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19th February 2021

Subject: Appeal FAC 315/2020 regarding licence DL04-FL0051

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 DL04-FL0051 for the felling and replanting of forest on 2.88 ha at Aghangaddy Glebe, Co. Donegal was approved by the DAFM on 12th June 2020.

Hearing

An oral hearing of appeal FAC 315/2020, of which all parties were notified, and the appellant, representatives of the DAFM and the applicant attended, was held by the FAC on 20th January 2021.

In Attendance at Oral Hearing:

Department Representative(s):	Mr. Luke Middleton, Ms. Eilish Kehoe,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr Vincent Upton and Mr. Seamus Neely.
Secretary to the FAC:	Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions received including at the oral hearing, clarifications obtained, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence DL04-FL0051.

The licence pertains to the felling and replanting of forest on 2.88 ha at Aghangaddy Glebe, Co. Donegal. The forest is currently predominately composed of Sitka Spruce, and the replanting proposed would be of Sitka Spruce with 5% open space. The application includes inventory details, maps, and a harvest plan including general environmental and site safety rules and an AA pre-screening report. The site is described

as being on a predominantly moderate slope (0-15%). The project is in the Lough Swilly Catchment and Lennan SC_10, and the Newmill_010 (100%) waterbody. The proposal was referred to Donegal Co. Council and the Inland Fisheries Ireland (IFI). A response was received from IFI which set out that the project should adhere strictly to a number of stated forestry related guidelines. A screening for appropriate assessment was undertaken by DAFM dated 11th June 2020 that identified eight European sites (5 SAC & 3 SPA) within 15km and it was found that there was no reason to extend the likely zone of impact beyond 15km in this case. All eight sites, 004075 Lough Swilly SPA, 002287 Lough Swilly SAC, 002176 Lennan River SAC, 000116 Ballyarr Wood SAC, 004060 Lough Fern SPA, 002159 Mulroy Bay SAC, 002047 Cloghernagore Bog And Glenveagh National Park SAC, and 004039 Derryveagh And Glendowan Mountains SPA are considered in the screening process in turn and all are screened out. The reasons for the screening conclusions reached in the case of each site is provided in the screening report. It is noted that Coillte provided an updated pre-screening report dated 10th June 2020. The projects potential to contribute to in-combination effects on European sites was also considered, with planning sites and DAFM internal records consulted, with other plans and projects in the general vicinity of the site listed. The licence issued on the 12th June 2020 and had a number of conditions attached, which included those related to environmental protection, sustainable forest management, water quality, and the public road.

The decision to grant the Licence is subject to one appeal. The grounds set out in the appeal include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project and that the application does not describe any aspects of the environment which are likely to be significantly affected, that the licence and its associated operations threaten the achievement of objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21, that the Stage 1 AA conclusion is not legally valid, 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, that the licence should contain a condition requiring notification of commencement and conclusion of operations, that the licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works, and that the licence should include conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In its statement to the FAC the DAFM set out that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act. The statement to the FAC provides responses to the grounds included in the appeal. It submitted that the standard operational activities of clear-felling and replanting already established forests areas 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) and 4(4) had not occurred. This view was reiterated by the DAFM representative at the oral hearing.

In relation to the contention that the licence and its associated operations threaten the achievement of objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21, the DAFM statement dated 3rd October 2020 outlines the checks and balances that DAFM applies during the evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (2018) and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which, it states, set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. The DAFM representatives at the oral hearing also outlined the processing of the application (including spatial analysis and assessment) and the information submitted by the Applicant including maps of the proposal and confirmed that the application had been referred to both the Donegal County Council and the IFI who replied on 30th December 2019.

The DAFM statement to the FAC confirmed that in regard to the granted Felling licence application DL04-FL0051, information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-screening Report and associated Pre-screening Report methodology document were considered during the licencing process and that the 2.88 ha felling and reforestation project licenced as DL04-FL0051 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors* (v.05Nov19) (DAFM, 2019). The related AA screening document is on file and includes the screening rationale identified by the relevant inspector. Appropriate Assessment screening was carried out by DAFM for European sites within 15 km from the clearfell and reforestation project submitted for licencing. It stated that DAFM, having reviewed the details of relevant European sites their qualifying interests and conservation objectives deemed that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on the relevant screened European sites and the clearfell and reforestation project was screened out and an Appropriate Assessment deemed not required in relation to the European sites considered during the screening exercise. For consideration of in-combination effects of the proposed project, DAFM stated that it carried out an in-combination assessment and included an associated in-combination statement based on this.

The appellant during his contribution to the oral hearing contextualised the submitted grounds of appeal and made reference to a recent Judgement of Ms. Justice Niamh Hyland in the High Court which quashed the decision of An Bord Pleanála granting permission to a proposed development on the basis of its failure to comply with the requirements of the WFD. The appellant submitted that this case is relevant in the context of the case of project DL04-FL0051 as the project is in the Newmill-010(100%) waterbody which he submits does not have an assignment of status by the EPA. The appellant also submitted that the FAC should examine project DL04-FL0052 for which a licence was granted previously, and pointed out that although the site for DL04-FL0052 lay between the two plots that make up the project area DL04-FL0051, that it was screened in for appropriate assessment. He submitted that there is an inconsistency between the screening for the two projects. He further submitted that he considers this as project splitting. In response to query at the oral hearing to clarify what error he referenced in his grounds in relation to the

DAFM Stage 1 AA conclusion, he confirmed that when he made the appeal, he only had access to the pre-screening report from Coillte that had accompanied the application which had an error. He acknowledged that the DAFM had confirmed that the *'expert opinion and the rationale presented in Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project'*, which was cited by DAFM in the screening report was that contained in the Coillte updated pre-screening report dated 10th June 2020 and which had corrected the error he had identified when submitting the appeal.

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. In its statement to the FAC, the DAFM submitted that the standard operational activities of clear-felling and replanting already established forests areas 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) and 4(4) had not occurred. In considering this aspect, 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 2.88 hectares. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. Therefore, that FAC agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

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, which outlines the checks and balances applied during the evaluation of felling licence applications, in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (2018). The FAC noted that the licence includes conditions in relation to water quality. While referencing the screening conclusion

reached in the case of an adjacent project (DL04-FL0052) the Appellant did not submit any specific information regarding effects on water quality or pathways related to proposal DL04-FL0051. The FAC notes that the proposal was referred to Donegal Co. Council and the IFI who replied on 30th December 2019. The reference to the recent Judgement of Ms. Justice Niamh Hyland in the High Court (2018 740 JR) by the appellant at oral hearing presupposes that the proposed development has a connection affecting a surface water body, in this instance the Newmill-010 (100%) waterbody. As discussed below, the FAC has satisfied itself that in the case of this project there is no such connection and that there is no evidence that the felling would affect the waterbody. 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 noted the content of the DAFM statement provided in relation to the contention in the grounds that the Stage 1 AA conclusion is not legally valid (due to reliance on an "erroneous pre-screening report from Coillte"). The FAC also noted the clarification from the appellant at the oral hearing that he was not aware of the updated Coillte pre-screening report dated 10th June 2020 at the time of submitting the appeal nor the confirmation by DAFM (at oral hearing) that the Coillte pre-screening report referenced in its AA Screening report was the Coillte report dated 10th June 2020. In response to a query at oral hearing as to how two sites adjacent to each other could have a different screening result with regard to the requirement for appropriate assessment the Coillte representative indicated that the project site DL04-FL0052 extended some 400m approximately further north than the project site for DL04-FL0051 and therefore could have a different hydrological connection circumstance. The FAC reviewed publicly available maps and information from the EPA website and satisfied itself that project DL04-FL0051 did not have a direct hydrological connection to the 002287 Lough Swilly SAC whereas project DL04-FL0052 did. The Coillte representative also submitted at oral hearing that the nature of project DL04-FL0051, which had severe windblow impact, was much different to project DL04-FL0052, which was an ordinary clearfell. This he cited as the main reason for making separate applications for the two projects.

Under Article 6(3) of the Habitats Directive, a 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 undertook a Stage 1 screening in relation to eight Natura 2000 sites within 15km of the project and concluded that an appropriate assessment was not required in relation to any of the eight. In relation to DL04-FL0051, the potential for the proposed project to contribute to an in-combination impact on European sites was considered by the DAFM wherein it deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed in the screening report in this case. The grounds of appeal submitted that the screening exercise was flawed as it relied on an erroneous Coillte pre-screening report, however this was clarified at the oral hearing as the appellant did not have access to the Coillte pre-screening report dated 10th June 2020 when submitting the appeal and had based the ground on the content of the pre-screening report submitted with the application. The appellant also drew attention to what he submitted as screening inconsistency as between two adjacent sites (DL04-FL0051 and DL04-FL0052) and this has been addressed

elsewhere in this letter. The FAC, having considered the information available to it, including the grounds of appeal and the contributions made by the parties at the oral hearing, considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding appropriate assessment screening in this case and concurs with the conclusions provided.

The FAC, having considered the submission in the grounds of the appeal that the licence does 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, agrees 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 agrees that 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 grounds did not submit any specific details in relation to bird nesting or rearing on this site. The FAC is satisfied based on the information available to it, that the inclusion of the condition as raised in the grounds of appeal in this case, is not required. Regarding the submission in the grounds of the appeal that certain conditions should be attached to the licence, including those relating to the commencement and conclusion of operations, and notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals, the FAC considered the existing legislative safeguards in place with regard to these items 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 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, is not required.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, other submissions received, the submissions made, and clarifications obtained 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. In deciding to affirm the decision of the Minister regarding licence DL04-FL0051 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.


Seamus Neely On Behalf of the Forestry Appeals Committee