



[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

14<sup>th</sup> December 2020

**Subject:** Appeals FAC 340/2020 and FAC 409/2020 regarding licence LS06-FL0058

Dear [REDACTED]

I refer to the appeals FAC 340/2020 and FAC 409/2020 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 LS06-FL0058 for the felling and replanting of forest on 3.59 ha at Capard, Co. Laois was approved by the DAFM on 19<sup>th</sup> June 2020.

#### Hearing

An oral hearing of appeal FAC 409/2020 (and appeal FAC 340/2020), of which all parties were notified and representatives of the DAFM and the Applicant attended, was held by the FAC on 9<sup>th</sup> December 2020.

#### In Attendance at Oral Hearing:

Department Representative(s):

Mr. Frank Barrett, Ms. Jade Mc Manus,

Appellants:

[REDACTED]  
[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. James Conway, and  
Mr. Seamus Neely.

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 notices of appeal, submissions received including at the oral hearing, clarifications obtained, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence LS06-FL0058.

The licence pertains to the felling and replanting of forest on 3.59 ha at Capard, Co. Laois. The forest is currently composed (approximately) of 1% Sitka Spruce, 3% oak, 12% Japanese Larch and 84% Lodgepole Pine (S) and replanting would be of Sitka Spruce (30%) and Lodgepole Pine (N) (70%) with 5% open space. The application includes inventory details, maps, and a harvest plan including general environmental and site safety rules and an AA pre-screening report. The site is described as being on a predominantly moderate slope (0-15%). The project is within Barrow 14\_01 catchment area and waterbody Barrow\_030 (1%) and Barrow\_040 (99%). The proposal was referred to Laois Co. Council and a response was received stating that, the application does not involve an area more than 50 ha, there is no Environment Impact Statement required, the project is not within an NHA, SAC, an Architectural / Archaeological Site, or Prime Scenic / Amenity area and that the project is on an unclassified road. A screening for appropriate assessment was undertaken by DAFM dated 27<sup>th</sup> April 2020 that identified seven European sites, one of which (4160 Slieve Bloom Mountains SPA) is overlapped by the project, and six which are within 15km. These six (412 Slieve Bloom Mountains SAC, 2162 River Barrow And River Nore SAC, 859 Clonaslee Eskers And Derry Bog SAC, 2141 Mountmellick SAC, 4233 River Nore SPA, and 571 Charleville Wood SAC) were all screened out. An appropriate assessment report and determination for the screened in site (4160 Slieve Bloom Mountains SPA) was undertaken and had a final sign off on 11<sup>th</sup> June 2020. The licence was approved with a number of conditions attached, which included those related to the mitigation of effects as outlined in the appropriate assessment report.

The decision to grant the Licence is subject to two appeals. The grounds set out in the appeal received on 6<sup>th</sup> July 2020 (FAC 340/2020) 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 the licence and its associated operations threaten the achievement of objectives of the River Basin Management Plan for Ireland 2018-21, that the Stage 1 and Stage 2 AA determinations are not legally valid, 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 licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works to ensure compliance, 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 should contain a condition requiring notification of commencement and conclusion of Operations, 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.

The grounds set out in the appeal received on 15<sup>th</sup> July 2020 (FAC 409/2020) include that the licence decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive. It submits that the test for Appropriate Assessment Screening in Irish and EU law is that it is merely necessary to determine that there may be such an effect - rather than to state that it will not have a significant effect. It also submits that if the development which is within 15km of a Natura 2000 site it has (sic) been screened in. It makes reference to Case C-323/17 and includes extracts

from it regarding measures considered at the screening stage for appropriate assessment. The appeal also submitted grounds relating to suggested legal obligations of the Forestry Appeals Committee.

In the statement to the FAC in relation to appeal FAC 340/2020, the DAFM provide responses to each of the grounds included in the appeal. It 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. This view was reiterated by the DAFM representative during the oral hearing in this case. In relation to the contention that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the DAFM statement dated 5<sup>th</sup> October 2020 outlines the checks and balances that DAFM applies 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 DAFM representatives at the oral hearing also outlined the processing of the application and the information submitted by the Applicant including maps of the proposal.

The DAFM in its statements to the FAC confirmed that an AA Screening report was completed and that having reviewed the details of relevant European sites, their qualifying interests and conservation objectives, it identified the possibility of the project having a significant effect on a screened European site (Slieve Bloom Mountains SPA 004160). It further states that an Appropriate Assessment was carried out which involved review of Special Conservation Interest and the Conservation Objectives of the above European site (as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service) and that these have also been considered in the AA Report and AA Determination Statement in this case. In its statement DAFM confirmed that it determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (LS06-FL0058), either individually or in combination with other plans or projects, will not adversely affect the integrity of any European site and that the site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of licence issued for the project. In the update provided at the oral hearing DAFM advised that there were some pieces of text included in error at page 3 of the AA Determination and that this did not affect the Determination made. It was also noted that some additional text was included in error at page 5 of the DAFM AA screening form which did not affect the screening conclusion reached. In response to the appeal ground that the opinion of the general public has not been sought under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination, the DAFM sets out the provisions of the said Article 6(3) as it relates to Screening for Appropriate Assessment and Appropriate Assessment specifically, and the consideration, if appropriate, of the opinion of the general public in the making of a related determination, and submits that these provisions, and any

considerations and decisions made pursuant to them, in relation to this application, fully concord with the requirements of Article 6(3) of Habitats Directive as regards public participation.

In the statement to the FAC in relation to appeal FAC 409/2020 the DAFM provided a response to the grounds and confirmed that the information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures were considered during the licensing process in relation to the felling and reforestation project LS06-FL0058. It further states that the application 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 (v.05Nov19)* (DAFM, 2019) and that the related AA screening document is on file. It also sets out that an Appropriate Assessment was required and involved review of Special Conservation Interest and the Conservation Objectives of the Slieve Bloom Mountains SPA 004160 as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service. The response confirms that there is no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects. The statement also confirmed that DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination Statement for LS06-FL0058. It determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (LS06-FL0058), either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of licence issued for this felling and reforestation project LS06-FL0058.

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. 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 3.59 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 and therefore considered that breaches of Article 4(3) and 4(4) had not occurred.

In relation to the contention that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the FAC notes the DAFM statement dated 5<sup>th</sup> October 2020 wherein it outlines the checks and balances that DAFM applies 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 FAC notes that the proposal was referred to Laois Co. Council and that the reply did not raise any issue in relation to water quality or objectives of the River Basin Management Plan 2018 – 2021 (2018). While a ground in the case of appeal FAC 340/2020 made reference to the site being in a catchment with 'previous records' of Freshwater Pearl Mussel it did not submit any specific information regarding effects on water quality or pathways related to the proposal. In response to a query at the oral hearing both the applicant and DAFM confirmed that the project site does not have a hydrological connection to a site with a designated population of Freshwater Pearl Mussels. Subsequent examination of EPA WFD Catchment mapping by the FAC indicates that the proposal area is not within a Margaritifera Catchment, that it is in the Barrow WFD subcatchment 010 and that the distance from a WFD subcatchment with a Margaritifera Catchment within its WFD catchment is c60km in a straight line and c92km for hydroconnection. The FAC noted the submission made by the applicant at the oral hearing as to the process it follows to ensure that the conditions attached to the licence are complied with. Having regard to the information available to it, the submissions and clarifications made to the oral hearing, and having examined the relevant maps publically available on the EPA website, the FAC is satisfied that the proposal 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 (LS06-FL0058) is not directly connected with or necessary to the management of any European Site. DAFM undertook a Stage 1 screening in relation to seven European sites (5 SAC & 2 SPA) one of which (4160 Slieve Bloom Mountains SPA) is overlapped by the project. The FAC examined publicly available information from the NPWS and EPA and identified the same seven sites, 4160 Slieve Bloom Mountains SPA which is overlapped by the project, and, 412 Slieve Bloom Mountains SAC, 2162 River Barrow And River Nore SAC, 859 Clonaslee Eskers And Derry Bog SAC, 2141 Mountmellick SAC, 4233 River Nore SPA, and 571 Charleville Wood SAC. Each site is considered in turn along with its qualifying interests and conservation objectives and the reasons for the screening conclusions. The grounds of appeal do not identify any specific concerns with the conclusions reached. The DAFM concluded that an appropriate assessment should be undertaken in relation to 4160 Slieve Bloom Mountains SPA with the 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. 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. The grounds of appeal do not

identify a specific concern regarding effects, impacts or mitigation measures described in the appropriate assessment report and determination. 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. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM determination concludes that;

*"the Department of Agriculture, Food & the Marine has determined, pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.*

*For the purposes of 42(16) of S.I.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any European Site."*

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. Regarding the submission in the grounds of the appeal received on 6<sup>th</sup> July 2020 (FAC 340/2020) that certain conditions should be attached to the licence, including those relating to protections for birds, notifications and inspections specific to this licence, the FAC considered the existing legislative safeguards in place with regard to these items and 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 as raised in the grounds of appeal in this case, is not required.

In considering the appeals in this case the FAC had regard to the record of the decision and the submitted grounds in the two appeals, other submissions received, the submissions made and clarifications obtained at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors was not made in making the decision and neither that the decision was made without complying with fair procedure. In deciding to affirm the decision of the Minister regarding licence LS06-FL0058 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

  
Seamus Neely On Behalf of the Forestry Appeals Committee