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6th April 2021

**Subject:** Appeal FAC 683/2020 regarding licence TFL00429319

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 TFL00429319 for the thinning of 42.35 ha in two plots at Esk North, Co. Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on 20<sup>th</sup> August 2020.

An oral hearing of appeal FAC 683/2020, of which all parties were notified, and representatives of the DAFM and a representative of the Applicant attended, was held by the FAC on 24<sup>th</sup> March 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Eilish Keogh, Mr. Brian Mahoney,

Appellant:

Not in attendance,

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Iain Douglas and Mr. Seamus Neely.

Secretary to the FAC:

Ms. Marie Dobbyn.

**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 affirm the decision of the Minister regarding licence TFL00429319.

## **Background**

### **The Licence**

The felling licence pertains to the thinning of 42.35 ha of forest, currently planted with Sitka Spruce, at Esk North, Co Cork. The Soil type is described in a Natura Impact Statement (NIS) submitted by the applicant as being a well-drained mineral soil. The site is described as being located 800m from the River Blackwater SAC at the Glen River and adjoins the Glennagurra Stream at the southern boundary of the site. The Glen River has been assigned a 'high' WFD status by the EPA in the 2013-18 assignment period. The NIS sets out that a tributary of the Glennagurra Stream flows through the site area and crosses the path of an existing farm track through an existing culvert. It is stated that a setback was established adjacent to the streams at afforestation stage in 2003 and that the streams have lots of vegetation and trees growing within the 10m setback.

The Inspector's Report which is on file records that DAFM undertook a screening of the proposal for Appropriate Assessment and found that there were two European sites, the Blackwater River (Cork/Waterford) SAC [2170] and Mullaghanish to Musheramore Mountains SPA [4162] within 15km of the project site and that there was no reason to extend this radius in this case. The details on the Inspector's Report indicate that both European sites were screened out. Despite this conclusion, the record shows that the proposal proceeded to Appropriate Assessment on the basis of the Blackwater River (Cork/Waterford) SAC [2170] being screened in.

As noted above, an NIS provided by the applicant and prepared by a forester/environmental scientist is on file dated the 11<sup>th</sup> of March 2020. This also includes an AA screening, which also identifies the Blackwater River (Cork/Waterford) SAC [2170] and the Mullaghanish to Musheramore Mountains SPA [4162]. The former is screened in on the basis of a possible hydrological pathway from the project site to the SAC. The latter is screened out on the basis its distance ca. 13km distant from the project site. For the Blackwater River (Cork/Waterford) SAC each of the Qualifying Interests are considered, and the NIS includes proposed mitigations for Freshwater Pearl Mussel, White-clawed Crawfish, Sea Lamprey, Brook Lamprey, River Lamprey, Twaite Shad, Atlantic Salmon, and Otter.

The DAFM also recorded other plans and projects that were considered in combination with the proposal. The DAFM considered the environmental effects of the proposal across a range of criteria and determined that the project was not required to undergo the EIA process. The application was referred to Cork County Council and to the National Parks and Wildlife Service, neither of which made a response.

An AA Determination (AAD) statement is on file dated the 26<sup>th</sup> of June 2020, prepared by a Forest Service ecologist. The AAD includes a section on screening for Appropriate Assessment, which records a decision to screen in the Blackwater River (Cork/Waterford) SAC [2170]. The AAD also includes a section on Appropriate Assessment, which refers to the NIS and the mitigations described therein. The AAD concludes with a Determination that includes a requirement that those site-specific mitigations



described in the NIS (and which are listed in the AAD itself) are to be attached as conditions to the licence.

The licence was approved on 20<sup>th</sup> August 2020 and includes a number of conditions including reference to guidelines and standards reflective of good forestry practice, and adherence to the mitigations set out in the appropriate assessment.

### **Grounds of Appeal**

There is one appeal against the decision to issue the licence. Briefly, the ground of appeal include: that the determination of the Inspector in terms of the requirement for an EIA is inadequately reasoned; that the responses on the Inspector's Certification and EIA screening on IFORIS contain errors; that the afforestation of the lands was carried out without adequate screening for the requirement for an EIA, and that retrospective assessment of the need for an EIA for the afforestation of the lands is required; that no Appropriate Assessment (AA) was carried out on the afforestation of the lands and that a retrospective AA is requirement; that the license and its associated operations threaten the achievement of the objectives of the Water Framework Directive River Basin Management Plan for Ireland 2018-21; that the mitigations presented in the AA Determination (and subsequently the licence) are not adequate to ensure compliance with Article 6(3) of the Habitats Directive; that residual effects from this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed; that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats directive on the AA determination; that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation; that there should be licence conditions regarding notification of the Minister at commencement and conclusion of operations; that the licence conditions do not provide a system of protection for animal species listed in Annex IV(a) of the Habitats Directive as required by Article 12; 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; and that the licence should contain a condition that plans and works must be inspected by the Forest Service prior to, during and post works.

### **Statement of Fact and Oral Hearing.**

In a statement to the FAC, the DAFM confirms the timeline of the application has outlined above and states that the application was both desk and field assessed. In the statement it is submitted that the decision was issued in accordance with the procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures listed in the statement have been adhered to in making a decision on the application. The statement sets out responses to each of the grounds of appeal and clarifies that the applicant was requested for further information as a replanting plan/map was required.

At oral hearing DAFM confirmed the contents of the Statement of Fact including the Appropriate Assessment and EIA considerations undertaken. It was clarified by DAFM that the original application included provision for the felling of trees, and this is what prompted the request for a replanting

plan/map. The DAFM submitted that this had been done on the basis that the clearfell operations originally included had seemed inappropriate to the Inspector on the basis that it would have involved the removal of too much stock in too short a time. It was submitted that the applicant's representative then decided to remove that element from the application in an email dated the 14<sup>th</sup> of February 2020, and as a result the decision related solely to the thinning of trees on the site.

In relation to the contents of the Inspector's Report and the indication therein that both the Blackwater River (Cork/Waterford) SAC [2170] and the Mullaghanish to Musheramore Mountains SPA [4162] were screened out, DAFM clarified that when the Inspector initially populated those fields on the IT system used, the Blackwater River (Cork/Waterford) SAC [2170] would have been screened in. It was submitted that this was the trigger for the project proceeding to Appropriate Assessment in respect of the European site concerned. It was further stated that a shortcoming in the IT system used at the time resulted in a requirement that the record be manually altered as a 'screen out' in order to let the system proceed through to the approval stage (and when the Appropriate Assessment had been completed).

DAFM further brought to the attention of the FAC errors in the record contained in the Inspector's report. These included question 1.1 in 'Environmental considerations', question 13 in 'Assessment to Determine EIA Requirement', and question 6 in 'Inspector's Certification Report' which should be 'yes' rather than 'no'. Similarly, the Inspector submitted that he recollected these being an initial 'no' based on the original clearfell element of the application and that he believed that the record reverted to an original entry in these fields (which had required alteration from their original states having had regard to further the information submitted by the applicant and the omission of the clear fell proposals from the application). The Inspector further brought the FACs attention to question 42 'Public Participation and NGO participation' which he submitted had originally been set to 'no' on the basis that further information was required from statutory bodies when the licence potentially included clearfell operations and would have required a replanting plan. Again, in this instance the Inspector submitted that this had subsequently been updated to a 'yes' but had reverted to the original entry.

In relation to the ground of appeal that the mitigations presented in the AA Determination are not adequate to ensure compliance with Article 6(3) of the Habitats Directive, the DAFM representative submitted that from an ecological perspective the mitigations are specific and are designed to both protect water quality and in doing so protect the aquatic qualifying interests and the otter. In the context of the existing setbacks it was submitted that the mitigations are both precautionary and appropriate.

The applicant's representative stated his concerns in relation to delays in issuing the licence, and the impact that this delay would have on his client's income who was now in retirement. The applicant's representative observed that this would be the first removal of trees from the site since planting.

#### **Consideration by the FAC**



In the first instance, the FAC considered the errors in the Inspector's Report which the DAFM highlighted at Oral Hearing, and which have relevance to the first and second grounds on the appeal, and then further considered issues relating to EIA generally including the third ground of appeal and the related fourth ground of appeal in relation to a suggested requirement for retrospective AA.

The FAC noted the submission by the DAFM representative at oral hearing that the answers to four questions included in the Inspectors report as outlined above should have been a 'yes' rather than a 'no.' While the FAC considers that these are an error in the record, the FAC notes that the project did proceed to Appropriate Assessment, and that the errors arose because of a failure of information technology systems to accommodate the Inspector's decision to query the appropriateness of proposed clearfell operations and the subsequent decision to remove those operations from consideration for a licence. The FAC finds that this does not constitute a significant error having regard to the circumstances as submitted by DAFM, the overall assessment and conclusions reached and the nature, scale and location of the proposal.

The FAC notes that 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 is 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 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 of trees as part of a thinning operation on an area of 42.35 ha. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The DAFM in their considerations on this, in the section focusing on the cumulative effect, recorded answers to questions on the area when the proposed operations are considered in combination with other recent, ongoing or planned work, and the responses indicated an area of 84.58 ha, and determined that the cumulative effect of the application would not have a significant impact. In a statement to the FAC, and at Oral Hearing, the DAFM expressed their satisfaction that they had considered the criteria appropriately, explained their considerations with regard to soil, terrain and slope (describing the proposal as being on a low-risk site) and that they had sufficient information from the applicant in order to make their determinations.

