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19th February 2021

**Subject:** Appeal FAC682/2020 in relation to licence CE06-FL0098

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 CE06-FL0098 for 5.33 ha at Ballymorris, Brickhill West, Cratloe, Co. Clare granted by the DAFM on 18<sup>th</sup> August 2020.

#### **Hearing**

An oral hearing of appeal FAC682/2020, of which all parties were notified, was held by the FAC on 12<sup>th</sup> February 2021. In attendance:

FAC Members:	Mr. Donal Maguire (Deputy Chairperson), Mr. John Evans, Mr. Derek Daly, Mr. Vincent Upton
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Anthony Dunbar & Ms. Eilish Keogh
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, and submissions received including those at the oral hearing, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister to grant the licence CE06-FL0098 through the inclusion of the following additional condition,

*Sediment trapping measures must be installed and maintained both during and following operations to provide sufficient buffering before reaching setback area. Geotextile silt traps should be installed in new and existing drains. Silt traps should be staggered along the length of the drain, and not only at the lower reaches towards its outflow. Reason: In the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations.*

The licence decision pertains to felling licence for an area of 5.33 ha at Ballymorris, Brickhill West, Cratloe, Co. Clare. The forest is comprised of Scots pine, beech, oak and sycamore. The application included inventory, restocking, environmental information, an Appropriate Assessment pre-screening report, a harvest plan including operational and environmental rules and maps. Replanting would be of Sitka spruce and other conifers. The site is described as a mineral soil, acid brown earth, brown podzolic, on a gentle slope. The Applicant submitted a second Appropriate Assessment pre-screening report.

The DAFM describe the site as lying within the Shannon catchment (100%), the Owenogarney\_SC\_020 (100%) Sub-Catchment & the Owenogarney\_060 (100%) waterbody. The DAFM undertook a screening for Appropriate Assessment and identified ten European sites within 15km. Each site is listed in turn among with its qualifying interests and the reasons for the screening decision is provided. In relation to Lower River Shannon SAC (IE0002165) it was concluded that the impacts are unknown and that there may be a possible effect due to hydrological connectivity between the project area and this SAC and that the proposal should proceed to Appropriate Assessment in relation to this SAC. An Appropriate Assessment Report and Determination were prepared by an independent ecologist on behalf of the DAFM. A felling licence was issued on 18<sup>th</sup> August 2020 with conditions attached including in relation to the Appropriate Assessment Determination and the retention of broadleaves on site.

There is one appeal against the decision. The grounds contend that a breach of Article 4(3) and Article 4(4) of the EIA Directive 2014/52/EU. It is contended that the licence is in a class of development covered under Annex II of the EIA Directive and that no screening has been undertaken and that the application does not represent the whole project and that the application does not describe the aspects of the environment likely to be effected. It is contended that the licence threatens the achievement of the objectives of the River Basin Management Plan for Ireland 2018-2021 and that there is no evidence that an Annex I habitat has not been adequately considered. It is submitted that licence conditions are not written with sufficient clarity to ensure that they will result in compliance with the overall environmental regulatory framework, that residual effects from the project can not be excluded, that the in-combination assessment is flawed, and that the Minister has not sought the opinion of the public regarding the Appropriate Assessment Determination. It is submitted that the Harvest Plan is not consistent with the requirements of the Interim Standards for Felling and Reforestation. It is submitted that licence conditions do not provide a system of protection for wild birds under Article 5 of the Birds Directive or for animal species listed in Annex IV(a) of the Habitats Directive. It is further submitted that licence conditions should contain commencement and conclusion notices, a requirement for the FS to inspect the works and a notification requirement regarding the spraying of chemicals.

In a written response to the FAC, the DAFM submitted that it is satisfied that the decision was made following their procedures. It is 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 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. In relation to water quality, the statement submits that the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in

relation to the protection of water and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation.

In relation to Appropriate Assessment, it was concluded by DAFM, as per Section 5 of the AA Report that the that the project design, together with adherence to the relevant site-specific mitigation measures, ensure that potential residual impacts do not arise and that the project itself (i.e. individually) will not prevent or obstruct the Qualifying Interests of the Lower River Shannon SAC IE0002165 from reaching or maintaining favourable conservation status. Furthermore, it was concluded, in view of best scientific knowledge and based on objective information, that the proposed project itself (i.e. individually) will have no adverse effect on the integrity of any European Sites, in view of its conservation objectives. It is submitted that the notice of the application was published and that the public is informed that they may make a submission or observation in writing concerning the application and that the Minister has regard to such submission in the Appropriate Assessment and decision-making process. It is submitted that the 26.6 ha Garrannon Wood pNHA is area of mature woodland 0.5 km east of Cratloe and 100 metres from the boundary of the proposed felling. The site is described and it is submitted that the licence does not pose a threat to this site.

Regarding licence conditions the DAFM submitted that it is "a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply." It is submitted that the Minister may attach or vary licence conditions and that in this instance a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM. The DAFM submitted that 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) and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPE is used in a targeted way.

An oral hearing of the appeal was held and attended by all parties. The DAFM outlined their processing of the application including the data sets and analysis undertaken and referrals made. They submitted that the proposal was not covered by the EU EIA Directive and that an appropriate assessment screening and subsequent appropriate assessment in relation to the Lower River Shannon SAC was undertaken. They submitted that they are satisfied that the decision was made following their procedures and policies. The Appellant submitted that there are a number of dwellings and a school in the area and that the restrictions on operations were not sufficient. They submitted that Owenogarney 060 waterbody has not been assigned a status by the EPA and therefore impacts on the achievement of the Water Framework Directive objectives can not be assessed. Reference was made to a recent High Court

Decision in this regard. It was confirmed that Garrannon Wood pNHA was the site referred to in the grounds. The Applicant described the site and application. They submitted that extensive public consultation had been undertaken with homeowners in the area and that part of the reason for undertaking the felling was to remove trees that were close to houses at the request of the owner. It was submitted that this was reflected in the design of the licence application and the areas covered and that the felling outside of the areas close to houses would be of the conifer species. They submitted that signs would be erected on any recreational paths in the area and some areas may be closed off during operations. They submitted that plants used in restocking site would be treated in the nursery and that any spraying at the site would be undertaken based on needs and in line with its pest risk management system. It was submitted that the local authority is informed on an annual basis when spraying is undertaken and signs are erected. They submitted that a network of haulage routes are in place to the north of the felling area.

