



[REDACTED]

30<sup>th</sup> October 2020

**Subject: Appeal FAC074/2020 regarding licence LM09-FL0041**

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 LM09-FL0041 for felling and replanting of 4.29 ha at Gubnaveagh, Stralongford Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 6<sup>th</sup> February 2020.

#### **Hearing**

An oral hearing of appeals FAC074/2020 and FAC085/2020 was held by the FAC on 15<sup>th</sup> October 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 [REDACTED]

DAFM Representatives: Mr. Frank Barrett (Forestry Inspector), Ms. Eilish Kehoe (Executive Officer)

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, 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 LM09-FL0041.

The licence pertains to the felling and replanting of 4.29 ha at Gubnaveagh, Stralongford Co. Leitrim. The forest is currently comprised of Sitka spruce and lodgepole pine planted in 1977 and the site would be replanted with the same species. The site is described as being on a moderate slope and on mineral and

peat soils, comprised of blanket peats and peaty gleys. The forest lies in the Yellow (Ballinamore) 010 and Aghacashlaun 010 river basins. The proposal was referred to Leitrim County Council which provided a response with reference to notification and adherence with harvesting guidelines. 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 two European sites within 15km and found that there was no reason to extend this radius in this case and that appropriate assessment was not required in this case. The licence was approved with a number of conditions attached which are of a general nature with three specific conditions relating to communication with the District Engineer and the establishment of broadleaves and diverse conifers and an unplanted setback adjacent to the public road for landscape and visual amenity purposes.

There are two appeals against the decision. The grounds of FAC074/2020 contend that the appropriate assessment screening undertaken by the DAFM does not comply with the law. It is submitted that the catchment in which the development drains is not known. Reference is made to the Judgments in 2013 802 JR 25/07/2014 and the interpretation of significant effects and CJEU C-323/17 in regards the consideration of mitigation measures. A document described as being from the NPWS was also submitted. The grounds of FAC085/2020 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 suggested that the appropriate assessment screening is flawed and that sources and pathways have not been fully considered. The grounds contend that there is inconsistency between the restocking table and condition k, that Hen Harrier and Merlin are present in the area and that the extraction route impacts on a cross border recreational trail. Furthermore, it is submitted that it should be a standard condition of a felling licence that a survey be conducted and mitigation actions recommended and implemented if any works are to be carried out during the breeding and rearing period to ensure compliance with the European Nature Directives and that this relates to all breeding birds.

In statements to the FAC, the DAFM submitted that they are satisfied that their standards and procedures had been adhered to in making a decision on the application. They submit that appropriate assessment screening was undertaken following relevant procedures and that the proposal when considered in combination with other plans and projects as identified in the pre-screening report, would not give rise to the possibility of a significant effect on the relevant screened European sites. It is suggested that there is a no downstream hydrological connection to the Cuilcagh - Anierin Uplands SAC 000584 while an upstream pathway is present. The DAFM further submit that in the original form, the qualifying interests were truncated and have submitted a new document with the full list of interests. They further submit that only projects identified by the Applicant were considered in the original screening and that a further in-combination screening was undertaken after the licence was issued which reached the same conclusion. The DAFM contend 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 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"*.

An oral hearing was held at which an 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. They contended that an EIA screening would be required and should consider water quality, dumping and the use of chemicals on site in particular. They further submitted that National legislation did not provide sufficient protection for birds in line with EU legislation. They contended that the restocking table on the licence contradicted condition k) regarding the planting of broadleaves. They suggested that while the DAFM claimed that European sites within 15km were considered, Cúlcaigh Mountain SAC in Northern Ireland was not considered and lies within 15km and that based on their personal observations that protected blanket bog habitat lies adjacent to the site. They contended that Hen Harrier have been documented in the general area at 1.5km and 1.8km from the proposal and that Merlin may use old nesting sites in forests. No documentary evidence was provided to the FAC in this regard. It was submitted that the Kingfisher cycle recreational route passes through this area and concerns were expressed regarding the timing and volume of operations. 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 suggested that their environmental officers undertake routine assessment of felling and other proposals, including considerations of habitats, and had considered the site and did not identify any environmental risks. They submitted that the application of chemical inputs is undertaken on a needs basis after replanting and following national legislation and guidelines. The DAFM reasserted their contention that the proposal does not include a class of project covered by the EIA Directive or National legislation and that the decision was made following DAFM procedures and protocols but that an error may have occurred in considering European sites in Northern Ireland. They further repeated their written submission regarding the use of data from the Applicant exclusively in considering other plans and projects in the appropriate assessment screening.

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 regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 4.29 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. Furthermore, the FAC does not consider that the proposal, being for felling and replanting of 4.29 ha and licenced to be undertaken following environmental guidelines, would be likely to result in a significant effect on water quality. The issue of illegal dumping does not form part of the proposal.

In regard to any requirement for the curtailment of 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 Applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. 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 that Hen Harrier have been identified in the general vicinity. Based on the evidence before it, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence. Furthermore the FAC concluded that there was no convincing evidence of protected species use of the forest to which the licence pertains or that the operations would impact on protected species.

In relation to the Kingfisher cycling route, while no evidence was provided of the haulage route for timber passing along this recreational route it is situated in the broad, general area. The Applicant provided on the application site safety measures that would be implemented during the operation. The licence was granted with a requirement to adhere to standards for felling and reforestation and landscape and forestry guidelines, which require safety signs to be erected during operations that adjoin a public road. Furthermore, the licence includes a condition to include a setback and broadleaf and diverse conifer planting along the public road which may enhance the visual amenity of the forest. The FAC concluded that the proposal and licence conditions are suitable and acceptable in this regard.

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 projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to two European sites. The FAC noted that the proposal lies some 12.5km from the boundary of Cuilcaigh Mountain SAC (UK0016603) and within the 15km radius employed by the DAFM in its procedures. However, no evidence was provided to the FAC regarding the likelihood of significant effects on this SAC. In relation to Cuilcagh - Anierin Uplands SAC, the FAC



concluded that no convincing evidence was provided to it regarding the likelihood of significant effects on the SAC arising from the proposal itself or the presence of related habitats in the vicinity of the proposal. The FAC noted that the DAFM failed to carry out an acceptable in-combination assessment before the decision to grant the licence was made by only considering projects submitted by the Applicant. The DAFM subsequently submitted to the FAC listings of other plans and projects that include a number of forest roads and afforestation licences that were not considered at the screening stage before the licence was issued. No further details were provided to the FAC regarding the details of these licences. Having regard to the nature of the site and the surrounding area, and to the nature and number of other forestry projects listed, 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.

In the above circumstances, the FAC concluded that the decision of the DAFM 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 the proposal itself and in combination with other plans and projects before a new decision is made.

Yours sincerely,

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

Vincent Upton On Behalf of the Forestry Appeals Committee

