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22nd January 2021

Subject: Appeals FAC570/2020 and FAC627/2020 regarding licence LS09-FL0142

Dear [REDACTED]

I refer to the 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

Felling Licence LS09-FL0142 was approved by the Department of Agriculture, Food and the Marine (DAFM) on 15th July 2020.

Hearing

An oral hearing of appeals FAC570/2020 and FAC627/2020, both regarding the decision to issue licence LS09-FL0142, was conducted by the FAC on 17th December 2020.

Attendees:

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Paula Lynch, Mr. Luke Sweetman
Secretary to FAC:	Mr. Michael Ryan
Appellant:	Neither Appellant participated
Applicant representatives:	[REDACTED]
DAFM Representatives:	Mr. Luke Middleton, Ms. Eilish Kehoe

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (LS09-FL0142).

The licence granted is for the clearfell and replanting of 13.66ha at Glendine, Co. Laois. The clearfell area is split between a northern and southern section. The species to be felled is composed of 97% Sitka spruce with 3% mix of Douglas fir, Japanese larch & Lodgepole pine across two distinct plots. The planned restock species is 100% Sitka spruce with 0.68ha open space retained. As per the DAFM information the underlying soil type is approximately Acid Brown Earths, Brown Podzolics (8%), Lithosols, Regosols (84%) & Podzols (Peaty), Lithosols, Peats (8%) The slope is predominantly steep 15-30%. The project is located in the Nore catchment (100%), the Nore_Sc_020 (100%) Sub-Catchment, the Killeen (Delour)_010 (100%) Waterbody.

The Applicant submitted an application pack which included maps, inventory data, a harvest plan document and an Appropriate Assessment Pre-screening Report.

The DAFM referred the application to Laois County Council (LCC), the National Parks & Wildlife Service (NPWS) and Inland Fisheries Ireland (IFI). There was no response from IFI. LCC responded 10th January 2020 stating that:

- At less than 50ha, the application does not require an Environmental Impact Statement.
- The proposed development is not within:
 - An SAC, NHA or National Park
 - An Architectural/Archaeological site
 - A Prime Scenic/Amenity Area
- The proposed development is on an unclassified road

The NPWS response (dated 13th January 2020) was not on the file before the FAC. The DAFM read it onto the record during the Oral Hearing. The NPWS had concerns that the Applicant's Pre-Screening Report had not made reference to the fire line at an area known as The Cut which was upgraded in 2018 on instruction from the Fire Services. This fire line is c.920 m in length and is c.5.8km from the proposed development.

The DAFM completed a Stage 1 AA Screening of 6 SACs and 2 SPAs within 15km of the project site. All but two of these sites were screened out for Stage 2 AA for various reasons included in the AA Screening form. The Slieve Bloom Mountains SPA 004160 (due to the location of the project within the Natura site) and Slieve Bloom Mountains SAC 000412 (due to the proximity of the project to the Natura site) were screened in for AA.

The DAFM produced an AA Report (AAR) and AA Determination (AAD) which were both dated 26th June 2020 and signed-off following ecological review on 13th July 2020. The AAR lists the screened-out Natura sites, the reasons for those decisions, and states that there is no possibility of the proposed development having any significant effect, either individually or in combination with other plans or projects, on any of the European sites listed and that the project will not adversely affect the integrity of those European sites.

Section 6 of the AAR lists the Special Conservation Interest (SCI) of the Slieve Bloom Mountains SPA as Hen Harrier and the Qualifying Interests (QIs) for the Slieve Bloom Mountains SAC as Blanket bogs, Northern Atlantic wet heaths with *Erica tetralix*, and Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (Alno-Padion, *Alnus incana*, *Salix alba*). This section describes the required mitigations for the SCIs/QIs. Section 9 of the AAR lists the site-specific measures for both Natura sites to be included as conditions on the felling licence. A mitigation measure relating to Geotextile Silt Traps is included in Section 6 of the report which is not carried into Section 9 and is not included as a condition of the licence.

The AAR considered the proposed project's potential to contribute to an in-combination impact on European sites. Various planning websites were consulted including; the Department of Housing, Planning and local Government, An Bord Pleanála, the EPA, the County Development Plan and the DAFM's internal records. The AAR lists projects and plans in the general vicinity of the project area; Nore catchment (100%), the Nore_Sc_020 (100%) Sub-Catchment, the Killeen (Delour)_010 (100%) Waterbody. The AAR's In-Combination Statement states that "the DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site".

The licence issued on 15th July 2020 and is exercisable until 31st December 2022. It is subject to standard conditions plus additional conditions (h), (i) and (k) relating to the Hen Harrier, (j) relating to water protection measures in the interest of sustainable forest management and protection of the environment and (l) which specifies certain requirements, standards and guidelines that the proposed works shall adhere to.

There are two appeals against the decision to grant the licence. In summary, the grounds of the first appeal contend that the Appropriate Assessment screening did not comply with “the decision of Finlay J in Kelly”. Under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. There has been no investigation as to whether the application site has complied with “the requirements of EU law”. The basic requirements of the NPWS have not been complied with. An issue raised in the appeal relating to the FAC is not a valid ground of appeal against a decision to issue a felling licence.

