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24th December 2020

Subject: Appeal FAC558/2020 regarding licence CK26-FL0050

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 CK26-FL0050 for felling and replanting of 1.71 ha at Rowls (Langford) North, Co. Cork was issued by the Department of Agriculture, Food and the Marine (DAFM) on 17th July 2020.

Hearing

A hearing of appeal FAC558/2020 was held by the FAC on 22nd December 2020.

FAC Members in attendance: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. James Conway, Mr. Vincent Upton

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, a consultant's report and any 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 CK26-FL0050.

The decision pertains to the approval for the felling of 1.71 ha at Rowls (Langford) North, Co. Cork. The site is described as being a coniferous forest, Sitka spruce planted in 1986, located on a peaty gley soil type with a moderate slope. It is a condition of the licence that the area is replanted and the species, Sitka spruce, has been proposed. The DAFM undertook a screening of the proposal for appropriate assessment and considered three sites in particular. Two of the sites were screened in to proceed to appropriate assessment. The proposal was referred to Cork County Council and Inland Fisheries Ireland and both provided responses. The licence was issued on 17th July 2020 and is exercisable until 31st December 2022. A number of conditions were attached to the licence and reasons are provided.

There is one appeal against the decision. The grounds contend that the Appropriate Assessment screening did not comply with the decision of Finlay J in Kelly and that there has been no investigation as to whether the application site has complied with the requirements of EU law. Further grounds relate to issues outside of the remit of the FAC.

In a statement to the FAC in response to the appeal, the DAFM submitted that it is satisfied that all criteria as outlined in its standards and procedures have been adhered to in making a decision on the application and that it has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The DAFM submitted that the clearfell and reforestation project was screened in and an Appropriate Assessment carried out for European sites considered during the screening exercise i.e. the Blackwater River (Cork/ Waterford) SAC (002170) and the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161). The DAFM submits that it was concluded that the proposed felling and reforestation project, when considered on its own, will not result in any residual adverse effect on the Blackwater River (Cork/ Waterford) SAC (002170) and the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161) and associated Special Conservation Interest and Conservation Objectives. It is submitted that there is no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects. DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination Statement for CK26-FL0050 and that 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 (CK26-FL0050), either individually or in combination with other plans or projects, will not adversely affect the integrity of any European site. It was submitted that the qualifying interests of the European sites were truncated in the original form when it was outputted but that all species and habitats were considered.

The FAC requested a report from an independent consultant concerning the licence decision and appeal and in particular a consideration of the stage 1 and stage 2 appropriate assessment. This report is available on the public file. The report considers the proposal and surrounding landscape and describes its proximity and presence of pathways with the European sites concerned. It agrees with the conclusions reached at stage 1 that Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161 and Blackwater River (Cork/Waterford) SAC 2170 should proceed to stage 2 appropriate assessment and that Lower River Shannon SAC 2165 should be screened out on the basis of its location within a separate catchment to the proposal with no hydrological connection. The proposal lies within the Blackwater (Munster) Catchment rather than the Shannon. Regarding site 4161 and its qualifying interest, the Hen Harrier, it is noted that the proposal falls outside of a nesting area but that conditions are attached should a nest site be identified within 1.2 km of the proposal. In relation to SAC 2170 a number of qualifying interests are noted as being particularly sensitive to water quality and at risk from sedimentation and the site specific mitigation measures are considered. The report concludes with agreement with the DAFM regarding the appropriate assessment undertaken and consideration that the

work is of a competent professional and that they are not aware of any reason to question its adequacy. The report also concludes that the proposal does not fall within the classes of development included in the EU EIA Directive.

In considering the grounds of appeal, the FAC considered, in the first instance, the screening for appropriate assessment undertaken by the DAFM. The grounds of appeal do not identify any specific European sites, measures or effects of concern. Three sites are identified within 15km from the proposal by the DAFM and the FAC confirmed this using information provided by the NPWS and EPA. The DAFM considered there was no requirement to extend the 15km zone in this instance and based on the nature, scale and location of the proposal the FAC concurred with this conclusion. Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161, Blackwater River (Cork/Waterford) SAC 2170, and Lower River Shannon SAC 2165 are located within 15km of the proposal area and were screened by the DAFM with SPA 4161 and SAC 2170 being screened in to proceed to appropriate assessment. A site inspection was undertaken and site specific measures were developed and outlined in the Appropriate Assessment Report in relation to the impacts that might occur on the specified qualifying interests and special conservation interests of the sites considered. In relation to the SPA these relate to the Hen Harrier (*Circus cyaneus*). The proposal is of a small size and located within the SPA and within a freshwater pearl mussel catchment which is a qualifying interest of SAC 2170. A number of measures are included in relation to the protection of water for the protection of a number of aquatic species in the SAC that are particularly sensitive to water quality and sedimentation in particular. It is submitted that these measures were developed following a site inspection of the area and the hydrological connection and relate, in particular, to the avoidance of sediment leaving the proposal area. The measures identified in the Appropriate Assessment Determination are included as conditions on the licence. While the DAFM notes that a number of qualifying interests are truncated on the screening record the FAC concluded that this error is of a clerical nature and would not affect the outcome of the appropriate assessment. The FAC concluded based on the information before it that there was no evidence of a significant or serious error or a series of errors having been made in the stage 1 and stage 2 appropriate assessment and the FAC is satisfied that the proposal would not adversely affect the integrity of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161 and Blackwater River (Cork/Waterford) SAC 2170.

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 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 Forestry Regulations 2017 (S.I. 191 of 2017), 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 and subsequent replanting of 1.71 ha of commercial forest managed for roundwood production. The FAC concluded that

the felling and replanting 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 under the EIA Directive was not required in this case.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, other submissions received, and a consultant's report available on the public file. 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. The FAC is thus affirming the decision of the Minister regarding licence CK26-FL0050 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, 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 of Vincent Upton.

Vincent Upton On Behalf of the Forestry Appeals Committee

Appeal in relation to Felling Licence

Consultant's Report

DAFM Ref. No. CK26-FL0050

FAC Ref. No. 558/2020

Tree Felling Licence at Rowls (Langford) North under Forestry Act 2014

The Licensing Proposal

This proposal is to clearfell a section of a forest at Rowls (Langford) North in North Cork. The area of the proposed felling is stated to be 1,71 ha. The species is indicated as Sitka Spruce. It does not include any other works relating to such activities as road construction or making of entrances.

Details of Site and Surrounding Areas

The site is located in the northwestern part of County Cork and is very close to the boundary with County Limerick. It is approximately 9 km east of the village of Rockchapel, 5 km southwest of Broadford (Co. Limerick) and 10 km north of Newmarket. This is essentially a large upland area centred on the main spine of the Mullaghareirk Mountain range. This range is aligned roughly on a west-east axis corresponding generally to the boundary between Counties Limerick and Cork. Towards the west it extends into County Kerry.

Within the area of this range the landscape has a rolling pattern. There are several peaks of some prominence, for example Rock Hill rising to a height of 390 metres and Mullaghareirk rising to 405 metres. Towards the east the range effectively tapers and Rowls (Langford) North is in this area at a level of approximately 290 metres. To the northeast of the site the Glashawee river flows in a southeasterly direction opening steadily into a widening valley. In this vicinity it coincides with the county boundary for a short distance. It continues then, as the River Allow, in a southerly direction through Kanturk and flows into the Blackwater near Banteer.

The Mullaghareirk area in general is sparsely inhabited. There are forests extending across large swathes of this extensive upland area. Aside from the forests there are extensive areas of agricultural land, mostly extending towards the southeast and into Co. Limerick. There is a pattern of dispersed settlement. The road network, comprising minor country roads, is coarse grained, particularly in the area extending westward from Rowls. There are no towns of any significant size anywhere near this site; Newmarket and Dromcolliher are the closest.

The site is located within a large block of afforested land. It comprises a small area in the context of the extent of the overall forest. Much of the area immediately adjoining it has been cleared and would be expected to be replanted in due course. This situation is indicated by the patchwork of licences issued and applied for in the vicinity.

Details of Licence

This is dated 14/07/2020. Schedule 3 specifies the obligation on the licensee to replant the SS species at a rate of 2,500 stems per hectare. Nineteen conditions are attached. These include many conditions of a general nature applicable to replanting and protection of watercourses. One condition (d) requires written approval for aerial fertilisation of restocking sites. Condition (h) specifies routes for lorries accessing and exiting the site. Condition (i) contains provisions relating to the potential disturbance during the Hen Harrier breeding season and measures to exclude this. This arises from the inclusion of the site in the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161. Several conditions (j to q) relate to measures to protect water quality and the Qualifying Interest of the Blackwater River (Cork/Waterford) SAC 2170.

Referrals

The licence was referred to Cork County Council and Inland Fisheries Ireland. Two responses were received from the former. The first from the local Assistant Engineer listed access and exit route for lorries, the need for consultation for any construction of a new entrance and others of a general nature. The second from the Area Planner specified a number of general requirements, including the possible need for an application for planning permission for any new entrance.

The response from IFI related to several sites the subject of felling proposals. IFI specified a number of requirements applicable to the proposed felling. These are of a general nature and relate inter alia to the maintenance of ground stability and protection of watercourses.

Grounds of Appeal

There is one appeal. This was received on 02/08/2020 and the grounds are as follows:

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.

According to the heads of the new bill the Minister has assumed control of the FAC.

The High Court decision referred to is in the case of *Eamon Kelly v An Bord Pleanála*. It related to an application to construct a wind farm development in Roscommon and was decided in July 2014.

It might be inferred that the grounds are to some extent related to matters outside the functions of the FAC and not elaborated in relation to the circumstances of this application.

DAFM Response to Appeal

This has been submitted by the Forestry Division. It is stated that the project was carried out subject to the Guidance Note for Forestry Inspectors entitled Appropriate Assessment Procedure. Having reviewed European Sites within 15 km of the project

site, the Department identified the possibility of effects on two European sites, the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (4161) and the Blackwater River (Cork/Waterford) SAC (2170). These sites were screened for Appropriate Assessment. The potential for impacts was identified on a precautionary basis and site-specific mitigation measures were described. These were to ensure that the project would not obstruct the Qualifying Interest or Special Conservation Interests of these European Sites.

In relation to in-combination impacts, it was concluded that the project, considered on its own, would not result in any residual adverse effect on the special conservation interest of these European Sites. The DAFM are stated to have concluded that identified pathways for any adverse effect are robustly blocked using avoidance, appropriate design and best practice. A felling licence was issued and certain site specific mitigations were attached as conditions of the licence. It is stated that all SCIs/Qis were considered during the screening exercise.

EIA Screening

Certain types of forestry projects, including initial afforestation and replacement of broadleaf high forest by conifer species, are of a type for which an EIA could be required in certain circumstances. The project now proposed, comprising the felling of a block of trees within an existing forest, does not fall within any of the scheduled development types. The need for EIA screening does not therefore arise.

European Sites

The following European sites are located within 15 km of the clearfelling site:

Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (4161)

The qualifying interest is the hen harrier and the conservation objective is to maintain or restore the favourable conservation condition of this bird species. The felling site is located within the SPA.

Blackwater River (Cork/Waterford) SAC (2170)

The qualifying interests include estuaries, mudflats, Atlantic salt meadows and particular species such as lamprey, pearl mussel and otter. The conservation objectives relate to the particular habitats and species and cannot practicably be all summarised in this report. The felling site is located approximately 750 metres from the SAC just above Glashawee Bridge but is closer (approximately 150 metres) to the upper reaches of the Glashawee river outside the SAC. This river becomes the Allow further downstream and then flows into the Blackwater near Banteer.

Lower River Shannon SAC (2165)

This SAC includes all of the Shannon Estuary from a point upstream of Limerick City and includes many tributaries. This SAC is stated to be 5.4 km from the felling site at its closest point close to the source of the river Feale.

No reference has been made to any site outside a radius of 15 km from the proposed felling site which might be susceptible to effects arising from that site. I infer that this position does not need to be further considered.

Other Licences

Having regard to the nature of the main land use and associated operations in the vicinity of the felling site, blocks of this forest have been subject to a large number of felling licences. The locations of these are indicated on a map in the documentation submitted. I would refer to two in particular. Licence no. CK26-FL0043 applied to several blocks in the vicinity of the currently proposed felling site and is shown to have been granted in May 2019. Licence no. CK26-FL0049 applies to a block of land in Rowls (Langford) South close to the felling site and having an area of 11.1 ha. The decision to grant the licence was made on 19/06/2020 and I understand that this decision is the subject of an appeal.

Screening

The situation with regard to screening is as follows.

Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA

This site is very large and I infer that this is a feature of the lifestyle and requirements of the qualifying interest, the hen harrier. The felling site is located within this European site. It may be at any particular time that there would be no nesting sites close to the site of the felling project but the possibility of such can not be excluded nor can possible mitigation measures be considered at this stage. That leads to the conclusion, as has been reached in the screening done by the DAFM, that this European site should be screened in.

Blackwater River (Cork / Waterford)

The uppermost limit of this European site is quite close to the felling site and part of the Glashawee river is very close. It is also at a lower level than the felling site. The vulnerability of this river is a material consideration and the ingress of silt or other polluting matter could have serious consequences for the quality of the water and possibly for some of the qualifying species. That leads to the conclusion that this European site should be screened in. This is consistent with the recommendation of the DAFM, who noted that a hydrological connection had been confirmed.

Lower River Shannon

This is a very large site, extending from a point above Limerick City to the mouth of the river and out into the open sea. It includes the entire waterbody and many tributaries which feed in to the main river. Habitats include mudflats and extensive tidal flats. It is tidal up to Limerick and the estuary is presumably saline for much of its length. The closest part of this site to the site of the felling project is a short distance to the east of Rockchapel. The river Feale rises in this area and its waters might be vulnerable to ingress of silt or other polluting matter. The position however is that a ridge of the Mullaghareirk range forms a watershed between the Shannon catchment and the Blackwater catchment. Therefore it seems reasonable to conclude that there is no likelihood of the felling project having any effect on this European site, a conclusion reached by the DAFM in screening it out.

Appropriate Assessment

In the case of the first site identified above, in which the Hen Harrier is the Qualifying Interest, an appropriate mitigation measure was identified which could be attached as a condition to a licence. The sensitive period is the breeding season (1st April to 15th August). the recommendation is that, while potential disturbance operations could take place in this period, these would be excluded if a new nesting site was discovered within 1.2 km of the felling location. It is submitted that the project design, having regard to the recommended site-specific mitigation measures, would ensure that potential residual impacts would not arise and that the project would not obstruct the Special Conservation Interests of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA from reaching favourable conservation status.

In the case of the second site, attention was drawn to certain species and habitats, including Otter, Freshwater Pearl Mussel and the sediment and siltation qualifying interest of this site. Unimpacted downstream benthic and water column habitats are stated to be critical for the mobile species listed. A number of mitigation measures were recommended including setbacks along aquatic zones, the installation of silt traps, avoidance of cleaning roadside drains and measures to redirect water around the back of a particular layby.

Further attention was then given to in-combination effects. A number of grants of planning permission in the area were listed, mostly relating to minor residential and agricultural developments. Other forest plans and projects are noted. These include an afforestation project, forest road projects, private felling licence projects and Coillte felling licence projects. Relevant provisions from the County Development Plan relating to natural heritage are summarised. These include objectives to protect all designated natural heritage sites, to protect plant and animal species listed in relevant legislation, to retain areas of local biodiversity outside protected areas and to ensure an appropriate level of ecological assessment of wetland habitats.

In an In-combination statement it is noted that the project lies in a rural landscape in North Cork in the sub-basin of the Glashawee river, in which there is approximately 44% forest cover. Various forestry activities and other developments have been listed. It is concluded that that the proposed project, with specified mitigation measures will not result in any residual adverse effect on the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA with its associated Conservation Interests and Objectives and that there is no potential for contribution to any cumulative adverse effects on this European site. The conclusion in the final determination is that, based on objective information, no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

The preparation of this Appropriate Assessment Report arose from the decision to screen in two European sites in the vicinity of the site of the felling project. This decision is commented on above and the considerations leading to that decision support the case that the project would be likely to have significant effects on the sites in question and the potential to affect their conservation objectives.

This Appropriate Assessment was carried out with a professional input in matters relating to the natural environment. I infer that this input was the work of a competent professional and I am not aware of any reason to question its adequacy.

In conclusion I note that three European sites were identified in this case for consideration of possible effects on them, that the screening of these sites determined that two should be subject to appropriate assessment and that the third could be screened out. I have commented on the appropriate assessment and I have expressed my agreement with the decision to exclude the third site (the Lower River Shannon) from further consideration at screening stage.

Signed; Michael Walsh

Date: 20/12/2020