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29th October 2020

Subject: Appeal FAC106/2020 regarding licence CK13-FL0198

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 CK13-FL0198 for felling and replanting of 18.25 ha at Fiddane South, Co. Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on 25th February 2020.

Hearing

An oral hearing of appeal FAC106/2020 was held by the FAC on 14th October 2020. In attendance:

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

Secretary to 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 record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing and other submissions, 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 CK13-FL0198.

The licence pertains to the felling and replanting of 18.25 ha at Fiddane South, Co. Cork. The forest is currently comprised of Sitka spruce and the same species would be replanted. The site is described as being on a moderate slope and on mineral soils, comprised of acid brown earths, brown podzolics, lithosols and regosols. The forest lies at the boundary of the Blackwater (Munster_150) and Ross (Killavullen)_010 river basins. The proposal was referred to Cork County Council which responded with references to planning legislation and did not object to the proposal. 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 both were screened out for appropriate assessment due to a lack of pathway and separation distance. The licence was approved with a number of conditions attached which are of a general nature and relate to environmental protection, the maintenance of the forest and good forestry practice.

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. 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.

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 and "cannot be circumvented by any process of interrogation of me", but did not state the class of development included in the EIA Directive to which the proposal belongs.

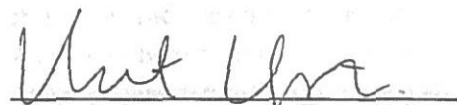
In a statement to the FAC, the DAFM submitted that the standard operational activities of clearfelling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 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"*. The statement goes on to describe the appropriate assessment procedure adopted by the DAFM in processing the licence and submits that the screening relied on information from the Applicant in relation to considering the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequently to the licence being issued.

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. They further submitted that National legislation, in particular the Wildlife Act, did not provide sufficient protection for birds in line with EU legislation. The Appellant did not submit any evidence regarding species that

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 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The FAC noted that the DAFM failed to carry out an in-combination assessment before the decision to grant the licence was made. The DAFM subsequently submitted to the FAC listings of other plans and projects. 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 which is 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 likelihood of significant effects of the proposal on European sites, itself and in combination with other plans and projects, and appropriate assessment where required,, having regard to the best available scientific information, before the making of a new decision.

Yours sincerely,



Vincent Upton On Behalf of the Forestry Appeals Committee