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15<sup>th</sup> June 2021

**Subject:** Appeal FAC027/2021 regarding licence DL31-FL0065

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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Background**

Licence DL31-FL0065 for the felling of 5.78 ha at Tievetooey, Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 13<sup>th</sup> of January 2021 with conditions.

#### **Hearing**

A hearing of appeal FAC027/2021 was held by the FAC on the 14<sup>th</sup> of May 2021. In attendance:  
FAC Members: Mr Donal Maguire (Chairperson), Mr. Vincent Upton, Mr. Derek Daly and Mr Iain Douglas  
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, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision to the Minister in relation to licence DL31-FL0065.

#### **Background**

The record describes the felling area as consisting predominantly of plantation conifer high forest on a gentle to moderate slope and a blanket peat soil. The felling area is comprised of seven sub-compartments, planted in 1979, 1981, 1985 and 1993, composed primarily of Sitka spruce. Replanting would be with Sitka spruce described as standard conifer reforestation for roundwood production. The landscape is described as comprising of managed forest and bog and heathland in an upland setting. The border with Northern Ireland lies to the east. A forest road is in place. A watercourse, identified as the Leaghany River, flows along the northern and eastern section of the forest. The application, dated 31<sup>st</sup> July 2020, included forest inventory and environmental information, operational and location maps. The Applicant also provided an Appropriate Assessment pre-screening report which concludes, in relation to three European sites, that there was a

possibility of the proposal having a significant effect on European sites. These are Lough Derg (Donegal) SPA 004057, River Finn SAC 002301, River Foyle and Tributaries SAC UK0030320. The Applicant also provided a Natura Impact Statement (NIS) which identifies the nature of the effects identified, considers other plans and projects, and proposes mitigation measures, and concludes

*It is objectively concluded, in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge.*

The application was referred to Donegal County Council and Inland Fisheries Ireland. The County Council provided a detailed response and that it had no objection subject to the observations contained in its reply. No reply was received from Inland Fisheries Ireland. There are two submissions from members of the public including one from the Appellant in relation to a number of felling licences.

The DAFM undertook a screening for Appropriate Assessment and identified eleven sites within 15km of the proposal and that there was no requirement to extend this radius in this case. Each site is considered in turn with its qualifying interests, special conservation interests and conservation objectives and reasons are provided for the screening conclusions. The DAFM considered that the same three sites should proceed to Appropriate Assessment. The DAFM recorded an Appropriate Assessment Determination which refers to the screening process and the NIS submitted. It describes a number of mitigation measures to be implemented through the licencing process. The AAD concludes,

*Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.*

The licence was issued on 13th of January 2021 with conditions and reasons are provided for the conditions.

There is a single appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- The FAC does not have an independent and impartial role as required by law.
- The restocking of the site has not been assessed, other than basic operational details. This is a serious error in the processing of the licence. The Appropriate Assessment does not contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on designated sites.
- Generic mitigations do not exclude the possibility of residual impacts and no alternatives to restocking have been assessed
- This project lies within the River Sub-Basin Derg River (Crocknacunny). There is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive (WFD). Based on a recent High Court judgment, the licence should not have been granted



- A proxy evaluation does not constitute compliance with the WFD. Specific steps in the architecture of the WFD must be followed. There is no evidence that the EPA has been consulted regarding the status of the waterbody.

In response, the DAFM state as follows:

- The FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process
- Sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands. The replanting objective as identified by the applicant in their application form and detailed in the associated pre-screening documents and NIS is consistent with the DAFM Felling and Reforestation Policy (2017).
- The Hyland JR decision is dated 10.01.2021. The licence decision pre-dates this. The appeal was submitted on 29.01.2021. DAFM applies a wide range of checks and balances during the evaluation of felling licence applications in relation to the protection of water. Adherence to specific measures in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD, and attached as conditions to the licence, ensure that the proposed development will not result in any adverse effect on any European site not on water quality or on waterbody status, regardless of hydrological connectivity.

#### **FAC hearing**

At a hearing of the appeal held on 14 May 2021, the FAC considered the record of the decision, written grounds of appeal and submissions received. The Appellant contends that the FAC does not have an independent and impartial role as required by law. There are no other arguments presented to substantiate this contention. The FAC operates under the Agricultural Appeals Act 2001, as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The Appellant contends that the restocking of the site was not assessed by the DAFM and that this represents a serious flaw in the processing of the licence. The FAC noted that the proposed project (clear-fell and restocking) was subject to Appropriate Assessment screening and, following the submission and assessment of a Natura Impact Statement (NIS), was the subject of an Appropriate Assessment Determination (AAD) by the DAFM. In addition, a referral submission from Donegal County Council was sought and considered prior to the making of the decision to grant the licence. The FAC considered that the information provided by the Applicant through the application, pre-screening report and NIS is sufficiently detailed to facilitate the assessment of the application by the DAFM. The replanting of the lands is identified and described in the documentation and certain measures are included that are specific to the replanting phase. The AAD concludes that the integrity of a European site will not be impacted by the proposal as licenced. In such a circumstance, the DAFM were not obliged to consider alternatives to the proposal.

The Appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence issued contains 29 conditions in total. Conditions 1-7 are of a standard nature. The additional conditions are attached for reasons relating to the protection of water quality, the protection of European sites during harvesting and restocking, protection of soil stability, and to minimise disturbance and protect established Habitat in designated European sites.



While the FAC is satisfied that the DAFM had regard to these issues, and that the procedures adopted were generally in keeping with the DAFM's obligations, it considered that a number of errors appear to have been made in the process. The AAD and licence specify a setback of 10 metres at replanting and refer to the *Environmental Requirements for Afforestation* document and policy in this context. The land is described as being on a blanket peat soil and the setback outlined in the referenced document for such soils and slope is 20 metres. While a setback of 10 metres is listed in the AAD, the Applicant must adhere with this condition and adhere with a set of identified standards, requirements and guidelines. The FAC considers that this contradiction should be addressed either through the DAFM amending the specified setback to 20 metres or providing reasons for a 10 metre setback in this case within the AAD and to specify which condition has priority in the licence conditions.

Furthermore, the FAC noted the following measures were identified as necessary in the AAD and do not appear to have been adopted in the licence as issued,

*In relation to the threat of the spread of invasive species in a designated site, the following mitigation is required, presented in the form of conditions to be attached to any licence issued:*

A. *All machinery, equipment and boots shall be thoroughly cleaned and dried prior to entering the site for the first time. Upon completion of works, all machinery, equipment and boots shall be cleaned again before leaving site. Reason: To protect European Sites against the spread of invasive species.*

*Adhere to all water protection measure guidance relating to sediment management, felling, cultivation, herbicide application, the location of onsite storage depots and the disposal of waste including : ...Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009)...*

The FAC considers that this represents a serious error which should be addressed by the DAFM in making a new decision through the inclusion of these measures on the licence.

In addition, while not raised in the grounds the FAC noted that the licence application was referred to Inland Fisheries Ireland, which did not reply, rather than the Loughs Agency in whose jurisdiction the proposal appears to lie. In this case, the FAC considered that the decision should be remitted to the Minister to make a referral to the Loughs Agency and, where provided within the specified period, to have regard to the response before a new decision is made.

The Appellant contends that the site is in the River Sub-Basin Derg River (Croknacunny), and that there is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive. Based on a recent High Court (Hyland) judgment, the licence should not have been granted. The 'Hyland' judgment, delivered on 15 January 2021, 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 current case under appeal. The FAC considered that, in the 'Hyland' case, that there would be a direct physical impact on the unassigned lake, and that the mitigations proposed were designed to reduce the impacts on the ecological and chemical status of the waterbody following the assignment of a status outside of the formal process implemented by the EPA. The Appellant's contention in the current appeal appears



to be based on an supposition that the proposal as licenced would give rise to an impact or impacts on the unassigned waterbody due to its location within the sub-basin but does not submit any evidence to demonstrate how or why this would be the case. In its statement to the FAC, the DAFM contends that the conditions attached to the licence prevent direct and indirect impacts on water quality arising from the operation.

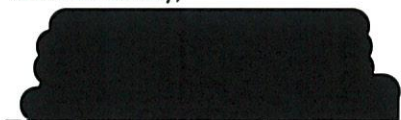
The forest is bordered to the north and east by a watercourse identified as Leaghany River (Order 4) and forming part of the Derg River (Crochnacunny) UKGBNI1NW010104068 waterbody by the EPA. The EPA record that this waterbody is unassigned and that its risk status is under review.

The decision before the FAC relates to a felling licence granted by the Minister for Agriculture, Food and the Marine under the Forestry Act 2014. The evidence before the FAC would suggest that the operations would not involve any exploitation of a waterbody while the FAC understands that poorly sited and managed forestry operations, including felling, have been identified as a potential source of water pollution by the EPA and DAFM, including through sedimentation, eutrophication and acidification. Regarding the specific decision, the felling operations would occur over a limited period of time while provision is made for long term setback from any waterbodies at the replanting stage in addition to other operational and management measures. It appears to the FAC that the DAFM contend that the licence conditions are preventative in nature and avoid impacts on water quality rather than represent an alternative form of assessment or status.

As previously noted, the FAC considers that the DAFM have erred in relation to the referral of the application and a number of licence conditions. While the FAC is satisfied that the proposal does not involve the exploitation of a waterbody and that the DAFM did not employ a proxy form of status to assess the waterbody, the decision is being remitted to the Minister to address the errors identified that relate to the avoidance of impacts on water quality and European sites.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is satisfied that serious errors were made in making the decision by referring the application to Inland Fisheries Ireland when it should have been referred to the Loughs Agency and in the specification of the identified licence conditions that relate to setbacks, invasive species and otter guidelines. The FAC is thus setting aside and remitting the decision back to the Minister to address these issues before a new decision is made.

Yours sincerely,

A large black rectangular redaction box covering the signature of Vincent Upton.

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Vincent Upton On Behalf of the Forestry Appeals Committee