In summary, the grounds of the second appeal contend that there is a breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive. The licence is in a class of development covered under Annex II of the EIA Directive. On the same date that the application for this licence was submitted a further two applications for clear felling licences were submitted for the same Forest Management Unit (FMU) totalling 38.56 ha. The purpose of the EIA Directive cannot be circumvented by the splitting of projects. The application has not described any aspects of the environment which are likely to be significantly affected.

The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-2021. The Stage 1 and Stage 2 AA determinations are not legally valid. An assessment carried out under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected areas concerned.

DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination

The licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive.

The licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation.

The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence.

The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In summary, the DAFM’s written statement in response to the grounds of appeal states that the licence application has been subject to the DAFM’s AA Screening procedure. AA screening was carried out for Natura sites within 15km of the project. The possibility of the project having a significant effect on the Slieve Bloom Mountains SAC and the Slieve Bloom Mountains SPA was identified, the proposed project was screened in and an AA carried out. An AAR and AAD were produced. Site-specific measures were identified by the DAFM to mitigate potential impacts on the Natura sites. The DAFM stated that the

mitigations ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the SCIs/QIs of the Natura sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive and the proposed development will not result in any adverse effect on any European Site. The potential for the proposed project to contribute to an in-combination impact on the Slieve Bloom Mountains SAC and the Slieve Bloom Mountains SPA was considered by the DAFM. The DAFM concluded that there is no potential for the proposed works to contribute to any cumulative adverse effects.

The DAFM stated that clearfell and replanting projects do not fall within the specified categories of forestry activities or projects 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, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. Therefore a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. The outputs from the FMU planning process undertaken by the Applicant and any resultant Business Area Unit (BAU) strategic plan should not be a material consideration in the DAFM's assessment *inter alia* of the potential environmental effect of the application. Amongst other reasons, this is because the FMU planning process and any resultant BAU strategic plan is not an obligatory statutory process, arising either from the legislation governing the operation of the company (the Forestry Act 1988 and the Forestry (Amendment) Act 2009) nor from the provisions for forest management plans set out in Section 10 of the Forestry Act 2014. Similarly, they do not constitute a plan or programme subject to the requirements of the SEA Directive, as transposed *inter alia* by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, as amended. The DAFM applies a wide range of checks and balances during its 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). Any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019). Those Standards stipulate water setbacks adjoining aquatic zones, and these introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. These measures are described in the document Woodland for Water: Creating new native woodlands to protect and enhance Ireland's waters (DAFM, 2018).

Regarding opportunities for public participation in the decision-making process around applications for felling licences, under Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) where the Minister for Agriculture, Food and the Marine receives such an application they are required to i) Publish a notice of the application, and ii) Inform the public that any person may make a submission or observation in writing concerning the application to the Minister within 30 days from the date of publication of that notice. In regard to Screening for AA and AA specifically, and the consideration, if appropriate, of the opinion of the general public in the making of a related determination under Article 6(3) of Habitats Directive –

a) Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making his or her decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6; and

b) 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.

It's 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 site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of licence issued for felling and reforestation project LS09-FL0142.

The DAFM had considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements.

It is the Minister that may at any time attach or vary conditions to any licence granted (see Section 17.4 of the 2014 Forestry Act).

The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. Regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

The FAC held an Oral Hearing on 17th December 2020. The parties were invited to attend in person or to join electronically. The FAC sat in person at this hearing. There were two Appellants with separate appeals against this licence; neither Appellant participated in the Oral Hearing. The DAFM and the Applicant both participated electronically.

At the hearing, the DAFM detailed their approach to processing the application and issuing the licence. The DAFM outlined how referrals to statutory consultees are automatically triggered according to interactions with certain spatial rules, and that this application had been referred to the LCC, IFI, and NPWS in this instance. The DAFM explained that the NPWS noted in their response that the DAFM AA Screening Form referred to them did not consider the fire line at "The Cut". The DAFM stated that this area had then been included in the AAR to address the NPWS's concern. The DAFM confirmed that the AA Report and AA Determination were completed and considered prior to their decision to grant licence LS09-FL0142.

The Applicant elaborated on the site details submitted with their application and stated that a field inspection had been carried out by their Environmental Manager (EM) on the 19th October 2020. The EM reported that the northern section of the proposed development had good access and underfoot conditions were soft. The site slopes southwest and there are two relevant watercourses (RWCs) present which flow southwards from the site. The southern section was described as having moderate ground conditions with an RWC flowing c.225m from the site along a well vegetated course to the Killeen River. The Applicant stated that there is a walking trail in close proximity to the site and that signage would be erected prior to operations commencing to divert walkers and facilitate onward access. Under questioning by the FAC the Applicant explained that it was decided to include two separate areas on this licence application based on several factors; the characteristics of the site, the species involved, the timber products available, customer demand, and the decision of the Resource Manager. Efficiencies within the management process were also a factor.

The FAC queried licence condition (i) with the DAFM and whether this additional broadleaf planting would be mapped. The DAFM stated that the location of these trees would be along a suitable boundary e.g. road/compartments, decided by the Applicant. They stated that the reason for the condition was to protect foraging area for the Hen Harrier within the SPA. The DAFM confirmed that the classification of "predominantly steep (15-30%)" applied across the whole site. The FAC queried why the recommended

mitigation measure of using Geotextile Silt Traps was included in Section 6 of the AAR but not in Section 9. The DAFM explained that this measure had been condensed by the expert reviewer (external Ecologist) into the measure, included in Section 9, which states *"Adhere to all water protection measures relating to exclusion zones, silt and sediment control, cultivation, fertilisation, herbicide application, the location of onsite storage depots and the disposal of waste. The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation, December 2016 (DAFM, 2016)"*. The FAC asked the DAFM what consideration had been given to the Freshwater Pearl Mussel (FPM) and why had the River Barrow and River Nore SAC (for which FPM is a QI) been screened out for AA, given the location of the proposed development within the Nore Margaritifera SAC Catchment. The DAFM stated that the desk assessment did not show hydrological connectivity via EPA mapped watercourses between the project site and the River Barrow and River Nore SAC. They stated the information regarding the presence of relevant watercourses on the project site had been submitted by the Applicant after the licence had been issued and so had not been considered prior to the issuing of the licence. The Applicant stated that their own desk assessment also did not identify a hydrological connection to the River Barrow and River Nore SAC and reiterated that the RWCs only became known due to the field inspection. The Applicant submitted that, to their knowledge, the nearest FPM population was approximately 30km downstream.

The FAC had regard, in the first instance, to the grounds of appeal of both Appellants which queried the validity of the AA carried out by the DAFM. The FAC noted that the DAFM undertook a Stage 1 AA Screening in relation to 8 Natura sites within 15km of the project and that the Slieve Bloom Mountains SAC and the Slieve Bloom Mountains SPA were screened in for AA. However, based on the evidence before it, the FAC considered that, due to the location of the project site within the Nore Margaritifera SAC Catchment and the presence of RWCs on-site, providing hydrological connectivity to the Killeen River and the River Barrow and River Nore SAC, the DAFM made a significant error in screening out this Natura site due to "the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise". It is the FAC's opinion that the potential for the project to result in significant effects on the River Barrow and River Nore SAC has not been adequately considered by the DAFM. Therefore, the FAC is not satisfied that the procedures adopted by the DAFM in their completion of a Stage 1 AA Screening and Stage 2 AA were consistent with the requirements of 6(3) the Habitats Directive.

The FAC considered the first Appellant's contention that "the basic requirements of the NPWS have not been complied with". The FAC noted the DAFM had referred the application to the NPWS and had responded to their remarks regarding the fire line at The Cut appropriately by including that feature in their In-Combination assessment. The FAC noted the DAFM's submission that this fire line measures c. 920 m in length and is 5.8km from the project area for LS09-FL0142 and that maintenance and upkeep of fire lines is not licenced by the DAFM. In this instance, the FAC is satisfied that the DAFM had sufficient regard to the response from the NPWS.

In addressing the grounds of the second appeal, the FAC had regard to the Appellant's submission that the proposed development should have been assessed in the context of the EIA Directive. The 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 (nor clearfelling) 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 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 FAC concluded that the felling and subsequent replanting, as part of a commercial forestry operation, with no change in land use, does not fall within the classes of development referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as contended in the written grounds of appeal.

The FAC considered the Appellant's contention that the proposed project threatens the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. As stated above, the FAC has concerns about the DAFM's level of consideration of the potential impact of the proposed development on the aquatic QIs of the River Barrow and River Nore SAC.

The FAC had regard to Article 6(3) of the Habitats Directive and its provisions for obtaining the opinion of the general public where the consent authority considers it appropriate. The FAC is satisfied that the DAFM exercised their discretion in this instance and did not consider it appropriate in this case.

In regard to a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season and for the animal species listed in Annex IV (a) of that Directive, the FAC observe that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

The FAC considered the Appellant's contention that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). The FAC concluded that the Harvest Plan is, in fact, a document outlining general environment and safety rules and that all of the licenced operations on site must comply with the conditions of the felling licence.

The FAC considered the Appellant's grounds that the licence should contain conditions relating to the commencement, carrying-out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the Licensee's adherence to the conditions of those licences.

The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. In this regard, the FAC noted there is no statutory basis to enforce the Licensee to inform individual landowners. The FAC observed the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No. 1107/2009 (concerning the placing of plant protection products on the market). Users of plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. On balance, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In the above circumstances, the FAC concluded that the DAFM made a significant error in their processing of, and subsequent decision to grant this licence (LS09-FL0142). Therefore, the FAC concludes that the decision should be set aside and remitted to the Minister to carry out a new screening assessment of the proposed development's impact on Natura 2000 sites, on its own and in combination with other plans and projects, and resulting from the screening conclusion, an appropriate assessment if necessary, before making a new decision in respect of the licence.

Yours sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee