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12th March 2021

Subject: Appeal FAC670/2020 in relation to felling licence TFL00135218

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 TFL00135218 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 14th August 2020.

Hearing

An oral hearing of appeals FAC670/2020 was held by the FAC on the 4th 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's representative:	[REDACTED]
DAFM representatives:	Ms Eilish Kehoe, Mr Mark Twomey & Ms Orla Coffey

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 vary the decision to grant felling licence TFL00135218.

This felling licence covers both thinning (in 2020 and 2022) and clearfelling (in 2025 and 2027) operations across five plots on a site of 38.3ha in Cloghboola Beg, Co. Cork. The species to be felled is 100% Sitka spruce and the proposed restock species is 90% Sitka spruce and 10% Additional Broadleaves in all five plots. The underlying soils are predominately highly modified peat & peaty Podzols/Blanket Bog. The slope is flat to moderate (<15%). The project area is crossed by aquatic zones and is located in the Blackwater (Munster) Catchment, the Blackwater[Munster]_SC_050 Sub-Catchment and the Owenbaun (Rathcool)_010 Waterbody and is within the Munster Blackwater *Margaritifera* SAC Catchment. The Owenbaun (Rathcool)_010 is not a High Status Objective Waterbody, its status is rated as 'Good' and 'Not at Risk' by the Environmental Protection Agency (EPA) under the Water Framework Directive (WFD). As per the DAFM information there are several watercourses present throughout the project lands. The upper reaches of the Owenbaun River flow along the western boundary of Plots 1 and 2 and the Mushera River headwater, a tributary of the Owenbaun River lies within the boundary of Plot 3. The Owenbaun River tributary stream occurs in Plot 4. Drainage ditches running through the project site discharge to these watercourses. The Owenbaun River is designated as part of the Blackwater River (Cork/Waterford) SAC (BRCW SAC) 2km downstream of the project lands.

The Applicant submitted a felling application with associated maps, and an original, and subsequently revised harvest plan. The DAFM completed an initial screening for Appropriate Assessment (AA) that considered two Natura sites within 3km of the proposal. The BRCW SAC was screened in for AA due to its direct hydrological connectivity to the site of c.2km and the potential for siltation/sedimentation, nutrient enrichment and changes in water flow patterns. The Mullaghanish to Musheramore Mountains SPA (MMM SPA) was screened in for AA as part of the proposed development is within the SPA and the significance of the project area for foraging, breeding, roosting etc. for the Hen Harrier; the Special Conservation Interest of the SPA. Based on the results of this screening, the DAFM required the Applicant to submit a Natura Impact Statement (NIS). The DAFM completed an AA Report (AAR) via an external Planning and Environmental Consultant and they carried out a review of the original AAS (dated 18th February 2020). This AAR also contained an AAS of seven Natura sites within 15km of the proposal.

This AAS screened in the same two sites for AA, and also screened out the below Natura sites due to the lack of hydrological connectivity, the nature of the Qualifying Interests (QIs)/SCIs, the nature of the habitat at the felling site and the scale of the development:

- Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC
- Mullaghanish Bog SAC
- St. Gobnet's Bog SAC
- The Gearagh SAC
- The Gearagh SPA

The AAR described a number of site-specific mitigation measures to protect the QIs/SCIs of the BRCW SAC and the MMM SPA. It also contained an in-combination assessment which consulted various planning websites and the DAFM's internal records to assess the cumulative impact of the proposed development with other plans and projects in the vicinity. The AAR concluded that the proposed development, individually or in combination with other plans and projects, will not adversely affect the integrity of the BRCW SAC or the MMM SPA.

The DAFM produced an AA Determination (AAD) dated 8th July 2020. The AAD states that, in undertaking the AA of the likely significant effects of the proposed activity on European sites, the DAFM considered;

- The application, including all information submitted by the Applicant, information available via iFORIS (including its GIS MapViewer), responses from referral bodies,
- Any subsequent supporting documentation received from the Applicant, including the NIS and the (revised) Harvest Plan dated 17th October 2019.
- The independent expert report by the external Planning and Environmental Consultant commissioned by the DAFM to inform the AA.

The AAD contains a review of the AAR by an internal DAFM Ecologist and states that the DAFM consider the AAR contained a fair and reasonable examination, evaluation and analysis of the likely significant effects of the proposed project on the environment, in particular the BRCW SAC and the MMM SPA, and adequately and accurately identifies, describes and assesses those effects, "except in the case of the following". The DAFM lists eight corrections of errors contained within the AAR and states that the assessment, with the exception of the errors outlined, is thus adopted as the assessment of the DAFM. The AAD contains site-specific measures to be attached to any licence issued and outlines the DAFM's basis for their determination and concludes that "for the purposes of 42(16) of S.I 477/ 2011, the DAFM has determined that the project will not adversely affect the integrity of any European site."

The DAFM referred the application to the Cork County Council (CCC), the National Parks & Wildlife Service (NPWS), Inland Fisheries Ireland (IFI) and the DAFM Archaeologist. The NPWS did not respond. CCC responded on the 26th July 2018 stating that the Applicant should have regard to the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended). They also stated that an AA may be required and if the project involves provision of access to a public road, planning permission may also be required. IFI responded (24th May 2018) that subject to compliance with the Forest Harvesting and the Environment Guidelines and the Forestry and Water Quality Guidelines; they had no objection in principle to the proposed operation. They also listed a number of conditions regarding protection of water quality to be included as licence conditions. The DAFM Archaeologist responded 5th February 2019 stating the areas proposed for felling do not contain any Recorded Monuments but the access routes to a number of the plots are contiguous to several Recorded Monuments and includes specific conditions to be adhered to during the proposed works and includes maps of operational exclusion zones.

The licence issued on the 14th August 2020 and is exercisable for 8 years. It is subject to relatively standard conditions (a) to (g) plus:

- (h) - States the site is within a Higher Likelihood of Nesting Area (Red Zone) and details the procedures regarding disturbance operations and Hen Harrier SPAs
- (i) - Specific archaeological conditions taken from the Archaeologist's report.
- (j) - Adhere to Inland Fisheries Ireland conditions of the 24/06/2018.
- (k) - Adhere to Archaeological recommendations of the 5/02/2019. Thin 33% of trees evenly distributed across the site in subsequent thinning; Clearfell Plot 2 in 2025.
- (l) - Adhere to Appropriate Assessment Determination of the 8/07/2020. Adhere to Harvest Plan of 17/10/2019, taking AAD conditions into account.
- (m) - Strictly adhere to the Standards for Felling & Reforestation (October 2019). These Standards replace the existing Forest Harvesting & the Environment guidelines (2000).

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:

- Breach of Article 4 (3) of the EIA Directive 2014/52/EU - this licence is in a class of development covered under Annex II of the EIA Directive.
- DAFM has failed to carry out an adequate EIA screening of the proposed development.

- The afforestation of these lands was carried out without any screening for the requirement for an EIA. No licence should be awarded for felling activity until there has been a retrospective assessment of the need for an EIA for the afforestation of these lands.
- 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.
- The mitigations in the AAD are not sufficient to ensure compliance with Article 6.3 of the Habitats Directive.
- The seasonal mitigation for protecting the Hen Harrier is not sufficient to comply with the requirement of Article 6.3 of the habitats Directive.
- The AA In-Combination assessment is flawed as the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives.
- The Minister has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination.
- The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation
- The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence
- The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.
- Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a strict system of 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.
- Licence conditions do not provide a system of protection for all wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive

The DAFM Forestry Inspector submitted a response to the appeal in a written statement to the FAC and stated that the site was desk assessed as per the Forest Service Standard Operating Procedures and the AA Procedure (26th November 2018 version). The site was field inspected on the 11th March 2019. Due

to the site being partially located in the MMM SPA and the hydrological connectivity to the RBCW SAC it was referred to the Ecology Unit for AA and observations. An AAR and AAD were produced. After detailing site specific mitigation measures, the conclusion of the AAD was that this project, both alone and in combination with other plans or projects, will not have a significant effect on the Natura sites listed therein. The issues raised in the submission were considered within the suite of guidelines, standards and procedures within which the (Forestry) Inspectorate operate, along with referral to the Ecology Unit; a recommendation to grant a licence was based on these. I would recommend referring the appeal submission onto the Ecology Unit to address the ecological issues raised.”

The FAC held an Oral Hearing on the 4th February 2021. The FAC members sat in person and remotely at this hearing. The Appellant, the Applicant’s Representative (AR), and the DAFM all participated remotely. The DAFM detailed the process leading to their decision to grant the licence and reiterated their response to the grounds of appeal. The DAFM stated that the AAD was central to the decision to issue the licence and the AAD’s mitigation measures transferred to the licence.

The Appellant expanded upon their grounds of appeal stating this was a large, confusing case, highlighted an error in area (ha) between the AAR/AAD, stated there was a Freshwater Pearl Mussel (FPM) population downstream and the site was partially within an SPA. The Appellant referenced the Inspector’s Certification which stated the NPWS had “no objection” to the project going ahead but that there was no evidence of this. They highlighted that the AA screening had missed five Natura sites which were included in the AAR and that the DAFM found eight mistakes in the AAR. They indicated there was potential for impact on water quality and queried the DAFM’s Hen Harrier protocol contending that it is not fit for purpose and does not align with the precautionary principle. The Appellant stated they had submitted an AIE request to the DAFM regarding this protocol and that no records exist. They queried was the project site in a Red or a Green Zone for Hen Harrier and if Red, like stated in the AAR and NIS, the restrictions on operations during summer would lead to harvesting during the wetter months of the year leading to increased pressure on water quality. The Appellant contended the mitigations regarding ceasing operations during heavy rainfall were too open to interpretation, referencing European case law to support their view. They stated the AAR does not assess reforestation properly and that this site would not be afforested under current rules. They submitted the stacking areas in the harvest plan were not mapped correctly and that an EPA-mapped watercourse runs through the area of the proposal that is within the MMM SPA.

The FAC queried the DAFM regarding the NPWS's response and it was confirmed that there had been no response. The DAFM confirmed that the AAR had been produced following a desk assessment and clarified that, although licence condition (h) and the AAR reference a Hen Harrier Red Zone, the application site is actually within a Green Zone but that provision is made within the AAD for that status changing accordingly if the DAFM are notified by the NPWS.

The AR described the project lands as part of a recreational facility that was now closed and highlighted the financial challenge of the Applicant while waiting three years since applying for this licence. The AR stated an Ecologist had been engaged to produce the NIS and that only one plot (11% of the application site) was in the MMM SPA. They stated the forest was planted in 1988 and that it was not a suitable habitat for the Hen Harrier but its replanting would be an ecological bonus in this regard by creating suitable foraging and nesting habitat. They contended that forestry is part (30%) of the mix of habitats listed by the NPWS for the MMM SPA and that managing this forestry would benefit the Hen Harrier. The AR submitted that if a Red Zone condition was attached to the licence it should only apply to the area within the SPA. They stated it was clear that the planned operations would have to comply with the Interim Standards for Felling and Reforestation even though they were published after the application was submitted. They described the project lands as having walkways and a visitor centre and submitted that, like many Coillte forests, the area could be of recreational value even though it was predominately planted with conifers. Responding to the FAC, the AR stated that they agreed with the Appellant that the plot within the MMM SPA would not be approved for afforestation but that the remaining plots probably would be. They stated the area is rough agricultural land which may include some 'unenclosed' land but it would meet the DAFM's criteria of producing Sitka spruce of at least Yield Class 14.

The FAC queried the DAFM who clarified that the project site is not within a Red Zone and that it was a mistake that the licence conditions referenced a Red Zone. The DAFM confirmed the licenced area is 38.3ha and agreed that a portion of the licenced area would not be approved for afforestation. They stated that all afforestation within SPAs was currently suspended until the Hen Harrier Threat Plan is published. The FAC queried the AR regarding a theoretical changed licence condition who responded that the Applicant would have concerns about any restock condition that would not be financially viable. They stated that the establishment of broadleaves in general can be more expensive and if a licence condition imposed that, there would need to be financial compensation as it would not make for a commercial crop. They submitted that the plot in question was too elevated and exposed and not fertile enough for the establishment of broadleaves.

The DAFM described the project lands as dry, peaty Podzols, well served by an existing road network, including bridges, due to the recreational activities on site which would facilitate operations taking place without impacting water quality. They stated the project site is not within a FPM 6km zone and therefore the nearest FPM population was >6km away. The AR queried if the licence conditions could be changed and the DAFM stated the felling licence was now a matter for the FAC. The Appellant stated the project site drains to an arm of the BRCW SAC which adjoins a section mapped for the presence of FPM and Brook Lamprey; two QIs of the SAC. They stated that the 90:10 planting mixture of Sitka spruce to Birch would be 97:3 in 30 years time and queried how close to a Hen Harrier Red Zone was the project site. The DAFM stated the nearest Red Zone was >1km to the east of the proposed development.

In addressing the grounds of appeal, the FAC had regard, in the first instance, to the contention that the proposed development should have been addressed in the context of the EIA Directive. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine through thresholds or on a case by case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation 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 felling of trees, as part of a forestry 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 decision under appeal relates to a licence for the thinning and subsequent clearfelling and replanting of an area of 38.3ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

Regarding the submission that the afforestation of these lands was carried out without any screening for the requirement of an EIA, the FAC noted the Appellant did not provide any specific evidence to support this contention. The FAC gave consideration to the issue at hand; an appeal against the DAFM's decision to issue felling licence TFL00135218 and whether or not they did so in compliance with fair procedures

and without making a serious or significant error, or series of errors, in the process of making the decision.

The FAC considered the grounds relating to the WFD and the potential for clearfelling to impact on water quality. The FAC observed that licence conditions (a), (b), (j) and (m) describe specific measures and adherence to various standards and guidelines, as well as the conditions required by IFI in their referral correspondence, for the reason of protection of water quality. The FAC observed the licence conditions require adherence to the mitigation measures in the AAD for the protection of water quality and the aquatic QIs of the BRCW SAC. These include the Forestry and FPM Requirements and the Forestry and Otter Guidelines. Based on the information before it, the FAC concluded that there is no convincing evidence that the proposed development would give rise to a negative impact on water quality.

The FAC had regard to the submission that the mitigations in the AAD are not sufficient to ensure compliance with Article 6(3) of the Habitats Directive and the seasonal mitigation for protecting Hen Harrier is not sufficient to comply with Article 6 (3) of the Habitats Directive. The FAC noted the DAFM's statement in the AAD that they considered the initial application pack, iFORIS MapViewer data, referral responses, the NIS and the updated Harvest Plan submitted by the Applicant, and the independent expert report commissioned by the DAFM to inform the AA, before arriving at an AAD. The FAC noted that the AAR contains a number of errors and considers that these errors were sufficiently addressed by the DAFM in their AAD document. The AAD lists site-specific mitigation measures prescribed by the DAFM's internal Ecologist which include detailed requirements to protect the aquatic QIs of the BRCW SAC. The AAD also states the application site is not within a Red Zone and prescribes adherence with Appendix 21 of the Forestry Standards Manual which sets out an agreed protocol regarding breeding Hen Harrier and potential disturbance operations, developed by the DAFM and the NPWS, to mitigate potential adverse effects on the Hen Harrier. The FAC noted that this protocol provides for the prevention or cessation of potential disturbance operations in the event of a new Hen Harrier Red Zone being notified to the DAFM by the NPWS. Based on the evidence before it, the FAC concluded that the AAD measures are sufficient to ensure compliance with Article 6 (3) of the Habitats Directive. However, based on the evidence at the Oral Hearing, the FAC concluded that the DAFM made a significant error by including licence condition (h) which prescribes the Hen Harrier Red Zone protocol, prohibiting disturbance operations during the Hen Harrier's breeding season (1st April – 15th August).

Regarding the DAFM's In-Combination assessment, The FAC observed that the in-combination assessment in the NIS did not actually consider any other plans and projects beyond the proposed

development. The AAR includes an in-combination assessment which was informed by a review of licenced forestry operations and various planning websites listed therein (dated 18th February 2020) before concluding that there is no potential for the proposal to contribute to any cumulative adverse effects on any European site when considered in combination with other plans and projects. The FAC noted the Appellant did not provide any specific evidence to support their claim that the regulatory systems in place for the various plans and projects referenced in the in-combination assessment are not sufficiently developed and implemented. Based on the evidence before it, the FAC is satisfied that the in-combination assessment carried out by the DAFM was adequate.

The FAC considered the grounds regarding 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 had regard to 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 noted that a revised Harvest Plan was submitted which used the template provided in the appendices to the interim standards and includes ancillary information which details the potential risks, mitigation measures, machine selection and plans for aquatic zone crossings. The FAC noted that the AAD references the updated Harvest Plan and that licence condition (I) states adhere to Harvest Plan of 17th October 2019, taking the AAD conditions into account. In these particular circumstances, the FAC concluded that it would be appropriate for the Harvest Plan to be further revised to reflect the conditions of the AAD and re-submitted to the DAFM prior to commencement of operations.

The FAC considered the Appellant's submission that the licence should contain conditions relating to the commencement, carrying-out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the Licensee's adherence to the conditions of those licences and that enforcement of these conditions is a matter for the DAFM. The FAC had regard to the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. The FAC observed there is no statutory basis to enforce the Licensee to inform individual landowners. The FAC noted the use of plant protection products 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). Users of plant protection products shall apply the principles of good plant protection

practice, as provided for in SI 155 of 2012. In these circumstances, the FAC considered that a condition regarding the notification of certain parties should not be attached in this instance.

Regarding a requirement for the licence conditions to provide a system of protection for the animal species listed in Annex IV (a) of the Habitats Directive and for wild birds during the breeding and rearing season, the FAC noted that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC noted that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. In these circumstances, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

Based on the information before it, the FAC concluded that the DAFM made a significant error in the issuing of this licence by including an erroneous licence condition related to the Hen Harrier. The FAC concluded that the decision should be varied to correct condition (h) to reflect the Green Zone status of the project site confirmed by the AAD. The FAC also decided in the particular circumstances of this case that the licence should contain a condition requiring the completion, and submission to the DAFM, prior to the commencement of operations, of an updated Harvest Plan which reflects the requirements of the AAD conditions. The FAC concluded that, subject to the attachment of the following additional conditions to the licence dated 14th August 2020 (and all of the conditions attached to that licence), which varies the decision to grant the licence, the proposed development would be consistent with Government Policy and Good Forestry practice.

Additional conditions to be attached to the licence:

1. Prior to the commencement of operations on the site, the applicant shall submit to the DAFM a revised Harvest Plan which incorporates the mitigation measures prescribed in the AAD dated 8th July 2020, clearly indicating i) the location of the stacking areas, ii) the machinery exclusion zones, iii) the required setbacks from lakes, watercourses, and aquatic zones, iv) the location of silt traps, and v) the relevant watercourses within 50m of an aquatic zone to be excluded from 'cleaning' in relation to the protection of the Otter. The revised Harvest Plan shall be attached to, and become part of the DAFM file.
 - a. Reason: In the interests of providing clarity and to ensure the full range of environmental protection measures are recorded.

2. This area falls within a foraging (green) zone for Hen Harrier. As set out in the Forest Service document "Procedures regarding disturbance operations and Hen Harrier SPAs", specific procedures, agreed with National Parks & Wildlife Service, apply to disturbance operations within SPAs designated for Hen Harrier.

Disturbance operations include:

- timber felling (thinning, clearfell)
- timber extraction to roadside
- timber loading at roadside
- mechanical cultivation for both afforestation and reforestation
- forest road construction (and associated developments)
- the driving of fencing posts
- any other operation(s) the Forest Service may deem as creating disturbance.

Regarding sites wholly within Green Areas, a disturbance operation(s) associated with the licence can proceed during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, the Forest Service will notify the licensee in the future if any new Red Area (generated by a newly recorded nesting site) overlaps the site. From the date of receipt of this notification, no disturbance operation(s) associated with the licence is to take place within the breeding season. To do so will lead to the immediate cancellation of the licence (where trees remain standing) and may represent an offence under the Birds & Habitats Regulations 2011. If notification of a new Red Area is given within the breeding season itself, any ongoing disturbance operation(s) associated with the licence is to cease immediately on receipt of the notification, unless otherwise agreed with the Forest Service, and can only recommence after the breeding season has closed.

- a. Reason: to mitigate the impact of any potential disturbance operations on the Hen Harrier; the Special Conservation Interest of the Mullaghanish to Musheramore Mountains SPA.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee