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5th January 2021

Subject: Appeal FAC401/2020 regarding licence CK11-FL0090

Dear [REDACTED]

I refer to your 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

Licence CK11-FL0090 for the felling and replanting of forest on 7.82 ha at Glendav, Co. Cork was approved by the DAFM on 25th June 2020.

Hearing

An oral hearing of appeal FAC 401/2020, of which all parties were notified, and the appellant, representatives of the DAFM and the Applicant attended, was held by the FAC on 16th December 2020.

In Attendance at Oral Hearing:

Department Representative(s):	Mr. Frank Barrett, Ms. Eilish Kehoe,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr Vincent Upton and Mr. Seamus Neely.
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 notices of appeal, submissions received including at the oral hearing, clarifications obtained, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CK11-FL0090.

The licence pertains to the felling and replanting of forest on 7.82 ha at Glendav, Co. Cork. The forest is currently composed of Sitka Spruce, and the replanting proposed would be of Sitka Spruce (99%) and

Broadleaf (1%) with 5% open space. The application includes inventory details, maps, and a harvest plan including general environmental and site safety rules and an AA pre-screening report. The site is described as being on a predominantly moderate slope (0-15%). The project is within the Lee catchment and waterbody Foherish_010 (100%). The proposal was referred to Cork Co. Council and a response was received which included observations that the applicant have regard to Planning requirements set out in the Planning and Development Act 2000, as amended and the Planning and Development Regulations 2001, as amended. A screening for appropriate assessment was undertaken by DAFM dated 6th April 2020 that identified eight European sites (5 SAC & 3 SPA) of which one is where the project overlapped (004162 Mullaghanish to Musheramore Mountains SPA), one is as a consequence of extending the likely zone of impact beyond 15km (the 004030 Cork Harbour SPA) and six where the project is within 15km. These six (001890 Mullaghanish Bog SAC, 000106 St. Gobnet's Wood SAC, 000365 Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, 002170 Blackwater River (Cork/Waterford) SAC, 000108 The Gearagh SAC, and 004109 The Gearagh SPA) together with 004030 Cork Harbour SPA were all screened out. An appropriate assessment report and determination for the screened in site (004162 Mullaghanish to Musheramore Mountains SPA) was undertaken and had a final sign off on 18th June 2020. The licence was approved with a number of conditions attached, which included those related to the mitigation of effects as outlined in the appropriate assessment report.

The decision to grant the Licence is subject to one appeal. The grounds set out in the appeal include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project and that the application does not describe any aspects of the environment which are likely to be significantly affected, that the licence and its associated operations threaten the achievement of objectives of the River Basin Management Plan for Ireland 2018-21, that the Stage 1 and Stage 2 AA determinations are not legally valid, that the opinion of the general public has not been sought under Article 6 (3) of the Habitats Directive on the AA Determination, that the licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works to ensure compliance, 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 Article 5 of the Birds Directive, that the licence should contain a condition requiring notification of commencement and conclusion of Operations, and that the licence should include conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In its statement to the FAC the DAFM provide responses to the grounds included in the appeal. It 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 Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of 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. This view was reiterated by the DAFM representative during the oral hearing in this case. In relation to the contention that the licence and its associated operations threaten the achievement of objectives in

the River Basin Management Plan for Ireland 2018-21, the DAFM statement dated 8th October 2020 outlines the checks and balances that DAFM applies during the 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) and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which, it states, set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. The DAFM representatives at the oral hearing also outlined the processing of the application (including spatial analysis and assessment) and the information submitted by the Applicant including maps of the proposal.

The DAFM in its statement to the FAC confirmed that an AA Screening report was completed and that having reviewed the details of relevant European sites, the qualifying interests and conservation objectives, it identified the possibility of the project having a significant effect on a screened European site (004162 Mullaghanish to Musheramore Mountains SPA). DAFM further stated that an Appropriate Assessment was carried out which involved review of Special Conservation Interest and the Conservation Objectives of the above European site (as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service) and that these have also been considered in the AA Report and AA Determination Statement in this case. In its statement DAFM confirmed that it determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project (CK11-FL0090), either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site and that the site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of licence issued for the project. In the update provided at the oral hearing DAFM advised that some text was included in error in the second page of the DAFM AA screening form and that this did not affect the screening conclusion reached. In response to the appeal ground that the opinion of the general public has not been sought under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination, the DAFM set out the provisions of the said Article 6(3) as it relates to Screening for Appropriate Assessment and Appropriate Assessment specifically, and the consideration, if appropriate, of the opinion of the general public in the making of a related determination, and submits that these provisions, and any considerations and decisions made pursuant to them, in relation to this application, fully concord with the requirements of Article 6(3) of Habitats Directive as regards public participation.

The appellant during his contribution to the oral hearing enquired whether the planting of a part of the project area in 1992 comprising 6.59 ha was a replanting of the same, submitted that the reduction in planting density in this case was a change and therefore should have been addressed in the context of the EIA Directive, that the condition requiring the planting of at least 5% Broadleaf conflicts with the licence, that the project should have been referred to the NPWS (referencing a 2012 draft NPWS document), raised the chronology of the AA documentation submitting that there was a reliance on a report before it was fully signed off, and submitted that a part of section 22 of the Wildlife Act contravenes the Birds Directive.

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 EIA Directive. 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 FAC considered the contributions made by the appellant in relation to the related appeal ground wherein it was submitted that the reforestation would leave portion (5%) of the site as open space and that this was a change such that should have been addressed in the context of the EIA Directive. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation on 7.82 ha and does not consent to any change of land use. The FAC further considers that the proposed felling is for the production of timber for commercial purposes and that there is no convincing evidence that the purpose of the proposed felling is a change of land use. The FAC also noted the confirmation by the applicant (in response to a question posed by the appellant), that the portion of the project area (6.59 ha), referenced in the application as having been planted in 1992, was a replanting of the same at the time. The decision under appeal in this case relates to a licence for the felling and replanting of an area of 7.82 ha. 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 20 per cent of the total area or the potential to achieve this cover at maturity. 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 and therefore considered that breaches of Article 4(3) and 4(4) had not occurred. In relation to the contention that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the FAC notes the DAFM statement dated 8th October 2020 wherein it outlines the checks and balances that it applies during the 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). The FAC notes that the proposal was referred to Cork Co. Council and that the reply did not raise any issue in relation to water quality or objectives of the River Basin Management Plan 2018 – 2021 (2018).

The FAC noted the content of the DAFM statement provided in relation to the contention that the Stage 1 and Stage 2 AA determinations are not legally valid. Under Article 6(3) of the Habitats Directive, a 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 proposed felling and reforestation project (CK11-

FL0090) is not directly connected with or necessary to the management of any European Site. DAFM undertook a Stage 1 screening in relation to eight European sites (5 SAC & 3 SPA) one of which (004162 Mullaghanish to Musheramore Mountains SPA) is overlapped by the project. The FAC examined publicly available information from the NPWS and EPA and identified the same eight sites, 004162 Mullaghanish to Musheramore Mountains SPA which is overlapped by the project, 004030 Cork Harbour SPA included as a consequence of extending the likely zone of impact beyond 15km, 001890 Mullaghanish Bog SAC, 000106 St. Gobnet's Wood SAC, 000365 Killarney National Park, Macgillycuddy's Reeks And Caragh River Catchment SAC, 002170 Blackwater River (Cork/Waterford) SAC, 000108 The Gearagh SAC and 004109 The Gearagh SPA, all of which are within 15km of the project. Each site is considered in turn along with its qualifying interests and conservation objectives and the reasons for the screening conclusions. The grounds of appeal do not identify any specific concerns with the conclusions reached. The DAFM concluded that an appropriate assessment should be undertaken in relation to 004162 Mullaghanish to Musheramore Mountains SPA with the other sites screened out. An appropriate assessment report and determination was prepared with ecological review, and mitigation measures were derived and incorporated into the licence conditions. The reasons on which the screening decisions were made are set out and recorded in the screening and AA reports for the project. The special conservation interests, conservation objectives, adverse impacts and the species-specific mitigation measures in relation to the SPA are described. The grounds of appeal do not identify a specific concern regarding effects, impacts or mitigation measures described in the appropriate assessment report and determination. Other plans and projects considered in-combination with the proposal are described. The FAC noted the clarification provided by the DAFM that there was a clerical error on page 22 of the AA report which is in response to the appellants submission at the oral hearing regarding the chronology of the AA documentation in this case. The FAC, having considered the information available to it, including the grounds of appeal and the contributions made by the parties at the oral hearing, considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM determination concludes that;

"the Department of Agriculture, Food & the Marine has determined, pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

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 Site."

Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

The FAC having considered the submission in the grounds of the appeal that a condition should be attached to the licence relating to a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, and the related contributions made by the appellant at the oral hearing, agrees that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. While the appellant submitted at the oral hearing that the project should have been referred to the NPWS and that there was a shortcoming in law, the FAC noted that he did not submit any specific details in relation to bird nesting or rearing on this site. At the oral hearing reference was made to a draft referral matrix from 2012 provided to the Appellant by the NPWS and which he considered to be the 2012 document referred to in the MacKinnon 2019 report, 'Review of the Approval Process for Afforestation in Ireland'. The FAC considered that given the draft nature of this document (and noting that it predates the publication of the Forestry Standards Manual in November 2015) that it could not be considered to be evidence of a procedural breach on behalf of the DAFM but needed to be considered along with more recent publications such as the Forestry Standards Manual, November 2015 as mentioned above. The FAC further noted the submission at the oral hearing from DAFM as to the procedure it follows when deciding whether to refer a project to the NPWS. DAFM representatives also advised of the engagement of NPWS with it in this connection, wherein notification is provided to DAFM on an ongoing basis of the relevant details when a new Hen Harrier nesting site is recorded and that this procedure is outlined in the Forestry Standards Manual. Regarding referrals to the NPWS, the FAC is satisfied that the DAFM decision was made in line with the Forestry Standards Manual November 2015. DAFM also described the systematic approach it takes in establishing where such notifications relate to sites with licenced activities, so that the relevant requirements are made known to the licensees to effect compliance. The FAC is satisfied based on the information available to it, that the inclusion of the condition as raised in the grounds of appeal in this case, is not required.

Regarding the submission in the grounds of the appeal that certain conditions should be attached to the licence, including those relating to the commencement and conclusion of operations, and notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals, the FAC considered the existing legislative safeguards in place with regard to these items and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in the grounds of appeal in this case, is not required. Regarding the contribution made by the appellant at the oral hearing that the condition stipulating a minimum planting of 5% Broadleaf is in conflict with the licence and the submission by DAFM that the condition has the effect of modifying the approval, the FAC, agrees that the Minister may attach conditions, including in relation to the type of trees to be planted, as the Minister considers appropriate, but FAC considers the specifically listed condition to replant with a minimum 5% broadleaves is definitive in this case.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, other submissions received, the submissions made, and clarifications obtained at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. In deciding to affirm the decision of the Minister regarding licence CK11-FL0090 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Seamus Neely On Behalf of the Forestry Appeals Committee