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26<sup>th</sup> November 2020

**Subject:** Appeal FAC175/2020 regarding licence WW09-FL0169

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 WW09-FL0169 for felling and replanting of 2.42 ha at Ballinamona, Knocknamohill, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 13<sup>th</sup> March 2020.

#### **Hearing**

An oral hearing of appeal FAC175/2020 was held by the FAC on 6<sup>th</sup> November 2020. In attendance:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Bernadette Murphy, Mr. Vincent Upton

Secretary to the FAC: Ms. Ruth Kinehan

Appellant: [REDACTED]

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 set aside and remit the decision of the Minister regarding licence WW09-FL0169.

The licence pertains to the felling and replanting of 2.42 ha at Ballinamona, Knocknamohill, Co. Wicklow. The forest is currently comprised of Corsican pine, western hemlock, noble fir and beech and the site would be replanted with Douglas fir and oak. The site was planted in 1963 and is described as being on a moderate slope and on mineral soils, comprised of acid brown earths, brown podzolic, lithosols and regosols. The forest lies in the Aughrim (Wicklow) 020 river basin. The proposal was referred to Wicklow County Council and Inland Fisheries Ireland (IFI). Inland Fisheries Ireland replied requesting that operations abide by forestry guidelines and not create ground instability and that their officer is

contacted prior to works commencing. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application. The DAFM undertook and documented an appropriate assessment screening that found seven European sites within 15km and found that there was no reason to extend this radius in this case and that the proposal would not give rise to the possibility of a significant effect on a European site itself or in-combination with other plans and projects. The licence was approved with a number of conditions attached which related to water and the environment generally, including contacting an IFI officer, and is exercisable until 31<sup>st</sup> December 2022.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. It is also submitted that the Forest Service failed to supply an EIA screening of the project when requested. The grounds also contend that a nationally designated site was not considered in the approval process, the Avoca River Valley pNHA, and that the catchment contains an extant population of Freshwater Pearl Mussel and that an IFI report has identified the Avoca as an important salmonid river. It is submitted that licence conditions contain duplications, are not enforceable and 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. It is contended that the Forest Service failed to provide a copy of the application when requested and that this represented a breach of Regulation 20 (3) of the Forestry Regulations 2017.

The FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant responded that his appeal should be considered on its own merits and that the applicability of EU Law and National Law are matters for the FAC but did not state the class of development included in the EIA Directive to which the proposal belongs.

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), 4(4) and 4(5) had not occurred. In relation to designated sites, the DAFM submitted that they had screened the application for appropriate assessment and that in relation to the Avoca River Valley pNHA the project is located adjacent to and not within the pNHA. Standard procedures in regard to referrals were followed in relation to this pNHA and therefore no referral correspondence was issued to NPWS. They further submitted that there is no hydrological connection between the project location and the Avoca River Valley therefore there is no pathway, hydrological or

otherwise for an effect on the aquatic species noted. The DAFM contended that duplicate conditions on a licence as a result of a clerical error are inconsequential. 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"*. The statement further contends that the Appellant had requested files for 451 licences and that a number of licences had subsequently been appealed. The statement goes on to describe the appropriate assessment procedure adopted by the DAFM in processing the licence and notes that a number of qualifying interests had been truncated on the original document but that the screening was sound. It is further submitted that the screening relied on information from the Applicant in relation to the consideration of the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequent to the licence being issued which was consistent with the first screening.

An oral hearing was held at which the Appellant submitted that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EU EIA Directive. Reference was made to the listing of open space in the application and that such areas would be defined as non-forest areas in the CORINE land cover map coordinated by the EU EPA. Comparisons were made to the protection of forests from damage under forestry legislation and the processing of felling licences. They further submitted that the licence conditions did not provide sufficient protection for birds in line with EU legislation and that National legislation was lacking in this regard. The Appellant did not submit any evidence regarding species that related to the specific decision under appeal and submitted that their appeal was made based on a desk assessment of the proposal. They suggested that the site was at risk from landslide and would threaten water quality and reference was made to a dataset prepared by the Geological Survey of Ireland. They submitted that the application should have been referred to the NPWS in relation to the Avoca River Valley pNHA and suggested that the area contains an extant population of Freshwater Pearl Mussel and that the IFI has identified the Avoca river as an important salmonid river and reference was made to an assessment report undertaken for a different project by Byrne Looby PH McCarthy Consultants. They queried the conditions on the licence that related to water quality and dwellings. The Appellant did not provide evidence of protected species being present in or making use of the forest. The Applicant submitted that the proposal does not include any deforestation or land use change while noting that the application did include small unplanted areas. They submitted that a forest road is in place to the south of the forest. They suggested that their environmental officers undertake routine assessment of felling and other proposals, including considerations of habitats and environmental features, and had considered the site and did not identify any risk to water. They contended that the site had been visited after the appeal was made and that there was no hydrological connection between the forest and the Aughrim River described as 200 metres from the boundary of the forest to be felled. They submitted that there would be no impact on any European site due to the small scale and lack of hydrological connection. The DAFM reasserted their contention that the proposal does not include a class of project covered by the EIA Directive or National legislation and does not constitute deforestation or land use change. They submitted that their referral system procedures were

followed and that the forest is located outside of the pNHA. Details of other plans and projects referred to in the assessment were queried and provided.

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 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 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 Forestry Regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 2.42 ha. 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.

Regarding the application being referred to the NPWS and general concerns expressed regarding the Avoca River Valley pNHA which covers an area to the south of the proposal including the Aughrim river, the FAC noted that under Regulation 9 of the Forestry Regulations 2017 the Minister shall refer an application to an authority that they consider may have an opinion on the application where it appears to them that a proposal may cause an adverse impact on the environment or have a significant effect on nature conservation. The DAFM contended that referral in this case was not mandatory. The proposal is for felling and replanting of a commercial forest planted in 1963 and managed for timber production that lies outside of the proposed Natural Heritage Area. The Aughrim River flows some 200 metres to the south of the proposal. The forest is separated from the boundary of the pNHA by a road and a public road runs along the Aughrim River, existing mature forest lies in between the proposed felling and the river. The Geological Survey of Ireland has produced a landslide susceptibility map of Ireland based on research which classifies the forest area as being at a moderately high, moderately low, and low susceptibility. The FAC concluded that there was no convincing evidence before it that protected habitats or species are present in the forest. Given the small size of the forest, its nature and characteristics, including mineral soil type, its degree and nature of separation from the Aughrim River and the pNHA and the conditions under which operations would be undertaken the FAC concluded that the proposal does not represent a significant threat to water quality or nature conservation and that there was no requirement for the DAFM to refer the application to the NPWS 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 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 provided a record of a Stage 1 screening in relation to seven Natura 2000 sites. The FAC examined publicly available information on the EPA website and estimated that the distances to each site were approximately Buckroney-Brittis Dunes and Fen SAC 9.6km, Deputy's Pass Nature Reserve SAC 13.2km, Kilpatrick Sandhills SAC 13.7km, Slaney River Valley SAC 11.7km, Vale of Clara (Rathdrum Wood) SAC 11km, Wicklow Mountains SAC 14.7km, Wicklow Mountains SPA 14.7km. No pathway for significant effects could be identified and the proposal is for the felling and replanting of a commercial forest. The FAC concurs with the DAFM conclusion that the proposal itself would not give rise to the possibility of a significant effect on a European site. As noted in the statement from the DAFM, the FAC noted that the DAFM erred when carrying out an in-combination assessment before the decision to grant the licence was made in relying exclusively on plans and projects identified by the Applicant. The DAFM subsequently submitted to the FAC listings of other plans and projects not considered before the licence was issued. The FAC is satisfied that the failure of the DAFM to carry out a satisfactory in combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

The licence conditions include a repetition of lettering but the FAC considered this to be an obvious clerical error and that it should not affect the overall decision. In regard to felling activities during the bird breeding and rearing season, 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.

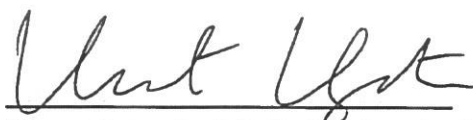
Regulation 10(3) of the Forestry Regulations 2017 (SI 191 of 2017) states that,  
*(3) The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.*

The FAC considers that this particular Regulation does not provide a right to the Appellant to access information but instead provides powers to the Minister to make such information available. The DAFM contended that the Appellant had requested files for 451 licence applications and that this information was provided to them, although a number of months after the request was made. The FAC is satisfied that the Appellant was provided with an opportunity to appeal the licence and provided with further opportunities to make submissions on the licence decision, including at an oral hearing.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal, including at the oral hearing. In the above circumstances, the FAC concluded that the decision of the DAFM regarding WW09-FL0169 should be set aside and remitted to the Minister to carry out a screening for appropriate assessment under

Article 6 of the Habitats Directive of the likely significant effects of the proposal in combination with other plans and projects before a new decision is made.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Vincent Upton', written over a horizontal line.

Vincent Upton On Behalf of the Forestry Appeals Committee