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26th July 2021

Subject: Appeal FAC660/2020 in relation to felling licence TFL00367319

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 TFL00367319 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 12th August 2020.

Hearing

The FAC convened an Oral Hearing of appeal FAC660/2020 on the 25th May 2021.

FAC: Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Iain Douglas & Mr Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Appellant: [REDACTED]

DAFM Representatives: Ms Eilish Kehoe, Mr Alan Booth, Mr Kevin Keary

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, and all other submissions, before deciding set aside and remit the decision to grant felling licence TFL00367319.

The licence under appeal is for the clearfell and restocking of 12.01ha in two plots containing 100% Sitka spruce in Tullagower, Co. Clare. The proposed restocking is with 75% Sitka spruce and 10% Additional Broadleaves with the provision of 15% open space. The DAFM information states the underlying soil is predominately peat and the slope is flat to moderate (<15%).

The site is within the 27 Shannon Estuary North Catchment, the Wood_SC_010 Sub-Catchment and the Moyasta_010 River Sub-Basin. The Moyasta_010 waterbody has not been assigned a status by the Environmental Protection Agency (EPA). The Moyasta 27, an EPA-mapped first-order stream, rises c. 700m to the east of the proposal and runs from east to west along the southern boundary of Plot 1 (c. 11.61ha). Plot 2 (c. 0.40ha), to the north-east of Plot 1, does not contain or adjoin any EPA-mapped watercourses.

The application for this proposal was submitted on the 17th June 2019. In assessing the application, the DAFM completed an Appropriate Assessment Screening (AAS) of seven European sites within 15km of the proposal. This AAS is contained within the Inspector's Certification document and records that six sites were screened out for Stage 2 Appropriate Assessment (AA) for the following reasons:

- **Carrowmore Dunes SAC, Carrowmore Point to Spanish Point and Islands SAC, Kilkee Reefs SAC, Tullagher Lough and Bog SAC**
 - Due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection
 - Due to the unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site.
- **Mid-Clare Coast SPA, River Shannon and River Fergus Estuaries SPA**
 - The unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site.

One site was screened in for Stage 2 AA:

- **Lower River Shannon SAC**
 - Due to other factors, mitigation measures detailed in the AA Report.

The Inspector's Certification Document contains a comment which states there is a "direct hydrological connection to SAC, mound drains opening out into aquatic zone along southern boundary of Plot 1."

An AA Report (AAR), dated 16th June 2020, was completed by an external consultant on behalf of the DAFM. The AAR contains a table reviewing the District Inspector's AAS conclusions. This table states that the Lower River Shannon SAC, the River Shannon and River Fergus Estuaries SPA and the Mid-Clare Coast SPA were screened in by the District Inspector and the expert review agrees with these conclusions. The AAR states that both the Lower River Shannon SAC and the River Shannon and River Fergus Estuaries SPA are 6.1km to the south of the proposal and identifies a hydrological connection between these European sites and the proposal as a potential pathway for effect. The AAR also states that the Mid-Clare Coast SPA is 10.6km to the northwest of the proposal and this is within the core foraging range of the Barnacle Goose (15km) and that there may be potential for habitat loss or habitat displacement. Site-specific mitigation measures are prescribed to address water quality protection and silt and sediment control.

The AAR contains an assessment of the proposal's potential to contribute to an in-combination effect on European sites which focussed on the general vicinity of the project area. Various planning websites were consulted along with DAFM records for both forestry and non-forestry plans and projects and the Clare County Development Plan 2017-2023 was also consulted regarding objectives relating to Natura sites. The AAR concluded that "this project, when considered in combination with other plans and projects, will not give rise to an adverse effect on the integrity of any European site.

An AA Determination (AAD), dated 8th July 2020, was made by a DAFM Ecologist. The AAD states the AAR is a fair and reasonable evaluation of the likely significant effects of the activity on "the environment" and adequately and accurately describes those effects except in relation to the following:

- The Mid-Clare Coast SPA should have been screened out as no habitat suitable for Barnacle Goose exists within the project area.
- The soils on-site are peat and not Podzols as referred to in AAR.
- At felling, a 10m wide setback from aquatic zones will be implemented as per Felling & Reforestation Standards (October, 2019), not 20m as the AAR states.
- An increased setback of 20m at replanting with 5 rows broadleaves planted from the land side, as per Environmental Guidelines for Afforestation (DAFM, 2016).

