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21<sup>st</sup> May 2021

**Subject:** Appeals FAC030/2020 & FAC044/2020 in relation to felling licence TFL00318719

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 TFL00318719 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 2<sup>nd</sup> January 2020. The licence is for the clearfell and replanting of 33.4ha across 3 plots of 100% Sitka spruce at Ballindollaghan (Crump), Co. Roscommon. The proposed operations were licenced to take place in three phases with the felling of 10.8ha in 2020, 12.4ha in 2023 and 10.2ha in 2026. The application area will be restocked with 80% Sitka spruce, 10% Additional Broadleaves and 10% open space will be provided. The DAFM information states the underlying soils are predominately highly modified peat and peaty Podzols in nature. The slope is predominantly flat to moderate. The site is in the 26D Upper Shannon Catchment, the Suck\_SC\_010 Sub-Catchment, and the Termon Stream\_010 River Sub-Basin. The Termon Stream\_010 River Waterbody was assigned 'Good' status and deemed to be 'Not at Risk' by the Environmental Protection Agency (EPA) during the Water Framework Directive (WFD) 2013-2018 reporting period. An unnamed, EPA-mapped watercourse rises in the south-east of the site and flows c.2.3km west/north-west before joining the Termon River. There are two relevant watercourses (RWCs) running from east to west within the proposal, one along the northern boundary and another through the centre of the site.

#### **Hearing**

An Oral Hearing of appeals FAC030/2020 & FAC044/2020 was held by the FAC on the 13<sup>th</sup> April 2021.

Oral Hearing Participants:

FAC:	Mr Des Johnson (Chairperson), Mr Pat Coman, Mr Dan Molloy & Mr Luke Sweetman
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
DAFM representatives:	Ms Eilish Kehoe, Mr Momme Reibisch

## 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 vary the decision to grant felling licence TFL00318719

The applicant originally submitted a felling licence application with associated maps and a Harvest Plan. Following a request from the DAFM, an updated Harvest Plan which included specific additional details was submitted. In completing a desk-assessment, the DAFM carried out a Stage 1 AA Screening that considered the 10 Natura 2000 sites within 15km of the proposal, all of which were screened out for Stage 2 AA for the following reasons:

- **Bellanagare Bog SAC, Callow Bog SAC, Cloonchambers Bog SAC,**
  - The position of the project area downstream from the Natura site and the lack of any hydrological connection.
  - The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site.
- **Cloonshanville Bog SAC, Corliskea/Trien/Cloonfelliv Bog SAC, Drumalough Bog SAC, Kilsallagh Bog SAC, Mullygollan Turlough SAC:**
  - The position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection.
- **Bellanagare Bog SPA:**
  - Other factors - Bellanagare Bog SPA (004105) – the generic conservation objective of this designated site is: to maintain or restore the favourable conservation condition of the bird species listed as SCI for this SPA Greenland White-fronted Goose (*Anser albifrons flavirostris*) [A395] (Wintering). Wintering populations of this species are traditionally known to winter on peat-land habitats, though now are more commonly recorded on wet grasslands and intensively managed agricultural fields where they feed on plant material including roots, shoots, tubers and leaves. The species is listed on Annex I of the Birds Directive and is on the Birds of Conservation Concern in Ireland Amber List as the majority of the winter population is located at less than 10 sites with the majority occurring in the Wexford slob. Bellanagare Bog SPA is not one of these 10 overwintering sites. A review of literature pertaining to the Bellanagare Bog SPA was conducted. The Natura 2000 Standard Data Form, as updated in 2017, states “in the past, the bog was used by wintering *Anser albifrons flavirostris* from the population that is centred on Lough Gara. However, the Geese now feed mainly on intensively managed grassland and seldom use the bogs in the area”. The international Single Species Action Plan for the Conservation of Greenland White-fronted Goose (AWEA, 2012 Technical Series No.45) identifies that the Bellanagare Bog population have abandoned the SPA.
- **Lough Gara SPA:**
  - The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site.
  - Other factors – Project distance from Natura site (14.2km)

The DAFM consulted various planning websites along with their internal records in completing an assessment of the potential for the proposal to contribute to a cumulative impact on Natura 2000 sites in the project Townland (Ballindollaghan (Crump), Co. Roscommon). The DAFM deemed that this

project, when considered in combination with other forestry and non-forestry plans and projects, “will not give rise to the possibility of significant effect on any Natura site.”

The Inspector’s Certification information states that the project area, together with existing thinning and/or clearfelling of three years or less within a 500m radius constitutes an area of 68.18ha. It also states that the project area, together with other thinning and/or clearfelling applications within 500m and recommended for felling equates to an area of 68.18ha.

The DAFM referred the application to Roscommon County Council (RCC), the National Parks and Wildlife Service (NPWS) and the DAFM’s internal Archaeologist. The NPWS responded stating they had no comment to make. The Archaeologist’s report states the project area is “contiguous to and may partially contain SMR site – Linear Earthwork (RO 021-060) which runs along the southern and eastern boundaries of the forest”. This report also contains a number of conditions to be adhered to during the proposed works. RCC responded stating, *inter alia*, that it is the opinion of the Council that all relevant RWCs in and around the site are at risk from sediment, nutrient and organic matter losses from the proposed forestry activities. They included a map and photographs highlighting two RWCs within the application area (one at the northern boundary and another through the centre of the site) along with the EPA River at the southern boundary. RCC recommended that a number of measures “be a priority prior to commencement of clearfelling”:

- Silt traps should be installed and maintained on all drainage channels/watercourses that discharge to RWCs and the river.
- The owner of the site must ensure that all necessary measures are put in place such that the objectives of the WFD River Basin Management Plan 2018-2021 are not compromised. These measures must be managed, monitored and maintained such that they are continually effective in the protection of water quality in order to comply with environmental legislative quality objectives.
- All measures to protect watercourses within the site from sediment, nutrient and organic matter losses as outlined in the Environmental Requirements for Afforestation 2016 (ERA) and in Felling and Reforestation policy documents must be strictly applied during tree felling and replanting at the site.
- The proposed replanting of the site should be subject to the setback/buffer distances as set out in the ERA.

The licence was issued on the 2<sup>nd</sup> January 2020 and is subject to relatively standard conditions (a) to (g) plus condition (h) which states; (i) the attached Archaeology Report is to be strictly adhered to, (ii) a minimum of 3 years greening up is to be implemented between reforestation and subsequent clearfell, (iii) Standards for Felling and Reforestation 2019 apply, and (iv) adhere to forestry & water quality guidelines. Condition (i) is also attached and details the conditions from the Archaeology Report.

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:

**FAC030/2020 –**

- The Forest Service found that the development is within 15km of a Natura 2000 site; this is a trigger for AA.
- The Inspector has failed to show any evidence on which environmental assessments were made.

- It is not appropriate at screening stage to take account of measures intended to avoid or reduce the harmful effects on a European site. Guidelines, Standards and Procedures are, in fact, mitigation measures.
- The possibility of there being a significant effect on a Natura site will generate the need for an AA for the purposes of Article 6(3) of the Habitats Directive.
- The Inspector fails to state which catchment the proposed development is in. The only legal answer is that the proposed development must be screened in for AA.

**FAC044/2020 –**

- There is no EIA screening and, as such, the licence must be cancelled.
- The EIA screening process and determination are not consistent with European law.
- There are at least 8 Natura 2000 sites within 15kms, including an SAC and SPA within 2.5kms. The Precautionary Principle must apply and the licence must be cancelled.
- Licence conditions are not written with sufficient precision.
- The Harvest Plan is inadequate / contradictory and does not provide all of the information required under the (Interim) Standards for Felling and Reforestation. There are insufficient assurances that the proposed development will not negatively impact on the environment.
- There is discrepancy between the published area and the area to which the licence applies. Amendment to the application should have required a new public notice.
- The recording of a response from a Prescribed Body is incorrect and misleading.
- There are procedural flaws with the licence and it must be cancelled.

The DAFM submitted responses to the grounds of appeal in written statements to the FAC:

**FAC030/2020** – The AA screening procedure relevant at the time was applied. The proposal would be screened out using the Habitat Table and the Bird Foraging Table. In-combination assessment was carried out. All relevant information can be found on file.

**FAC044/2020** – The AA screening procedure relevant at the time was applied. The proposal would be screened out using the Habitat Table and the Bird Foraging Table. Sub-threshold EIA is not required. In-combination assessment was carried out. All relevant information can be found on file.

The area applied for is the area calculated by the applicant and is the area that appears on the licence. On receipt of a map submitted by the applicant the department sends it to be digitised, allowing for a more accurate measurement of plots. It is this measurement that is used when making referrals to RCC, NPWS etc. and also when advertised at the new application and decision stages.

On 12<sup>th</sup> May 2020 the FAC sought additional information from the appellant for appeal FAC044/2020, specifically related to his grounds regarding the EIA Directive, and while a response was received on 14<sup>th</sup> May 2020 the requested information was not provided.

The FAC held an Oral Hearing on the 13<sup>th</sup> April 2021 at which the FAC sat remotely. The DAFM, and one of the appellants also participated remotely. Neither the applicant nor the second appellant participated. The appellant in attendance made a statement regarding the composition of the FAC and then withdrew from the hearing. The DAFM outlined their approach to processing the application stating that a Further Information Request seeking the submission of a more detailed Harvest Plan, including environmental setbacks, location of broadleaf species, extraction routes etc., had been made by the District Inspector and that the updated plan submitted by the applicant provided sufficient information to allow approval of the licence. Responding to FAC questions, the DAFM stated that the

conditions on the licence would ensure sufficient 'green-up' time (three years) between felling and reforestation operations. The FAC queried the purpose of the 10% Open Space licenced at reforestation stage. The DAFM stated that this would include significant setbacks to be created during reforestation. The DAFM responded to FAC questions stating the RWCs identified by RCC are addressed by the Harvest Plan and indicated that these would be dealt with in line with the Interim Standards for Felling and Reforestation. The FAC queried the DAFM's AA Screening conclusions and they stated that the AA screening procedure relevant at the time was applied but that all sites would be screened out based on the criteria in the DAFM's Birds Foraging Table (January, 2020) and Habitats Table (December, 2019). Responding to FAC questions regarding the grounds of appeal, the DAFM confirmed that they do not consider EIA to be required for this proposed development. The DAFM also stated that differences between the area applied for and the area digitised by the DAFM can arise but that it is the digitised area (and map) that is advertised and sent to referrals bodies.

The FAC queried if there are peaty soils on site and if so, which setback should apply to watercourses as 10m is specified on the Harvest Plan. The DAFM stated that the relevant setback for peaty soils would be 20m and that they are satisfied that this is covered by the licence conditions. They stated that the application was desk-assessed and that the soils layer is not completely accurate so it is possible there are large sections of non-peaty soils and in these cases a 20m setback would not apply. The DAFM confirmed that access to the site is adequate and is marked on the Harvest Plan map.

In addressing the grounds of appeal, the FAC had regard, in the first instance, to the grounds common to both appeals concerning the DAFM's AA screening process. The FAC noted that the DAFM completed a Stage 1 AA screening that considered 10 Natura 2000 sites within 15km of the proposal, all of which were screened out for Stage 2 AA with reasons provided. The FAC does not consider that the presence of a Natura site within 15km of the proposal is reason for automatically screening that site in for Stage 2 AA, as contended by the first appellant, nor does the FAC consider the presence alone of Natura sites within a 15km radius reason to 'cancel' (or set aside) a licence as contended by the second appellant. The FAC considered that none of the DAFM's reasons for screening out Natura sites constituted the taking into account of measures intended to avoid or reduce the harmful effects on a European site, as proposed by the first appellant. The FAC noted that in relation to Bellanagare Bog SPA, for which the Special Conservation Interest is the Greenland White-fronted Goose (GWFG), the DAFM's reason for screening out the European site, contends that the GWFG population associated with the site has abandoned the SPA. The FAC considers that, given that the Conservation Objective of this SPA remains to maintain or restore the favourable conservation condition of the GWFG, this conclusion is not appropriate for a Stage 1 AA screening and that the DAFM erred by screening the Bellanagare Bog SPA out for AA for this reason. However, in the particular circumstances of this case, the FAC did not consider this error to be serious or significant in terms of the AA Screening outcome, given the distance of the proposal from the SPA (c.2.3km), the position of the proposal downstream of the SPA and especially the absence of any suitable habitat for the GWFG within the mature conifer forestry of the application area. The FAC noted that the DAFM also considered an in-combination report which included both forestry and non-forestry plans and projects in the vicinity of the project's Townland before concluding that the project, when considered in combination with other forestry and non-forestry plans and projects, "will not give rise to the possibility of significant effect on any Natura site." The FAC notes the nearest downstream Natura 2000 site is the River Suck Callows SPA at c. 43km, the Qualifying Interests for which comprise wetlands, GWFG, Lapwing, Wigeon, Whooper Swan and Golden Plover and based on distance and the unsuitability of the habitat within the proposal area and the consideration of other thinning/felling projects, the FAC is satisfied with the screening conclusions of the DAFM. Based on the information before it, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in completing a Stage 1 AA Screening.

The FAC considered the second appellant's grounds regarding the EIA Directive. The FAC noted that 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 FAC does not consider that the proposed clearfell and replanting project falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. In these circumstances, the FAC concluded that the licence is not in breach of the provisions of the EIA Directive. Regarding the discrepancy in the area applied for and the area published, the FAC noted the DAFM's statement that the change in area is attributable to the digitisation of the maps submitted by the applicant. The FAC noted the DAFM's evidence at the Oral Hearing that the area advertised on their website, and included in their referrals to Statutory Bodies, is the same as this digitised area (34.09ha). The FAC considers that it is the boundaries/area of these digitised land parcels, identified in Table 2 of licence TFL00318719, which comprise the area licenced for felling and reforestation.

The second appellant submitted that the licence conditions are not written with sufficient precision to ensure compliance with the overall environmental regulatory framework but did not provide any further details as to which conditions he is referring to or any evidence to substantiate this claim.

The FAC considered the grounds related to the Harvest Plan submitted by the applicant and the responses the DAFM received from outside referral bodies. The second appellant states that the recording of a response from a Prescribed Body is incorrect and misleading. No further information was provided to substantiate this statement. The FAC observed that the DAFM Inspector's Certification records both RCC and the NPWS as having "no objection" to the proposal. The FAC noted that the RCC response to the DAFM included a map showing the location of two RWCs present on the site as well as a recommendation that, *inter alia*, the proposed replanting of the site should be subjected to the setback distances outlined in the ERA. The FAC noted that the updated Harvest Plan map does not show the RWCs highlighted by RCC in their submission. However, the text of the plan refers to watercourses on-site and refers to water setback distances at reforestation stage of 10m followed by 10-15m of broadleaf planting. The FAC noted that the Interim Standards for Felling and Reforestation 2019 require a 10m water setback for sites with a flat to moderate slope, regardless of soil type. The ERA requires that a 20m water setback be applied on flat to moderately sloped sites with peat soils present. The FAC accepts the DAFM's statement at the Oral Hearing that GIS soils layers are not definitive. However, the FAC considered that, given the importance placed on the protection of water quality by RCC in their response, the presence of several RWCs within the application area, and the likelihood of the presence of at least some peat soils on site, the reforestation of the site should be completed in adherence to the requirements of the ERA, as requested by RCC. The FAC considered that, in the particular circumstances of this case, the DAFM made a significant error in not having sufficient regard to the recommendations of RCC, specifically in relation to the recommended water setbacks at reforestation. The FAC decided that a detailed Harvest Plan map should be submitted to the DAFM prior to the commencement of any

works, identifying all water features within the application area (including any aquatic zones, RWCs, hotspots, water abstraction points and crossing points).

The FAC had regard to the second appellant's grounds stating there are procedural flaws with the licence and it must be cancelled. The appellant did not provide any further information or evidence to support this contention. The FAC have considered the information before it regarding the DAFM procedures in processing this licence. As outlined above, the FAC identified a number of flaws in the DAFM's processing of TFL00318719 but the FAC concluded that the cancelling or setting aside of the licence based on these errors would be a disproportionate response.

In the circumstances outlined above, and based on the information before it, the FAC concluded that the DAFM made a significant error in their decision to issue TFL00318719. The FAC decided to vary the decision of the Minister to include a licence condition requiring the reforestation of the application area to be completed in adherence to the ERA. The FAC decided that the following licence conditions should be attached to felling licence TFL00318719:

*(j) Reforestation operations shall adhere to the Environmental Requirements for Afforestation 2016.*

**Reason:** *for the protection of water quality at reforestation stage.*

*(k) An updated Harvest Plan map, identifying all water features within the application area (including any aquatic zones, RWCs, hotspots, water abstraction points and crossing points) must be submitted and agreed in writing with the DAFM prior to the commencement of operations. A copy of the updated Harvest Plan map and the written agreement shall be placed on the case file.*

**Reason:** *in the interest of protecting water quality during harvesting operations.*

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee

