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8th October 2021

Subject: Appeal FAC025/2021 regarding licence DL24-FL0082

Dear [REDACTED]

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

Background

Licence DL24-FL0082 for felling on 1.45 ha at Altilow & Lackcrom, Co. Donegal was issued by the Minister for Agriculture, Food and the Marine (DAFM) on 11th January 2021.

Hearing

A hearing of appeal FAC025/2021 was held by a sub-division of the FAC on 12th May 2021. In attendance at the hearing:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr. Seamus Neely, and Mr. Vincent Upton.

Secretary to the FAC: Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister for Agriculture, Food and the Marine regarding licence DL24-FL0082.

The licence decision relates to the felling and replanting of forest on 1.45 ha at Altilow & Lackcrom, Co. Donegal. The application was made on 31st July 2020. The forest is submitted as currently composed of 0.59ha Lodgepole Pine planted in 1961, 0.78ha Sitka Spruce planted in 1961 but with 0% canopy due to wind blow and smaller area of 0.07ha with 0% canopy also. Replanting is to be of Sitka spruce 100% with 5% open space.

An Appropriate Assessment pre screening report dated 11/9/20 from the Applicant is on file. It identified 18 Natura 2000 sites. It includes an in-combination assessment also. It identified that the project lies within two river sub basins;

This project lies in a rural landscape in the townlands Lackcrom, Altilow, Co. Donegal in the River Sub Basins ESKE_010, IE_NW_37E050200 and Leitrim Hill Stream_010, IE_NW_37L370150.

These sub-basins have approximately 18.3% and 15.5% forest cover, compared to the national average of 11%. At 1.45 hectares the project is considered small in scale.

Overall it concluded;

For the reasons set out above, and having regard to all of the information set out herein, it has been determined that, in our opinion, the project will have direct, indirect or in combination effects on three European sites, namely Donegal Bay SPA (004151), Donegal Bay (Murvagh) SAC (000133), and Lough Eske And Ardnamona Wood SAC (000163).

I / we therefore contend that the project should therefore proceed to Appropriate Assessment (Stage 2).

A Natura Impact Statement dated 11/9/20 from the Applicant is also on file.

The DAFM desk assessed the proposal with referrals to Donegal County Council and Inland Fisheries Ireland (IFI). Donegal Co. Co. stated they had no objection subject to their observations made. IFI responded referring to the need for adherence to various stated guidelines. There are two submissions on file, one from the appellant in this case.

A screening for Appropriate Assessment was undertaken by DAFM dated 29/12/20. The project and project area was described in the AAS as;

The Underling (sic) soil type is approximately; Renzinas, Lithosols (74%) & Surface water Gleys, Ground water Gleys (25%), The slope is predominantly moderate (0 - 15%)Habitat is predominant WD4The project is located within the Donegal Bay North (100%) catchment, the Eske_SC_010 (100%) sub-catchment, the Eske_010 (30%), Leitrim Hill Stream_010 (69%) sub basins.

18 European sites (13 SACs & 5 SPAs) were identified within 15km;

- Lough Eske and Ardnamona Wood SAC IE0000163
- Meenaguse/Ardbane Bog SAC IE0000172
- Donegal Bay (Murvagh) SAC IE0000133
- Donegal Bay SPA IE0004151
- River Finn SAC IE0002301
- Meenaguse Scragh SAC IE0001880
- Lough Nillan Bog (Carrickatlieve) SAC IE0000165
- Lough Nillan Bog SPA IE0004110
- Dunragh Loughs/Pettigo Plateau SAC IE0004099
- West of Ardara/Maas Road SAC IE0000197

- Pettigo Plateau Nature Reserve SPA IE0004099
- Croaghonagh Bog SAC IE0000129
- Durnesh Lough SAC IE0000138
- Durnesh Lough SPA IE0004145
- River Foyle and Tributaries SAC UK0030320
- Ballintra SAC IE0000115
- Lough Derg (Donegal) SPA IE0004057
- Tamur Bog SAC IE0001992

Lough Eske and Ardnamona Wood SAC IE0000163 and Donegal Bay (Murvagh) SAC IE0000133 were screened in for AA, while all other sites were screened out and reasons are provided.

A stand alone associated in-combination effects report outlines that planning systems and datasets were reviewed on 23/12/20 focusing on the general vicinity of the project area in the River Sub-Basin Leitrim Hill Stream_010: with non forestry projects listed under Donegal Co Council, ABP, EPA and County Development Plan outlined and other forestry projects.

An Appropriate Assessment Determination (AAD) was completed on 04/01/21. It summarised the reasons for screening in the two sites in the AAS as follows;

- *Lough Eske and Ardnamona Wood SAC IE0000163 Possible effect due to the direct hydrological connectivity exists between the project area and this SAC.*
- *Donegal Bay (Murvagh) SAC IE0000133 Possible effect due to the direct hydrological connectivity exists between the project area and this SAC.*

Mitigation measures are described and the AAD states and concludes,

This 1.45ha brown earth podzolic on a moderate slope approx. 70m from an aquatic zone at its closest point. The east of the project area, in the Eske_010 River Sub Basin, on a slope 280m to 255m south facing the Clardrumnaghan stream. This flows south into the River Eske, constituting a hydrological connection with the Lough Eske And Ardnamona Wood SAC (approx. 4.7km downstream). The River Eske then flows west, providing a hydrological link with Donegal Bay SPA (approx. 9.4km downstream, screened out) and Donegal Bay (Murvagh) SAC (approx. 9.4km downstream). West of the project area, in the Leitrim Hill Stream_010 River Sub Basin, is on a slope varying from 280m to 255m facing south to part of Leitrim Hill Stream_010, flowing southwest constituting the same hydrological connection. With Lough Eske and Ardnamona Wood SAC designated for FPM consideration. Appropriate aquatic and watercourse measure protections have been set out for the relevant designated features. The above conditions in combination, will eliminate pathways of impact of significance to the screened in features.

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation

19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

Approval issued 11th January 2021 with 26 conditions and reasons are provided.

Notice of Appeal

There is one appeal against the decision. The Notice of Appeal and full grounds were provided to each party. The grounds submit that the FAC does not fulfil an independent and impartial role. The grounds contend that the re-stocking of the site has not been assessed in the AA (Appropriate Assessment), that the findings and conclusions are not complete, precise and definite and that the possibility of residual effects have not been excluded and that no alternatives have been assessed. The grounds submit that the project lies within the River Sub-Basin Leitrim Hill Stream _010 and that this has not been assigned a status in line with the Water Framework Directive and that based on the High Court judgement in the case of the Judicial Review of Case 280 (Sweetman v An Bord Pleanala) 2018 and that the authorisation of the licence is inconsistent with the requirements of Article 4(1) (a) of the WFD.

Statement of Minister for Agriculture, Food and the Marine

In a statement to the FAC in response to the appeal, the DAFM submitted the legislative basis for the appeals process and that the FAC carries out its functions in an independent and impartial manner. The DAFM submitted that the replanting of the lands was identified in the application and detailed in other documentation and that specific measures have been included in relation to the restocking of the lands. They submit that the AA contains sufficient information in relation to the felling and reforestation project to assess impacts and that the licence conditions are consistent with best forest practice, national forest policy and protection of the environment. In relation to unassigned waterbodies, the DAFM submitted that the decision was made before the decision by Ms. Justice Niamh Hyland. It is submitted that 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 impact on water quality arising from the operation. It is further submitted that the specific measures as described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AA Determination and attached as licence conditions ensure that the proposal will not result in any adverse effect on the water quality.

Considerations of the FAC

Regarding the first grounds raised in the appeal that relate to the appeals process and the FAC. The FAC was established under the Agriculture Appeals Act 2001, as amended, with a function to hear and determine appeals against decisions of the Minister for Agriculture, Food and the Marine under Section 7 of the Forestry Act 2014, excluding grant aid, and the Forestry Regulations 2017 in relation to afforestation, tree felling, forest road works and aerial fertilisation. The FAC is required under the Act to be independent in its function and it operates in an independent and impartial manner. The FAC does not consider that any evidence of a deficiency in this regard was submitted in the grounds and the matter does not ultimately fall within the remit of the FAC itself to determine. The FAC understands that decisions

of public bodies may be challenged through the Judicial Review process in line with the Rules of the Superior Courts.

In considering the possibility of significant effects on the environment and related obligations on the Minister for Agriculture, Food and the Marine, the FAC considered whether 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) and “Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.” (Class 13 (a) 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 decision before the FAC relates to the felling of 1.45 ha of commercial managed forest which would be replanted and no change of land use would occur. The FAC concluded that 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 not covered by national regulations and that screening for significant effects under the EIA Directive was not required in this case.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In relation to the Appropriate Assessment, the grounds question the assessment of the restocking of the lands, the presence of residual effects and the consideration of alternatives. In relation to the restocking of the lands, the Application documents clearly submit that the lands would be replanted. The pre-screening report and Natura Impact Statement describe this process in detail and propose a number of specific measures that relate to the replanting stage. The Appropriate Assessment undertaken by the DAFM also notes and describes this process and requires a number of measures specific to replanting. These are attached as conditions to the final licence. The regulation and general policy of avoidance of deforestation through ensuring the restocking of lands is in keeping with Government Policy. The grounds of appeal do not provide any specific examples in relation to the processes described. The FAC noted the documentation provided in the Application which includes the fact that the land would be replanted, the species and stocking rate provided, and the operations that would be undertaken and considered that they appeared to be sufficiently detailed. The FAC considered the Appropriate Assessment undertaken by the DAFM which includes, in addition to operational details, a number of measures specific to the replanting stage and considered the matter to be sufficiently addressed. The FAC is not satisfied that errors were made in the decision in this regard.

In relation to residual effects, the FAC considered the Appropriate Assessment undertaken by the DAFM and the Natura Impact Statement and other documentation provided by the Applicant. The FAC considered that the information provided appeared to be sufficient to process the application and addressed the stages of the proposed operations. The AA concludes stating,

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

The FAC considered that no convincing evidence was provided to it that demonstrates that residual effects on the integrity of any European site might remain should the proposal be completed in keeping with the licence as required. In this situation, the FAC does not consider that there was any requirement for the Minister to consider alternatives to the proposal and to further restrict the operations. The FAC is not, therefore, satisfied that an error was made in this regard.

In relation to the grounds that query the authorisation of the proposal, an unassigned waterbody and the requirements of the Water Framework Directive, the FAC had regard to the record of the decision, the grounds of appeal, submissions made and the judgement of Ms. Justice Niamh Hyland in *Sweetman v An Bord Pleanála* (2021) IEHC 16. In relation to the latter and as described in the grounds of appeal, that judgement related to a decision in which a form of proxy status had been assigned to an unassigned waterbody by an authority under than the EPA and that mitigation measures had been developed that were specific in relation to the proxy status.

In relation to DL24-FL0082, the FAC did not consider that there was any evidence before it that the DAFM had employed some form of proxy status in the making of the decision. Nonetheless and in having regard to the judgement of Ms. Justice Niamh Hyland, the FAC considered if the licenced proposal might impact on an unassigned waterbody. The licence pertains to the clearfelling of trees on 1.45ha followed by replanting. Much of the area is already windblown and so the site would be currently disturbed. The area is small and divided between two sub-basins. The eastern portion lies in the Eske_010 River Sub Basin and the Clardrumnaghan stream, which forms part of the Eske_010 waterbody, lies some 100 metres to the east of the proposed felling. This waterbody has been assigned a Good status and to Not At Risk by the EPA (2013-2018). An unnamed first order stream flows some 75 metres to the southwest of the lands to be felled and flows southerly. This forms part of the Leitrim Hill Stream_010 waterbody which has not been assigned a status according to data provided by the EPA. The pre-screening report submitted by the Applicant considered that both streams could act as a pathway to a European site such that the proposal should proceed to Appropriate Assessment. The FAC considers that it can be reasonably concluded from this that both waterbodies could be impacted by the proposed development in the absence of mitigation measures. The grounds of appeal do not identify or describe a particular form of impact or pathway and appear to be based on the general location of the proposal within the Leitrim Hill Stream_010 sub-basin. The AA undertaken by the DAFM specifies a number of mitigation measures in relation to the protection

of water quality and the document concludes that these measures in combination will eliminate pathways of impacts of significance to the European sites and their interests. In responding to the appeal, the DAFM submitted that the proposal as licenced and having regard to the specific conditions attached would not have adverse effect on water quality or a waterbody status.

The FAC considered the nature, scale and location of the proposal and the conditions attached to the licence. The proposal at 1.45 ha is of a very small scale and only a portion of it falls within the Leitrim Hill Stream_010 sub-basin. The forest is already largely windblown and situated on mineral soils on a slope with a southerly aspect. The forest does not contain or adjoin a waterbody and is situated some 75 metres from the unassigned waterbody and the maps provided identify a track and existing forest separating the two. Access to the forest is in place through a forest road at the north of the lands. It appears to the FAC that the measures that relate to water quality specified as conditions on the licence are primarily of a preventative rather than limiting nature. These include the blocking of any existing drains, soil protection measures and restrictions on the use of inputs. Having regard to the evidence before it, the FAC considers that it can be reasonably concluded that the proposal as licenced would not have an impact on an unassigned waterbody and the FAC is not, therefore, satisfied that an error was made in the making of the decision in this regard.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and other submissions received. The FAC is 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 regard to fair procedures. The FAC is thus affirming the decision to the Minister regarding licence DL24-FL0082 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In affirming the decision the FAC considered that the proposal as licenced is in keeping with Good Forest Practice and Government Policy.

Yours sincerely,

A large black rectangular redaction box covers the signature area.

Vincent Upton On Behalf of the Forestry Appeals Committee