



[REDACTED]

2<sup>nd</sup> December 2020

**Subject:** Appeal FAC 392/2020 regarding licence TY06-FL0089

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**

Licence TY06-FL0089 for felling and replanting of forest on 7.11 ha at Commaun Beg, Gortahumma, Co. Tipperary, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 25<sup>th</sup> of June 2020.

### **Hearing**

An oral hearing of appeal FAC 392/2020 was held by the FAC on 11<sup>th</sup> of November 2020.

### **In Attendance at Oral Hearing:**

DAFM Representative(s):	Mr. Frank Barrett, Mr. Joe O'Donnell,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely and Mr. Derek Daly.
Secretary to the FAC:	Ms. Ruth Kinehan.

### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision to grant this licence (Reference TY06-FL0089).

The licence pertains to the felling and replanting of an area of 7.11 ha at Commaun Beg, Gortahumma, Co. Tipperary.

The forest is currently comprised of Sitka Spruce and the site is to be replanted with the same species. The site has an underlying soil type that is approximately comprised of Blanket Peats (89%) & Peaty Gleys (12%). The slope is predominantly moderate 0-15%. The habitat is predominantly WD4. The site is located in the Shannon catchment, the Clodiagh [Portlaw]\_Sc\_010 Sub-Catchment and is proximate to the Nenagh\_010 waterbody.

The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application. The proposal was referred to Tipperary County Council and Inland Fisheries Ireland. Inland Fisheries Ireland responded stating that it has no objections to the felling and that measures should be put in place to avoid silt entering any watercourses and ground stability should be kept under constant review, that guidelines be adhered to and that their Limerick office be contacted one month before felling commences.

The DAFM undertook and documented an appropriate assessment screening dated 6<sup>th</sup> April 2020. This found eight European sites within 15km. The screening determined that an appropriate assessment was not required regarding seven SACs ([2165] Lower River Shannon SAC, [2124] Bolingbrook Hill SAC, [2137] Lower River Suir SAC, [2125] Anglesey Road SAC, [939] Silvermine Mountains SAC, [1197] Keeper Hill SAC, [2258] Silvermines Mountains West SAC) by reason of there being no possibility of cumulative impacts on the Natura sites, and the location of the project area being within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway hydrological or otherwise.

The screening also determined that an appropriate assessment was required regarding one SPA ([4165] Slievefelim to Silvermines Mountains SPA), in which the project site is located. The screening extended the zone of impact to consider the [4058] Lough Derg (Shannon) SPA, which was subsequently screened out by reason of the separation distance between the Natura site and the project.

An appropriate assessment report and a separate determination document were prepared and were both subject to a review by an ecologist on the 19<sup>th</sup> of June 2020. The determination found the project would not adversely affect the integrity of any European site, in particular the site in which the project site is located, and will not affect the preservation of those sites at favourable conservation status if carried out in accordance with a specific mitigation to be attached as conditions to the licence. The proposed mitigation related to constraints on works during the Hen Harrier breeding season, and these are reflected in the licence issued.

The decision to grant the Licence is subject to one appeal. The grounds of appeal include; breach of Article 4(3) of the EIA Directive 2014/52/EU, through failure to carry out screening for EIA; Breaches of Article 4(4) of the EIA Directive 2014/52/EU; that the license and its associated operations threaten the achievement of the objective set for the underlying waterbody or waterbodies of the River Basin Management Plan for Ireland 2016-21; that there was an invalid Stage 1 and Stage 2 Appropriate Assessment determinations under Article 6(3) of the Habitats Directive 92/43/EEC; that there was an absence of consultation with the general public under Article 6(3) of the Habitats Directive 92/43/EEC on Appropriate Assessment determination; that the Harvest Plan is inconsistent with the requirements of the Interim Standard for Felling & reforestation; that licence conditions do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC; that licence conditions do not provide a system of strict protection for species listed in Annex IV(a) of the Habitats Directive 92/43/EEC; that there is an absence of a condition in the licence notifying the Minister of the commencement and conclusion of operations; that there is absence of a condition that plans and works must be inspected by the Forestry Service prior, to during and post works to ensure compliance with the licence conditions; and that there is an absence of stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

At oral hearing, two errors in the Appropriate Assessment documentation were discussed. The first was raised by the DAFM in their statement of fact, where they observed that a number of the qualifying interests for European sites were truncated in the original screening document. The department stated that a revised screening form had been provided to the FAC, and that all SCIs/Qis were considered during the screening exercise itself. The second error related to the Determination document which included an erroneous reference to the Wicklow Mountains SPA 4040. At hearing, DAFM confirmed that this was a typographic error, and the text in question should refer to the [4165] Slievefelim to Silvermines Mountains SPA. In both cases the FAC is satisfied that these constitute minor errors and do not represent a serious or significant error or series of errors in making the decision or that the errors impacted on the decision being made while complying with fair procedures.

At oral hearing, DAFM summarised their approach to the licencing decision and outlined the basis for licence conditions. The applicant provided information on their activities, including field assessment, that formed the basis for their application.

