laois in the River Sub Basin GORRAGH_010. The River Sub Basin GORRAGH_010 has approximately 55% forest cover which is higher than the national average of 11%. At 10.09 hectares the project is considered medium sized in scale. Forestry activity including afforestation, forest roading and felling, have been either submitted and still under evaluation, licenced / approval in place or completed and approved in the River Sub Basin in the last 5 years are listed and that these are subject to environmental protection measures. A number of developments in the River Sub Basin GORRAGH_010 granted planning permission over the last five years are also listed and are also subject to appropriate environmental protection measures. Reference is made to upgrading an existing fire line measuring c. 920 m in length and is 1,362 m from the project area for LS01-FL0080. It concludes there is therefore no potential for the proposed works to contribute to any cumulative adverse effects on European sites, when considered in-combination with other plans and projects.

The licence was issued on the 11th December 2020 subject to conditions which reflect the site-specific conditions stated in the AAD and also general standard conditions.

Appeal

There is a single appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- Commission observations to the CJEU Case C-461/17 Brian Holohan and others requires that the appropriate assessment be complete in the sense that it must not "contain gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the [site] concerned" This purpose of the appropriate assessment requires that it be recorded and reasoned. The Commission considers in its relevant guidance document that an assessment that does not disclose the reasoned basis for the subsequent decision (e.g. a simple unreasoned positive or negative view of a plan or project) does not fulfil its purpose and can, therefore, not be considered to be "appropriate".
- On those grounds, the Court (Second Chamber) hereby rules:
 1. Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.
 2. Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.

- Reference is made to Case C-323/17.
- There is no assessment of the likely effects on the Fresh Water Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment only conditions.
- There can be no certainty concerning the conditions if it is not known what is being mitigated.
- The case law of the CJEU has found that it is not legally possible to grant a permission to a development for which an Environmental Impact Assessment was required and not carried out.
- There is no evidence submitted that any of the afforestation in the overall forest was ever subjected to even an EIA screening No Information has been provided and there has been no assessment of the alternative of returning the site to Nature for the benefit of the Hen Harrier.
- The Forest Appeals Committee carries out a de novo assessment. It must be able to make a finding that complies with the following: from C.JEU 258/11 para 44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 Commission v Spain, paragraph 100 and the case-law cited).
- The Mitigation measures in the Natura Impact Statement/Report must be complete, precise and definitive.
- The Minister has not made an assessment under the Habitats Directive. The Minister has not made a screening under the Environmental Impact Assessment Directive.
- We have appealed these decisions to the Forest Appeals Committee the final decision must be made by the Forest Appeals Committee, it cannot be delegated.
- The appellant listed a number of cases stating, it is our submission that the following cases are all part of the same forest unit and therefore the Forest Service in permitting them as multiple application is practicing project splitting.

In response, the DAFM state as follows:

- The decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act. The Department is satisfied that all criteria outlined in its standards and procedures policy have been adhered to in making a decision on the application.
- With regard to the granted Felling licence application, information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-screening Report and associated Pre-screening Report methodology document and a Natura Impact Statement (NIS) were considered during the licencing process. These documents have been submitted to the FAC in respect of FAC Appeal FAC Reference: FAC 869/2020.
- In consideration of the felling licence application for LS01-FL0080, the DAFM carried out and documented an AA Screening exercise, arrived at a determination that the proposed felling and reforestation project meets the threshold of being considered likely to have significant effects on European sites, carried out and documented a Stage 2 Appropriate Assessment exercise and produced a formal determination as per Regulation 19(5) of SI 191 of 2017, as amended, and per Regulation 42(16) of SI 477 of 2011.
- This formal determination stated 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 measures identified. The formal determination also states that based on objective information no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

- Reference is made to the procedures carried out in relation to the assessment of the licence application. DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.
- A felling licence was issued for the clearfell and reforestation project having considered the comments and observations of referral bodies who submitted information to DAFM (referral correspondence on file).
- The clear-felling and replanting of an already established plantation forest (planted in 1969/1970/2001), as granted under licence LS01-FL0080, is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed).
- The total area applied for in LS01 on the day that the application was made for LS01-FL0080, 0083 and 0084 was 125.6 ha (9 no.). This represents 5.9% of the total area for Forest LS01. The majority of the application for felling licenses in this forest concerns the rehabilitation of the forest following a fire; 108 ha of the 125.6 ha applied for is classified as "Burnt". This burnt area includes LS01-FL0080, 0083 and 0084.
- The site-specific mitigations identified in the AA Determination were attached as conditions of licence issued for the felling and reforestation project licenced as LS01-FL0080. DAFM submits that the conditions attached to the licence are consistent with best forest practice, national forest policy and protection of the environment.

FAC Hearing

At a hearing of the appeal held on the 3rd June 2021, the FAC considered the written grounds of appeal and response received from DAFM and the documentation submitted in relation to the licence application. In addressing the appeal, the FAC considered the requirements of the EIA and Habitats Directives which are referred to in many of the grounds of appeal, the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In relation to the grounds of appeal many of the grounds refer to the Council Directive 92/43/EEC of 21 May 1992 and that the Minister has not made an assessment under the Habitats Directive, that the Minister also has not made a screening under the Environmental Impact Assessment Directive, and that there is no evidence submitted that any of the afforestation in the overall forest was ever subjected to even an EIA screening. Reference is made to the functions of the FAC and there is reference to the absence of assessment of the likely effects on the Fresh Water Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment only conditions.

Specifically, in relation to the EIA Directive, the 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 I (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 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). As such, the FAC concluded that there is no breach of the provisions of the EIA Directive in this case.

In relation to the Habitats Directive, the FAC examined the Appropriate Assessment undertaken by the DAFM including the initial screening and Determination. The FAC examined publicly available information from the EPA and NPWS and noted that the DAFM, in addition to the eight sites identified within a 15 kilometre radius, included and assessed two additional sites (Middle Shannon Callows SPA Site Code 004096 and River Shannon Callows SAC Site Code 000216) outside of this radius due to hydrological connection. The River Shannon Callows SAC Site Code 000216 was screened in owing to a possibility of the project having a significant effect on a qualifying interest of this SAC. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the screening conclusions provided by the DAFM. The DAFM considered each site in turn and provided the reasons for screening all the sites and the FAC concurs with the conclusion to advance to Appropriate Assessment stage in relation to the screened in European Sites.

The FAC also considered and assessed the Appropriate Assessment Determination (AAD) and the findings and conclusions as set out. Details of other plans and projects were also examined including other forestry projects. The FAC noted in the AAD that the Minister determined that there is no likelihood of the felling and reforestation project LS01-FL0080 having any significant effect, either individually or in combination with other plans or projects, on European sites including the River Shannon Callows SAC Site Code 000216 in view of their conservation objectives and the reasons as set out. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached. Conditions are outlined in the AAD in relation to three sites, Slieve Bloom Mountains SAC Site Code 00412; Slieve Bloom Mountains SPA Site Code 004160 and Charleville Wood SAC Site Code 000571 which are consistent with the measures as outlined in the NIS for these European sites.

The appellant contends that the Minister has not made an assessment under the Habitats Directive. In this regard, the FAC noted that the proposed project, the clear-felling and reforestation, was subject to initial screening and, following the submission and assessment of an NIS, was the subject of an Appropriate Assessment Screening and Appropriate Assessment Determination by the DAFM. In addition, the proposal was referred to Laois County Council, was referred to the National Parks and Wildlife Service (NPWS) who in a response recommended conditions to be attached to any grant of permission that may issue and as the area is within a Hen Harrier Red Zone set out that works should take place from August 15th to March 31st and the FAC finds that these were included in the conditions of the licence. The FAC also finds that the proposal was referred to Inland Fisheries Ireland (IFI) who responded indicating no objections and conditions are recommended. Based on the information

before it, the FAC finds no reason to conclude that the DAFM erred in its processing of the application as it relates to this ground of appeal and is satisfied that the procedures followed leading to the making of the decision to grant the licence were consistent with the requirements of Article 6(3) of the Habitats Directive.

In relation to discharging its statutory functions, the FAC operates under the Agricultural Appeals Act 2001, as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

In relation to conditions, It is noted that the licence, in addition to standard forestry management operational conditions, has specific conditions operational conditions which are based on the findings of the NIS and the AAD and which set out specifically requirements relating to the Hen Harrier species, and other qualifying interests of the European Sites including meadow habitat, open heath or blanket bog habitats in relation to setbacks of operations, the location of drains, the control of natural regeneration of non-native tree species, the retention of broadleaves, identification and set back from water hot spots, that brash and branch wood is to be utilised to create and maintain brash mats along all machine routes, a range of measures to avoid discharge to watercourses in relation to silt and sediment, controls in relation to use of fertilisers and chemicals and ongoing inspection of all protective measures periodically to ensure continued functionality throughout operations. Considering the information before it, the FAC finds no basis for the appellant's contention on this issue.

In relation to the Freshwater Pearl Mussel and that there is no assessment of the likely effects on the Freshwater Pearl Mussel in either the Natura Impact Statement or the Appropriate Assessment it is noted the appellant has not specifically identified any particular site. The documentation submitted identifies all European sites with hydrological links to the project area and the Qualifying Interests of these sites. In relation to sites with a hydrological link to the project area, no European site downstream includes the Freshwater Pearl Mussel as a Qualifying Interest and there is no evidence submitted to the contrary. The Freshwater Pearl Mussel is identified as a qualifying Interest in the River Barrow and River Nore SAC 002162 which is within a 15 kilometres radius of the project site. There is no direct hydrological connection between the project site and this European site. The waterbody into which the project site drains is the Gorragh River which continues in a northerly direction and does not merge with the River Barrow and River Nore.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received. 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 is thus affirming the decision of the Minister regarding licence LS01-FL0080 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. 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,

A black rectangular redaction box covering the signature of the official.

Derek Daly On Behalf of the Forestry Appeals Committee