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24 April, 2020

Subject: Appeal FAC344/2019 KK03-FL0044 – Felling licence

Garryrickin, Kilkenny

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 KK03-FL0044 for 3.43 hectares was approved by the Department of Agriculture, Food and the Marine on 22nd October, 2019.

Hearing

A hearing was conducted by the FAC on the 15th April, 2020.

In attendance at the hearing:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Mary Lawlor
& Mr Vincent Upton

Decision

Having regard to the evidence, before it and, in particular, the considerations and reasoning set out below, the FAC has decided to confirm the decision of the Minister regarding licence

KK03-FL0044. The decision is related to 3.43 hectares of clearfell and replanting at Garryrickin, Kilkenny for which a licence was granted on 22nd October, 2019. The forest is currently comprised of Sitka spruce and replanting will be of the same species. While there are other forests in the general vicinity the forest to be felled is surrounded by agricultural land and is not directly connected with a water feature.

There is a single appeal against the decision to grant. The grounds of appeal contend that it was not possible to carry out an assessment in accordance with the requirements of the Habitats Directive based on the information submitted and that no proper assessment was carried out. Reference is made to Court judgments and to an absence of an assessment of cumulative effects.

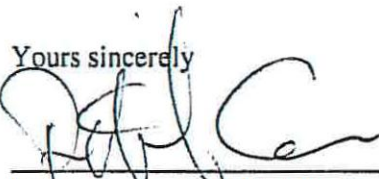
The statement provided by the DAFM in response to the appeal states that there is no possibility of a significant effect on any Natura site, and that an Appropriate Assessment is not required. The DAFM also state that *"There are no lakes near or adjacent to this felling licence application area. The nearest lake (not hydrologically connected) is 740 m. There are no streams or rivers directly connected to the felling area."*

The FAC sought a report by an independent consultant in relation to this proposal and, in particular, a Stage 1 screening for Appropriate Assessment in accordance with the provisions of Article 6(3) of the Habitats Directive (92/43/EEC). The report, dated 4th April 2020, was considered by the FAC in coming to its decision and a copy of the report is contained in the public file. The FAC is satisfied that the screening procedure detailed in the report is in accordance with the requirements of the Habitats Directive. The report details 4 Natura 2000 sites within a radius of 15km of the proposed felling site (3 SACs and 1 SPAs) and this is considered to be appropriate in this case. The FAC agrees with, and adopts the findings of the report in respect of each of the individual Natura 2000 sites, having regard to the qualifying interests of those sites, and with the overall conclusion that the proposed development by itself, or in combination with other plans or projects, would not be likely to give rise to significant effects on any Natura 2000 site. In these circumstances the FAC considers that the carrying out of Appropriate Assessment as referred to in Article 6(3) of the Habitats Directive is not required.

Furthermore, the FAC agrees with the conclusion of the consultant's report that the proposed felling does not come within the classes of development covered by the Environmental Impact Assessment Directive (2011/92/EU as amended by 2014/52/EU). The proposed replanting is not initial afforestation and does not involve any change in the use of the land. The FAC also concludes that the proposed development by itself, or cumulatively with other permitted projects would not be likely to give rise to significant effects on the environment.

In deciding to confirm the licence, the FAC considered that the proposed development is consistent with Government policy and Good Forestry practice.

Yours sincerely



Pat Coman on behalf of the Forestry Appeals Committee

FAC Case Ref: 344/2019

DAFM Case Ref: KK03-FL0044

Details of application:

The application is for the clear-felling and replanting of an area of 3.43 Hectares of mainly Sitka Spruce trees in the townland of Garryrickin in County Kilkenny.

Location and details of lands:

The lands where the clear-felling is proposed are located in a rural area of County Kilkenny about 5 kilometres to the south-southwest of the town of Callan. The lands are about 5 kilometres east of the village of Mullinahone in County Tipperary. The lands are located close to the border of County Kilkenny with County Tipperary and close to the N76 national secondary road which links Kilkenny/Callan to Clonmel.

The predominant land uses in the area are agriculture and forestry. The relatively small plantation in question in the current application is set back a short distance from the local road to the south. The intervening lands are in agricultural use and appear to be well drained. There are 2 relatively new houses located near the roadside in this area and there is another, also relatively new house located on the south side of the local road. There is a relatively large area of forestry located on the north side of the local road a short distance to the east of the project lands. There is also some forestry on the south side of the local road to the east and there are further plantations further north towards Callan.

The old OS maps indicate trees on the lands for a considerable period of time. The maps suggest that the very straight local road to the south may be relatively new and the lands may have been part of the demesne attached to a large house in earlier times. The OS maps indicate two streams or drains flowing in a north-westerly direction to the west and northwest of the project lands. The nearest of these is about 80 metres to the west and the other is about 250 metres to the northwest. The streams/drains meet a short distance away to the north. The ground level at the road to the south is indicated to be 259 feet AOD.

Decision of DAFM:

The Department decided to grant a licence for the proposed tree felling. Full details of the licence are not contained in the documentation available to me. I assume that the licence is subject to the normal

standard type conditions requiring compliance with various standards and guidelines. I also assume that no specific condition was included to limit or mitigate the impact of the project on any Natura 2000 site.

Grounds of appeal:

It is submitted that based on the information submitted it is not possible to make a decision which would be in compliance with the requirements of the Habitats and EIA Directives.

The appellant refers to a High Court decision given by Ms Finlay Geoghegan on 25 July 2014. The judgement, in a quotation from a European Court of Judgement decision, states that for Appropriate Assessment to be a mandatory requirement there is no need to *establish* that there would be a significant effect on a Natura 2000 site. It is merely necessary to determine that there *may* be such an effect. A further quotation, from a EU Court decision, referred to in the judgement states that "It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3)".

In an earlier submission, which he requested be attached to all his appeals, the appellant stated that there is a lack of proper assessment. He submits, for example, that there is no assessment of cumulative effects. (This submission pre-dates the date of the current appeal).

The appellant submits that if mud was to get into the lake it could have an effect on the SAC/SPA. He submits that the fact that the distance is over 15 Km has no relevance to the fact that there may still be an effect. (The appellant does not indicate what lake or SAC/SPA he is referring to).

DAFM response to grounds of appeal:

In its response the Department refers to the documentation submitted, including the pre-screening report on Appropriate Assessment, and to the screening exercise carried out by the Department. It is submitted that having reviewed the details of relevant Natura sites, their qualifying interests and conservation objectives in the context of possible sources and pathways for impact, the Department deemed that the project, when considered in combination with other plans and projects (as identified in the Pre-screening Report), will not give rise to the possibility of a significant effect on any of those Natura sites. As such, the clearfell project was screened out and an Appropriate Assessment was deemed unnecessary.

The Department also submits that there is no lake close to the project lands. The nearest lake is 740 metres away and there is no hydrological from the lands to the lake. It is submitted that there is no stream or river directly connected to the felling area.

Appropriate Assessment screening:

There are 4 Natura 2000 sites located at least in part within 15 kilometres of the project lands. These are the Higginstown Fen SAC located, at the nearest point

about 14.3 Km from the lands, the Lower River Suir SAC located, at the nearest point, about 6.2 Km from the lands, The River Nore SPA located, at the nearest point, about 5 Km from the lands and the River Barrow and River Nore located, at the nearest point, about 4.6 Km from the subject lands. (The distances given are the shortest distances and not distances along hydrological connections).

The Higginstown Fen SAC is located in the River Suir water catchment to the southeast of the project lands and at a minimum distance of over 14 Km. The project lands are in the River Nore water catchment. There is no hydrological connectivity from the project lands to the SAC. The Nore joins the Suir much further downstream. The SAC has been designated for [7230] Alkaline fens. Due to the absence of any hydrological connection from the project lands to the SAC the small-scale project in question would have no effect on this Natura 2000 site.

The Lower River Suir SAC, to the southwest, is located at a minimum distance of over 6 Km from the project lands. The SAC is located in the River Suir catchment and the project lands are in the River Nore catchment. The Lower River Suir SAC has been designated for the following qualifying interests.

Atlantic salt meadows (*Glaucopuccinellietalia maritima*) [1330]

Mediterranean salt meadows (*Juncetalia maritimi*) [1410]

Water courses of plain to montane levels with the *Ranunculon fluitantis* and *Callitricho-Batrachion* vegetation [3260]

Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels [6430]

Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles [91A0]

Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]

Taxus baccata woods of the British Isles [91J0]

Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]

Austropotamobius pallipes (White-clawed Crayfish) [1092]

Petromyzon marinus (Sea Lamprey) [1095]

Lampetra planeri (Brook Lamprey) [1096]

Lampetra fluviatilis (River Lamprey) [1099]

Alosa fallax fallax (Twait Shad) [1103]

Salmo salar (Salmon) [1106]

Lutra lutra (Otter) [1355]

The small-scale project in question in the current application would be in a different river basin with no hydrological connection to the Lower River Suir SAC. The Lower River Suir SAC ends at the point where the Suir joins the River Barrow at a location east of Waterford. The Nore joins the Barrow much further to the north at a location north of New Ross. As there is no hydrological connection from the lands to the SAC there would not be any effect on any habitats or species due to impact on water quality. There is also no other pathway through which the tree felling on the project

lands could have any impact on the various qualifying habitats in the Lower River Suir SAC.

The special interest of the River Nore SPA is the Kingfisher. The conservation objective is to maintain or restore the favourable conservation condition of this species. The mature coniferous plantation in the project lands is not a habitat suitable to or favourable for the Kingfisher. The project would clearly not have any effect on the SPA in question having regard to the basis for the designation of the site and its conservation objective.

The River Barrow and River Nore SAC is located, at the nearest point about 4.6 Kms, from the project lands. The nearest point to the SAC is some distance downstream and to the southeast of Callan. The nearest hydrological connection from the area where the project lands are located to the SAC is to the Kings River to the southeast of Callan. The hydrological distance from the nearest stream is about 7 Kms. There is no evidence of any direct hydrological connection from the footprint of the project lands.

The qualifying interests of the River Barrow and River Nore SAC are:

Estuaries [1130]

Mudflats and sandflats not covered by seawater at low tide [1140]

Reefs [1170]

Salicornia and other annuals colonising mud and sand [1310]

Atlantic salt meadows (*Glauco-Puccinellietalia maritima*) [1330]

Mediterranean salt meadows (*Juncetalia maritimi*) [1410]

Water courses of plain to montane levels with the *Ranunculus fluitantis* and *Callitriche-Batrachion* vegetation [3260]

European dry heaths [4030]

Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels [6430]

Petrifying springs with tufa formation (*Cratoneurion*) [7220]

Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles [91A0]

Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]

Vertigo moulinsiana (Desmoulin's Whorl Snail) [1016]

Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]

Austropotamobius pallipes (White-clawed Crayfish) [1092]

Petromyzon marinus (Sea Lamprey) [1095]

Lampetra planeri (Brook Lamprey) [1096]

Lampetra fluviatilis (River Lamprey) [1099]

Alosa fallax fallax (Twait Shad) [1103]

Salmo salar (Salmon) [1106]

Lutra lutra (Otter) [1355]

Trichomanes speciosum (Killarney Fern) [1421]

Margaritifera durrovensis (Nore Pearl Mussel) [1990]

The conservation objectives are generally to maintain and/or restore the favourable conservation condition of the site for the habitats or species for which the site is designated. The drainage system between the project lands and Callan is not part of the SAC and has not been designated. I consider that any mud or debris which would enter the drainage system close to the project lands would have little or no effect 7 Km downstream at Callan. Most of the habitats listed are to be found much further downstream. I consider that the project is unlikely to have any significant effect on the habitats listed.

I accept that some of the species for which the SAC has been designated are particularly sensitive to water pollution in the form of suspended solids, nutrients or mud. I refer in particular to the Freshwater Pearl Mussel and the Nore Pearl Mussel.

The NPWS conservation objective in relation to the Freshwater Pearl Mussel states "The status of the freshwater pearl mussel (*Margaritifera margaritifera*) as a qualifying Annex II species for the River Barrow and River Nore SAC is currently under review. The outcome of this review will determine whether a site-specific conservation objective is set for this species. Please note that the Nore freshwater pearl mussel (*Margaritifera durrovensis*) remains a qualifying species for this SAC. This document contains a conservation objective for the latter species." There is accordingly at present no specific Conservation Objective except for the Nore Freshwater Pearl Mussel.

The Conservation Objective relevant to the Nore Freshwater Pearl Mussel refers to the presence of this species in a stretch of the Nore River upstream of Ballyragget. The conservation objective is to restore the favourable conservation condition of the Nore freshwater pearl mussel in the River Barrow and River Nore SAC, which is defined by a list of attributes and targets set out in detail in the Conservation Objectives. The stretch of river indicated on Map 7 of the maps attached to the Conservation Objectives is a significant distance from Callan and upstream of same. The Kings River joins the Nore over 30 Kms downstream of Ballyragget.

Of the various qualifying interests listed for the River Barrow and River Nore SAC the only one identified in the Kings River on the maps attached to the Conservation Objectives document on the NPWS website is the White Clawed Crayfish. The major threat to this species is indicated to be alien crayfish and disease. It is stated that this species is widespread throughout the SAC. The characteristics of the species is indicated to be "Crayfish need high habitat heterogeneity. Larger crayfish must have stones to hide under, or an earthen bank in which to burrow. Hatchlings shelter in vegetation, gravel and among fine tree-roots. Smaller crayfish are typically found among weed and debris in shallow water. Larger juveniles in particular may also be found among cobbles and detritus such as leaf litter. These conditions must be available on the whole length of occupied habitat." I consider that the project proposed is not likely to have any significant effect on this species.

Having regard to the qualifying interests of the River Barrow and River Nore SAC and the nature, small-scale and location of the project in question here I consider it

was reasonable for the Department to conclude that the project would not individually or in combination with any other project have any significant effect on the SAC in question. I noted, in checking the history of planning permissions in the area in recent years, that most permissions are for agricultural developments, single houses or modifications/extensions. I noted also permission for a school extension to the west near the N76 and permission for a driving school in lands to the east. I note that the Department states that there are no licences for clear-felling, thinning or forest roads in the area. I consider that the proposed tree felling would not have any in-combination effect, with any of the permitted developments, on any Natura 2000 site.

I am not aware of what lake the appellant refers to in the grounds of appeal. I have noted none in the vicinity of the project lands. Neither am I aware of what Natura 2000 site, outside a 15 Km radius, he considers might be affected.

In the above assessment I have not considered the normal good felling practices, referred to in the documentation, in forming my conclusions. I consider, however, that compliance with the various guidelines etc referred to would re-enforce my conclusions. I also consider that the practices referred to are designed to protect the local environment, as they are general standards for all felling, and are not designed to prevent any significant effect on the Natura 2000 sites.

The proposal is clearly not necessary for or connected with the management of any Natura 2000 site. I conclude, also, that the proposed felling of itself or in combination with any other plans or projects is not likely to have any significant effect on any Natura 2000 site. In these circumstances the carrying out of an Appropriate Assessment as referred to in Article 6(3) of the EU Habitats Directive is not required.

Screening for Environmental Impact Assessment (EIA):

In my screening for EIA I have regard to the requirements contained in the EU Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU), in Irish regulations transposing the Directive into Irish law and to the Guidance for Consent Authorities regarding Sub-threshold Development published by the Department of the Environment in August 2003. I have had regard to the characteristics of the project, the location of the project (including the environmental sensitivity of the area) and the types and characteristics of potential impacts of the development as referred to in Annex 111 of the Directive. I have also taken account of my conclusions, set out above, in relation to the likely impact of the development on any Natura 2000 site.

The EU Directive sets out, in Annex 1 a list of projects for which EIA is mandatory. Annex 11 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 (nor clear-felling) are referred to in Annex 1. Annex 11 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 11). 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. It appears to me that felling of trees and subsequent replanting, 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). I will, however, consider the likely effects of the proposal on the environment.

The site is located in an area where the predominant land uses are agriculture and forestry. Forestry by its nature involves afforestation, thinning, clear-felling and replanting. Such activities are normal and not out of character visually or otherwise in an area such as that in question. The area is not designated as being of exceptional or special visual amenity significance in the current County Kilkenny development plan. The trees in question are visible from some locations along the surrounding road network. They are not however particularly prominent and are not of such exceptional amenity value as to warrant retention. I consider that the felling proposed would not have any significant impact on the landscape.

The felling will give rise to the transport of timber on the local roads. This will cause some inconvenience in the short term but is an inevitable consequence of the afforestation and would not of itself result in such likely significant effects on the environment as to require compliance with the full Environmental Impact Assessment process. I also consider that the project in question here would not be likely to give rise to significant effects on the environment due to water or air pollution.

There are no National Monuments located within the project lands. The nearest such monument is located about 1 kilometre away to the northwest on the opposite side of the N76 national road. The proposed project would have no effect on this National Monument.

I consider that the felling proposed does not come within the classes of project covered by the EU EIA Directive. I also consider that the proposed development would not be likely to give rise to significant effects on the environment of itself or cumulatively with other permitted projects. I consider that the possibility of significant effects on the environment can be ruled out on the basis of this preliminary screening

Overall conclusion:

I conclude that the proposed project would not be likely to have significant effects on the environment and the carrying out of EIA is not required. I also conclude that the project individually, or in combination with other plans or projects, is not likely to have any significant effect on any Natura 2000 site, having regard to the reasons for designating the sites and their conservation objectives.

Padraic Thornton

4 April 2020