- 5m setback along all relevant watercourses at felling and reforestation.
- Adhere to water protection measures on refuelling location etc. as per Felling & Reforestation Standards (October, 2019).

The mitigation measures from the AAR are prescribed along with adherence to additional specified standards and requirements. The AAD states that “the basis for the AAD is as follows:”

- The project is not located within a European Site.
- There will be no loss of Annex I habitat or any supporting habitat of any Qualifying Interests/Special Conservation Interests species associated with designated European Sites.
- The prescribed measures in the AAR ensure that all pathways for potential impact are robustly blocked.
- There is no potential for the project to contribute to a cumulative impact, either individually or in combination with other plans and projects, on any European Site.

The AAD concludes that “no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.”

The DAFM referred the application to Clare County Council with no response and carried out both a field and desk assessment before issuing TFL00367319 on the 12th August 2020. The licence is exercisable for two years and is subject to relatively standard conditions (a) – (g) plus the following:

(h) - Strictly adhere to the Standards for Felling & Reforestation (October 2019). These Standards replace existing Harvesting & the Environment Guidelines (2000).

- Refer to the attached AAD report for mitigation measures relating to Natura 2000 sites.
- The use of geotextile barriers or log dams every 40m is required in the large main drains transecting the site from N to S which open into the drain along the S boundary.
- Observe harvesting replanting requirements with relation to the S boundary.

There is one appeal against the licence. The summarised grounds of appeal are as follows:

1. There is a breach of Article 4(3) of the EIA Directive. This is a class of development covered under Annex II. A Number of criteria set out in Annex III do not form part of the screening and have not been taken into account.
2. DAFM failed to carry out an adequate EIA screening of the proposed development. The determination is inadequately reasoned. There is an error in law.
3. The afforestation of these lands was carried out without any screening for the requirement for EIA. No licence should be granted until a retrospective assessment of the need for an EIA is carried out.
4. The licence and associated operations threaten the achievement of the objectives for the underlying waterbody or waterbodies. Clear-felling has the potential to impact on water quality.
5. The mitigations in the AAD are not written with sufficient precision.
6. Residual effects from this project cannot be excluded and, as such, the in-combination assessment is inadequate.
7. The AA in-combination assessment is flawed.
8. The Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the AAD.
9. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation.
10. There should be a standard condition requiring notification to the Minister at the commencement and conclusion of operations.

11. This licence should contain a condition that plans and works must be inspected by FS prior to, during and post works to ensure compliance with all environmental conditions and mitigations.
12. Licence conditions should include stringent and enforceable conditions regarding notification of appropriate bodies, groups and the public of the intention to spray any chemicals
13. Licence conditions do not provide for the strict protection of all wild birds during periods of breeding and rearing consistent with the requirements of the Birds Directive.
14. Licence conditions do not provide for the strict protection of Annex IV animal species in their natural range.

The DAFM responded in a written Statement to the FAC, as summarised below:

- The standard operational activities of clear-felling and replanting already established forest areas are not categorised either in Annex II of the EIA Directive or in the national transposing legislation. 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.
- 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 felling and reforestation project licenced as TFL00367319 has undergone the DAFM's AAS procedure. The AAS report was completed by the Inspector and contains the recommendations regarding screened out European Sites. Screening information for each Natura 2000 site is available on file. The paperwork submitted as part of application was reviewed by the Inspector. It was deemed sufficient in providing the required information in reaching a decision to approve the licence with conditions.
- An application for a licence to clear-fell and replant an established plantation forest does not constitute a change or extension of an earlier authorisation for that project [within the meaning of Point 13 of Annex II of the EIA Directive] (if such an authorisation was originally required), as the future clear-felling and replanting (being as it is a standard operational activity integral to many such projects) would have been envisioned and accounted for at time of the of the plantation forest's establishment as one of the main cyclical management options going forward.
- There is no requirement on a forest owner/forest manager to apply for a licence for clear-felling and replanting to continue to operate the forest. As set out inter alia in the Department's Felling and Reforestation Policy document (May, 2017) there are a variety of different harvesting / management interventions available to owners/managers to aid them in their management of the forest and the fulfilment of the objectives they have for it.
- The site was inspected in July, 2019. After different iterations of the evolving AA procedure, an AAR and the Subsequent AAD was compiled. These documents reflect the most recent iteration of the Screening procedure that was carried out.
- Seven Natura 2000 sites were found to be within the 15kms zone of impact. Of these, two were finally screened in: Lower River Shannon SAC and the River Shannon and River Fergus Estuaries SPA.
- Standard mitigation measures were prescribed for the treatment of the harvesting operation along the southern boundary of the plantation i.e. adherence to the standards for felling and reforestation. It was deemed that based on the prescribed mitigation measures and on the

objective information available, that no reasonable scientific doubt remains as to the absence of an adverse effect on the integrity of any European site.

- An In-combination report was compiled which deemed that there is no potential for the project to contribute to a cumulative impact either individually or in combination with other plans or projects on any European sites.
- The application was approved with conditions as follows:
 - Refer to the attached AAD for mitigation measures relating to Natura 2000 sites.
 - The use of geotextile barriers or log dams every 40m is required in the large main drains transecting the site from north to south which open into the drain along the southern boundary.
 - Observe harvesting and replanting requirements with relation to the southern boundary.

The FAC held an Oral Hearing of FAC660/2020 on the 25th May 2021 at which the FAC sat remotely. The appellant and the DAFM participated remotely, and the applicant did not participate. The DAFM detailed their processing of the application and issuing of TFL00367319, stating that the application site had been field inspected in July 2019. The DAFM Inspector stated that there are large drains on-site, running north to south through the mature spruce before opening into the aquatic zone along the southern boundary. He stated that mitigation measures were required to prevent/restrict “run-off” but that the drain was quite flat, with a slight fall and some vegetation and branches present. He stated that his field inspection coincided with heavy rain but that the drain was not carrying much water. The Inspector confirmed that the file had been referred to the DAFM Ecology Unit which resulted in an AA being carried out and mitigation measures being prescribed. He also confirmed that an in-combination report had formed part of the AA process and that this had been considered before the making of the decision to issue the felling licence. The DAFM Ecologist confirmed that both the AAR and the in-combination report had been considered in the making of the AAD.

The appellant made a statement regarding the independence and impartiality of the FAC. He then highlighted his second and fourth grounds of appeal and queried how questions nine and 13 of the Inspector’s Certification had been considered in light of the Q-value for the underlying waterbody. He stated that the Moyasta_010 had an ‘Unassigned’ status and, referencing a recent High Court (Hyland) judgment in Sweetman versus An Bord Pleanála, stated that the DAFM can not validate if the proposal would result in compliance with the requirements of Article 4(1) of the Water Framework Directive (WFD). The appellant contended that the AAR should be re-done because there are parts of it which are contradicted by the AAD. He stated that the requirement for geotextile silt traps in the licence conditions was not contained in the AAR or the AAD. He stated that the in-combination report did not consider forest road maintenance or upgrading works. The appellant stated that there is no mapped stacking area for the smaller of the two plots and stated that a water crossing would have to be made also.

The FAC sought clarification from the appellant regarding his statements on the ‘Hyland’ judgment, noting the nature of the proposed development in that case and the acceptance of a direct impact on the associated waterbody. The appellant stated that the fact that there are water quality mitigation measures in the AAD means there is obviously a risk of impact. The FAC queried the appellant as to his view of the purpose of the prescribed mitigations attached to TFL00376319, in the context of the mitigation measures in the Hyland case being aimed at reducing direct impacts on water quality. The appellant did not offer an opinion and reiterated his reference to the Hyland Judicial Review outcome. In response to FAC queries, the DAFM stated that the area applied for was greater than the digitised area, which was more accurate. The DAFM Ecologist stated that the AAD addressed any deficiencies within the AAR, such as the screening-in of the Mid-Clare Coast SPA. They stated that this site had been

screened in based on foraging distance but that the conifer forestry within the project area would not be utilised by the Barnacle Goose.

The DAFM Inspector confirmed that, following his field visit, he had added a condition requiring geotextile silt traps or log dams every 40m within drains as an extra level of security. He stated that if machines must cross drains, they can use log dams to reduce potential damage. Responding to FAC queries, the Inspector confirmed that the drains on-site open into the southern boundary drain which is an EPA-mapped watercourse but that it was more like a field boundary which may have been a natural water course converted into a drain and was dry and well vegetated. The Inspector stated that both plots have sufficient road access but that the smaller plot may require some road upgrade works and that there was no application before him for any such development. Responding to FAC questions, the Inspector stated that he was aware at the time of processing the file that Agriculture was the main pressure on water quality. The DAFM Ecologist stated that the Moyasta_010 waterbody is unassigned but stated that this was a first order stream and was quite dry and that the prescribed mitigations would negate any potential deterioration. Responding to FAC queries, the Ecologist confirmed that the proposal has a direct physical connection to the Moyasta_010 and that there was a hydrological distance of c.10km to the Lower River Shannon SAC and the River Shannon and River Fergus Estuaries SPA. The Inspector stated that this hydrological connection was tenuous but that the Natura sites had been screened in using the precautionary principle and that is why conditions were added to the licence. The FAC queried the DAFM as to whether the water quality mitigation measures were designed to avoid or reduce impacts on the Moyasta_010 Waterbody. The DAFM Inspector stated that in the natural world it is impossible to 100% prevent any impacts on water quality due to the small particle sizes and that ultimately the measures would result in a reduction in impact. The DAFM Ecologist stated that the water protection measures are designed to reduce potential impacts on water quality as much as possible. In closing, the DAFM Inspector stated that the best laid plans can go wrong and that monitoring and site management is dynamic and it was necessary for managers to adjust operations in real time.

In considering the grounds of appeal, the FAC had regard, in the first instance, to the appellant's submission that the issuing of this licence resulted in a breach of Article 4 (3) of the EIA Directive and that the DAFM has failed to carry out an adequate EIA screening of the proposed development. The FAC noted that 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 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 assessment under 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 FAC does not consider that the proposed clearfell and replanting project falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. In these circumstances, the FAC concluded that the licence is not in breach of the provisions of the EIA Directive. The appellant submitted that the afforestation of these lands was carried out without any screening for the requirement for EIA. No licence should be granted until a retrospective assessment of the need for an EIA is carried out. The FAC noted that the appellant did not submit any evidence to substantiate their contention regarding the afforestation of the project area. In considering the grounds of appeal, the FAC was cognisant that the remit of the FAC is to decide if the Minister made a significant

or serious error, or series of errors, in deciding to grant TFL00367319, and if the licence was granted in compliance with fair procedures. In these circumstances, the FAC considered that there was no basis on which to affect the decision.

The FAC considered the appellant's submission that the licence and associated operations threaten the achievement of the objectives for the underlying waterbody. The appellant expanded on this point at the Oral Hearing, stating that the proposal is in the River Sub-Basin Moyasta_010, which has 'Unassigned' status and that, based on a recent High Court (Hyland) judgment, the licence should not have been granted. The FAC noted that the proposal is bordered to the south by the Moyasta 27, a 1st-order stream (waterbody code of IE_SH_27M040900) which forms part of the Moyasta_010 Waterbody. The Moyasta_010 has an unassigned status (2007-09, 2010-12, 2010-15, 2013-2018), and is listed as being under 'Significant Pressure' due to agriculture. The 'Hyland' judgment concluded that, in circumstances where there would be a direct impact on an unassigned lake waterbody, the efficacy or appropriateness of mitigation measures could not be evaluated by reference to the requirements of the WFD. The adoption of 'some type of proxy evaluation' which did not follow steps identified in the WFD for the assignment of status to all waterbodies does not constitute compliance with the WFD.

The FAC considered the implications of the 'Hyland' judgment for the licence under appeal. The FAC noted that in the 'Hyland' case it is accepted by all parties that there would be a direct physical impact on the unassigned lake waterbody, and that the mitigations proposed were designed to reduce the impacts on the ecological and chemical status of the waterbody. The appellant's submission at the Oral Hearing contends that the licensed development would give rise to an impact or impacts on the unassigned waterbody, Moyasta_010. The FAC considered the fact that the conditions were attached to TFL00367319 for the reason of the protection of water quality, including adherence to the mitigation measures prescribed by the AAD, the installation of silt traps or log dams, and adherence to the Standards for Felling & Reforestation (October 2019). The FAC is cognisant that these measures were considered sufficient by the DAFM to remove the potential for the proposal to give rise to the possibility of significant effects on the integrity of the screened-in European sites, in light of their Qualifying Interests and Conservation Objectives. However, the FAC noted the DAFM's submissions at the Oral Hearing that the conditions related to protecting water quality were aimed at reducing potential impacts on water quality, as opposed to preventing any such impact. Based on the evidence before it, the FAC is not satisfied that the water protection measures attached to the licence will ensure there will not be an impact on the Moyasta_010 waterbody and that this constitutes a significant error on behalf of the DAFM in light of the findings of the 'Hyland' judgement.

The appellant submitted a number of grounds relating to the AA procedures employed by the DAFM and their outcomes. The FAC considered the DAFM's process regarding AA and noted that the DAFM completed a Stage 1 AAS which led to the production of an AAR by external environmental consultants. This AAR included an assessment of the potential for the proposed development to contribute to an in-combination effect along with other forestry and non-forestry plans and projects. The FAC noted that numerous forestry plans and projects are listed multiple times within the in-combination report. A DAFM Ecologist assessed the AAR, including the in-combination assessment and concluded that it represented a fair and reasonable evaluation of the likely significant effects of the activity on the environment and adequately and accurately describes those effects except in relation to a number of points. The AAD addresses what the DAFM described as deficiencies in the AAR relating to the screening conclusion for the Mid-Clare Coast SPA, the nature of the soil on site, various setback distances, and adherence to specific water protection measures. The AAD prescribes mitigation measures, some of which are site-specific, in particular a water exclusion zone of 10m from the watercourse along the proposal's southern boundary and a 20m setback at reforestation based on the slope and soil type on-site. However, regarding silt and sediment control, the AAD states that "the project will adhere to all

mitigation measures, as set out in the Felling & Reforestation Standards (v.Oct, 2019).” The AAD also states the proposed works shall adhere to the Felling & Reforestation Policy (DAFM, 2017), the Forestry Standards Manual (DAFM, 2015), the Forestry and Water Quality Guidelines (DAFM, 2000) and the “Environmental Guidelines for Afforestation (DAFM, 2016)”. The FAC noted that the prescribed standards and guidelines contain robust water protection measures aimed at avoiding impacts from forestry operations on water features. However, the FAC noted that these guidelines also contain a range of measures that may apply in particular circumstances. For example, in relation to silt and sediment management, the Standards for Felling and Reforestation (October, 2019) state “silt trap design can vary, from depressions added to the drain bed, to log sections laid lengthways into the drain, to the use of geotextile barriers”. In these circumstances and having regard to the particular circumstances of this case, the FAC are not satisfied that the water protection measures contained in the AAD are sufficiently precise and site-specific to ensure there will not be a direct impact on the Moyasta_010 waterbody and that this constitutes a significant error on behalf of the DAFM. The FAC noted that the DAFM did not deem it appropriate to seek the opinion of the general public in relation to the AAD, as submitted by the appellant. The FAC also noted that the proposal was advertised at application stage and a submission was received by the DAFM on the 10th August 2019, albeit not from the appellant.

The FAC had regard to the appellant’s contention that the Harvest Plan 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 the licenced operations must comply with the conditions of the felling licence.

Regarding 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 the Habitats Directive, the FAC noted that the appellant did not provide any site-specific details in relation to any particular species of concern. The FAC considers that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute.

The FAC considered the appellant’s submissions regarding conditions that should have been attached to TFL00367319, including a requirement for the licensee to notify the Minister at both the commencement and conclusion of operations, that plans and works must be inspected by the Forest Service prior to, during and post works, or conditions regarding the spraying of chemicals. The FAC considers that compliance with, and enforcement of licence conditions is a matter for the DAFM as the licencing body and the use of chemical sprays/plant protection products in Ireland is governed by a legislative framework. In these circumstances there is no convincing evidence before the FAC that additional conditions as proposed by the appellant should be attached to the felling licence.

Based on the information before it, the FAC decided to set aside and remit the decision of the Minister in order for the DAFM to complete a Stage 2 AA of the screened-in European sites, including an assessment of the potential for the proposal to contribute to a cumulative effect in combination with other plans and projects and, to identify precise, site-specific mitigation measures sufficient to avoid any impact on the unassigned waterbody (Moyasta_010) arising from the proposed development, before making a new decision in respect of TFL00367319.

Yours sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee