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19<sup>th</sup> March 2021

**Subject:** Appeal FAC393/2020 in relation to felling licence TY06-FL0090

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 TY06-FL0090 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 25<sup>th</sup> June 2020.

#### **Hearing**

An oral hearing of appeals FAC393/2020 was held by the FAC on the 11<sup>th</sup> February 2021.

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Dan Molloy & Mr. Luke Sweetman
Secretary to the FAC:	Mr. Michael Ryan
Appellant:	[REDACTED]
Applicant representative:	[REDACTED]
DAFM representatives:	Ms. Eilish Kehoe, Mr. Frank Barrett

## 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 felling licence TY06-FL0090.

The licence issued is for the clearfelling and replanting of 10.35ha of mixed species but predominately Sitka spruce with Willow, Ash and Birch at Commaun Beg, Co. Tipperary. The proposed restock species is 100% Sitka spruce (9.83ha) with 0.52ha open space retained. The underlying soils are approximately 15% Acid Brown Earths, Brown Podzolics, 12% Blanket Peats, 28% Peaty Gleys and 45% Surface water Gleys, Ground water Gleys. The slope is predominantly steep (15-30%). The project site is located in the Lower Shannon Catchment, the Nenagh\_SC\_010 Sub-Catchment and the Nenagh\_020 River Sub-Basin, a waterbody with 'Good' status deemed to be 'Not at Risk' by the Environmental Protection Agency (EPA) under their 2013 – 2018 assessment. The EPA-mapped Gortnagowna\_25 rises within the site and flows east-southeast.

The Applicant submitted an application pack which included maps, inventory data, restock species, a Harvest Plan document, and an Appropriate Assessment (AA) Pre-Screening Report. The DAFM completed an AA screening (AAS), dated 6<sup>th</sup> April 2020, that considered nine Natura 2000 sites (eight SACs and one SPA) within 15km of the proposal. In this instance the DAFM extended the 'likely zone of impact' to include Lough Derg (Shannon) SPA. The Slievefelim to Silvermines Mountains (SSM) SPA was screened in for Stage 2 AA due to the location of the proposal within the Natura site. The remaining sites were screened out for Stage 2 AA:

- **Lower River Shannon SAC, Lower River Suir SAC, Anglesey Road SAC, Silvermine Mountains SAC, Keeper Hill SAC, Silvermines Mountains West SAC;**
  - 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.
- **Bolingbrook Hill SAC, and Kilduff, Devilsbit Mountain SAC;**
  - Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise
- **Lough Derg, North-east Shore SAC;**

- Due to the considerable distance to the SAC (34km) and complexity of the hydrological connection.

The DAFM produced an AA Report (AAR) and AA Determination (AAD), both dated 9<sup>th</sup> June 2020, and both reviewed by an external Ecologist on 19<sup>th</sup> June 2020. The AAR states the DAFM identified the potential for the proposal to result in impacts on the Special Conservation Interest (Hen Harrier) and Conservation Objectives of the SSM SPA on a precautionary basis. Section 9 of the AAR lists the site-specific measures prescribed by the DAFM to be inserted as conditions of the licence. The AAR contained an in-combination assessment of the proposed development's potential to contribute to a cumulative impact on Natura sites which focussed on the general vicinity of the project area in the River Sub-Basin Nenagh\_020. The DAFM consulted various planning websites along with their own records for forestry and non-forestry plans and projects and also consulted the North Tipperary County Development Plan 2010 (as varied) regarding objectives relating to Natura sites. The DAFM concluded that the proposed development, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any of the screened Natura sites. The AAD includes the site-specific measures from the AAR and concludes that "no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site."

The DAFM referred the application to Tipperary County Council and Inland Fisheries Ireland (IFI). The County Council did not respond. IFI responded (21<sup>st</sup> January 2020) stating they had no objections to the felling licence but recommended measures relating to silt traps, ground stability, crossing watercourses, contacting the IFI Limerick office prior to commencement of works, and adherence with "Good Forestry Guidelines and Water Quality Guidelines."

The DAFM issued the licence on the 25<sup>th</sup> June 2020. The licence is exercisable until the 31<sup>st</sup> December 2022 and is subject to relatively standard conditions (a) to (g) plus additional conditions relating to water quality (h, i, n, o, p, q, r, s), road and dwelling setbacks (l, m), site-specific measures from the AAD (j, k), and adherence to specified standards and guidelines (a, t).

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC, the following is a summary of the issues raised:

1. Breach of Article 4 (3) of the EIA Directive 2014/52/EU - Failure to carry out screening for EIA



2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU - The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive.
3. Breach of Article 4 (4) of the EIA Directive 2014/52/EU - This application has not described any aspects of the environment which are likely to be significantly affected.
4. This licence and its 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. Clear felling has the capacity to impact on water quality. There is a significant potential In-Combination effect for the catchment.
5. The Stage 1 and Stage 2 AA determinations are not legally valid - An assessment carried out under Article 6 (3) of the Habitats Directive may not 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 proposed works on the protected areas concerned.
6. DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination
7. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation
8. Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive
9. 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.
10. 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.
11. This 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 contained within the licence
12. The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

The DAFM submitted a response to the appeal in a written statement to the FAC which was considered in full; the following is a summary:

- 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). 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).
- TY06-FL0090 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 TY06-FL0090, 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.

The notification of such felling licence applications and details of the arrangements for public participation are published and readily accessible on the Department's website. 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.

- The DAFM considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements.
- 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.
- Specific conditions were issued on the licence in respect of mitigations identified in the AAR and AAD for the granted licence. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAR and AAD statement ensure that the proposed felling and reforestation project TY06-FL0090 will not result in any adverse effect on any European Site.
- Pursuant to Section 17.4 of the 2014 Forestry Act, the Minister may at any time attach or vary conditions to any licence granted. In this instance, a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM.
- 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.

The FAC held an Oral Hearing on the 11<sup>th</sup> February 2021. The FAC members sat in person and remotely at this hearing. All other parties participated remotely. The following is a summary of the matters discussed. Initially, the DAFM detailed the process leading to their decision to grant the licence, stating the application had been desk-assessed, subject to the DAFM's AAS procedure, and that the response from IFI had been considered prior to deciding to issue the licence. The appellant contended that the requirement to plant broadleaves under licence condition (k) was a contradiction with the 100% Sitka spruce restock species in Schedule 3 of the licence. The DAFM responded that the conditions modify the restock species submitted by the applicant and that on this occasion the condition takes precedence over the licence schedule. The appellant stated that the forest had been planted in 1991 and queried if an EIA screening had been carried out, was the contiguous block of forestry greater than 50ha, and stated the licence should not have been granted if the forest was not established in accordance with the law. He indicated that previous to afforestation the site would have contained hedgerows, scrub and a Townland boundary hedgerow. He queried was this addressed in the Harvest Plan. The appellant stated there is c.22ha of forestry in the proximity of the proposal and queried why the application had not been referred to the National Parks and Wildlife Service (NPWS) given that it is located within an SPA. He contended that the DAFM's Hen Harrier Green Zone protocol does not align with the precautionary principle. The appellant stated that the Ecologist reviewing the AAR/AAD did not have access to the current location of Red Zones at the time of reviewing. The DAFM stated that the nearest Red Zone is c.2km from the project site and that they followed the procedures agreed with the NPWS and detailed in Annex 21 of the Forestry Standards Manual. The appellant stated that reforestation with Sitka spruce is assumed but that a change of land use type may be required in order to maintain or restore the status of the Hen Harrier in the SPA. He submitted that the AA contained lacunae and that this forest would not be planted within an SPA now. He stated there are watercourses throughout the site and that the AAS references the wrong River Sub-Basin; the Nenagh\_010. He stated the project site is hydrologically connected to the Lower River Shannon SAC and that this site should not have been screened out as water from the site will end up there, possibly contributing to a cumulative effect. He stated the expert review had not noticed the inclusion of the wrong Sub-Basin in the AAR. The Appellant queried the process and the dates involved in the DAFM's internal review of the AAR/AAD prior to the external review on the 19<sup>th</sup> June 2020 and questioned how the AAD can reference the AAR when both were completed on the 9<sup>th</sup> June 2020. The appellant stated the Lower River Shannon SAC should not have been screened out as it is part of a wetland system depended upon wholly, or in part, by migratory water birds and queried how there could be no impact given the proximity of the proposal at c.200m.



The applicant described the proposal site as having a moderately easterly slope and was on the eastern edge of a larger block of forestry and otherwise surrounded by farmland. He stated a desk-assessment had identified a hydrological connection via two tributaries of the Gortnagowna which rise within the project lands flowing east. He said the nearest Natura site was c.39km by hydrological distance. He stated the proposal did not constitute deforestation and that prior to commencement, the operations manager would walk the site with the contractor to appraise them of any environmental factors and the details of the Harvest Plan. The applicant stated that dipped plants would be used at restock and that the Local Authority were notified annually of areas where chemical spraying was planned and that signage is erected on-site stating that the area has been sprayed. The applicant, responding to a FAC question, confirmed the underlying River Sub-Basin is the Nenagh\_020.

The appellant contended that the Lough Derg SPA could not be screened out for significant effect because the wetlands therein would be at risk from by an impact on water quality. He stated that just because this SPA is c.39km away that doesn't mean it can't be impacted. He queried at what distance an effect would be a risk.

The applicant stated the building adjoining the project site was in their ownership and was disused. Responding to a FAC query, the DAFM stated that condition (i) was added in response to the IFI's request, was not in conflict with other licence conditions, and that different types of watercourses would be crossed by different means (log bridges, culverts etc.). The FAC queried the reasoning for the distances used in the DAFM's Habitats Table which is used to screen out Natura sites. The DAFM stated that these screen-out rules were the result of an ecological review of their processes. Responding to the FAC, the DAFM confirmed the correct River Sub-Basin is the Nenagh\_020 that the AAS incorrectly references the Nenagh\_010 waterbody. The FAC queried the reference to the Gortnagowna 'water body' in Section 9 of the AAR and it was confirmed that this referred to a stream.

The applicant confirmed that access to the site would be from the existing forest road in the adjoining block of forestry to the west. The applicant was unable to confirm the status of the underlying waterbody as his internet coverage would not allow access for him to check. He stated the status was known at the time of submitting the application.

The FAC questioned the appellant as to which specific objectives for the underlying waterbody he was referring to in his grounds of appeal. There was a discussion about the details of Article 4 of the WFD and how they relate to the appellants grounds of appeal and the FAC stated that the primary purpose of the Oral Hearing was an information gathering exercise for the FAC.



The applicant's concluding remarks stated that the water quality conditions of the felling licence would be adhered to. The DAFM stated that the project site is not within 1.2km of a Hen Harrier Red Zone and that the proposal would have no negative impacts and some potential positive impacts on the species. They further stated that if the NPWS notified them of a new nearby Red Zone during the breeding season that operations on site will cease. The appellant reiterated that the licence states restocking should be 100% Sitka spruce with no caveats regarding broadleaves. He queried the scientific basis for the DAFM's Habitats Table and contended his point regarding the location of Red Zones is that the external Ecologist did not have updated locations at the time of reviewing. He also stated that he had received a response to an AIE request to the DAFM stating no records exist of their agreement with the NPWS regarding the Hen Harrier protocol.

The FAC had regard, in the first instance, to the submission 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 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 clearfelling 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 considered the grounds relating to the potential for the proposal to impact on water quality. The FAC noted the inclusion of specific conditions for the protection of water quality (h, i, n, o, p, q, r, s), which include conditions recommended by IFI, and the requirement for the Licensee to adhere to the Forestry and Water Quality Guidelines (condition a) and the Interim Standards for Felling and Reforestation (Condition t). The FAC noted the current status of the Nenagh\_020 waterbody is rated as 'Good' and 'Not At Risk'. Based on the information before it, the FAC is satisfied that there is no convincing evidence that the proposed development would result in a negative impact on water quality.

Regarding the Stage 1 and Stage 2 AA determinations, the FAC observed that the DAFM carried out an AAS of Natura sites within 15km , and extended that 'likely zone of impact' to include Lough Derg (Shannon) SPA. The potential for significant effect on the SSM SPA was identified 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 independent Ecologist, and the site-specific mitigation measures described therein were attached as conditions of the licence issued. The FAC noted the DAFM's error of referencing the incorrect waterbody (Nenagh\_010) in their AAS but also noted that the correct River Sub-Basin (Nenagh\_020) was referenced throughout the AAR. The FAC observed that the application site is in a separate Sub-Catchment to the Lower River Shannon SAC and, based on the evidence before it, does not consider that this SAC should have been screened in for AA. The FAC noted the appellant's contention regarding the delayed updating of Hen Harrier Red Zone data but also noted the DAFM's evidence that the nearest Red Zone is c.2km from the application site in this instance. In the particular circumstances of this case, the FAC is satisfied that the Stage 1 and Stage 2 AA determinations arrived at by the DAFM are correct and in line with the requirements of the Habitats Directive. The FAC is also satisfied the mitigations from the AAD are reflected in the conditions of the licence and include condition (k), which the FAC is satisfied applies to the proposal and is not superseded by the planting schedule.

The FAC had regard to Article 6(3) of the Habitats Directive and its provisions for obtaining the opinion of the general 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 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 Harvest Plan is, in fact, a document outlining general environment and safety rules and that all of the licenced operations on site must comply with the conditions of the felling licence.

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 and for the animal species listed in Annex IV (a) of that Directive, the FAC observed that the appellant did not provide any site-specific evidence in relation to any species of concern. The FAC considers that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the information



before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the 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 and conditions relating to DAFM inspections of the licenced operations at various stages. The FAC considers that the enforcement of the licence conditions is a matter for the DAFM and concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

Regarding additional conditions related to the spraying of chemicals, the FAC noted the DAFM's submission that the use of PPPs in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU 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), and that users of PPPs shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. In these circumstances, the FAC concluded that additional conditions as described by the appellant should not be attached to the licence.

Based on the information before it, the FAC concluded that the DAFM did not make a serious or significant error, or series of errors, in their decision to issue the licence, and did so in compliance with fair procedures. 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 black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee

