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26th February 2021

Subject: Appeal FAC651/2020 & FAC677/2020 in relation to felling licence TFL00364819

Dear [REDACTED]

I refer to the 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

Felling licence TFL00364819 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 13th August 2020.

Hearing

An oral hearing of appeals FAC651/2020 & FAC677/2020 was held by the FAC on the 2nd February 2021.

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Dan Molloy & Mr. Luke Sweetman
Secretary to the FAC:	Mr. Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr. Michael O'Brien, Ms. Jean Hamilton & Ms. Eilish Kehoe

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the 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 felling licence TFL00364819.

The licence at issue covers both thinning and clearfelling operations on a site of 32.8ha in Glenagragara, Co. Limerick. Plot 1 (7ha) is for thinning only while Plot 2 (25.8ha) is for thinning followed by clearfell and replanting in 2029. The proposed restock species for this area is 80% Sitka spruce and 20% Lodgepole pine. The underlying soils are predominately peat and the slope is flat to moderate (<15%). A public road crosses the north-west corner of the site. The project is located in the Tralee Bay-Feale Catchment, the Galey_Sc_010 Sub-Catchment and the Galey_030 River Sub-Basin. According to Environmental Protection Agency (EPA) mapping, two unnamed watercourses rise within close proximity of the project site. One rises along the southwest boundary and flows c.2km before joining the Moyvane River. Another rises at the western boundary and flows c.1.5km before joining the same. The Moyvane River then flows c.5.4km to the Galey River which forms part of the Lower River Shannon SAC. The EPA Appropriate Assessment (AA) tool lists the hydrological distance from the application site to the Lower River Shannon SAC as c.7.5km.

The Applicant submitted a felling application with associated maps and a harvest plan. The DAFM stated that an external Ecologist undertook an AA screening (AAS) of four Natura sites within 15km of the project lands and screened two sites in for AA but no evidence of this AAS was before the FAC. An AA Report (AAR) produced by the external Ecologist (dated 24th July 2020) does not include any reference to screened-out Natura sites' qualifying interests (QIs) or the reasons they were screened out. The AAR states that the Lower River Shannon SAC and the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA were screened in for AA. It states that the project site is within the SPA, in a Higher Likelihood of Nesting Area (HLNA) for Hen Harrier, and is 8km upstream from the SAC. The AAR describes site-specific mitigation measures in relation to the Hen Harrier, the Otter and a number of other aquatic QIs of the Lower River Shannon SAC. The AAR contains an in-combination statement which consulted various planning websites and the DAFM's internal records to assess the cumulative impact of the proposed development with other plans and projects in the vicinity. The DAFM deemed the project, in-combination with other plans and projects, would not give rise to any adverse effect on any European site.

The DAFM produced an AA Determination (AAD) dated 28th July 2020. The AAD, made by a DAFM Forestry Inspector, lists two Natura sites which were screened-out for AA; Moanveanlagh Bog SAC and River Shannon and River Fergus Estuaries SPA. It states that the reasons for screening these sites out are listed in an AAS document (stated as being completed on the 23rd July 2020) but does not state any of the reasons. The AAD contains the mitigation measures prescribed in the AAR and both documents are stamped as received by the DAFM felling section on the 30th July 2020.

The DAFM referred the application to the Limerick County Council (LCC), the National Parks & Wildlife Service (NPWS) and the DAFM Archaeologist. LCC did not respond. The NPWS responded (8th August 2019) and stated the application site is within the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and a Red Zone (HLNA) for Hen Harriers. Therefore an AA is required if works are planned to be carried out during the Hen Harrier breeding season (1st April – 15th August).

The DAFM Archaeologist's report (30th October 2019) states there is a Fulacht Fia contiguous to Plot 2 of the proposed development which is scheduled for inclusion on the next revision of the Record of Monuments and Places (RMP). The submission lists specific conditions to be adhered to during the proposed works and includes maps of operational exclusion zones.

The licence issued on the 13th August 2020 and is exercisable for 10 years. It is subject to relatively standard conditions (a) to (g) plus several additional conditions. Condition (h) details the DAFM's Hen Harrier protocol and states no disturbance operations during Hen Harrier breeding season (1st April and 15th August). Condition (i) lists some of the conditions from the Archaeologist's report and states "see attached report and illustrative map for further details". Condition (j) requires strict adherence to the Standards for Felling & Reforestation (Oct, 2019). There are two further conditions without an alphabetic reference which state:

- No operations to occur during the Hen Harrier breeding season from April 1st to August 15th
- Adhere to mitigation and conditions in the AAR and AAD.

There are two appeals against the licence. The written grounds of appeal were considered in full by the FAC, the following is a summary of the issues raised:

FAC651/2020:

"This development was screened in.

No Appropriate Assessment according to EU and Irish law was carried out."

FAC677/2020:

- Breach of Article 4 (3) of the EIA Directive 2014/52/EU - this licence is in a class of development covered under Annex II of the EIA Directive.
- DAFM has failed to carry out an adequate EIA screening of the proposed development.
- The afforestation of these lands was carried out without any screening for the requirement for an EIA. No licence should be awarded for felling activity until there has been a retrospective assessment of the need for an EIA for the afforestation of these lands.
- There is no evidence that the potential impact on a non-designated European Annex I habitat has been adequately considered as part of the approval process
- This licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. Clear felling has the capacity to impact on water quality. Inland Fisheries Ireland & EPA were not consulted on this application.
- The mitigations in the AAD have not considered aspects of the reforestation which could impact negatively on the qualifying interest of the SPA. This is not sufficient to ensure compliance with Article 6.3 of the Habitats Directive.
- The seasonal mitigation for protecting the Hen Harrier is not sufficient to comply with the requirement of Article 6.3 of the habitats Directive.
- The AA In-Combination assessment is flawed as the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives.
- The Minister has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination.
- The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation
- The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence
- 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.
- Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a strict system of 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, rearing, hibernation and migration.

- Licence conditions do not provide a system of protection for all wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive

The DAFM submitted an identical response to each appeal in written statements to the FAC:

“Following the current DAFM AAS guidance document I carried out a 15km radius screening on the Natura 2000 sites in the area. I had reviewed the qualifying interests of the Natura 2000 sites in question and by using the latest information available to some Natura 2000 sites were screened out, the remainder have had an appropriate assessment report (AAR) and subsequently an appropriate assessment determination (AAD) has been carried out. Following the recommendation from the AAD I have recommended this licence to proceed.”

The FAC held an Oral Hearing on the 2nd February 2021. The FAC members sat in person and remotely at this hearing. The Appellant, the Applicant, and the DAFM all participated remotely. The DAFM detailed the process leading to their decision to grant the licence and reiterated their response to the Appellants’ grounds of appeal. The DAFM stated that an incomplete AAS which appeared as part of the Inspector’s Certification document was not the original AA and that the original AA had been carried out by the same external Ecologist that produced the AAR.

The Appellant contended that the application site was planted in 2001 and is part of a contiguous forest area >50ha planted since 1991. They indicated that if the forest was not established in compliance with the EIA Directive then felling licence TFL00364819 cannot be valid. The Appellant stated that the AAR contained no details of the emissions from the proposed project, that there is c.76ha of felling activity licenced within 500m of the project site in the last three years and an unknown amount of felling licenced within a 5km radius (4.4% of digitised forest area). They stated that the felling coupe size is large and that this was not just a factor in landscape sensitivity but for the environment too. The Appellant stated there is a discrepancy in felling area between the licence application and the forestry licence viewer. They queried had the AAR been reviewed by an external Ecologist and contended that it had been stamped as received on the 10th July 2020 whereas the completion date is the 24th July 2020. The Appellant submitted that the distance from the project site to the SAC varies within the AAR and that the licence conditions should contain the mitigations prescribed by the AAR rather than refer the Licensee to the AAR document. The Appellant stated that the AA is deficient in that the impacts of

reforestation had not been addressed. They highlighted the AAR's assessment of the felling site as unsuitable habitat for the Hen Harrier and commented that it *will* be suitable once it has been felled and for a period of time afterwards. They stated that the Hen Harrier population is not stable, that more suitable foraging and nesting habitat was required and that this site could provide that if not restocked. The Appellant stated an adjoining area of non-designated Annex I Habitat (Wet/Dry Heath) was at risk of colonisation by conifers and that this would reduce Hen Harrier foraging area and increase predation. They contended that the licence conditions were too vague and quoted European case law to support their argument that conditions must be strict enough to protect the environs of the site in question. In relation to the water protection measure in the AAR requiring the cessation of works during periods of heavy rainfall, the Appellant queried the definition of "heavy rainfall" and stated the condition was too open to interpretation.

The Applicant declined to comment during the hearing. The DAFM stated that "heavy rainfall" is defined by Met Éireann and that more recently the definition has been included in licence conditions.

The Appellant queried who determines if the rainfall on site meets the definition of "heavy rainfall" and stated that the Standards for Felling and Reforestation (October 2019) refer to the halting of works during and after rainfall. They also stated that there were omissions in the Inspector's Certification document and queried whether strict adherence to standards as required by licence condition (j) was different to just adhering.

In the first instance, the FAC had regard to the first Appellant's contention that no AA according to EU and Irish law was carried out. The FAC noted the DAFM's submission that an AA screening of the four Natura sites within 15km of the project was completed with the result that two sites were screened in for AA and an AAR and AAD were completed, as outlined above. The FAC noted that the AAD states in Section 2 that the reasons for screening out two European sites (the Moanveanlagh Bog SAC and River Shannon and River Fergus Estuaries SPA) for AA were contained in the AAS Report dated 23rd July 2020. However, this AAS Report did not form part of the suite of documents provided by the DAFM to the FAC in support of their decision to grant licence TFL00364819 and thus there was no evidence before the FAC to show how or why the DAFM arrived at their conclusion to screen out the Natura sites at issue. The FAC considered this a significant error on the DAFM's behalf.

In addressing the grounds of the second appeal, the FAC considered the submission that the proposed development should have been addressed in the context of the EIA Directive. The 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 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 assessment under 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 thinning of 7ha and the thinning and subsequent clearfelling and replanting of an area of 25.8ha. 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.

