



23 February 2021

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FAC ref: 532/2020

Subject: Appeal in relation to felling licence GY11-FL0370

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence GY11-FL0370.

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 GY11-FL0370 was granted by the Department of Agriculture, Food and Marine (DAFM) on 02 July 2020.

#### Hearing

An oral hearing of appeal 532/20 was conducted by the FAC on 11 February 2021.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
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 and submissions made at the Oral Hearing, before deciding to affirm decision to grant the licence (Reference GY11-FL0370).

The proposal is for the clearfelling and restocking on a stated site area of 17.89ha at Cappanagh, Loughrea, Co. Galway. The current crop is a mixture of Sitka Spruce and Lodgepole Pine. Restocking would be with 70% Lodgepole Pine (11.90ha), 30% Sitka Spruce (5.10ha) and provision is made for 0.89ha open space. Soils are 100% Blanket Peats and the slope is predominantly moderate 0-15%. A 'Harvest Plan' and Appropriate Assessment Pre-screening Report are submitted. It is stated that the

harvest block is not within a water basin with hydrological connectivity to an aquatic SAC. The project lands are within the Shannon Catchment (100%), Blackwater (Kilmacow)\_Sc\_010 (100%) Sub Catchment, the Duniry\_010 (100%) waterbody.

The DAFM completed a screening for Appropriate Assessment, identifying Natura 2000 sites within a 15km radius of the project site. Fifteen Natura sites were assessed and screened out for stage 2 assessment - Sonnagh Bog SAC, Lough Rea SAC, Lough Rea SPA, Pollagoona Bog SAC, Peterswell Turlough SAC, Pollnaknockaun Wood Nature Reserve SAC, Derrycrag Wood Nature Reserve SAC, Drummin Wood SAC, Loughatorick South Bog SAC, Lough Coy SAC, Rosturra Wood SAC, Gortacarnaun Wood SAC, Carrowbaun, Newhall & Ballylee Turlough SAC, Cloonmoylan Bog SAC and Barroughter Bog SAC. Reasons given for the screening out included presence in a separate waterbody catchment with no upstream connectivity, separation distance, insufficient connectivity with a significant buffer to reach the waterbody by drainage channels and/or diffusion (>250m) and 18.5km separation. One site was screened in for Stage 2 Appropriate Assessment – *Slieve Aughty Mountains SPA* – for reason of the location of the project within the Natura 2000 site. The qualifying interests for this site are the Hen Harrier and Merlin.

The DAFM produced an Appropriate Assessment Report (AAR) dated 23.06.20. This was independently ecologically reviewed on 29.06.20. The AAR report includes the Appropriate Assessment screening. This is also independently reviewed by the ecologist and the screening conclusion is upheld. A Stage 2 Appropriate Assessment for *Slieve Aughty Mountains SPA* is carried out. Qualifying Interests and conservation objectives are listed and potential for significant effects assessed. Based on the assessment, site-specific mitigation measures are proposed for the Hen Harrier and the Merlin as follows (in summary):

#### Hen Harrier

- Prohibition on disturbance during the Hen Harrier breeding season
- Planting of 5 rows of broadleaves on the north side of the site

#### Merlin

- Prohibition on felling and other operations associated with the licence during period 1 March to 31 August within 100m of the forest edge, where such edge is immediately adjacent to moors, heathlands, peat bogs or natural grassland, or within 100m of a forest clearing greater than 1ha
- Such operations can commence in sections of the project area furthest away from the 100m exclusion zone. Such operations can progress towards the exclusion zone but can only enter it during the period 1 September to 29 February inclusive
- Planting of 5 rows of broadleaves on the north side of the site
- Adhere to Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation (December 2016).

An in-combination assessment lists a domestic extension as a non-forestry project and 8 Coillte felling licences as forestry related.

There is approximately 71% forest cover in Duniry\_010 River sub basin and approximately 49% in Drumkeary Stream\_010 sub basin.





The DAFM made an Appropriate Assessment Determination (AAD) that the proposed activity, individually or in combination with other plans or projects will not adversely affect the integrity of any European site, in particular the *Slieve Aughty Mountains SPA*, having regard to the qualifying interests and conservation objectives, and will not affect the preservation of the site at favourable conservation status, if carried out in accordance with the specified mitigation measures. No reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

DAFM referred the application to the NPWS. A response dated 24.01.20 recommends:

- Forestry Best Practice to be followed in all phases of the operations
- Invasive species, if present, should be managed appropriately as part of the forests management so as to avoid their spread

The submission includes an appendix of 'general points'

The licence issued on 02.07.20 and is exercisable until 31.12.22. The licence is subject to standard conditions (a) – (g). Additional conditions are as follows:

(h) Felling site is within a Red (Breeding) Zone for Hen Harrier. No disturbance operations associated with the licence to take place between 01 April and 15 August (incl), (i) Minimum of 5 rows of broadleaves on the north of the site to act as a corridor and haven for prey species for the Hen Harrier, (j) 60m setback for dwellings or 30m if agreement reached, (k) No conifers within 20m of the public road. Broadleaves and diverse conifers within the strip 10-20m from the public road, (l – q) Protection of water quality, (r) No felling or other forestry operations in the period 01 March to 31 August (inclusive) within 100m of the forest edge where the forest edge is immediately adjacent to moors, heathland, peat bogs, or natural grassland, or within 100m of a clearing in the forest greater than 1ha, (s) Adherence to specified Guidelines and standards.

There is a single appeal against the decision to grant the licence. In summary the grounds of appeal contend that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA, there is a breach of Article 4(4) of the EIA Directive. On the same date as this application was made a further 8 applications were made for the same FMU totalling 147.74ha. The application does not cover the whole project. Project splitting is not permitted, there is no evidence that the impact on a Nationally designated site had been adequately considered, the licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan, the Stage 1 and Stage 2 AA determinations are not legally valid, the opinion of the general public was not sought under Article 6(3) of the Habitats Directive, the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation, licence conditions do not provide for the protection of all wild birds during breeding and rearing season, licence conditions do not provide for the strict protection of Annex IV species, there should be a standard condition requiring the licensee to notify the Minister at the commencement and conclusion of operations, there should be a condition requiring the Forest Service to inspect plans and works prior to, during and post works to ensure compliance, and there should be stringent and



enforceable conditions regarding notification of appropriate bodies, groups and the public of the spraying of chemicals.

In response the DAFM state that the proposed development is not of a class of development to which the EIA Directives applies, the application was referred to the Local Authority and NPWS in line with current procedures, DAFM applies a wide range of checks and balances in relation to the protection of water quality, the Slieve Aughty NHA is 650m to the east and the site synopsis notes that the site is threatened by afforestation but felling and reforestation are not mentioned as a threat, the application was subject to Appropriate Assessment screening procedures and sites within a 15km radius were assessed, the DAFM procedures concord with the requirements of Article 6(3) of the Habitats Directive, it is a principle of law that unless the grant of a first consent exempts the holder from any obligation to obtain a second consent or adhere to any other restriction on the timing of activities or similar, where such is set out by statute elsewhere, these other obligations and restrictions apply, the Minister may, at any time, attach or vary conditions to any licence granted, and the use of PPPs is governed by Statutory Instruments. These provide the basis for the proper and appropriate use of chemicals.

An Oral Hearing was convened on 11 February 2021. All parties were invited to attend and participate. The FAC sat in-situ and remotely. All parties attended and participated remotely. The DAFM outlined the procedures followed in coming to the decision to grant the licence. They confirmed that the Appropriate Assessment screening (AAS), the AAR and AAD had been completed, reviewed by an independent ecologist and taken into consideration before the making of the decision. Recommended mitigation measures were incorporated into the licence, but the condition relating to the protection of the Hen Harrier contained some alternative wording to that recommended in the AAD. The application had been desk assessed. There is no evidence of invasive species on the site. The Appellant contended that if an application was made to afforest this site now, it would not be licenced. The project lands are 100% Blanket Peat and within an SPA for which the conservation objective is to preserve and restore the qualifying interests – Hen Harrier and Merlin. A serious decline in the number of pairs of Hen Harriers had been recorded in this area; the appellant claimed that forestry operations had been a factor in the decline. There is no scientific basis for the buffer distances set out in the licence for Merlin and a more realistic buffer would be 300 – 500m. The licence contains contradictions and there should be certainty in the wording of the conditions attached. Two additional Natura 2000 sites – Lough Derg SAC and Lough Derg SPA should have been considered for screening for Appropriate Assessment. There appears to be a failed area of planting on the eastern side of the site and it is not clear if this was considered by the DAFM. The NPWS website shows Annex I habitat to the north of the project lands. The Appellant contended that the proposed restocking had not been assessed. The Applicant stated that the site had been desk assessed before the application was lodged and field assessed on 19.11.20, after the licence was granted. The site is on a north facing slope. There is one relevant watercourse in the northern section of the site. This flows approximately 350m to the Duniry River which, in turn, flows east for about 10.5km before joining the Cappagh River and then for a further 9.6km to Ballyoughter Bog SAC. The site drains to Lough Derg at a hydrological distance in excess of 20km and direct separation of about 17km. Adjoining the site to the west and south is open heath land, to the east is forestry plantation and to the north is farmland and forestry.





In response to FAC questions, the DAFM stated that the public consultation period had been 30 days from the advertising of the licence. No consideration had been given to invasive species as there was no evidence that any existed. An in-combination assessment had been carried out. The Appellant stated that the status of the underlying waterbody was 'Good'. The Appellant stated that Lough Derg (North East Shore) SAC and Lough Derg (Shannon) SPA should have been screened for the likelihood of significant effects.

Addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development is in breach 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). Furthermore, the FAC considers that the proposed development does not involve any works that, in themselves, would constitute a class of development covered by the EIA Directive. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as the proposed development is not of a class of development covered by the Directive.

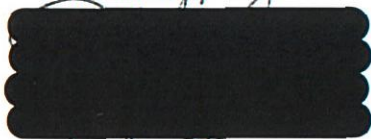
The FAC considered the processes followed by the DAFM in the screening for Appropriate Assessment and the AAR leading to the Determination. The DAFM considered Natura 2000 sites within a 15km radius of the project lands and, having regard to the nature and scale of the proposed development, the FAC considered this to be acceptable. The FAC noted the reasons stated by the DAFM for screening out fourteen of the listed sites and considers that there is no convincing evidence before it, to indicate that the screening conclusion reached is not correct. In respect of the site screened in for Stage 2 Appropriate Assessment – *Slieve Aughty Mountains SPA* – the FAC noted that this had been assessed in light of its qualifying interests, conservation objectives and consideration of potential for significant effects, and that site-specific mitigation measures had been recommended to avoid any residual effects. The FAC is satisfied that this assessment was carried out in accordance with the provisions of the Habitats Directive and that the conclusion of the Stage 2 assessment gives a sound basis for the Determination that the proposed activity, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular the Slieve Aughty Mountains SPA, having regard to the Qualifying Interests and conservation objectives, and will not affect the preservation of these sites at favourable conservation status, when carried out in accordance with the specified mitigation measures. The FAC notes that both the AAR and AAD were reviewed by an independent ecologist.

At the Oral Hearing the appellant contested the basis for the wording of the recommended condition in respect of the Merlin and, in particular, the scientific basis for the 100m buffer proposed. In considering this ground, the FAC noted that the application had been referred to the NPWS and that the response had not recommended any specific requirements in respect of the Merlin by way of conditions in the event of the licence being granted. Furthermore, the recommended condition had been reviewed by an independent ecologist who did not raise any concerns regarding the wording of the recommended condition. In these circumstances, the FAC considers the recommended mitigation in respect of the Merlin to be acceptable.

The project lands are within the Shannon Catchment (100%), Blackwater (Kilmacow)\_SC\_010 (100%) Sub Catchment, the Duniry\_010 (100%) waterbody. The FAC notes that the status of the underlying waterbody is stated to be 'Good', and that the licence granted includes conditions related to the protection of water quality. There is no convincing evidence before the FAC to suggest that the proposed development would be likely to have an adverse impact or inhibit the achievement of the objectives for this waterbody. No information has been submitted by the appellant in respect of any Annex IV species or wild bird species on the project lands likely to be affected by the proposed development, and the FAC finds no basis for requiring site-specific conditions to be attached to the licence requiring their protection. The DAFM is the body responsible for the compliance with, and, where necessary, the enforcement of conditions attached to the licence, and the FAC finds no convincing reason to attach additional conditions to the licence in respect of these matters. The FAC considers that the Harvest Plan, required by way of condition, provides a guide for operators carrying out the clearfelling and restocking, but that the development permitted must adhere to all of the conditions attached to the licence. The use of PPPs is controlled by way of Statutory Instruments, and there is no specific legal requirement to inform the public or bodies of the intention to spray in individual cases.

In deciding to affirm the decision to grant the licence, the FAC considers that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours Sincerely

A large black rectangular redaction box covering the signature of Pat Coman.

Pat Coman, on behalf of the FAC