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4th October 2021

Subject: Appeals FAC 572 and 624/2020 in relation to licence GY12-FL0192

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, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Background

Licence GY12-FL0192 for felling of 11.65 ha at Derrybrien South & Derrybrien West, Co. Galway was issued by the DAFM on 17th July 2020.

Hearing

An oral hearing of appeals FAC 572/2020 & 624/2020, of which all parties were notified, was held by the FAC on 3rd February 2021.

In Attendance at Oral Hearing:

Department Representative(s):

Mr. Frank Barrett & Ms. Eilish Kehoe

Appellant FAC 624/2020:

[REDACTED]

Appellant FAC 572/2020:

[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway

Secretary to the FAC:

Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and in particular the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence GY12-FL0192.

The licence pertains to the felling and replanting of an area of forest on 11.65 ha at Derrybrien South & Derrybrien West, Co. Galway. The forest is currently composed of approximately 93% Sitka spruce and 7% Broadleaf, replanting would comprise 95% Sitka spruce and 5% Broadleaf with 5% of the project area being open space. The project is described in the DAFM Appropriate Assessment Screening (AAS) form as having an underlying soil type of Peaty Gleys, the slope of the site is described as predominantly moderate (0-15%) and the habitat as predominantly WD4. The project is described as being located in the Kinvarra-Coastal catchment, the Cannahowna_Sc_010 Sub-Catchment, the Owendalulleagh_020 waterbody (83%) and the Owendalulleagh_030 waterbody (17%). The proposal was referred to the NPWS on 10th December 2019 and a reply was received on 22nd January 2020. The project was referred to Galway County Council on 8th January 2020 and there is no response from the Local Authority on the file provided to the FAC.

The NPWS / Department of Culture, Heritage and the Gaeltacht (DCHG) submission set out a number of nature conservation recommendations of the DCHG for the proposal and referenced the potential for flooding, which it outlined may affect downstream European Sites. The submission stated that the removal of the tree canopy, the exposure of underlying drains, and the cleaning of drains prior to any forestry related activity at this site, has the potential to lead to accelerated run-off and increased silt loading and further stated that on its own, or in combination with other forestry or similar works in the catchment, the project has the potential to have an impact on downstream wetland European Sites namely; Termon Lough SAC (001321), Cahermore Turlough SAC (002294), Caherglassaun Turlough SAC (000238), Coole-Garryland complex SAC (000252), and Lough Cutra SAC (000299). The submission went on to include that Forestry best practice should be followed during all phases of operations and that invasive species, if present, should be managed appropriately as part of the forests management so as to avoid their spread. It also enclosed an appendix containing more general points of relevance to assist in the consideration of the application.

Appropriate Assessment Screening and Determination

The DAFM undertook and documented a screening for Appropriate Assessment (AA) dated 13th May 2020 that found twenty-one European sites (17 SAC & 4 SPA) within 15km, one of which (004168 Slieve Aughty Mountains SPA) overlaps with the project area. The likely zone of impact was not extended to include further European sites in this case. It was found that an AA was required regarding 004168 Slieve Aughty Mountains SPA due to the location of the project within the European site while the other twenty sites (002181 Drummin Wood SAC, 002180 Gortacarnaun Wood SAC, 001913 Sonnagh Bog SAC, 000299 Lough Cutra SAC, 004056 Lough Cutra SPA, 002126 Pollagoona Bog SAC, 002117 Lough Coy SAC, 000318 Peterswell Turlough SAC, 002293 Carrowbaun, Newhall and Ballylee Turloughs SAC, 001912 Glendree Bog SAC, 000252 Coole-Garryland Complex SAC, 000308 Loughatorick South Bog SAC, 002295 Ballinduff Turlough SAC, 000286 Kiltartan Cave (Coole) SAC, 004107 Coole-Garryland SPA, 001926 East Burren Complex SAC, 001321 Termon Lough SAC, 002317 Cregg House Stables, Crusheen SAC, 004134 Lough Rea SPA and 000304 Lough Rea SAC) were screened out. The screening report provides the reasons for the screening conclusions reached for each of the screened European sites. An AA report and determination was undertaken that had a final sign off on 14th July 2020. This report reviewed the initial screening of the twenty-one European sites and agreed with the conclusions reached. An Appropriate Assessment was then undertaken for the screened in site (004168 Slieve Aughty Mountains SPA) with its Qualifying

Interests (QIs)/ Special Conservation Interests (SCIs), as appropriate to the site, reviewed and mitigation listed where required. Site specific measures were identified, and it was stated that the mitigations were to be inserted as conditions of the licence if approved. The proposal's potential to contribute to in-combination effects on European sites was also considered, with various planning sites and DAFM internal records consulted, with other plans and projects in the general vicinity of the site being listed. The licence issued on 17th July 2020 subject to the eighteen conditions (a-r) attached, which included those relating to environmental protection and sustainable forest management, road network and traffic safety, water quality, and mitigation as set out in the Appropriate Assessment Report (AAR) and Determination Statement (AAD).

The Appeals

The decision to grant the Licence is subject to two appeals and the Notices of Appeal and full grounds were provided to all parties. The grounds set out in appeal FAC 572/2020 include; that there is an (sic) development on this Applicants land whix (sic) requires EIA and no Eia has been preformed (sic), that the Appropriate Assessment screening did not comply with the decision of "Finlay J in Kelly", submitting that under the basic principles of EU law the decision is invalid as the Minister is being a judge in his/her case, that there has been no investigation as to whether the application site has complied with the requirements of EU law, that according to the heads of the new bill the Minister has assumed control of the FAC, and that the basic requirements of the NPWS have not been complied with.

The grounds set out in appeal FAC 624/2020 include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project and that the application does not describe any aspects of the environment which are likely to be significantly affected, that there is no evidence that the impact on non-designated European Annex I habitat has been adequately considered, no evidence that the impact on a nationally designated site has been adequately considered as part of the approval process, that the licence and its associated operations threaten the achievement of objectives set for the underlining (sic) waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21, that the Stage 1 and Stage 2 AA determination is not legally valid, that there has been inadequate consideration of feedback from a consultation body regarding the AA, that the opinion of the general public has not been sought under Article 6 (3) of the Habitats Directive on the AA Determination, that the harvest plan is not consistent with the Interim Standard for Felling & Reforestation, 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 Article 5 of the Birds Directive, that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Birds Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, that the licence should contain a condition requiring notification of commencement and conclusion of operations, that the licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works to ensure compliance, and that the licence should include conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

DAFM statement to the FAC

In the statements to the FAC relating to the two appeals, the DAFM submitted that their decision was issued in accordance with Department procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act and provided responses to the grounds of appeal. It also set out the relevant processing dates for the application. At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence. The DAFM representative clarified that some of the dates as provided on the SOFs were incorrect and provided the correct dates to the hearing. The DAFM representative reiterated the Department's contention that the proposal did not constitute a class of development covered by the EU EIA Directive and that it did not constitute deforestation. The DAFM Representatives submitted that the application was processed following the procedures in place and that the applicant had submitted a range of information, including maps, which were considered in processing the application. The DAFM representatives provided an overview of the processing including the issuing of referrals, the undertaking of an Appropriate Assessment screening, and the Appropriate Assessment and determination statement regarding the project.

Oral Hearing

At the oral hearing, the appellant (in the case of appeal FAC 624/2020) contextualised the submitted grounds of appeal and made more specific reference to some of the grounds including ground number 4, stating that he did not receive a copy of the NPWS submission with the appeal papers, while acknowledging that he had a copy of same. The Deputy Chair confirmed, following enquiry from the appellant, that the FAC had been provided with a copy of the NPWS (DCHG) submission.

The appellant also referenced requests that he had made to the DAFM seeking information on the rationale regarding the 100m buffer as mitigation in the case of Merlin and indicated that he had not received same. He also referenced a similar request that he has made to the DAFM in relation to a hen harrier protocol and submitted that there were delays in getting information from the NPWS onto the DAFM system. He quoted a reference to a field guide by Hardey J, Crick H, Wernham C, Riley H, Etheridge B and Thompson D (2013) titled *Raptors: A Field Guide to Survey and Monitoring*, 3rd Edition which he submitted recommended that when surveying Merlin nest sites, that it should be from a distance of 300m – 500m. He also stated that two of the European Sites listed on the NPWS submission had not been dealt with in the DAFM AAS report and that the Appropriate Assessment Determination report included a reference to “the DAFM internal Appropriate Assessment Report for LS01-FL0090”.

When asked at the oral hearing whether the DAFM had any further comment to make on the grounds regarding the consideration of submissions from consultation bodies, its representative reiterated that DAFM had taken full consideration of submissions received from consultation bodies in this case. The DAFM representative submitted that the FAC may contact the Department's own resources on ecology should it require further response on the submissions made by the appellant at Oral hearing in relation to the reference made regarding the buffer for Merlin.

At the oral hearing the applicant's representatives provided an overview of the application submitted, provided some clarification with regard to hydrology on the site, responded to matters raised by the appellant regarding the hen harrier zone as it affects this site, reiterated the applicant's view that the

project is not covered by the EIA directive and gave details of the briefings employed by the applicant when instructing contractors, to ensure that all conditions attached to licences are complied with.

Post Hearing Correspondence

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, and in line with Article 14B of the Agricultural Appeals Act of 2001 (as amended) and keeping with fair procedures, that the parties should be allowed make submissions to the FAC on these issues and that any submissions made would then be circulated to all parties for final observations. The FAC wrote to the DAFM on the 26th 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. (Note: the emphasis on <10 meters was added by DAFM). 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. One appellant (FAC 624/2020) responded on the 7th of July 2021 in the form of a written submission accompanied by correspondence between the appellant and DAFM in relation to an AIE request previously submitted by the appellant. This sought information on the mitigation protocol in relation to Merlin where the species is a qualifying interest of a Natura 2000 site, and the response indicated that no such records exist.

In the appellant's written submission, it was submitted that while it was stated that a named ornithologist was involved in the formulation of the DAFM mitigation for Merlin, no evidence of this involvement had been provided. The appellant pointed to the AIE request in this regard, to which DAFM had responded by stating that no records exist in relation to the formulation of a mitigation protocol. The appellant further disputed the DAFM contention that the reference to 300-500m was taken out of context, highlighting that

this figure was in the quoted literature in the context of minimising disturbance and not eliminating it. The appellant submitted that disturbance by an approaching observer was likely to be significantly less than forestry operations and submitted the view that the burden fell to DAFM to demonstrate that disturbance would not occur in the context of forestry operations following mitigation, and that no lacunae may occur in an AA and that in this instance such lacunae existed. The appellant submitted that the scientific literature relied upon by DAFM in the Appropriate Assessment: *The feeding ecology of Merlin Falco columbarius during the breeding season in Ireland, and an assessment of current diet analysis methods. Irish Birds 9:159-164.* (Fernández-Bellon, D. & J. Lusby. 2011) and *Breeding ecology and habitat selection of Merlin Falco columbarius in forested landscapes, Bird Study, 2017* (Lusby, J., I. Corkery, S. McGuinness, D. Fernández-Bellon, L. Toal, D. Norriss, D. Breen, A. O'Donaill, D. Clarke, S. Irwin, J.L. Quinn & J. O'Halloran. 2017); did not comment on disturbance distances; but that in one case observed that Merlin are vulnerable to disturbance from forest operations with respect to nesting preference; and in the other stated that the principle prey of Merlin are subject to disturbance by forestry operations. In conclusion the appellant submitted that evidence that indicated the possibility of a disturbance effect at distances substantially greater than those used by DAFM in its mitigation, and the only refutation offered by DAFM was to name an ornithologist who had advised in the mitigation.

Consideration by the FAC

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 EIA Directive and related matters. In its statement to the FAC, the DAFM submitted that the standard operational activities of clear-felling and replanting already established forest areas are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred. In considering this aspect, the FAC notes 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 11.65 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, that FAC agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

In relation to the contention in the grounds of appeal that there is no evidence that the impact on non-designated European Annex I habitat and on a nationally designated site has been adequately considered as part of the approval process, the FAC noted the submission made in the DAFM statement wherein it set out that the project area is located within an area dominated by WD4 (Coniferous forest) as set out in the Pre-Screening Report submitted by the applicant in respect of the felling and reforestation project GY12-FL0192. The FAC also noted the statement that the information in the applicant's pre-screening report was considered by DAFM when compiling the AAR and that the inventory details and map, location map, Environmental best practice guidelines, Health and safety best practice guidelines and pre-screening report submitted was considered by DAFM during the licencing process. Based on the information available to it, including the application details, the assertions from DAFM in relation to the processing of the licence application, the absence of the identification of the impacts relating to these grounds, and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to the non-designated European Annex I habitat or to a nationally designated site. Neither does the FAC consider that the DAFM erred in its processing of the application as it relates to these grounds of appeal.

The FAC considered the contention in the grounds of appeal that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody (or waterbodies) under the River Basin Management Plan 2018-2021. In doing so, the FAC noted the content of the DAFM statement, which outlines the checks and balances applied during the 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). The statement also sets out that 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 and that these measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the proposal. The project is located 83% within the Owendalulleagh_020 sub-basin and the waterbody has been assigned a HIGH status during the 2013-2018 WFD assessment, and 17% within the Owendalulleagh_030 sub-basin and waterbody was recorded as having a GOOD status during the 2013-2018 WFD assessment. Based on the information available to it and having regard to the scale, nature and location of the project and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality.

The FAC noted the content of the DAFM statement provided in relation to the contentions made in the two appeals in relation to Appropriate Assessment (AA) and related matters including screening (FAC 572/2020), and the Stage 1 and Stage 2 AA determination (FAC 624/2020). In relation to the Stage 1 or

screening for AA, the FAC examined publicly available information provided by the EPA and NPWS and identified the same European sites within 15km of the proposal. The DAFM concluded that the proposal should proceed to AA in relation to Slieve Aughty Mountains SPA while the remaining European sites were screened out and reasons are provided for the conclusions. The record records details of other plans and projects considered in-combination with the proposal. Having regards to the nature, scale and location of the proposal and its relative proximity to European sites and the record of the DAFM including the reasons provided, the FAC is not satisfied that an error was made in the DAFM screening considerations. In considering the grounds of appeal that the Stage 2 AAD is not valid the FAC considered the submission made at the oral hearing by the appellant in relation to the Hen Harrier and Merlin. At the oral hearing, the appellant submitted that those mitigations proposed in the licence in relation to the SCIs for Slieve Aughty Mountains SPA [4168] (Merlin and Hen Harrier) are inadequate. In relation to the Hen Harrier species the appellant submitted that the use of “green zones” is not a precautionary approach, as it does not preclude the possibility of individual breeding pairs being present in such a green zone before their presence is observed and submitted that it does not stand up to test. The FAC notes that the licence contains the following text in condition h) in relation the Hen Harrier:

‘The site of this project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, if the Department of Agriculture, Food & the Marine (DAFM) is notified by the National Parks & Wildlife Service of a new Hen Harrier nesting site, and if the site of the project lies within or partially within 1.2 km of this location, the DAFM will inform the Applicant of this situation and will amend the terms of the licence, with immediate effect, to exclude potential disturbance operations from taking place during the Hen Harrier breeding season (1st April to 15th August, inclusive). (A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance). Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA 004168, as per the DAFM’s Appropriate Assessment determination for GY12-FL0192.’

Having regard to the nature of the lands in question, the FAC considered that the licence condition above is appropriate for the protection of a SCI within a forest habitat where specific nesting sites are not known, and that where such a specific site becomes known an appropriate mechanism is in place to restrict forestry operations.

When considering the mitigations relating to Merlin, the FAC had regard to the submissions at Oral Hearing, subsequent written submissions and the licence application. Licence condition k), which is derived from mitigations detailed in the AAD, contains the following text:

'No Felling or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, within 100 metres of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland; or within 100 metres of a clearing in the forest of larger than one hectare. Such operations can commence in sections of the project area furthest away from the 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive. Reason: In the interest of protecting the Special Conservation Interest of the Slieve Aughty Mountains SPA 004168, as per the DAFM's Appropriate Assessment determination for GY12-FL0192.'

It appears to the FAC that there is agreement in the various literature submitted by DAFM and the appellant that Merlin are subject to disturbance by forestry operations, and that there is an absence of empirical data in relation to disturbance of breeding birds. The appellant has submitted literature, derived from surveys of expert opinion, that static disturbance during incubation may occur up to a range of 300 – 500m. DAFM have submitted that a named expert ecologist has supported the development of a standard utilised in the AAR 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. 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. 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 relation to 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 the making a decision to grant the licence in this case and that this decision should be set aside and remitted to the Minister to address the matter.

The FAC considered the contention in the grounds of appeal that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats directive on the AA determination. In its statement to the FAC, DAFM summarise the opportunities for public participation in the decision-making process in relation to applications for felling licences and including under Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017). The Statement outlines that Regulation 20 of those regulations expressly provides that in the making his or her decision on a felling license application, the Minister must have had regard to any written submissions or observations made by the public. Furthermore Regulation 19(4) expressly requires the Minister when carrying out an Appropriate assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in

view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. The FAC accepts the DAFM position that these provisions (and that any considerations and decisions made pursuant to them), are in keeping with the requirements of Article 6(3) of Habitats Directive as regards public participation. Based on the information available to it the FAC is not satisfied that the DAFM erred in its processing of the application in this case as it relates to this ground of appeal.

The grounds of appeal submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, archaeological features, designated sites and other environmental features. In its statement to the FAC the DAFM asserts that the application and associated information as submitted by the applicant in support of the application was considered and deemed as meeting the Department's requirements. Based on the information available to it, the FAC is satisfied that the Harvest Plan submitted with the application was sufficient to inform the decision-making process in this case. Neither is the FAC satisfied that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

In relation to the submitted grounds 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 Article 5 of the Birds Directive and relating to a system of strict protection for the animal species listed in Annex IV(a) of the Habitats Directive, 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. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site (other than those relating to the QIs of the Slieve Aughty Mountains SPA as discussed above), or details of any animal species for which licence conditions should be provided. The FAC also noted that the licence conditions contain reference to standards of good forestry practice. Based on the evidence before it, the FAC is not satisfied that an error was made in relation to the processing of the licence as it relates to these grounds in the appeal.

Regarding the conditions that the Appellant suggested should be attached to the licence relating to commencement and conclusion of operations, inspections, and notification in the case of the spraying of any chemicals, the FAC noted the response provided to it by DAFM and considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions relating to these grounds in the appeal in this case, was not required.

The FAC considered the contention in the grounds of appeal that in processing the licence GY12-FL0192 DAFM had taken inadequate consideration of feedback from a consultation body regarding AA – in this case the NPWS as submitted by the appellant at oral hearing. In its consideration of this ground the FAC had regard to the submission of DAFM in its statement to the FAC wherein it stated that standard procedures were followed in respect of issuing referrals and considering referral responses in this case,

that an Appropriate Assessment stage 2 was carried out by DAFM in respect of felling and reforestation project GY12-FL0192 and that the AA Screening Document, AA Report and AA Determination are recorded on file. The FAC considered the submission from NPWS wherein it referenced that that the project has the potential to have an impact on five named downstream wetland European Sites (Termon Lough SAC 001321, Cahermore Turlough SAC 002294, Caherglassaun Turlough SAC 000238, Coole-Garryland complex SAC 000252, and Lough Cutra SAC 000299). It is noted that three of these sites are within 15km of the project and have been addressed within the Appropriate Assessment screening process and were found not to require Appropriate Assessment. The other two sites referenced, Cahermore Turlough SAC 002294 and Caherglassaun Turlough SAC 000238 are each located in excess of 16 km from the nearest part of the project area. Based on the information available to it and having regard to the scale, nature and location of the project, the assertions by the DAFM representative at oral hearing that all submissions received from consultation bodies were fully considered, and the straight-line distance between the project area and the SACs, the FAC is not satisfied that DAFM has given inadequate consideration of feedback from a consultation body regarding the AA in this case, nor is the FAC satisfied that the DAFM erred in its processing of the application as it relates to this specific ground in the appeal.

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions made by parties to the appeal and including post hearing correspondence. In the above circumstances, the FAC is satisfied that there was a serious error made in the making of the decision to grant the licence. As a result, the FAC has decided to set aside and remit the decision of the Minister regarding licence GY12-FL0192 and is remitting the consideration of the application to undertake a new Appropriate Assessment in line with the requirements of Article 6 of the EU Habitats Directive, before making a new decision in respect of the application.

Yours sincerely,

A black rectangular box redacting the signature of the official.

Seamus Neely, On Behalf of the Forestry Appeals Committee