The FAC considered the second Appellant’s submission that the afforestation of these lands was carried out without any screening for the requirement of an EIA. The FAC noted the Appellant did not provide any specific evidence to support this contention. The FAC gave consideration to the issues at hand which are the appeals against the DAFM’s decision to issue felling licence TFL00364819 and whether or not they did so in compliance with fair procedure and without making a serious or significant error, or series of errors, in the process of making the decision.

Regarding the potential impact of the proposed development on the adjoining non-designated European Annex I habitat, the FAC noted the DAFM had referred the licence application to the NPWS and that they did not make any reference to this non-designated habitat or raise any concerns in their nature conservation recommendations.

The FAC considered the grounds relating to the WFD and the potential for clearfelling to impact on water quality. The FAC observed that licence conditions (a), (b) and (j) prescribe various measures and adherence to specific standards and guidelines for the reason of protection of water quality. The FAC also noted the licence conditions require adherence to the mitigation measures in the AAR and AAD for the protection of water quality and the aquatic QIs of the Lower River Shannon SAC. The FAC considers that it would be beneficial for all of the conditions prescribed by the DAFM to be included as additional conditions of the licence, rather than contained in separate documents attached to the licence. Based

on the information before it, the FAC concluded that there is no convincing evidence that the proposed development would give rise to a negative impact on water quality.

The FAC had regard to the second Appellant's submission that reforestation could impact negatively on the Hen Harrier and the seasonal mitigation for protecting Hen Harrier is not sufficient to comply with Article 6 (3) of the Habitats Directive. The FAC noted that the felling and restocking of the application site would provide potentially suitable habitat Hen Harrier ground nesting over a period of 9-12 years, prior to the forest reaching thicket stage. The FAC noted the response from the NPWS which provided for potential forestry operations during the Hen Harrier breeding season following the completion of an AA. The FAC observed that the DAFM included a licence condition which prescribed their Hen Harrier Red Zone protocol which prohibits disturbance operations during the Hen Harrier's breeding season (1st April – 15th August). Based on the information before it, the FAC concluded that, in the particular circumstances of this case, the DAFM's assessment of the proposal's potential impact to the Hen Harrier and subsequent inclusion of site-specific measures for the protection of the species was satisfactory in this instance.

Regarding the DAFM's In-Combination assessment, The FAC observed that Annex I of the AAR contains an in-combination assessment of forestry and non-forestry plans and projects within the Galey_030 River Sub-Basin. This included consulting the websites of the Department of Housing, Planning and Local Government, An Bord Pleanála, the EPA, and the DAFM's internal records of other forestry operations in the vicinity. The Limerick County Development Plan was also consulted in relation to the objectives relating to the Natura 2000 network, before the DAFM concluded that the proposed project, in combination with other plans and projects will not give rise to the possibility of an effect on the Natura sites screened in for AA. The FAC noted the Appellant did not provide any specific evidence to support their claim that the regulatory systems in place for the various plans and projects referenced in the In-Combination assessment are not sufficiently developed and implemented. Based on the evidence before it, the FAC is satisfied that the in-combination assessment carried out by the DAFM was adequate.

The FAC considered Article 6(3) of the Habitats Directive and its provisions for obtaining the opinion of the general public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. Having regard to the Appellant's grounds of appeal, the FAC concluded that there is no convincing reason for public consultation at this stage.

The FAC had regard to the Appellant's contention that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). The FAC noted that the date of application for TFL00634819 (21st June 2019) pre-dates the

publishing of the DAFM's Interim Standards for Felling and Reforestation (October 2019). However, the FAC considered the Harvest Plan submitted to be deficient in its own right in not addressing a number of questions posed therein, and is therefore erroneous. The FAC is otherwise satisfied the DAFM had sufficient information on which to adjudicate regarding the site, and that any operational harvest plan must reflect the licence conditions.

Regarding a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season and for the animal species listed in Annex IV (a) of that Directive, the FAC noted that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC considered the Appellant's grounds that the licence should contain conditions relating to the commencement, carrying-out and conclusion of operations, and the DAFM's monitoring of same. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the Licensee's adherence to the conditions of those licences and that enforcement of these conditions is a matter for the DAFM. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

The FAC had regard to the second 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. The FAC observed there is no statutory basis to enforce the Licensee to inform individual landowners. The FAC noted the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU 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 plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. In these circumstances, the FAC considered that a condition regarding the notification of certain parties should not be attached in this instance.

Based on the information before it, the FAC concluded that the DAFM made a significant error in the processing of this licence application by not documenting the AAS that was carried out and/or providing evidence of this AAS process and its reasoning and conclusions. The FAC concluded that the decision to issue felling licence TFL00364819 should be set aside and remitted to the Minister to carry out a new AA screening of the proposed development regards Natura 2000 sites within a 15km radius, on its own and

in combination with other plans and projects, and resulting from the screening conclusion, an AA if necessary, before making a new decision in respect of the licence.

Yours sincerely,

A black rectangular redaction box covering the signature of the sender.

Luke Sweetman on Behalf of the Forestry Appeals Committee