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24<sup>th</sup> December 2020

**Subject:** Appeal FAC623/2020 and FAC584/2020 regarding licence WW05-FL0109

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 WW05-FL0109 for felling and replanting of 8.80 ha at Ballinagee, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 15th July 2020.

#### **Hearing**

An oral hearing of appeals FAC623/2020 and FAC584/2020 was held by the FAC on 18<sup>th</sup> December 2020. In attendance:

FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Ms. Claire Kennedy, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellant [REDACTED]

Appellant FAC584/2020: Not present

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Frank Barrett, Ms. Eilish Kehoe

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence WW05-FL0109.

The licence pertains to the felling of 8.80 ha at Ballinagee, Co. Wicklow. The forest is currently comprised of Sitka spruce and lodgepole pine, primarily planted in 1954 and 1967, and replanting would

be of Sitka spruce and rowan. The soil type is described as Podzols (Peaty), Lithosols, Peats (100%) on a slope of 15-30%. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. It also includes a pre-screening report for Appropriate Assessment. The DAFM undertook an appropriate assessment screening of the proposal and identified five sites within 15km of the proposal and that there was no reason to extend this radius in this case. These sites are 004040 Wicklow Mountains SPA, 002122 Wicklow Mountains SAC, 004063 Poulaphouca Reservoir SPA, 000781 Slaney River Valley SAC and 000733 Vale Of Clara (Rathdrum Wood) SAC. One site, 004040 Wicklow Mountains SPA was screened in as it was determined that there might be a possible effect due to the proximity of the project and the Natura site. The application was referred to the County Council and Inland Fisheries Ireland and responses were provided by both. The licence was issued on 15th July 2020 with conditions listed (a) to (r) and is exercisable until 31<sup>st</sup> December 2022.

The decision to grant the Licence is subject to two appeals. The grounds set out in appeal FAC623/2020 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 there has been inadequate consideration of feedback from a consultation body, 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. FAC584/2020 submits that the Appropriate Assessment screening did not comply with the decision of Finlay J in Kelly. It further contends that there has been no investigation as to whether the application site has complied with the requirements of EU law and that basic requirements of the NPWS have not been complied with.

In a statement to the FAC, the DAFM contended that the standard operational activities of clearfelling and replanting already established forests 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. 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 statement also refers to the appropriate assessment report on file in relation to forestry and other projects within the sub river basin where the licensed project is located and that the DAFM 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, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. It is submitted that standard procedures were followed in respect of issuing referrals and considering referral responses and that Appropriate Assessment stage 2 was carried out by DAFM in respect of the felling and reforestation project. It is submitted that the potential for the project to result in impacts on the Conservation Interests of the Wicklow Mountains SPA 004040 was identified on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described in the Appropriate Assessment report. The DAFM contended 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 WW05-FL0109. Regarding public participation and consultation the statement outlines the requirements under Forestry legislation and submits that these provisions, and any considerations and decisions made pursuant to them, fully concord with the requirements of Article 6(3) of Habitats Directive as regards public participation.

In relation to the contention that a condition should be attached to the licence in relation to birds, the DAFM submitted that it is *"a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply"* and refers to the mitigation measures attached to the licence stemming from the appropriate assessment. The statement submits that the Minister may attach or vary licence conditions under the Forestry Act 2014 and that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012.

An oral hearing of the appeals were held and attended by representatives of the DAFM and the Applicant and the Appellant in appeal FAC623/2020. The DAFM again submitted that it was satisfied that the decision was made in accordance with its procedures and outlined the processing of the application. It was submitted that that an appropriate assessment screening was undertaken and that Wicklow Mountains SPA proceeded to appropriate assessment on a precautionary basis given its proximity to the SPA. It was submitted that all submissions were considered and are reflected in the licence conditions and that the DAFM is satisfied that these conditions will address any concerns expressed regarding

water quality. It was submitted that the proposal does not comprise deforestation and is not a class of development included in the EIA Directive. The Appellant questioned the screening and appropriate assessment undertaken and, in particular the decision to screen out Wicklow Mountains SAC and the mitigation measures proposed for Wicklow Mountains SPA. Reference was made to research in Norway regarding colonisation of habitats by Sitka spruce. The dates of the appropriate assessment report and determination were queried. They submitted that the response provided by Inland Fisheries Ireland was not sufficiently considered regarding setbacks. The Applicant outlined the application process and described the site. They contended that the conditions attached to the licence and the manner in which operations would be undertaken would protect water quality, that the proposal does not comprise deforestation and that any spraying of pesticides after tree establishment would be undertaken on a risk basis and in accordance with regulations.

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 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, 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 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 similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 8.8 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 any other classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to five Natura 2000 sites, as noted. The FAC examined publicly available information provided by the EPA and NPWS and confirmed the identified sites within 15km and having regard to the nature, scale and location of the proposal concluded that there was no requirement to consider sites outside of this radius. The closest boundary of the Wicklow Mountains SAC lies some 400 metres to the north of the boundary of the felling under appeal and is separated by managed forest that has been felled and replanted in recent years. The felling would occur outside and

downstream of Wicklow Mountains SAC. The reference to research undertaken in coastal Norway submitted at the oral hearing is understood to relate to 'Spread of the Introduced Sitka Spruce (*Picea sitchensis*) in Coastal Norway', by Per Holm Nygaard & Bernt-Havard Oyen, January 2017, which concluded that the establishment of new Stika Spruce plantations within 200 metre of protected areas should be avoided in the study area which is half the distance to the closest boundary of the SAC. The Wicklow Mountains SPA was screened in for Stage 2 Appropriate Assessment and the DAFM submitted that this was on a precautionary basis due to proximity. The boundary of the SPA lies some 400 metres to the north of the forest boundary and is separated by recently replanted managed forest. An incorrect distance is recorded in the determination but the FAC is satisfied that this constitutes an obvious error and that all other descriptions of the proposal clearly relate to WW05 FL0109 as does the available mapping. The FAC considered that the DAFM had carried out a Stage 2 Appropriate Assessment, which led to the making of an Appropriate Assessment Determination. While the dates of drafting the report and determination were queried during the oral hearing the FAC is satisfied that both were finalised prior to a decision being made on the application. Specific conditions relating to the protection of the A098 Merlin *Falco columbarius* and A103 Peregrine *Falco peregrines* were incorporated into the licence issued by the DAFM. It was submitted at the oral hearing that the mitigation measures were developed by an ecologist and that the appropriate assessment report and determination was prepared with the review by another ecologist. While the Appellant queried the mitigation measures proposed the FAC does not consider that any convincing, scientific evidence was submitted to contradict the appropriate assessment undertaken. The DAFM Appropriate Assessment Determination outlines the proposed mitigation measures that must be adhered to and concludes that

*Therefore, 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.*

The identified measures were subsequently attached to the licence when issued. Based on the evidence before it, the FAC agrees with the conclusions reached at both the stage 1 and stage 2 of the appropriate assessment and is not satisfied that a serious or significant error or a series of errors occurred in the Minister's decision in this regard. In relation to public consultation, the FAC is satisfied that the public are provided with opportunities to make submissions at the licence application stage and that the Minister, in making a decision, must have regard to such submissions.

Regarding the conditions that the Appellant suggested should be attached to the licence, the FAC considered that, as submitted, the Minister may attach conditions including the erection of site notices and any other environmental or silvicultural requirements as the Minister considers appropriate. The grounds do not provide reasons for the suggested attachment of conditions regarding notifications or



inspections to this specific licence. In this instance, the licence requires the erection of a site notice following the directions of the DAFM. The FAC considers that an authorised officer of the DAFM may undertake such inspections as they consider necessary in line with the Forestry Act 2014. In regard to the suggestion that further conditions should be attached regarding species, the FAC considered that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that there is potential for the presence of birds on the site and considered the mitigation measures attached to the licence following appropriate assessment.

The grounds suggest that there was inadequate consideration of feedback from a Consultation Body. The application was referred to the County Council and Inland Fisheries Ireland (IFI) and, at the oral hearing, the Appellant submitted that the setbacks provided for on the licence conditions do not reflect the submission from the IFI regarding setbacks. The licence conditions include a requirement to apply a 10 metre setback from any aquatic zone and the blocking of pathways regarding any existing mound drains amongst a number of other water related conditions and a requirement to adhere to forestry standards and guidelines identified. The responses from the County Council and Inland Fisheries Ireland referred to water quality, adherence with forestry guidelines, pH sensitivity and the suitability of the replanting species and the District Engineer responded that no issues arose, and were queried at the oral hearing. The DAFM submitted that these responses were considered in the making of the decision and that they are satisfied that the licence conditions address any identified concerns. The Applicant submitted that this area is under consideration and study and that they did not consider that there was any particular concerns with the proposal. No further evidence was submitted to the FAC in this regard by any party. The proposal is surrounded by existing managed forest some of which has been felled and replanted in recent years and there is a requirement to allow a newly planted area to the south to "green up" prior to felling the forest block under appeal. The forest block is separated into two stands and is generally well setback from any marked watercourse, with the southeastern corner lying c.30 metres from a stream but separated by another forest stand. There is submitted to be three relevant watercourses or drains that lead from the site. Licence conditions require that these pathways be blocked and that the risk of sediment is managed. The soil type is described as a mixture of mineral and organic soils and the proposal includes the replanting of some native broadleaves. The FAC concluded, based on the evidence available to it, that the proposal as licensed and with adherence to the required licence conditions would not pose a significant threat to water quality and that it is not satisfied that an error was made by the DAFM in this regard. Regarding the use of chemicals the FAC considers that such use is regulated through national legislation and restrictions are included in the requirements of the licence conditions. The Applicant further submitted that notifications are made under the voluntary sustainable forest management certification scheme of which it is a member. Regarding the conditions attached to the licence the approval of which forms the subject of the appeal, the FAC is not satisfied that a significant or serious error or series of errors had been made in the decision making process and considers the licence conditions to be acceptable in this case.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors were not 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 WW05-FL0109 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 black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton On Behalf of the Forestry Appeals Committee

