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29<sup>th</sup> September 2021

**Subject:** Appeals FAC719/2020 and FAC763/2020 in relation to licence CE03-FL0203

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and 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 the parties to the appeal.

#### Background

Felling licence CE03-FL0203 for 13.1 ha at Loughatorick South, Pollagoona Mountain, Co. Clare granted by the DAFM on 28th August 2020.

#### Hearing

An oral hearing of appeals FAC719/2020 and FAC763/2020, of which all parties were notified, was held by the FAC on 17<sup>th</sup> February 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr. Iain Douglas, Mr. Seamus Neely, Mr. Vincent Upton
Appellant FAC719/2020:	[REDACTED]
Appellant FAC763/2020:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Luke Middleton, Ms. Eilish Keogh
Secretary to the FAC:	Ms. Marie Dobbyn

#### Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received including those at the oral hearing, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CE03-FL0203.

The licence decision pertains to a felling licence for an area of 13.1 ha at Loughatorick South, Pollagoona Mountain, Co. Clare. The site is comprised of Sitka spruce and lodgepole pine planted in 1978. Replanting would be of Sitka spruce, lodgepole pine and a small area of Japanese larch. The application includes inventory, restocking and environmental information, an appropriate assessment pre-screening

report, a harvest plan with operational and environmental rules and maps. The Applicant submitted a second pre-screening report dated 11th August 2020. The site is described as being on a blanket peat soil on gentle slope with a northerly direction. An aquatic zone (unnamed stream) flows along the eastern boundary of the project area in a northerly direction then flows into the Bleach River which flows west and discharges into Lough Atorick. This prescreening report suggests that Pollagoona Bog SAC (002126) and Slieve Aughty Mountains SPA (004168) should be screened in and proceed to Appropriate Assessment. The Applicant submitted an NIS dated 11th August 2020 with proposed mitigation measures for the Blanket Bog Habitat and for Merlin. As the forest lies outside (more than 1.2km) of a known location of breeding Hen Harrier and is within a mature coniferous forest which is not considered suitable habitat for the species it is concluded that no specific mitigation measures are required. In relation to the Lower River Shannon SAC it is submitted that the lower reaches of Lough Derg are designated for the Lower River Shannon SAC approx. 52.3 km south east of the project area. This site was screened out in the Applicant's screening based on the nature and scale of the project, the hydrological distance of 52.3 km and the assimilative capacity of the intervening watercourses and it was concluded that there is no potential for significant effect on this downstream European site.

The forest site is within the boundaries of Slieve Aughty Mountains SPA and partially overlaps Pollagoona Bog SAC (1 hectare). The application was referred to Clare County Council, which did not provide a response, and the NPWS. The NPWS responded that the proposal does not fall within a Higher Likelihood of Nesting Area for the Hen Harrier and that as such the works should follow the protocol agreed between the NPWS and Forest Service for operational works in Hen Harrier SPAs. That the Forest Service must carry out a screening for appropriate assessment to determine if the proposed activity, on its own and in combination with other plans and projects, may have a significant effect on the European Site and that the conservation objective of this European Site is to maintain or restore the favourable conservation status of Hen Harrier and Merlin.

The DAFM undertook a screening for Appropriate Assessment and considered 14 European sites specifically. Each site is considered in turn and reasons for the conclusions reached are provided. The DAFM documented a consideration of other plans and projects in combination with the proposed felling. Three sites were screened in, Pollagoona Bog SAC IE0002126, Slieve Aughty Mountains SPA IE0004168, Lower River Shannon SAC IE0002165. An Appropriate Assessment Determination was prepared by an Ecologist that outlined the required mitigation measures in relation to the qualifying interests and special conservation interests of sites IE0002126 and IE0004168. In relation to IE0002165, it was determined that no mitigation measures were required due to the distance and nature of the connection. A licence issued on 28th August 2020 with conditions.

There are two appeals against the licence. FAC719/2020 submits that the application is for felling and reforestation and that no Environmental Impact Assessment screening has ever been carried out and that it is necessary to establish if the planting of the forest complied with the law. It is submitted that no decision to replant can be made without an Environmental Impact Assessment Report screening and that no appropriate assessment screening has been carried out according to the requirements of the EU Directive and Irish implementing law.



FAC763/2020 submits that they made a submission on the application but were not notified of the decision and the Minister has failed to comply with the Forestry Regulations and the Forest Service has failed in an appropriate timeframe to supply relevant records that have informed its decision to award this licence. It is submitted that there has been a breach of Article 4(3) and 4(4) of the EIA Directive 2014/52/EU in that the DAFM has failed to carry out a screening to determine the requirement for EIA, that the application does not represent the whole project and that aspects of the environment likely to be significantly affected by the project have not been identified in the application. It is submitted that there is no evidence that the impacts on a European Annex I habitat in the vicinity of the project have been adequately considered and that the Stage 2 AA Determination is not legally valid in relation to site 0002126. A number of grounds relate to the AA process undertaken by the DAFM contending that the in-combination information lacks sufficient detail and clarity, that the mitigation measures are not precise and clear, that residual effects cannot be excluded and that therefore the in-combination effect has not been adequately assessed, that the in-combination assessment of other plans and projects cannot be substantiated, that the DAFM have not sought the opinion of the general public in regards the AA Determination. It is submitted that the licence and its associated operations threatens the achievement of the River Basin Management Plan for Ireland 2018-2021. That the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation. A number of grounds relate to licence conditions and contend that the conditions do not provide a system of protection for wild birds consistent with the requirements of Article 5 of the Birds Directive or animals species listed in Annex IV(a) of the Habitats Directive. That the licence conditions should include commencement and conclusion notifications, a requirement for the works to be inspected by the FS, and notifications regarding the spraying of chemicals.

In statements to the FAC in response to the appeals, the DAFM submit that it is satisfied that all criteria in its standards and procedures have been adhered to in making a decision on the application. It is submitted that the Appellant had requested information on 451 applications and that a number of these had been subsequently appealed. It is submitted that the 13.10 ha felling and reforestation project licenced as CE03-FL0203 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors. The clearfell and reforestation project was screened in and an Appropriate Assessment carried out for the European site considered during the screening exercise i.e. the Pollagoona Bog SAC IE0002126 and Slieve Aughty Mountains SPA IE0004168. The potential for the project to result in impacts on the Qualifying Interests and Special Conservation Interests of the Pollagoona Bog SAC IE0002126 and Slieve Aughty Mountains SPA IE0004168 were identified on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described. It was concluded that the proposed felling and reforestation project, when considered on its own, will not result in any adverse effect on the Pollagoona Bog SAC IE0002126 and Slieve Aughty Mountains SPA IE0004168 Conservation Interests and Conservation Objectives. DAFM determined that there is no potential for the proposed works to contribute to any cumulative adverse effects on the screened in European sites when considered in-combination with other plans and projects. It is submitted that the site-specific mitigations identified in the AA Determination Statement were attached as conditions of

licence issued for felling and reforestation for CE03-FL0203. It is submitted that public consultation is provided for in the application and assessment process and that the Minister has regard to any submissions received in making a decision.

Regarding EIA it is submitted that it is the position of the Department that clear-felling and replanting an already established plantation forest 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. That an application for a licence to clear-fell and replant an established plantation forest does not constitute a change or extension of an earlier authorisation for that project and that there is also no requirement on a forest owner/forest manager to apply for a licence for clear-felling and replanting to continue to operate the forest. In relation to water quality, the statement submits that the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation.

Regarding licence conditions the DAFM submitted that it is "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." It is submitted that the Minister may attach or vary licence conditions and that in this instance a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM. It is submitted that information submitted by the Applicant 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 were considered during the licencing process and that 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. The DAFM submitted that 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) and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPE is used in a targeted way.

An oral hearing of the appeal was held and attended by the parties as identified. The DAFM outlined their processing of the application including the data sets and analysis undertaken and referrals made. They submitted that the application was referred to the County Council and the NPWS and that the NPWS provided a response. They submitted that the proposal was not covered by the EU EIA Directive



and that an appropriate assessment screening and subsequent appropriate assessment in relation to the identified sites was undertaken. They submitted that the Appropriate Assessment Determination was prepared by an Ecologist with reference to the Natura Impact Statement submitted. They submitted that the mitigation measures, including those for Merlin, had been prepared by a specialist Ecologist. They submitted that they are satisfied that the decision was made following their procedures and policies but that they had no record of a notification being made to the Appellant in FAC763/2020.

The Appellant submitted that the site is on 100% peat and lies within the boundaries of the Slieve Aughty Mountains SPA and partially within Pollagoona Bog SAC. They submitted that the closest watercourse flows to Lough Atorick and that this lake has not been assigned a status and that therefore a decision on the application could not be made that would comply with the Water Framework Directive and reference was made to a recent decision of the High Court (Hyland J.) in *Sweetman v An Bord Pleanála* [2021] IEHC 16 (the "Hyland judgement"). They submitted that there is no scientific basis for the mitigation measures proposed in relation to the SPA, that the requirement to contact the NPWS should have been included in the Appropriate Assessment, that the site lies 40 metres from a Hen Harrier "red zone" and that Hen Harrier are not site faithful, and that continued use of the site could impact on the SAC. They made reference to a publication entitled *Raptors: a field guide to survey and monitoring* (Hardey *et al.* 2013) in relation to mitigation measures included for Merlin. This publication recommends a distance of 300-500 metres to minimise risk of disturbance when viewing nests. They submitted that they had become aware of the decision through the DAFM website.

The Applicant described the site and application. They submitted that the application was not a class of project covered by the EIA Directive. They submitted that due to the nature of the proposal, the distance and nature of hydrology no impacts on Lough Derg would occur. They submitted that plants used in restocking site would be treated in the nursery and that any spraying at the site would be undertaken based on needs and risk. It was submitted that the local authority is informed where spraying is undertaken and signs are erected. They submitted that access is good and that the public road lies to the northwest.

Following the conclusion of the Oral Hearing, the FAC formed the view given the specific and detailed nature of the academic references cited by the appellant relating to the licence conditions concerned with the protection of Merlin (*Falco columbarius* A098), and in line with Article 14B of the Agricultural Appeals Act of 2001 (as amended) and in keeping with fair procedures, that the parties should be allowed make submissions to the FAC on these issues and that these submissions would then be circulated to all parties for final observations. The FAC wrote to the DAFM on the 27th of April 2021 seeking observations on the submission at Oral hearing in the context of possible disturbance as identified in the Appropriate Assessment undertaken. A response was requested within two weeks.

On the 10th of May 2021, DAFM sought a one-week extension to respond to this request which was agreed to by the FAC. On the 20th of May, DAFM requested a further extension to the 18th of June 2021 to respond, which was also agreed to by the FAC.

On the 22nd of June 2021, the FAC received a written submission from the DAFM in response to the query raised. This submitted that in the preparation of its Merlin Mitigation, the DAFM had engaged a named expert and outlined the expert's academic and professional expertise. It further put forward the view that the relevant passage in *Raptors: a field guide to survey and monitoring* (Hardey et al. 2013), relies on the publication *A review of disturbance distances in selected bird species: A report from Natural Research (Projects) Ltd. to Scottish Natural Heritage* (Ruddock, M. & Whitfield D.P. 2007). DAFM submitted that:

*The paper highlights different views around the disturbance distance from "an approaching human" presumably in full view of the nest ranging from <10 metres to 300 – 500 metres. The summary also notes that empirical records of disturbance distances were few in the literature and confined to observations of non-breeding birds which flushed at up to 125 m distance from an approaching human. DAFM then submitted that the appellant's reference to 300 to 500 meters is taken out of context and should not be used to undermine the Department's Merlin mitigation. DAFM also stated its commitment to reviewing all its migration practices on a continuous basis and updating it where necessary and where new information becomes available, and stated that a number of related studies are due for publication in 2021.*

On the 24th of June 2021 the FAC forwarded the DAFM submission to the appellant and applicant and invited comments. The applicant did not make any observations. The appellant responded on the 7th of July 2021 in the form of a written submission accompanied by correspondence received by the appellant and DAFM from DAFM in relation to an AIE request previously submitted by the appellant. This was submitted to have sought information on a mitigation protocol in relation to Merlin where the species is a qualifying interest of a Natura 2000 site, and a response indicated that no such records exist.

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that the EU 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 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 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 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 13.1 hectares.



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. Therefore the FAC concluded that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans projects, having regard to the conservation objectives of that designated site. An Appropriate Assessment Screening was undertaken by the DAFM and identified 14 sites within 13 within 15km and 1 additional. Each site is considered in turn and is screened out for Appropriate Assessment and reasons are provided. The DAFM undertook and documented a consideration of the potential for in-combination effects and concluded that DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites in relation to those that were screened out. Three sites were screened in Pollagoona Bog SAC IE0002126, Slieve Aughty Mountains SPA IE0004168, Lower River Shannon SAC IE0002165. The Appropriate Assessment Determination prepared by an Ecologist subsequently determined that effects on site IE0002165 could not occur due to the distance from the site. This is also reflected in the Natura Impact Statement (NIS) submitted. Mitigation measures as identified in the NIS are identified in the Determination for inclusion in the licence conditions and the document concludes that *"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 FAC had further consideration of to the measures proposed in relation to Merlin and the submissions made by the parties. It appears to the FAC that there is agreement in the various literature submitted by DAFM and the appellant that Merlin may be subject to disturbance by forestry operations, and that there is a scarcity of empirical data in relation to disturbance of breeding birds. The appellant has submitted literature, derived from surveys of expert opinion, that recommends maintaining a disturbance distance of 300-500 metres. DAFM have submitted that a named expert ecologist has supported the development of a standard of 100m from the forest edge at which the possibility of disturbance can be precluded, although this information was not recorded in any of the documentation before the FAC. In addition, the Appropriate Assessment was prepared by an Ecologist. All parties to the appeal and the NPWS were invited to submit their views in relation to that standard as included in the relevant condition of the licence, and the FAC has considered the responses received. The FAC noted that the reference submitted by the Appellant, *Hardey et al. (2013)*, is derived from Scottish research and a survey of primarily British experts whose individual experience with specific species was not recorded. The identified Irish research has noted a difference in nesting habits between the Irish and British Merlin populations, with the former displaying preference for nesting in trees and the latter in open habitat. The research underlying the recommendation in *Hardey et al.* itself notes the wide variety of responses received in the survey, the range of which includes 100m, and suggests that this might be

partially attributed to experience with different nesting habits with specific reference to tree versus open habitat nesting individuals. Nonetheless in considering the information provided in relation to the processing of the application, the submissions at Oral Hearing, and submissions provided in post-hearing correspondence, the FAC is not satisfied that in the Appropriate Assessment of the licence under consideration the DAFM have evidenced or reasoned the sufficiency of the mitigations proposed as they relate to the conservation status of Merlin. The FAC is satisfied that this represents a serious error in the processing of the application and making a decision to grant the licence and that this decision should be set aside and remitted to the Minister to address the matter.

In relation to the other aspects of the Appropriate Assessment including the consideration of other plans and projects, the FAC does not consider that any convincing evidence was provided to it that the consideration of other plans and projects in combination with the proposal or the other aspects of the assessment were deficient.

The Application was published on the DAFM website and the FAC is satisfied that the Minister is required to have regard to submissions made in making a decision on the application. The FAC is not satisfied that the DAFM erred in this regard. Regarding accessing the file and notification, according to the description provided to the FAC the Appellant was provided with the Application on the 19<sup>th</sup> February 2020. The Appellant submitted at the oral hearing that they were not notified of the decision but that they became aware of the decision from the DAFM website and submitted a request for documentation on 31<sup>st</sup> August 2020 but that this was not provided until 18<sup>th</sup> September 2020. The FAC considers that this issue related to the provision of information after the decision was made, that the Appellant had appealed the decision and that they were provided with an opportunity to make oral submissions at an oral hearing before the FAC.

Regarding the achievement of the River Basin Management Plan and objectives of the Water Framework Directive (WFD), the most proximate waterbody to the project is a stream (un-named in EPA data) that passes the eastern boundary of the felling coupe and flows northwesterly into Lough Atorick. This stream forms part of the Bleach 10 waterbody which is recorded as being assigned a 'Good status' and to be 'Not at Risk' for the third 2013-2018 WFD monitoring cycle. The appellant has submitted that Lough Atorick has not been assigned a status according to EPA data. Apart from the connectivity via the un-named stream with a good status as described above, the project site is separated from Lough Atorick by forest and the Woodford Road at a distance of ca. 300m or greater. The DAFM submit that the licence conditions provide operational measures to prevent direct and indirect impact on water quality arising from the operation, this includes exclusion zones in proximity to watercourses and the implementation of silt traps and other measures to close off direct pathways to watercourse. There would be no direct exploitation of a waterbody. No evidence was submitted to the FAC that these measures might be inappropriate in this particular case. The Application was referred to the County Council and the NPWS, both of which have a role in meeting the objectives of the WFD. The FAC is not satisfied that the felling operation undertaken in line with the licence conditions would pose a significant risk to water quality or that the status of any waterbody would be negatively affected by the operation or that the Minister has erred in this regard. The FAC also took the view that the Hyland judgement



concerning 'unassigned' water bodies did not apply in this case, as the measures outlined are such that there could be no effect on the unassigned waterbody arising from the project.

The application included inventory, restocking, environmental information, an Appropriate Assessment pre-screening report, a harvest plan including operational and environmental rules and maps. While the harvest plan does not include all of the information identified in the Interim Standards for Felling and Reforestation, this plan was not requested by the Minister as part of the application process. The FAC considers that the information available in the decision-making process was appropriate and acceptable in this instance.

In relation to the appellant's stated ground of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM statement and note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing or animals on the proposed site. The DAFM have attached licence conditions that relate to the Appropriate Assessment undertaken in relation to the Slieve Aughty Mountains SPA and its related special conservation interests.

In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM. Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence and that it would not be reasonable to attach a licence condition requiring actions to be undertaken by the DAFM. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. In the above circumstances and for the reasons outlined, the FAC is satisfied that there was a serious error in the making of the decision in relation to CE03-FL0203. As a result, the FAC has decided to set aside and remit the decision to the Minister for Agriculture, Food and the Marine to undertake a new Appropriate Assessment of the proposal before making a new decision in relation to CE03-FL0203.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee