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17<sup>th</sup> January 2022

**Subject:** Appeal FAC101/2021 in relation to felling licence TFL00241818

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 TFL00241818 was issued by the Department of Agriculture, Food, and the Marine (DAFM) on the 19/05/2021.

#### **Hearing**

A hearing of appeal FAC101/2021 was convened by the FAC on the 07/12/2021. In attendance:

**FAC Members** - Mr Des Johnson (Chairperson), Mr Seamus Neely & Mr Luke Sweetman

**FAC Secretary** - Mr Michael Ryan

#### **Decision**

The FAC considered all of the documentation on file including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to affirm the decision to issue felling licence TFL00241818.

The licence under appeal is for the clearfell and restocking of 14.1ha of Sitka spruce across three plots in Toorlougher, Co. Limerick. Plot 1 is 10.82ha. Plots 2 (1.78ha) & 3 (1.51ha) are grouped together and lie c.600m southwest of Plot 1. The restock species in all plots will be 90% Sitka spruce & 10% Birch. The Inspector's Certification states the predominant soil types are highly modified peat & peaty podzols. The slope is predominantly flat to moderate (<15%). The project area is crossed by/adjoins an aquatic zone(s), and the proposal sits within a landscape of relatively large-scale coniferous forestry.

The site is in the Annagh (Tipperary)\_020 River Sub-basin. The Annagh (Tipperary)\_020 Waterbody was assigned 'Good' status by the Environmental Protection Agency (EPA) during the 2013-2018 reporting period. The Annagh River runs along the northern and western boundaries of Plot 1. An unnamed EPA stream (Order 1) runs from roughly south to north through Plot 1 before joining the Annagh River. The EPA-mapped Toorlougher stream (Order 1) runs roughly south to north along the eastern boundary of Plots 2 & 3 before joining the Annagh River c.175m north of Plot 2.

There are two Inspector's Certification documents before the FAC. The 2nd version (dated 13/05/2021) states that the application was desk assessed, the proposal is in a fisheries sensitive area, not in an acid sensitive area, not within a Freshwater Pearl Mussel 6km zone, is within a Hen Harrier SPA, is not wholly or partially within a Red Area, there are no archaeological concerns, the site is within a high amenity area or prime scenic area as per County Development Plan, there are other high amenity landscape considerations, and the proposal is not located within the catchment of a Local Authority designated water scheme.

The application was accompanied by a Natura Impact Statement (NIS), completed by an Ecologist, and dated 02/11/2020. The DAFM issued a Further Information Request (FIR) which raised the following issues; the risk to the Lower River Shannon SAC which the proposal is hydrologically connected to, amending the Habitat Map, submission of a harvest and restock plan, ensuring that the works referred to in the revised NIS match the proposed works in the revised harvest and restock plan requested above, clarify how and where Rhododendron and Cherry laurel will be dealt with, 98145F in the NIS title is not a valid TFL number, the NIS has an incomplete sentence under photo 4 (page 23). The applicant subsequently submitted an updated NIS, dated 04/02/2021, along with a Replanting Map and a document titled Replanting Operations which addressed the issues raised in the FIR.

Following an initial Appropriate Assessment (AA) Screening by the District Inspector, an AA Screening Determination (AASD) was completed by an Ecologist on behalf of the DAFM and included an "expert verification" of the District Inspector's screening conclusions. The AASD lists the screened-out Natura sites with reasons including any amendments following expert verification. The following sites were screened out for Stage 2 AA with reasons provided including separation distance, location within a separate Sub-Basin with no upstream/downstream connection, and the terrestrial nature of some Qualifying Interests (QIs); Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, River Shannon and River Fergus Estuaries SPA, Silvermine Mountains SAC, Silvermines Mountains West SAC, Clare Glen SAC, Glenstal Wood SAC, Keeper Hill SAC, River Shannon and River Fergus Estuaries SPA, Silvermine Mountains SAC, Silvermines Mountains West SAC.

The Lower River Shannon SAC and the Slievefelim to Silvermines Mountains SPA were screened in for Stage 2 AA and the reasons include the location of the proposal within the SPA and the proximity of the project area to a number of High Likelihood Nesting Areas for Hen Harrier (Red Zone, May 2020; iFORIS), the hydrological connection to the SAC and the potential impacts to Otters, aquatic QIs and aquatic supporting habitats/species.

An AA Determination (AAD), dated 19/03/2021, was made by an Ecologist on the DAFM's behalf. The AAD states the NIS does not contain a satisfactory In-Combination assessment and references the DAFM's In-Combination Report as being on iFORIS and dated 18/02/2021. There was no copy of this In-Combination Report before the FAC at the time of the Hearing.

The AAD states that "the NIS (updated 04/02/2021) for TFL00241818 contains a fair and reasonable examination, evaluation and analysis of the likely significant effects of the activity on the environment and adequately and accurately identifies, describes and assesses those effects except in relation to the following points." The AAD then lists a number of issues identified in the NIS and the actions taken by the DAFM to address them. Included amongst these were the potential for disturbance of Otters, reforestation water setback distances, and the location of the proposal in close proximity to a number of Hen Harrier Red Zones and the resulting restriction of disturbance operations to outside the Hen Harrier breeding season.

The AAD prescribes mitigation measures related to: Hen harrier, sediment and nutrient controls, replanting, chemical and hydrocarbon pollutants, invasive species controls, in addition to requiring that



all works must adhere to specified standards and guidelines (including the *Environmental requirements for Afforestation* (DAFM, 2016)).

The DAFM referred the application to Limerick County Council, the National Parks & Wildlife Service (NPWS), & Inland Fisheries Ireland (IFI). Limerick County Council did not respond. The NPWS response highlights the location of the project upstream of the Lower River Shannon SAC and the hydrological connections visible via desk assessment. It also highlights the requirement for water setbacks to be created and that this will provide some of the 20% of open space that “should be left post-felling for Hen Harriers as this site is also an SPA for them”. The NPWS also attached an appendix of more general points.

The IFI responded stating they had “no major objections to this application”. IFI highlight the need to constantly monitor ground stability to avoid excess run-off during and post-harvesting. They also stated all works should be carried out in accordance with good forestry practice and the water quality guidelines.

The licence issued on the 19/05/2021 and is valid for four years. Schedule 2 lists “Other conditions attached to this licence” with (a) to (g) being relatively standard. Condition (h) sets out the restrictions on potential Hen Harrier disturbance operations. Condition (i) lists the District Inspector's conditions regarding:

- Notifying DAFM of commencement of works,
- Adhering to the Standards for Felling & Reforestation, the Felling & Reforestation Policy, and the Environmental Requirements for Afforestation,
- Adhering to the mitigation measures set out in the AAD,
- Use of brash mats,
- Installation and management of silt traps.

### **Grounds of Appeal**

There is one first party appeal against the licence. The grounds of appeal were considered in full by the FAC and are summarised below:

1. The proposal is within a Hen Harrier Green Zone and the standard Green Zone condition should apply.
2. The condition limiting felling to 15ha per year is at variance to the DAFM's own Interim Standard for Felling and Reforestation (ISFR) and should be replaced with “The maximum allowable size for any single clearfell coupe is 25 ha.”
3. AAD Condition 9 should be replaced with the guidelines from the ISFR – “Cease all felling and extraction and other machine operations onsite (or redirect to more stable areas of the site) during and after periods of rainfall which result in the possibility of the surface mobilisation of silt.” It should allow for the movement of machinery to dryer areas of a site when appropriate.
4. AAD Condition 15 should be replaced with wording from ISFR – “Where necessary, deploy a heavy-duty plastic culvert lengthways into the channel and cover with brash material.” Clear span structures are not required on most small drains. This AAD condition is excessively onerous and out of step with the DAFM's own standard.

5. AAD Condition 19 (requiring the spreading of grass seed within setbacks) seems both economically and environmentally inefficient. This is not 'good forestry practice' and no justification is appropriate in this property. There is potential for introduction of invasive species. The ground will have a covering of needles and organic matter which will require cultivation. Any cultivation or ground disturbance within the aquatic zone would be a breach of AAD Condition 21 – "no windrowing within 20m of any aquatic zone or within 10m of relevant watercourses." Therefore, the licence conditions are contradictory.
6. Regarding Condition 21 - windrowing involves gathering of brash, not mounding/drainage. Windrows can protect water quality. The ISFR stipulates an appropriate 10m setback for aquatic zones and 5m for a relevant watercourse.
7. AAD Condition 24 requires "a minimum 15m unplanted, undisturbed water setback must be implemented both sides of all aquatic zones." The ISFR sets 10m as the appropriate setback on a moderately sloped site. An increased setback beyond what is set by the ISFR is unacceptable. It also contradicts setbacks in conditions 21 of the AAD. There is no justification for increasing the setbacks and creating unproductive ground.
8. Grounds of appeal numbered 8 & 9 both refer to the requirement in the AAD Conditions 25 & 27 to plant native broadleaves adjoining specific setbacks. The appellant contends that the planting of native trees is encouraged in the ISFR but is not (and should not be) mandatory.

#### DAFM Response

The DAFM responded in a written Statement of Facts to the FAC which provides a brief overview of the processing of the application and a submission from the District Inspector stating "As District Inspector I referred the file to the consultative bodies in November 2018 i.e., NPWS etc for their input and expertise. I was not involved in original decision as the file was reassigned to another District Inspector who recommended approval and conditions in this case." A separate document titled "Ecology Response to Appeal" is on file, dated 27/10/2021. The detail of this document was considered in full by the FAC and the main points are summarized below:

1. The ecology response (ER) submits that Scenario A of Appendix 21 of the Forest Standards Manual (DAFM, 2015) states: "*Generally, within a Green Area, a potential disturbance operation will not disturb Hen Harrier breeding activity*". The ER states that this is a general guideline but that the proposed project is atypical due to its "proximity to a large number of Hen Harrier Red Zones". The proposal is almost surrounded by, and within the disturbance thresholds of 500-750m (Ruddock and Whitfield, 2007) for four Red Areas. The project adjoins suitable Hen Harrier foraging and nesting habitat on three sides and, after clearfelling, will contain suitable Hen Harrier nesting/foraging habitat for approximately 10 years (Ruddock *et al.*, 2016). Therefore, allowing disturbance operations associated with this project (including subsequent replanting and management such as weed control) during the Hen Harrier breeding season presents a risk of disturbance and subsequent nest abandonment or failure. To this end, mitigation is not limited to standard Forest Service minimum guidelines and instead, must remove "reasonable scientific doubt" as per European case law.
2. Given that the proposed felling area is less than the area specified in the condition it will not affect the proposed operations. The ISFR states that (Section 1 Introduction, page 1) "*Additional measures that might apply on specific sites in response to specific sensitivities may also arise.*"
3. The mitigation measures outlined in the ISFR may be amended following assessment of a project by DAFM. The text in relation to rainfall and timing of operations in the ISFR was in the process of review and the quoted condition (and the condition in ISFR) has now been replaced with the text which appears in the AAD.



4. The ISFR Section 8.1 (forest drains), states “*where a drain crossing is needed, select a method that prevents the breakdown and erosion of drain sides*”. Section 8.2 Aquatic zones and larger relevant watercourses states “*where needed, any necessary crossing shall be via an appropriate structure that spans proud of the flow of water and prevents the breakdown and erosion of the banks*”. Mitigation measures other than what is specified in the ISFR may be selected for sites based on assessment of applications and the associated risks. The use and subsequent removal of plastic culverts presents risk of significant silt loss to adjacent sensitive aquatic habitats. However, the proposed plastic culverts or lengthways logs may be appropriate in smaller, dry or stagnant drains but these would not equate to temporary bridging points as addressed in the condition – the condition states “*structure that spans proud of the flow of water*” which would not apply to dry/stagnant drains if there is no flow of water.
5. Regarding revegetation of setbacks by spreading grass seed the ER states that clearfelled coniferous forestry has notoriously depauperate seed banks for ground vegetation (Eyecott *et al.*, 2006). Irish studies into broadcasting particular grass species on clearfelled peat sites have shown that this can rapidly improve revegetation and thereby significantly reduce risk of sediment and nutrient loss (Asam *et al.*, 2012; O’Driscoll *et al.*, 2011; 2014, 2021). However, if there is >90% ground vegetation within 12 months, without spreading seed, the condition will be met.

Regarding the economic and environmental efficiency of this condition, the ER submits that in addition to preventing sediment and nutrient loss, seeding may facilitate future tree growth by retaining nutrients on site. Rodgers *et al.* (2012) recorded 5.15 kg P/ha lost in the first three years after a clearfell (with the majority being lost in year 2). Teagasc cost fertiliser for reforestation at €190-220/ha. Research has shown that this grass seeding can reduce reactive Phosphorus losses by 58% and 95% (O’Driscoll *et al.*, 2014; Asam *et al.*, 2012)."

Regarding the potential to introduce invasive species, the ER states the proposed mitigation is two species of grass (Yorkshire fog and Common bent) that is sold as a straight mix. These species are native but are typically grown overseas in better seed-ripening climates. Approximately 140,000ha in Ireland is sown with similar grass seed every year without being identified as a significant source of invasive species. The risk of introducing invasive species from this proposed mitigation is not significant and must be considered in context of the clear and evidence-based benefits in reducing risk of nutrient and sediment loss.

The ER states that extensive research has shown this approach to work on clearfelled sites in Ireland without ground cultivation (O’Driscoll *et al.*, 2011; 2014, 2021).

6. Windrowing has been shown to cause a “*substantial increase in total suspended solids and total phosphorus*” loss to streams in Ireland (Clarke *et al.*, 2015). Consequently, given the aquatic sensitivities of this site, the condition in relation to windrowing has been included in the licence.
7. Section 14 of the ISFR sets out minimum water setbacks but it does not consider soil type. The Environmental Requirements for Afforestation do consider soil type and is used as a reference here, given the aquatic environmental sensitivities. The AAD states “For reforestation setback distances, the NIS does not clarify the soil or slope of the proposed area. EPA maps indicate the soil in Plot 1 is Acid Deep Poorly Drained Mineral and the soil in Plots 2 and 3 is Blanket peat. O.S. Discovery maps indicate the slope is approximately 13% and is therefore categorised as ‘Moderate’. However, given the hydrological connectivity to the Lower River Shannon SAC, the aquatic sensitivities, and the recommendation by NPWS, water setbacks are required around all aquatic zones consisting of 15m unplanted plus 5m pit-planted broadleaves.” Condition 21

states it is a “minimum” water setback. If brash mats prevent planting in the 5m area between 15m and 20m from an aquatic zone, the larger setback must apply here according to the wording of the conditions.

8. The ER’s response to grounds 8 & 9 states *“See response 7 in relation to water setbacks and associated broadleaf planting conditions.”*

### **Considerations of the FAC**

The FAC convened a Hearing of FAC101/2021 on the 07/12/2021. The FAC considered the DAFM’s processing of the application prior to deciding to issue TFL00241818, noting that the proposal was assessed by the DAFM to determine its potential to have a significant effect on European sites. As detailed above, an AASD was made which led to an AAD, which took account of the applicant’s NIS, leading to the prescribing of mitigation measures which were attached as licence conditions for TFL00241818. The FAC noted that no satisfactory In-Combination Report was on file at the time of the Hearing. On the 07/12/2021 the FAC wrote to the DAFM asking them to confirm if an In-Combination Report had been completed by them, and considered, prior to deciding to issue TFL00241818. The FAC requested a copy of any such report. The DAFM responded on the 08/12/2021 with a copy of the In-Combination Report, dated 18/02/2021. The FAC’s request, the DAFM’s response, and the In-Combination Report were circulated to the appellant/applicant on the 09/12/2021 for any comments or submissions. No response was received by the FAC. The FAC considered the In-Combination Report completed by the DAFM. The report contains an assessment of the proposal’s potential to contribute to an in-combination effect on European sites focusing on the general vicinity of the project area in the River Sub-Basin Annagh (Tipperary)\_020 and concludes that there is the possibility of the project having a significant effect, either individually or in combination with other plans and projects, on the Lower River Shannon SAC and the Slievefelim to Silvermines Mountains SPA and the project advanced to AA stage. The FAC is satisfied that the DAFM considered the potential for the proposal to contribute to an in-combination effect on European sites prior to deciding to issue TFL00241818 and concurs with their conclusion in this instance. Based on the evidence before it, the FAC considered the DAFM’s processing of the application in relation to AA procedures to be in line with the requirements of the Habitats Directive.

The FAC considered the grounds of appeal. The FAC noted the appellant’s contention that the proposal is within a Green Zone and the standard Green Zone condition should apply. The FAC also noted the evidence supplied by the DAFM that the application site is effectively surrounded by Hen Harrier Red Areas and suitable Hen Harrier nesting/foraging habitat. The evidence before the FAC indicates that the DAFM have applied the precautionary principle and prescribed mitigation measures beyond the standard Forest Service minimum guidelines in order to remove “reasonable scientific doubt” as to the proposal’s potential for significant effect on the Slievefelim to Silvermines Mountains SPA.

The FAC noted the appellant’s submission regarding the maximum felling coupe size in the ISFR (25ha). The FAC considers that the condition limiting felling to 15ha in a year will have no impact on the licenced operations; the clearfelling of 14.1ha.

In relation to the wording of the condition dealing with the timing of operations around rainfall events, the FAC noted that the text in the AAD condition differs from that used in the ISFR. The FAC noted the DAFM’s submission that mitigation measures outlined in the ISFR may be amended following their assessment of a project. In the context of the sensitivities on this site, including hydrological connection to the Lower River Shannon SAC, the FAC concluded that the DAFM did not err in applying a more



detailed and stringent condition relating to the timing of operations around rainfall events than that which was originally in the ISFR.

The FAC considered the appellant's submission that AAD Condition 15 is "excessively onerous and out of step with the DAFM's own standard." The FAC also noted the appellant's contention that clear span structures are not required on most small drains. The FAC considered the DAFM's response that the use and subsequent removal of plastic culverts as temporary bridging points presents "a risk of significant silt loss to adjacent sensitive aquatic habitats." The DAFM also state that "plastic culverts or lengthways logs may be appropriate in smaller, dry or stagnant drains but these would not equate to temporary bridging points as addressed in the condition – the condition states *"structure that spans proud of the flow of water"* which would not apply to dry/stagnant drains if there is no flow of water." Given the aquatic sensitivities of the application site, the FAC found no convincing evidence to conclude that the DAFM made a significant or serious error in applying Condition 15, as worded, to the licence.

Regarding AAD Condition 19 (requiring the spreading of grass seed within water setbacks) the FAC considered that the DAFM have provided scientific evidence to support their decision to apply this condition. The FAC also noted that if there is >90% ground vegetation within 12 months, without spreading seed, the condition will be met. Based on the information before it, the FAC found no convincing evidence to conclude that the DAFM had made a significant or serious error in applying this licence condition.

The FAC considered the appellant's submission that Condition 21 should be replaced with the standard wording (and smaller setbacks) in the ISFR. The FAC considered the DAFM's submission that windrowing has been shown to cause a *"substantial increase in total suspended solids and total phosphorus"* loss to streams in Ireland (Clarke et al., 2015). Based on the information before it, and having regard to the aquatic sensitivities of the site, the FAC finds no convincing reason to conclude that the required exclusion zones are incorrect.

Regarding AAD Condition 24, the FAC noted the appellant's submission that this condition contradicts setbacks in AAD Condition 21 and that there is "no justification for increasing the setbacks and creating unproductive ground." The FAC considered the DAFM's response which states that the ISFR does not consider soil type when prescribing setback distances but that the Environmental Requirements for Afforestation do. The FAC noted the DAFM's contention that they had considered the hydrological connectivity to the Lower River Shannon SAC, the aquatic sensitivities, and the recommendation by the NPWS in prescribing the water setbacks. Based on the information before it, the FAC considered that the DAFM provided sound reasoning to justify the prescribed water setbacks. The FAC also noted the DAFM's submission that "If brash mats prevent planting in the 5m area between 15m and 20m from an aquatic zone, the larger setback must apply here according to the wording of the conditions." The FAC is satisfied that this explanation resolves any apparent contradiction between the licence conditions regarding water setbacks.

The FAC considered the appellant's contention that the ISFR encourages the planting of native broadleaves but this is not a mandatory requirement. The DAFM's response to these grounds of appeal indicates that the requirement to plant rows of native broadleaves adjoining water setbacks is due to the hydrological connectivity to the Lower River Shannon SAC, the aquatic sensitivities, and the recommendation by the NPWS. The FAC noted that the prescribed conditions differ from the recommendations of the ISFR, however, the FAC considered that the DAFM provided suitable justification for their decision to attach these conditions to the felling licence.

Based on the evidence before it, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in deciding to issue felling licence TFL00241818 and did so in compliance with fair procedures. In deciding to affirm the decision of the Minister, the FAC considered that the proposed development is in line with Government policy and good forestry practice.

Yours sincerely,

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

Luke Sweetman on behalf of the Forestry Appeals Committee