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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 5.33 hectares. 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 the FAC concluded that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

Under Article 6(3) of the Habitats Directive, any 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 projects, having regard to the conservation objectives of that designated site. An Appropriate Assessment Screening was undertaken by the DAFM and identified ten sites within 15km and that there was no reason to extend the radius in this case. Each site is considered in turn and is screened out for Appropriate Assessment and reasons are provided. The DAFM undertook and documented a

consideration of the potential for in-combination effects and concluded that DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites in relation to those that were screened out. A watercourse lies outside of the western boundary of the forest that flows southerly entering the Lower River Shannon SAC after some 3.1km. This part of the SAC is tidal and the Conservation Objectives identify this section in relation mudflats and sandflats not covered by sea water at low tide and estuaries and other related habitats and associated species. The DAFM prepared an Appropriate Assessment Report that outlined possible impacts of the proposal on the qualifying interests of the SAC and specified the mitigation measures required. The DAFM AA Determination concluded that *“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 FAC reviewed publicly available information from the EPA and NPWS and identified the same sites within 15km of the proposal and agrees that there was no reason to extend this radius in this case. Having regard to the location, scale and nature of the proposal and the conservation objectives of these European sites, the FAC concurs with the decision of the DAFM in relation to European sites that were screened out. Regarding the Lower River Shannon SAC, the FAC considers that the DAFM adopted a precautionary approach in undertaking an Appropriate Assessment in relation to this SAC and that the measures identified are clear and would ensure that no pathway would exist for any adverse effects to occur on the integrity of the SAC. Based on the evidence before it, the FAC is not satisfied that an error occurred regarding the Stage 1 screening and Stage 2 Appropriate Assessment undertaken by the DAFM before the issuing of the licence.

During the oral hearing the FAC queried the conditions attached to the licence and the mitigation measures identified as part of the Appropriate Assessment. While the FAC is satisfied that the majority of the measures are included in the licence conditions and the related standards, mitigation measure “C” in the Determination appears to be absent and this was confirmed by the DAFM. The FAC considered that this was a significant error but one of a clerical nature and that it solely related to the transfer of the measures to the licence condition. Therefore, the FAC has decided to vary the decision and attach an additional condition to address this error. The Application was published on the DAFM website and the FAC is satisfied that the Minister is required to have regard to submissions made in making a decision on the application. No reasons were submitted as to why any additional public consultation might be required in this case. The FAC is not satisfied that the DAFM erred in this regard.

Regarding the achievement of the River Basin Management Plan and objectives of the Water Framework Directive, as noted by the Appellant the Owenogarney 060 waterbody has not been assigned a status by the EPA. A stream, identified as the Bricklieve East by the EPA, flows from a small lake to the north of the forest stand and continues to the west of the stand running south and forms part of the Owenogarney 060 waterbody. The stream is identified on the Application maps and on the EPA’s Flow Network (Indicative) dataset as running adjacent to but outside of the western boundary. Aerial imagery of the site show this area as well vegetated with scrub and woodland. The proposal area is long and

narrow and a small boundary lies in proximity to the watercourse. The soil type is brown earth and brown podzolic, indicating a well-drained mineral soil and described to be on a gentle to moderate southerly slope. The licence conditions contain a number of conditions related to the protection of water, both as general conditions and in relation to the Appropriate Assessment, this includes the exclusion of the removal of wet woodland and scrub within 50 metres of an aquatic zone, machinery exclusion zones and the closing off of any drains that lead to an aquatic zone. The DAFM submitted that licence conditions include operational measures to prevent direct and indirect impact on water quality arising from the operation as outlined in its Standards for Felling and Reforestation adherence with which are a condition of all felling licences, in addition to the Appropriate Assessment undertaken in this case. No evidence was provided to the FAC that the licence conditions would not have the stated effect in this case. Having regard to the nature, scale and location of the proposal and the conditions attached, the FAC is satisfied that no pathway of effect would arise in this case and it does not consider that the Owenogarney 060 waterbody would be affected by the operation as licenced and that no issue arises regarding the objectives of the River Basin Management Plan or Water Framework Directive.

The application included inventory, restocking, environmental information, an Appropriate Assessment pre-screening report, a harvest plan including operational and environmental rules and maps. While the harvest plan does not include all of the information identified in the Interim Standards for Felling and Reforestation, this plan was not requested by the Minister as part of the application process. The FAC considers that the information available in the decision-making process was appropriate and acceptable in this instance.

In relation to the Appellant's 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 the Birds Directive or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM statement and 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 noted that the appellant did not submit any specific details in relation to bird nesting or rearing or animals on the proposed site. The DAFM have attached licence conditions that relate to the Appropriate Assessment undertaken in relation to the Lower River Shannon SAC and its related qualifying interests. This includes a number that relate to otter. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM. Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence and that it would not be reasonable to attach a licence condition requiring actions to be undertaken by 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.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. In light of the information submitted at the oral hearing as noted, the FAC is satisfied that a significant error was made in making the decision regarding CE06-FL0098 and that the decision should be varied to include the additional condition identified.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee