



[Redacted]

17th December 2020

Subject: Appeal FAC 406/2020 regarding licence MN01-FL0076

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 MN01-FL0076 for felling and replanting of forest on 5.41 ha at Barratitopy Lower, Knockballyrone. Co. Monaghan, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 25th of June 2020.

Hearing

An oral hearing of appeal 406/2020, of which all parties were notified, was held by the FAC on 9th December 2020.

In Attendance at Oral Hearing:

Department Representative(s):	[Redacted]
Appellant:	Not present,
Applicant / Representative(s):	[Redacted]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Seamus Neely and Mr. James Conway.
Secretary to the FAC:	Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and in particular the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence MN01-FL0076.

The licence pertains to the felling and replanting of forest on 5.41 ha at Barratitopy Lower, Knockballyroney. Co. Monaghan [ING (E) 258075.66, (N) 341987.81], and was approved by the Department of Agriculture, Food and the Marine (DAFM) on 25th of June 2020. The forest is currently composed of Sitka Spruce and replanting is to be of Sitka Spruce (100%). The site is described as having an underlying soil type approximately composed of Surface water Gleys, Ground water Gleys (91%) & Variable (9%); It is located on a slope that is predominantly moderate 0-15%, while the habitat is predominantly WD4. The project is proximate to the Scotstown_010 and Scotstown_020 waterbodies.

Referrals are on file to the Local Authority on the 8th of January 2020, and the NPWS on the 10th of December 2019, both with no response. A submission from IFI dated 10th of January is on file drawing attention to the WFD Ecological Status of the Scotstown_010 as High, the presence of certain species, and the need to ensure that the proposed project not cause a deterioration of existing conditions in the waterbody.

The application which is dated the 2nd of December 2019 included a harvest plan, including maps, and general environmental and site safety rules related to the operations. It also includes a pre-screening report for Appropriate Assessment.

The DAFM undertook and documented an appropriate assessment screening dated 8th of June 2020. This AAS screened in [4167] Slieve Beagh SPA and [UK9020302] Slieve Beagh-Mullaghfad-Lisnaskea SPA. It screened out [UK0016622] Slieve Beagh SAC and [UK0016621] Magheraveely Marl Loughs due to absence of hydrological connection and there being no possibility of in-combination effects. The Special Conservation Interest (SCI) for Slieve Beagh SPA and Slieve Beagh-Mullaghfad-Lisnaskea SPA is hen harrier.

An Appropriate Assessment report was prepared by DAFM with a final review by an ecologist noted on the 22nd of June 2020. It concludes that mitigations are required with respect to the Hen Harrier and for the protection of the Scotstown [010] waterbody. The AA includes an in-combination effects assessment, with planning applications from the Local Authority (41), An Bord Pleanála (0), the EPA (4) and other forestry consents (6) considered. It also considers the contents of the county development plan. DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. The AA is accompanied by an AA determination with the same ecologist review date.

The decision to grant the Licence is subject to one appeal. The grounds of appeal include: a breach of Article 4(3) of the EIA Directive 2014/52/EU (through failure to carry out screening for EIA); a breach of Article 4(4) of the EIA Directive 2014/52/EU (through failure to consider possible cumulative effect of several projects where those project form part of a whole project); a breach of Article 4(4) of the EIA Directive 2014/52/EU (through failure to adequately describe aspects of the environment likely to be

significantly affected by the project); that the license and its associated operations take inadequate consideration of the Water Framework Directive River Basin Management Plan for Ireland 2018-21; that the Stage 2 AA determination is not legally valid by reason of a lacunae in its contents; that DAFM has not sought the opinion of the general public (under Article 6(3) of the Habitats Directive) of the Appropriate Assessment Determination; that the licence conditions that do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC; that the licence conditions that do not provide (as would be required by Article 12 of the Habitats Directive) a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, reading hibernation and migration; that the harvest plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation; that the licence should contain a condition to notify the Minister of the commencement and conclusion of operations; and that the licence should include 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 DAFM summarised their approach to the licencing decision and outlined the basis for licence conditions. They also referenced their Statement of Fact, which addresses each of the appeal grounds. 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 5.41 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 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.

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 FAC also considered the submission from Inland Fisheries Ireland in relation to this application, and the inclusion in the licence of a number of conditions addressing the management of surface water and drainage on the site, planting and operations in proximity to the aquatic zone, and the prevention of silt, sediment and other contaminants into receiving aquatic zones or watercourses. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the proposal.

At oral hearing, the FAC noted the apparent error in the Appropriate Screening document which places the relevant waterbodies in the Nenagh_Sc_010 Sub-Catchment and the River Blackwater catchment. EPA mapping indicates that the waterbodies are in fact located in the Lough Neagh and Lower Bann WFD Catchment. However, the EPA mapping also confirms the AAS screening conclusion that there is no direct hydrological connection to any Natura site. Based on the responses given at oral hearing, the FAC is satisfied that this error was typographical in nature, and does not affect the conclusion of AA screening process. Based on the information available to it, the FAC is satisfied that the proposal does not pose a significant threat to water quality.

When considering the stated ground of appeal that the Stage 2 AA determination is not legally valid by reason of a lacunae in its contents the FAC noted the content of the DAFM statement provided. 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 (MN01-FL0076) is not directly connected with or necessary to the

management of any European Site. DAFM undertook a Stage 1 screening in relation to four Natura 2000 sites. The FAC examined publicly available information from the NPWS and EPA and identified the same four sites as being within 15km of the project site: [4167] Slieve Beagh SPA, [UK9020302] Slieve Beagh-Mullaghfad-Lisnaskea SPA, [UK0016622] Slieve Beagh SAC and [UK0016621] Magheraveely Marl Loughs. No aspects of the proposed project were identified that would warrant extending the likely zone of impact for the project for the purposes of screening assessment. 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 the two SPAs, while the SACs were 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 SPAs 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, nor are any specific lacunae suggested. Other plans and projects considered in-combination with the proposal are described in the Assessment carried out by the DAFM. The FAC considers that the DAFM followed a process that yielded 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, including with respect to lacunae and the opinion of the general public, and concurs with the conclusions outlined in the Appropriate Assessment Determination provided by the DAFM.

In relation to the appellants stated ground of appeal that the Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, and a similar ground with respect to the protection of certain animal species under Article 12 of the Habitats Directive, the FAC had regard for the statement provided by DAFM, and sought further clarification on 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 grounds 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. The DAFM submitted at the oral hearing that the Applicant provided such plans and that all materials submitted with this application were fully assessed by DAFM in considering the application. The FAC is satisfied that the Harvest Plan submitted with the application is sufficient to inform the decision-making process in this case.

Regarding the conditions that the Appellant suggested should be attached to the licence pertaining to notifications to the Minister and other parties, the FAC considered the DAFM statement to the effect conditions may be attached as the Minister considers appropriate. 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 management of the licensing and enforcement process, that the inclusion of the conditions as raised in the grounds of appeal in this case, are not required.

In deciding to affirm the decision to grant the licence, on the balance of evidence, the FAC is satisfied that there was no serious or significant error or series of errors made in making the decision or that the decision was made without complying with fair procedures. The FAC concluded that the proposed development would be consistent with Government policy and Good Forestry Practice.



John Evans, On Behalf of the Forestry Appeals Committee