Regarding the contention in the grounds of appeal that the afforestation on the lands subject of this appeal, was carried out on these lands without adequate screening for EIA, including an AA, and that there should be no approval for further works without retrospective assessments for EIA / AA, the FAC



noted the assertion by the DAFM representative at oral hearing that the afforestation in question was subject to the consent process of the relevant Department at the time of its planting. No particular details were provided by the Appellant to substantiate their grounds. The FAC having considered all of the evidence before it, including the grounds of appeal, submissions made including at oral hearing, is not satisfied that a serious or significant error or a series of errors was made by DAFM in the making of the decision in this case as it relates to this ground of appeal.

In light of all the foregoing the FAC having considered all of the evidence before it, including the grounds of appeal, submissions made including at oral hearing, is not satisfied that a serious or significant error or a series of errors was made by DAFM in the making of the decision in this case as it relates to EIA or AA.

The FAC considered the contention in the grounds of appeal that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody (or waterbodies) under the River Basin Management Plan 2018-2021. In doing so the FAC noted the content of the DAFM statement, the submissions made at oral hearing and that the licence includes a requirement to adhere to the mitigation measures set out in the AA Determination which deal extensively with site specific requirements in relation to water quality. The Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways related to the proposal. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality.

The FAC also had regard for the DAFM submission at oral hearing relating to the ground that the mitigations presented in the AA Determination (and subsequently the licence) are not adequate to ensure compliance with Article 6(3) of the Habitats Directive. The FAC notes that the mitigations are site specific and include reference to an Operations Mitigation Map. The FAC is not satisfied that the mitigations are inadequate in the context of Article 6(3) of the Habitats Directive.

In relation to the ground that residual effects from this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed, the FAC had regard for the statement by the Forest Service Ecologist in the Statement of Fact. This sets out the DAFM position to the effect that adherence to the relevant Forest Service Guidelines and site-specific mitigation measures set out in the AA Determination will ensure that there will be no adverse effects associated with the licenced operations that could adversely affect the integrity of the Blackwater River (Cork/Waterford) SAC (002170) or any other Natura site, and that therefore there will be no residual effects, and that consequently the possibility of in-combination effects do not arise. The FAC is satisfied that DAFM has included conditions that provide for site specific mitigation measures and has consulted with other planning systems to ensure that no other consents will conflict with those mitigations. Consequently, the FAC does not accept that the ground that residual effects from the proposed project have not been adequately excluded.



The grounds of appeal assert that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats directive on the AA determination. In the Statement of Fact provided to the FAC, DAFM summarise the opportunities for public participation in the decision-making process in relation to applications for felling licences, and in particular under Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017). The Statement outlines that Regulation 20 of those regulations expressly provides that in the making his or her decision on a felling license application, the Minister must have had regard to any written submissions or observations made by the public. Furthermore Regulation 19(4) expressly requires the Minister when carrying out an Appropriate assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. The FAC accepts the DAFM position that these provisions, and any considerations and decisions made pursuant to them, concord with the requirements of Article 6(3) of Habitats Directive as regards public participation.

The grounds submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, and other environmental features. Revised maps were provided at the Inspector's request which show further detail. The Statement of Fact provided by the DAFM to the FAC questions the basis for the assertion that the harvest plan is not consistent. The FAC is satisfied that the Harvest Plan and other information submitted with the application and in response to queries from the Inspector are sufficient to inform the decision-making process in this case.

Regarding the conditions that the appellant suggested should be attached to the licence relating to protections for animal species listed in Annex IV (a) of the habitats directive, in their natural range, prohibiting deliberate disturbance of these species and in relation to a general system of protection for all species of birds, and relating to notification and inspections specific to this licence, the FAC had regard to the assertions made by DAFM in the Statement of Fact, and restated at oral hearing that these grounds had been considered and that the conditions suggested are not warranted in this case and that the Appellant had not provided any specific information regarding the presence of any species or habitats in the area. The FAC considered the existing legislative safeguards in place with regard to the matters raised in these grounds and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC further considered the nature, scale and location of the proposal being for felling for the purposes of thinning in an area of managed agricultural and forestry land, and the Appropriate Assessment and associated measures required by the DAFM. The FAC finds that the granting of the licence for the operations in this case does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required.

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 was 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 TFL00429319 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 John Evans.

John Evans On Behalf of the Forestry Appeals Committee