



8th April 2022

Subject: Appeal FAC033/2021 regarding licence TFL00472320

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TFL00472320 for felling on 19 ha at Glensharrold, Co. Limerick was issued by the Minister for Agriculture, Food and the Marine (DAFM) on 13th January 2021.

Oral Hearing

A hearing of appeal FAC033/2021 was held by a sub-division of the FAC on 14th March 2022. In attendance at the hearing:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas and Mr. Vincent Upton.

Secretary to the FAC: Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine regarding licence TFL00472320.

Background

The decision relates to the granting of a licence for felling on 19 ha at Glensharrold, Co. Limerick. The forest is comprised of Sitka spruce planted in 1989 and situated on a moderate slope on a mixed gley/peat soil.

The application includes site, inventory and replanting details, harvest plan and maps. The application also included environmental and harvesting site safety rules. The proposed replanting would be of 85% Sitka spruce, 10% broadleaf and 5% unplanted open ground.

The proposal was referred to the NPWS, Department of Culture, Heritage and Local Government which replied stating it had no comments to make on the application and submitting an appendix of general observations in relation to forestry applications. The application was also referred to Limerick County Council and no reply is on file.

The DAFM completed a screening for Appropriate Assessment in relation to five European sites within 15km of the proposed felling. Two sites were screened out while three were screened in to proceed to Appropriate Assessment. These were Lower River Shannon SAC 002165; River Shannon and River Fergus Estuaries SPA 004077; Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161. Reasons are provided for the screening decisions. The three European sites were screened in on the basis of proximity and hydrological connectivity and potential effects in relation to disturbance/displacement of species and water quality.

The Appropriate Assessment (AA) Report prepared by the DAFM includes a detailed description of the application site and proposed operations. Each qualifying interest and associated conservation objective for each European site is described as are what effects might arise and specific measures that are required. Where no mitigations are considered necessary reasons are provided. In relation to Hen Harrier it is required that no operations associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). In relation to Freshwater Pearl Mussel, a species at risk from declines in water quality, it is recorded that the mapped population is in a separate subcatchment and that there are no recorded populations in the proposal area. In relation to a range of aquatic species and site-specific mitigation measures related to the protection of water quality are stated. With reference to the River Shannon and River Fergus Estuaries SPA 004077 it is stated that while the proposal does not contain suitable habitat for the related bird species and is outside the foraging range of these species that measures are required to protect water quality as the SPA is hydrologically linked to the proposal. The AAR includes a consideration of other plans and projects both forestry and non-forestry and appendices with details of the plans and projects, submitted operational details and photos taken during the inspection. An Appropriate Assessment Determination (AAD) (18/12/2020) was also prepared that outlines the screening and Appropriate Assessment undertaken and the measures required and concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The licence was granted on 13/01/21 subject to conditions including that “The specific conditions

outlined in the attached Appropriate Assessment (sic) Determination shall be fully complied with” and the specified exclusions in relation to Hen Harrier.

Appeal

There is one first party appeal against the decision and the full grounds have been provided to the parties. The grounds question a number of specific conditions related to windrowing, establishment of grass in setbacks, felling period and setbacks. The appeal states that an Ecologist’s report will be submitted and provides maps of the area.

Subsequent to the appeal submission, the DAFM varied a number of licence conditions. The Appellant wrote to the FAC indicating that, in light of the varying of the conditions, certain aspects of their grounds had now been addressed and that they wished to amend their grounds. Having reviewed the letters varying the conditions and replying statement provided by the DAFM, the FAC accepted this submission and considered that the matters to be determined related to the grounds considered to be still outstanding. A separate Ecological Report was submitted. The submission from the Appellant had been copied to the DAFM.

Considerations of the FAC

The first ground relates to windrowing on site and the requirement that there be no windrowing within 20 metres of aquatic zones and 10 metres of relevant watercourses.

The Standards for Felling and Reforestation state that the identified setbacks in Table 14.1 represent minimum water related setbacks rather than absolute values and relate to reforestation as stated in the document. The FAC considered that in this instance the setbacks are required in relation to windrowing under an Appropriate Assessment undertaken in relation to specific European sites. While the submitted Ecology Report does address the grounds in a general manner, the FAC does not consider that the content is sufficient to assess the proposed changes in the context of an Appropriate Assessment. The FAC does not consider that this Report contains the level of detail and assessment that would be expected from, for example, a Natura Impact Statement. In such circumstances the FAC is not satisfied that the DAFM erred in relation to the stated windrow setbacks.

The grounds further contend that the requirement that windrows must run across the slope of the site is not practical operationally and is unnecessary. The FAC noted that the site is relatively flat at 4% and comprised of a mineral soil with areas of peat around the aquatic zone, which require setbacks. The Harvest Plan submitted by the Applicant includes the timber extraction route through the forest and many of the windrows would likely lie across the slope. However, in order to meet this requirement faithfully the Applicant would likely have to substantially increase machine traffic on the site and move brush a greater distance than is standard practice. This would appear to be contradictory to the stated purpose of the condition. The FAC considers therefore that this requirement should be reassessed as to its effectiveness and appropriateness having regard to the specific characteristics of the site, the information submitted by the Applicant and the other required measures.

The DAFM noted in its statement that the forest is located in the Owvane 010 waterbody which has a Good status and considered to be Not At Risk in relation to the Water Framework Directive, while downstream this waterbody flows into the Owvane 030 waterbody which is at Moderate status and At Risk and recent results indicate a Poor status according to the LAWPRO Desk Study (2020) on this Priority Area for Action. Forestry is identified as a pressure on the 030 waterbody but it is noted that this likely relates to forestry on peat in upland catchments at the southern section of the waterbody. The 010 waterbody flows northerly and joins the 030 waterbody below the upland catchment. The proposal is for felling but would appear to occur on a mixed organo-mineral soil rather than pure peat.

The second matter raised in the grounds relates to a requirement to establish vegetation, through the spreading of native grass seed, in water setbacks where vegetation is not already present. The Appellant submits that there is adequate and naturally occurring vegetation on site already. This condition is required only in such circumstances where vegetation at the stated covering is not already present. The FAC does not consider that convincing evidence of the measure being unnecessary or that an alternative measure could be employed to provide the mitigations identified in the Appropriate Assessment has been provided to it. The FAC considers this condition to be reasonable and has been identified as a necessary measure in the Appropriate Assessment undertaken. The FAC, therefore, is not satisfied that an error was made in this regard.

The final matters raised in the appeal relate to the water setbacks. The Appellant submits that the stated requirements are not in line with the Standards for Felling and Reforestation and are unreasonable and that they had proposed to plant broadleaves adjoining the setback. The FAC noted that the Standards state that 10 metres would be the required setback at reforestation stage.

In its statement and referring to the setback the DAFM makes reference to the *Environmental Requirements for Afforestation* which require a 20 metre setback from aquatic zones in relation to peat soils. However, the FAC noted that these Requirements also provide for the planting of a portion of broadleaf trees in the setback. The FAC considers such riparian planting to have the potential to provide biodiversity benefits as well as acting as an attenuating buffer between the managed forest and the aquatic zone. The *Standards for Felling and Reforestation* identify a 10 metre setback on moderate slopes, although this is stated to be a minimum, and that no planting can take place in the setback. The FAC considers that there appears to be a contradiction in the DAFM's proposal in referring to the *Environmental Requirements for Afforestation*, which provide for the planting of broadleaves as part of an aquatic buffer, and the *Standards for Felling and Reforestation* which identify a narrower setback and no planting. Furthermore, the revised conditions state *ADB at reforestation stage to be focused along all riparian zones to ensure areas of long term retention are created* while condition 11 requires planting to be outside of the setback. The FAC noted that the measures stemmed from an Appropriate Assessment undertaken by the DAFM. The FAC considers that a 10 metre unplanted setback with 5 rows of suitably chosen and planted broadleaves would be reflective of the *Environmental Requirements for Afforestation* and that the licence conditions as stated lack clarity and are potentially contradictory. The FAC considers that this matter should be reassessed by the DAFM and that clarity be provided in the licence conditions as to the width of the setback and whether broadleaf planting can occur within this buffer.

The grounds further contend that the restrictions on cleaning any drains within 50 metres of an aquatic zone is unnecessary and could lead to damage to the site in terms of productivity and stability. In response the DAFM submit that Otter is a qualifying interest of the Lower River Shannon SAC and that this measure is required with reference to the *Forestry and Otter Guidelines*. However, both the Appropriate Assessment and the Ecology Report, which were both prepared following field survey by the respective Ecologists, state that the proposal lands do not contain suitable otter habitat. The Ecology Report submits that the aquatic zone on site is a minor first order stream that would not support any prey species relevant to Otter. The Appropriate Assessment identifies potential indirect effects resulting from water quality impacts but these are addressed in relation to other species through the specified water quality measures. The FAC notes that neither party has suggested that Otter has been recorded on the site and the NPWS Otter Surveys from 2004/2005 and 2010/2011 do not appear to have identified the species in the location although they are noted in the SAC downstream from the felling. The Otter Guidelines themselves state that where operations occur outside of an SAC and in an area without suitable habitat and with no records that the standard guidelines of the DAFM should apply. The FAC considers it reasonable that water protection measures be included to address potential downstream indirect impacts of the operations but that the evidence appears to suggest that the species and related habitat are not present on site. The FAC considers, therefore, that this requirement has not been explained or justified in the Appropriate Assessment and should be reassessed with reference to the nature of the stream and habitats on site as reflected in the Appropriate Assessment.

Finally, the grounds question the 10 metre exclusion zone in relation to the forest road and submit that the Appellant had requested clarification from the DAFM on the matter but that this was not provided. This in itself would suggest that the measure requires further clarity to ensure it is implemented correctly by the Appellant. The Appellant in making the application provided a Harvest Plan that identified the forest road, stacking areas and aquatic zone. The DAFM does not appear to have sought further information to clarify any of these details. For example, the DAFM could have sought clarity as to the relative distance between the proposed stacking areas and the aquatic zone. The Appellant is of the view that the condition would prevent the use of the road and, in the absence of an alternative haulage route this would appear to make the licence unviable. While the FAC considers that the exclusion of machine traffic relates only to harvesting and forwarding operations which are excluded from forest roads under the *Standards for Felling and Reforestation* the Appellant appears to be of the view that the exclusions are more restrictive. The FAC considers that the DAFM should engage with the Appellant on this matter and ensure that the condition is clear and implementable or that, where the operations cannot be undertaken without having an adverse effect on the integrity of a European site, that the DAFM should follow the requirements of the Forestry Act 2014, Forestry Regulations 2017 and Article 6 of the EU Habitats Directive.

In having regard to the record of the decision, the FAC noted the mitigations specified in the Appropriate Assessment and attached to the licence in relation to the Hen Harrier, which is the qualifying interest of the adjacent Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161. This excludes operations during the "*Hen Harrier breeding season from April 1st to August 15th*". The FAC has

recently sought the expert opinion of a consulting ornithologist on mitigation measures in relation to this species. This report is included with this letter and on the public file. This report concluded that, with reference to Appropriate Assessment, the Hen Harrier breeding season should be stated as March 1st to August 15th. The FAC has accepted this report and considers this to be the correct specification of the breeding season subject to any further scientific evidence that might contradict the conclusions of the report. Thus, the FAC in having regard to the record of the decision and the principle of sincere cooperation in EU Law considers that the related mitigations in the Appropriate Assessment and licence condition should be amended to reflect a breeding season of March 1st to August 15th, subject to any further assessment of the best available scientific information.

The FAC is satisfied that a series of errors were made in making the decision and is setting aside and remitting the decision. The FAC concluded that the DAFM should reassess the requirement that all windrows run across the slope and that drains are not cleaned within 50 metres of an aquatic zone and provide clarity on that the planting of broadleaves in relation to aquatic setbacks and the exclusion zone in relation to the forest road. Furthermore, the FAC considers that the Hen Harrier breeding season should be stated as March 1st to August 15th in line with the available scientific information.

The FAC concluded that the decision should be set aside and remitted for the DAFM to undertake a new Appropriate Assessment (AA) with complete, precise and definitive findings and conclusions, in order to determine whether the proposal will adversely affect the integrity of the European sites that it has assessed. Should it be concluded that such an affect can be excluded, the DAFM should specify licence conditions that are reflective of the measures identified in the AA.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and other submissions received. The FAC is satisfied that a series of errors was made in making the decision. The FAC is, thus, setting aside and remitting the decision to the Minister regarding licence TFL00472320 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to address the matters identified.

Yours sincerely,

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Vincent Upton On Behalf of the Forestry Appeals Committee