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24<sup>th</sup> June 2021

**Subject:** Appeal FAC 656/2020 regarding licence TFL00496620

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 TFL00496620, for felling and restocking of trees on 3.95 ha at Meenagolan, Fintown, Co. Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 5th of August 2020.

#### **Hearing**

An oral hearing of the above appeal of which all parties were notified, was held by the FAC on the 13<sup>th</sup> of May 2021.

FAC Members:	Mr. Des Johnson (Chairperson), Mr. Dan Molloy, Mr. Luke Sweetman and Mr. John Evans.
Appellant FAC 656/2020:	[REDACTED]
Applicant:	Not in attendance.
DAFM:	Ms. Eilish Keogh, Mr. Martin Regan
Secretary to the FAC:	Mr. Michael Ryan.

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions made at the oral hearing, all other submissions and, in particular, the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence TFL00496620.

#### **Summary of licence and file**

The licence relates to the felling and replanting of trees in 3 plots. Current stocking is 85% Sitka Spruce and 15% Lodgepole pine south coastal. Restocking is to be 85% Sitka Spruce (SS) and 15% Additional Broadleaves (ADB).

The application was received by DAFM on the 6<sup>th</sup> of May 2020. A Harvest Plan was requested by the Forestry Inspector on the 5<sup>th</sup> of June, and this was provided by the applicant's agent on the 9<sup>th</sup> of June 2020. This notes that felling is to take place in the Summer/Autumn period, that all hedgerows (noted to be very little) are to be retained and that no watercourses or relevant watercourses are on site. Maps are provided which show details such as power lines, the location of proposed sediment traps, hedgerows, stacking areas, a forest road, and the location of the entrance on the public road.

No submissions from the public in relation to the application for a licence are on file. A referral was made to the Northern Region Fisheries Board on the 22<sup>nd</sup> of May 2020. This was responded to by Inland Fisheries Ireland on the same day to the effect that the site was in the jurisdiction of the Loughs Agency. This resulted in a further referral to the Loughs Agency on the 27<sup>th</sup> of May 2020. The Loughs Agency responded on the 1<sup>st</sup> of June 2020 with several recommendations reflective of good practice with regard to the protection of water quality for consideration in any licence.

A referral was also made to the National Parks and Wildlife Service (NPWS) on the 22<sup>nd</sup> of May 2020. The NPWS responded with no specific comments, attaching a document entitled "Appendix 1 – General observations from the NPWS of the DCHG in relation to forestry application referrals" for reference by the Forest Service. A referral to Donegal County Council, made on the 22<sup>nd</sup> of May 2020, was not responded to.

An Inspector's Certification Report is on file which indicates that the application was both desk and field assessed, a field inspection being noted as having taken place on the 8<sup>th</sup> of June 2020.

The report describes the site as comprising 3.94 hectares of felling & reforestation. The predominant soil type underlying the project area is described as predominantly blanket bog in nature. The slope is said to be predominantly flat to moderate (<15%) and it is stated that the project area does not adjoin or contain an aquatic zone(s). Vegetation within the project area is described as comprising conifer forestry.

A record of screening for Appropriate Assessment exists in the Inspector's Certification report. This records the presence of 11 European sites within a radius of 15km of, but not overlapping, the project site. No sites beyond this 15km range are identified as being needed to be added to the sites to be considered for screening. The sites identified are:

1. Cloghernagore Bog and Glenveagh National Park SAC 002047
2. Coolvoy Bog SAC 001107
3. Derryveagh And Glendowan Mountains SPA 004039
4. Gannivegil Bog SAC 00014
5. Leannan River SAC 002176
6. Lough Nillan Bog (Carrickatlieve) SAC 000165
7. Lough Nillan Bog SPA 004110
8. Meenaguse Scragh SAC 001880
9. Meentygrannagh Bog SAC 000173



10. River Finn SAC 002301

11. West Of Ardara/Maas Road SAC 000197

Each site is considered in turn along with its Qualifying Interests. All sites were screened out from the requirement for Stage 2 Appropriate Assessment for the following reasons.

- The absence of any aquatic zone within or adjoining the project area. (sites 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 above).
- The absence of any significant relevant watercourse(s) within or adjoining the project area (sites 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 above).
- The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site (site 3 above).
- The absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site (Sites 5, 7, 10, and 11 above).

All sites are also screened out based on an in-combination assessment report discounting the potential for cumulative adverse effects, and this report is on file. This indicates searches of planning systems on the 10<sup>th</sup> of July 2020, these planning searches include other forestry projects.

The Inspector's Certification report also records an examination of the need for Environmental Impact Assessment. This considers the proposal across a range of criteria including cumulative effect and extent of the project, water, protection of Freshwater Pearl Mussel, archaeology, landscape, designated habitats, non-designated habitats, social impacts, potential for accidents, and public participation.

The licence was issued by DAFM on the 5<sup>th</sup> of August 2020 and contains standard conditions and references to good practice forestry guidelines and standards.

#### **Grounds of Appeal and Statement of Fact.**

There is one appeal to the granting to the licence.

