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30th December 2020

Subject: Appeals FAC559/2020 & 633/2020 regarding licence CW03-FL0147

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the 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 all parties to the appeal.

Background

Felling Licence CW03-FL0147 was approved by the DAFM on 24th July 2020.

Hearing

An oral hearing of appeals FAC559/2020 and FAC633/2020, both regarding the decision to issue licence CW03-FL0147, was conducted by the FAC on 8th December 2020.

Attendees:

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Paula Lynch, Mr. Luke Sweetman
Secretary to FAC:	Mr. Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM Representatives:	Mr. Frank Barrett, Ms. Jade McManus

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 affirm the decision to grant this licence (Reference CW03-FL0147).

The licence granted is for the clearfell and replanting on a stated site area of 3.47ha at Coonogue, Co. Carlow. The species to be felled is composed of 98% Sitka spruce with the remaining 2% comprised of Oak, Birch, Douglas fir, Japanese larch and Monterey pine. The restock species at application was 100% Douglas fir with 0.17ha open space retained. As per the DAFM information the underlying soil type is 100% Lithosols, Regosols and the site is on a predominantly steep slope. The project is located in the Barrow catchment (100%), the Barrow_Sc_140 (100%) Sub-Catchment, the Aughnabrisky_010 (100%) Waterbody.

The Applicant submitted an application pack which included maps, inventory data, a harvest plan document and an Appropriate Assessment Pre-screening Report.

The DAFM referred the application to the Carlow County Council and Inland Fisheries Ireland (IFI). The DAFM confirmed that no response was received from the County Council but the IFI responded on the 30th December 2019. Their response noted the location of the project site in the headwaters of the Mountain River Catchment, an “important Salmon spawning tributary of the Barrow River with excellent spawning/nursery habitat throughout”. An IFI inspection highlighted steep slopes through much of the site while significant wind-throw was also noted. The response stated that of concern to IFI is “the potential for soil erosion and suspended solids/nutrient loss to surface waters”. IFI requested that a detailed overview of the drainage of this site be undertaken and that the Applicant provide details of how the movement of heavy machinery on this site can take place without resulting in soil erosion and nutrient losses. IFI stated that given the sensitivity of the site and the waters downstream it is important that the Applicant details how trees will be extracted from the site without causing soil erosion.

The DAFM carried out a Stage 1 Screening for Appropriate Assessment, identifying 3 Natura 2000 sites (3 SAC) within 15km of the project site. The DAFM concluded that there is no possibility that this project will have a significant effect on any of these Natura sites. The River Barrow and River Nore SAC and the Blackstairs Mountains SAC were both screened out due to “the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise”. The Slaney River Valley SAC was screened out due to “the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise”. The DAFM produced an In-Combination Statement which consulted various planning websites (included Carlow County Council, An Bord Pleanála, the Environmental Protection Agency, the County Development Plan and the DAFM’s internal records) on the week of 23rd July 2020. This document listed projects and plans in the general vicinity of the project area in the River Sub Basin Aughnabrisky_010 including 10.19ha of clearfell licence projects planned for 2021.

The licence issued on 24th July 2020 for the clearfell and reforestation of 3.47ha and is exercisable until 31st December 2022. It is subject to standard conditions plus additional conditions regarding the “greening up” of an adjacent area recently felled and adherence to specified standards and guidelines.

There are two appeals against the decision to grant the licence. In summary, the grounds of the first appeal contend that the Appropriate Assessment screening did not comply with “the decision of Finlay J in Kelly”. Under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. There has been no investigation as to whether the application site has complied with “the requirements of EU law”. The basic requirements of the NPWS have not been complied with. An issue raised in the appeal relating to the FAC is not a valid ground of appeal against a decision to issue a felling licence.

The grounds of the second appeal state that there is a breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive. The licence is in a class of development covered under Annex II of the EIA Directive. On the same date that the application for this licence was submitted a further application for a clearfelling licence was submitted for the same Forest Management Unit (FMU) totalling 9.37ha. The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. The application has not described any aspects of the environment which are likely to be significantly affected.

The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-2021. In the absence of an adequate assessment of the cumulative impact of this project with other forestry activities approved or planned in the same catchment the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured.

The DAFM gave inadequate consideration to the feedback from a Consultation Body.

The Stage 1 and Stage 2 Appropriate Assessment determinations are not legally valid. An assessment carried out 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.

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.

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) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

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.

In summary, the DAFM's response to the grounds of appeal states that the 3.47 hectare felling and reforestation project licenced as CW03-FL0147 was subjected to the DAFM's Appropriate Assessment Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). This screening report completed by the Inspector was informed by the field inspection carried out on the site in question On the 21st July 2020. Appropriate Assessment screening was carried out by DAFM for European sites within 15 km from the clearfell and reforestation project. Felling licence application information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-Screening Report and associated Pre-Screening Report methodology document were considered during the licencing process. Note while the applicant's Pre-Screening Report recommended Appropriate Assessment, this licence application was field inspected by the DAFM and no hydrological connection or other pathways from the proposed project to the adjacent waterbody were found during the field survey. The Appropriate Assessment Screening report was completed by the Inspector and contains the recommendations regarding screened European Sites. All Qualifying Interests and Special Conservation Interests were considered during the screening exercise itself and the screening determination is considered sound.

Having reviewed the details of relevant European sites, their qualifying interests and conservation objectives, the Department deemed that the 3.47 hectare felling and reforestation project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on the relevant screened European sites. As such, the clearfell and reforestation project was screened out and an Appropriate Assessment deemed not required in relation to the European sites considered during the screening. For the purposes of 42(16) of S.I.477 / 2011, the DAFM has determined that the project will not adversely affect the integrity of any European sites. A felling

licence was issued for the clearfell and reforestation project having considered (where applicable) the comments and observations of referral bodies who submitted information to DAFM in respect of the licence. For consideration of in-combination effects of the proposed project, DAFM carried out an in-combination assessment and produced an associated in-combination statement based on this information.

The standard operational activities of a) thinning or b) clearfelling and replanting already established forest areas do not fall within the specified categories of forestry activities or projects set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. Article 4(3) of the EIA Directive requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable.

In the opinion of the Department the outputs from the FMU planning process undertaken by the Applicant and any resultant Business Area Unit (BAU) strategic plan should not be a material consideration in the Department's assessment *inter alia* of the potential environmental effect of the application. Amongst other reasons, this is because the FMU planning process and any resultant BAU strategic plan is not an obligatory statutory process, arising either from the legislation governing the operation of the company (the Forestry Act 1988 and the Forestry (Amendment) Act 2009) nor from the provisions for forest management plans set out in Section 10 of the Forestry Act 2014. Similarly, they do not constitute a plan or programme subject to the requirements of the SEA Directive, as transposed *inter alia* by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, as amended.

The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (2018). Any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impacts on water quality arising from the operation. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. This licence application was field inspected and no hydrological connection or other pathways from this licenced felling and reforestation project to the adjacent waterbody were found during the field survey. In relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. These measures are described in the document *Woodland for Water: Creating new native woodlands to protect and enhance Ireland's waters* (DAFM, 2018).

Regarding consultations, referrals to statutory consultees, including IFI, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. As set out in *Forests & Water*, DAFM has developed considerable experience in relation to

the protection of water during the forestry licensing process, and is actively engaged in the WFD process, contributing proactively to both the 2nd cycle and the 3rd cycle, the latter currently under development. Therefore, while referrals are an important part of the evaluation process, the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD.

As per Section 17.4 of the 2014 Forestry Act, it is for the Minister to attach or vary conditions to any licence granted. The correspondence received from referral bodies was considered during the licencing process as per standard practice.

The DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements.

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, 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, (although many do) nor is there a need for animals in adjacent properties to be moved as the application of this PPP is by hand in a very targeted manner that minimises exposure of the environment. 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 8th December 2020. The parties were invited to attend in person or to join electronically. There were two Appellants with separate appeals against this licence. One of the Appellants participated electronically while the other did not participate. The DAFM and the Applicant both participated electronically. The FAC sat in person at this hearing. At the hearing, the DAFM detailed their approach to processing and issuing the licence application. The DAFM also confirmed that a Stage 1 Screening for Appropriate Assessment had been concluded and an In-Combination Statement prepared, and considered, prior to the decision to grant felling licence CW03-FL0147. The DAFM outlined how referrals to statutory consultees are automatically triggered according to interactions with certain spatial rules, and that this licence application had been referred to the IFI in this instance and that Carlow County Council had also been consulted and they did not respond.

The DAFM stated that this site had been desk and field assessed (21st July 2020) by the District Inspector (DI) and that they found no hydrological connectivity between the project site and the River Barrow and River Nore SAC. The DI stated that the site was stable and they did not observe windblow on the site and did not agree with the IFI statements on the nature of the site and the associated threat to water quality from the proposed operations. The DAFM confirmed that referral to the National Parks & Wildlife Service (NPWS) did not take place as it was not mandatory based on spatial rules and that the DI's feedback indicated no need for referral in this instance. The DAFM confirmed that Condition (I)(iii), which refers to Hen Harrier protocols, had been included in error on the licence. The DAFM stated that, although the Applicant had submitted a Pre-Screening Report which screened in the River Barrow and River Nore SAC for Stage 2 Appropriate Assessment, the DAFM had screened this site out following field assessment. The DI was familiar with the property and did not agree with the opinion of the Applicant in this instance. The Applicant stated that they had screened this site in following identification of a possible hydrological connection to the adjacent River Barrow and River Nore SAC. They stated that their Environmental Manager carried out a field survey on the 2nd October 2020 and found that the site was dry, firm, and rocky in places. There were no watercourses found on site. They further stated that, following their own field inspection and the conclusion of the DI, they were satisfied that there was no possibility of a significant effect on the River Barrow and River Nore SAC.

The Appellant queried why a field assessment was required for this site if an impact on water quality was not a concern. The DAFM responded that the DI decided to field inspect because they were familiar with the site and felt that the Pre-Screening Report was inconsistent with their knowledge of the site regarding hydrological connectivity. The Appellant submitted that the project site is within the same Sub-Catchment of the River Barrow and River Nore SAC, a very sensitive SAC due to the presence of aquatic Qualifying Interest (QIs) including Freshwater Pearl Mussel (FPM) and the Otter. They stated that the IFI's response had not been adequately considered and that there were no licence conditions to reflect the IFI's request for a detailed overview of the Applicant's operation plan for the site regarding heavy machinery and management of silt. The Appellant stated that, having regard to the IFI response, there is a possibility that, following extreme rainfall events, excess surface water would drain into the River Barrow and River Nore SAC. They stated that once the possibility of an effect has been identified then a Stage 2 Appropriate Assessment is required. They contended that the DI's field inspection should have been undertaken as a component of a Stage 2 assessment. The Appellant submitted that the NPWS should have been consulted in this instance because the FPM and Otter are listed as QIs for the adjacent SAC. They stated that the site is predominately steep at 15-30% and that the risk of landslide was listed as moderate on the Geological Survey Ireland website.

In addressing the grounds of appeal, the FAC considered, in the first instance, the first Appellant's contention that the Appropriate Assessment screening was not carried out in compliance with the decision of "Finlay J in Kelly". 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 or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 Screening in relation to 3 Natura 2000 sites within 15km and concluded that the proposed project alone would not be likely to have a significant effect on any of the sites. The DAFM also produced an In-Combination Statement which considered various plans and projects in the vicinity of the project site, including other planned forestry operations, and concluded that the licenced development, in-combination with other plans and projects, was not likely to give rise to any significant effect on any of the screened Natura sites.

The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone, or in combination with other plans or projects, would not be likely to give rise to significant effects on any Natura site, were valid and did not contain any serious or significant errors, or series of errors. Based on the information before it, and with regard to the Precautionary Principle, the FAC considers that there is no convincing evidence provided to indicate that there is a possibility of significant effects arising from the proposed development on any of the listed Natura 2000 sites.

The FAC considered the Appellant's contention that "the basic requirements of the NPWS have not been complied with". The FAC also took into account the DAFM's statement regarding the referral of licence applications to the NPWS (and other statutory consultees) and that this proposed project was not referred for consultation because the criteria for doing so were not met. Based on the information before it, the FAC considers the processes completed prior to issuing the decision have complied with the requirements of Article 6(3) and the absence of referral to the NPWS does not provide sufficient grounds on which to deem the licence decision should not be affirmed.

Addressing the grounds of the second appeal, The FAC had regard to the Appellant's submission that the proposed development should have been assessed 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 (nor clearfelling) 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 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). As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as contended in the grounds of appeal.

The Appellant's grounds stated that the development could threaten the achievement of the objectives of the underlying waterbody and that clearfelling has the capacity to impact on water quality. The FAC considered the Appellant's submission during the hearing that the project site is within a FPM SAC Catchment area and that the DAFM should have referred the application to the NPWS and that they did not give adequate consideration to the response from IFI. The FAC noted that the application was initially desk assessed by the DAFM and subsequently field assessed by the DI where it was confirmed the site was generally dry, and did not contain any relevant watercourses or aquatic features. The FAC considered that the field inspection was carried out in response to the IFI's assessment of the proposed development. The FAC concludes that the DAFM had considered the feedback from IFI but that they had disagreed with the main thrust of it. The FAC noted that the DAFM completed a desk assessment, a field assessment, and a Stage 1 Screening for Appropriate Assessment prior to reaching their conclusion to screen out the River Barrow and River Nore SAC for Stage 2 assessment. The reasons given for this decision state that there is no possibility that this project will have a significant effect on this Natura site due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. Based on the evidence before it, the FAC concludes that the licenced development is not likely to give rise to a deleterious effect on water quality.

In regard to 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 observe 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 Applicant indicated that, prior to operations commencing, inspections take place in order to determine any actions needed regarding the protection of birds nesting and rearing (or any other environmental considerations). Based on the information 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 Appellant's grounds 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 concluded that the Harvest Plan is, in fact, a document outlining general environment and safety rules and that all of the licenced operations on site must comply with the conditions of the felling licence.

The FAC considered the Appellant's grounds that the licence should contain conditions relating to the commencement and conclusion of operations. 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. 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 use of plant protection products in Ireland is governed by S.I. 155 of 2012 and S.I. 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 S.I. 155 of 2012. On balance, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In the circumstances outlined above, it is the opinion of the FAC that the DAFM did not make a serious or significant error, or series of errors, in the process of making their decision to grant this licence (CW03-FL0147). In deciding to affirm the decision to grant the licence, the FAC considered 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 area.

Luke Sweetman on behalf of the Forestry Appeals Committee