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.

In its statement to the FAC, the DAFM submitted that the standard operational activities of clear-felling and replanting already established forests 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. At the oral hearing the DAFM reasserted its contention that the proposal does not include a class of project covered by the EIA Directive or by National legislation.

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 decision under appeal relates to a licence for the felling and replanting of an area of 7.11 ha. 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 agrees that screening for EIA was not required in this case and that breaches of Articles of the Directive stated in the appeal had not occurred.

The FAC considered the contention in the grounds of appeal that in granting the licence DAFM had taken inadequate consideration of the objectives of the WFD River Basin Management Plan. 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 project proposal is described as not containing an aquatic zone. Based on the maps provided, the forest is set back from any marked watercourse and on a moderate slope. The licence conditions require the implementation of a series of measures designed to protect water quality during operations. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the proposal. The application was referred to Inland Fisheries Ireland and the County Council and the licence conditions reflect the response provided by Inland Fisheries Ireland, including a requirement to inform the regional office prior to works commencing. Based on the information available to it, the FAC is satisfied that the proposal as licensed does not pose a significant threat to water quality.

The FAC noted the content of the DAFM statement provided in relation to the contention that the Stage 1 and Stage 2 AA determinations are not legally valid. Under Article 6(3) of the Habitats Directive, a 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 or projects, having regard to the conservation objectives of that designated site. In this case the proposed felling and reforestation project (TY06-FL0089) lies within the [4165] Slievefelim to Slivermines Mountains SPA. DAFM undertook a Stage 1 screening in relation to eight European sites within 15km and one a distance greater than 15km. The FAC examined publicly available information from the NPWS and EPA and identified the same eight sites. The FAC also observed that the [4058] Lough Derg (Shannon) SPA, which was also considered for screening, is hydrologically connected to the nearest water course proximate to the project site.

Each site is considered in turn along with its qualifying interests and conservation objectives and the reasons for the screening conclusions. The ground of appeal that contends that the Stage 1 and Stage 2 AA determinations are not legally valid does not identify any specific concerns regarding effects, impacts or mitigation measures described in the appropriate assessment report and determination, or with the conclusions reached. The DAFM concluded that an appropriate assessment should be undertaken in relation to the [4165] Slievefelim to Slivermines Mountains SPA with other sites screened out. An appropriate assessment report and determination was prepared with ecological review, and mitigation measures were derived and incorporated into the licence conditions. At the oral hearing the DAFM submitted that these measures reflected the protocol that it developed with the NPWS and that there is ongoing information sharing between the authorities. It was submitted that the most recent data request regarding nesting sites was in May 2020. The reasons on which the screening decisions were made are set out and recorded in the screening and AA reports for the project. The special conservation interests, conservation objectives, adverse impacts and the species-specific mitigation measures in relation to the SPA are described. Other plans and projects considered in-combination with the proposal are described. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. Based on the information available to it, the FAC is satisfied that a serious or significant error or series of errors were not made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

The grounds of appeal submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation but does not elaborate on 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. The DAFM in its statement submitted that the Applicant provided such plans and that all materials submitted with this application were fully assessed by DAFM in considering the

application and confirmed this at the oral hearing. The FAC is satisfied that the Harvest Plan submitted with the application is sufficient to inform the decision-making process in this case.

In relation to the appellants stated 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 the requirements of Article 5 of the Birds Directive, the FAC had regard for the statement provided by DAFM, and specifically sought further clarification on the wording of the response to this ground of appeal at the oral hearing. The FAC understands the DAFM position to be that as a general principle, a licence should not contain conditions that refer to obligations placed on a licence holder through legislation other than that under which the licence is granted. Those obligations continue to apply to the licence holder, unless the license specifically relieves the licence holder of the obligation, which does not apply in this case. In this instance, the licence holder must obtain the necessary permits as required under law to ensure the protection of wild birds during the period of breeding and rearing. The FAC concurs with this view.

The FAC also had regard to the statement by the DAFM , in relation to the ground of appeal relating the requirements of Article 12 of the Habitats Directive, that there are site-specific mitigations identified in the AA Report and AA Determination Statement. The FAC is satisfied that these were attached as conditions of the licence issued.

Similarly, with regard to the conditions that the Appellant suggested should be attached to the licence (grounds 9, 10 and 11 in the appellant's stated grounds of appeal) the FAC 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 also noted the information provided by the DAFM in relation the use of plant protection products in its statement. The FAC is satisfied, based on the information available to it, including the information provided at the oral hearing by the applicant as to the process it follows to ensure that conditions of licence are complied with, and the information provided by DAFM on its approach to enforcement inspection that it considers necessary, that the inclusion of the conditions as raised in the grounds of appeal in this case, was not required.

In affirming the decision, the FAC further concluded that the proposed development would be consistent with Government policy and Good Forestry Practice. Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.



John Evans, On Behalf of the Forestry Appeals Committee