



14 December 2020

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Our ref: 593/2020

**Subject:** Appeal in relation to felling licence WW07-FL0154

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence WW07-FL0154.

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 the parties to the appeal.

#### Background

Felling licence WW07-FL0154 was granted by the DAFM on 09 July 2020.

#### Hearing

An oral hearing of appeal 593/2020 was conducted by the FAC on 26 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Bernadette Murphy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Luke Middleton & Ms Eilish Kehoe

#### Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference WW07-FL0154).

The proposal is for the clear-felling and restocking of a stated site area of 22.31ha at Aghavannagh (Revell) Co Wicklow. Current stock per application; 9.97ha plot (98% Sitka Spruce and 2% Japanese Larch), 3 plots of 100% Sitka Spruce totalling 9.35ha, a 1.98 ha plot of undeveloped Sitka

Spruce, a 0.08ha bare unplanted plot and a 0.88ha plot denoted as blown. Replanting of 22.31ha is with 99% Sitka Spruce and 1% Rowan per the licence schedule. The application sought 1.12 ha of open space. The proposal site is predominantly steeply sloped to southwest from an elevation of circa 600m, the River Ow is located down-slope from the proposal at c.800m. The project is located in the Avoca catchment (100%), the Avoca\_Sc\_010 (100%) Sub-Catchment, the Ow\_010 (96%), and the Ow\_020 (4%) water-bodies. The Underlying soil type is approximately Blanket Peats (57%) and Podzols (Peaty), Lithosols, Peats (43%).

Application included a document titled harvest plan and a pre-screening report with four Natura sites identified and informing the proposal is within the Wicklow Mountains SAC and Wicklow Mountain SPA, and that Slaney River Valley SAC is at c. 6km distance. This pre-screening report also identified 16 other clear-felling projects by the applicant within a 1.5km radius totalling 107 Ha.

The DAFM referred the application to the Local Authority and to Inland Fisheries Ireland. No referral responses are evidenced.

The DAFM carried out a Stage 1 screening of the proposal as required by Article 6(3) of the Habitats Directive, identified four European Sites within a 15 km zone and screened in two of the sites for a Stage 2 Appropriate Assessment; Wicklow Mountains SAC and Wicklow Mountains SPA. The Appropriate Assessment Report and Appropriate Assessment Determination were reviewed by an independent ecologist on 07 July 2020.

The licence was issued on 09 July 2020 and is exercisable until 31<sup>st</sup> December 2022. It is subject to standard conditions (a) to (g) together with additional conditions (h) to (r), many of which relate to the protection of water quality. Condition (j) requires retention of scrub and the planting of specified broadleaf and relates to the Peregrine, also condition (q) requires a 100m exclusion zone from felling and other forestry operations in the period 01 March to 31 August where the proposal borders moors, heathland, peat bogs or natural grassland or is within 100m of a clearing in the forest of larger than one hectare, and relates to the Merlin. Condition (o) relates to a 10m exclusion zone along aquatic zones and relates to the Otter and condition (h) relates to restrictions within a 50m or 20m zone by aquatic or relevant watercourse, condition (i) to a 20m uncultivated / unplanted setback along aquatic zones.

There is a single appeal against the decision to grant this licence. The written grounds contend that the decision is in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive, adding that seven applications totalling 47.83ha were made on the same day as this application within the same FMU. It should be sent back to screening stage. The whole project has not been considered and aspects of the environment likely to be affected are not described. In the absence of adequate assessment for cumulative impact, the achievement of the objectives set for the underlying water-bodies under the River Basin Management Plan for Ireland cannot be assured. The Stage 1 Appropriate Assessment Screening and Stage 2 Appropriate Assessment are not legally valid, an assessment under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected areas concerned. Also the opinion of the general public has not been sought as is required by 6(3). The licence does not provide a system of protection for wild birds during



the period of breeding and rearing consistent with the requirements of the Birds Directive. Licence conditions do not provide a strict protection per Article 12 of Habitats Directive to Annex IV(a) species. The DAFM did not provide records requested. The harvest plan is not consistent with the Interim Standards for Felling and Reforestation. There should be a clear commencement and conclusion notification system for works required by the licence and DAFM inspections should be provided for. 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.

In response, the DAFM states that the proposed felling is not categorised as an activity covered by the EIA Directive, the DAFM Appropriate Assessment screening procedures were followed, the DAFM identified the possibility of the project having a significant effect on screened European sites (Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040). The mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservation Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive. There is no potential for the proposed works to contribute to any cumulative adverse effects on these European sites, when considered in-combination with other plans and projects. The site-specific mitigations identified in the Appropriate Assessment Report and Appropriate Assessment Determination were attached as conditions to the licence. The application is published and the applicant must complete and erect a site notice and submissions are invited from the public and any such, if appropriate, are taken account of in screening and assessments. It is a legal principle that, if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions continue to apply. Documents in respect of WW07 FL0154 were provided to the Appellant on 11 August 2020 and the appellant has exercised his right to appeal the decision to grant the subject licence. The DAFM also stated the proposal was the subject of a field inspection and no hydrological connection or other pathways from this licensed felling and reforestation project to the adjacent water-body were found during the field survey. The use of plant protection products (PPPs) in Ireland is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products.

There is no legal requirement for forest owners to inform adjacent land owners of their intention to spray. Regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

The FAC held an Oral Hearing on 26 November 2020. The parties were invited to attend in person or to join electronically. The FAC sat in person at this hearing, the Appellant did not participate and the DAFM and the Applicant both participated electronically. At the hearing the DAFM detailed the background to the processing of the application and the decision to grant the licence and their

previously submitted written response to the grounds of appeal. The DAFM outlined the reasons for the additional licence conditions and specifically (h), (i), (j) and (q) in respect of mitigations from the Appropriate Assessment Report and Determination. The DAFM also confirmed that the Appropriate Assessment Report and Appropriate Assessment Determination had been concluded, and their conclusions considered, prior to the decision to grant felling licence WW07 FLO154. The DAFM stated there was no aquatic zone on site but the conditions regards setback apply due to an aquatic zone north of the site. The Applicant clarified that a channel exists at the northwest of the site that drains to the Ow River at c. 900m. The Applicants provided a brief description of the site and its surrounds and stated, in response to the grounds of appeal, that the proposed clear-fell area will be replanted with conifers 99% and Rowan 1% and the land use type will remain as commercial conifer plantation forestry, with the Rowan used for diversity. The Applicants confirmed there is open heath-land northeast of the site and the site adjoins the Wicklow Mountains SAC. The DAFM contended there would be no seed source from the clear-felling and for approximately 30 years from the replanting. The Applicants stated there is no change of land use involved in the proposal. The Applicants confirmed the site slope is c. 23% or 13.2° and it is c. 800m to the nearest downstream SAC within which the Otter (a qualifying interest) is located c. 2km distance from the proposal.

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 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 (nor clear-felling) are 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 FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). The FAC also noted the licence issued is for the felling and reforestation of 22.31 ha and does not consent to any change of land use. The FAC further considers that the proposed felling is for the purposes of producing timber for commercial purposes and that there is no convincing evidence that the purpose of the proposed felling is a change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

In respect of the contention that the DAFM failed to provide the records on time, the appellant made an initial request for information on 14 July 2020, a date after the licence issue date, and the information was provided on 11 August 2020 per evidence to hand, the decision to issue the licence had been appealed on 05 August 2020, and the 28 days period to appeal the licence decision elapsed on 06 August 2020. The FAC noted that the written grounds of appeal would indicate that the Appellant had knowledge of the proposed development at the time of lodging his appeal, and the Appellant was afforded the opportunity to participate in the oral hearing.



In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to the felling licence. The applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species, and stating at the oral hearing that these grounds related to a shortcoming in law. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence. Regarding grounds that the licence conditions 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) in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. The FAC notes that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in statute elsewhere. The Appellant has not identified any Annex IV(a) species in particular. Based on the evidence before it and having regard to the licence conditions, the FAC considers that there is no convincing evidence to indicate that the proposed development would be likely to have an adverse impact on an Annex IV (a) species.

In addition to standard conditions attaching to the licence for the reason of protecting the environment during harvesting and restocking, specific conditions were attached for the reason of protecting water quality in this instance. Based on the information before it, the FAC considers that there is no reason to conclude that the proposed development would give rise to an adverse impact on water quality.

The FAC had regard to the grounds that the licence should contain conditions relating to notification of commencement and conclusion of operations and the inspection of works prior to, during, and post-completion. The FAC noted the DAFM's system of inspecting a sample of licences issued in order to establish adherence to the conditions of those licences. The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. In this regard, the FAC noted the content of the DAFM's statement in regards the legal requirements that are applicable in such instances and consider these are sufficient in the circumstances.

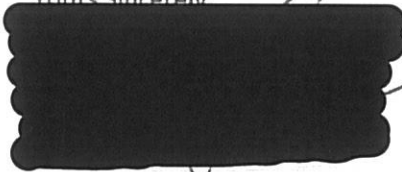
The Screening for Appropriate Assessment and the Appropriate Assessment carried out by the DAFM, included for the Wicklow Mountains SAC which adjoins part of the proposal's north-eastern edge borders, this is also part of the Wicklow Mountains National Park. The SAC includes the Otter as a qualifying interest and the NPWS mapping confirms the Otter occurs along part of the Avonbeg river system c. 2km northeast of the proposal. The evidence from the hearing is that open heath land occurs on the section of the SAC along the northeast edge of the proposal. The SAC was screened in due to the proximity of the project to the Natura site, and at the Stage 2 assessment each heath land qualifying interest was deemed not in the vicinity of the plot and with no pathway. The Assessment refers to the blanket bog, a qualifying interest, as not mapped and unlikely to be in the vicinity of the

proposal. The EPA mapping shows blanket peat along a northeast section of the proposal. This in addition to the hearing evidence suggests the precautionary principle should be applied in respect of the qualifying interest and the likelihood of significant effects. The FAC is satisfied with the mitigations reflected in the licence regards the Merlin, Otter and Peregrine.

While the DAFM statement in reply to the appeal suggests a field inspection was undertaken, the remaining evidence suggests the application was solely desk assessed. The DAFM statement suggests that no hydrological connection was found from the proposal, whereas the evidence from the hearing is that such a connection exists to the Wicklow Mountains SAC c. 800m southwest of the proposal.

Having regard to this background, the FAC concluded that a series of errors has occurred in the making of the decision on the licence, the subject of this appeal, and that the decision to grant the licence should be set aside and remitted to the Minister to carry out a new Stage 1 screening assessment and, subject to the conclusions of that screening assessment, carry out a Stage 2 Appropriate Assessment in accordance with the provisions of 6(3) of the Habitats Directive, having regard to potential habitat adjoining the proposal, before a new decision is made in respect of the licence.

Yours Sincerely

A large black rectangular redaction box covers the signature area. A handwritten mark, possibly a flourish or the start of a name, is visible above the redaction.

Pat Coman, on behalf of the FAC

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