Briefly and in summary, the grounds of the first appeal (FAC 656/2020) are: a breach of Article 4 (3) of the EIA Directive 2014/52/EU on the basis that the licence is in a class of development covered under Annex II of the EIA Directive, that Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account, and that a number of criteria set out in Annex III do not form part of the Forest Service screening assessment and have not been taken in to account, and as a result the application should be referred back to the EIA screening stage; that DAFM has failed to carry out an adequate EIA screening of the proposed development on the basis that there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application. That the afforestation of these lands, planted on blanket bog, was carried out without any screening for the requirement for an EIA, that this was contrary to EIA Directive, that there is a requirement under EU law

for the remediation of any deficiency in the implementation of EU law, and that as a result no licence should be awarded for felling activity until there has been a retrospective assessment of the need for an EIA for the afforestation of these lands; that this licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 on the basis that clear felling has the capacity to impact on water quality and that this site is in a priority Area for Action under the WFD and forestry is noted as a Significant Pressure on the water quality of a River Sub-Basin which forms part of the catchment; that in the absence of an adequate assessment of the cumulative impact of this project with other existing forestry and non-forestry projects and land uses, approved and proposed, in the same catchment the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured; that the Stage 1 AA conclusion is 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 area concerned and as a result DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question noting that where there are lacunae the precautionary principle applies; that 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 as this would facilitate the Department in being able to logistically schedule monitoring and inspection procedures; that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation; that 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; that 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; and that 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.

In a Statement of Fact (SoF) to the FAC in relation to FAC 656/2020, DAFM stated that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. It also includes a statement from the certifying Forestry Inspector that a desk audit and field inspection was carried out and all submissions/appeals were reviewed, and that all relevant criteria had been fully adhered to.

#### **Oral Hearing**

The FAC held an oral hearing on May 13<sup>th</sup>, 2021, which was attended by participants using remote means. The applicant did not participate or attend. The FAC initially asked the DAFM representatives as to the state of the stock currently on the stock and invited comment on the mottled appearance visible



from aerial imagery of the site. DAFM submitted that this was likely caused by nutrient deficiency on the site, or possibly was caused by Chlorosis, but that in any event there is an acceptable commercial crop available on the site.

In response to questions from the FAC, DAFM submitted that the site had been field assessed on the basis of the soil and ground type. In relation to the Inspector's certification report, and those questions that had been assigned an "S/A" response, DAFM submitted that this response had been used where the inspector could not definitively give an answer based on their own personal knowledge and were relying on the information provided by the applicant. In relation to question 8 on the certification, as to whether the amount of felling in the locality is known to be an issue, it was submitted by DAFM that the "S/A" response was selected as there were no submissions from the public. In relation to question 14, it was submitted that the "S/A" response was selected as the Inspector was not aware of particular concerns on this site but noted that the site was predominantly peat.

The FAC enquired whether the recommendations made by the Loughs Agency had been adequately considered. In response DAFM submitted that the letter provided by the Loughs Agency was standard in nature and contained references to good practice that are captured within DAFM guidelines that attach to licence conditions.

The FAC asked a number of questions in relation to the nature of the site and the cultivation techniques that were to be used at reforestation. In response, DAFM submitted that the current stock was planted in 1989, that the soil on the land to the north of the site is peat and is well vegetated, and the fertilisation of the replanted stock would be by means of ground rock phosphate.

The appellant submitted that the harvest plan indicated that felling was to take place in the summer or autumn, but that this was not reflected in the licence conditions, and that in light of the proposal to undertake brash harvesting this represented a threat to water quality if harvesting took place in wet periods of the year. The appellant further clarified that the grounds of appeal related to surface water, noting the proximity to the River Finn SAC [2301], and submitted that if there was no risk to water quality to nearby watercourse then there should be no requirement for the licence condition stipulating adherence to forestry and water quality guidelines. On this point, the appellant noted that a number of questions on the Inspector's Certification report relating to consideration of requirement for EIA noted that the site is in a fisheries sensitive and potentially acid sensitive area (questions 10 and 11). The appellant noted that any risk to the aquatic interest of the SAC, even if these were to occur in a period of extreme rainfall, would require an Appropriate Assessment.

The FAC asked the DAFM representatives to address those ground of appeal relating to water quality. In response, DAFM accepted that forestry can represent a pressure on waterbodies, but that standard forestry guidelines would be sufficient to ensure no risk to any waterbody in the vicinity of this site. DAFM noted that the site is relatively flat, there are no proposals to open drains on the site, that the site is surrounded by vegetation consisting of or similar to *Molinia caerulea*, and that as a consequence the potential for water to leave the site carrying sediment is nil.



### **Consideration by the FAC**

In considering the grounds of appeal, the FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, DAFM, and other on-line services. These confirm the details of the site as outlined above, in particular the presence of the 11 European sites identified in the Inspector's Certification report. EPA mapping shows the River Finn, marked as the Finn(Donegal)\_020 to be ca. 585m to the south of the site on the opposite side of the R252 road. It also shows a tributary of the River Finn, the Cummierk\_020 to be ca. 370m to the east of the northern part of the site. The Finn(Donegal)\_020 has a Moderate status arising from the 2013-2018 WFD monitoring cycle. The Cummierk\_020 has a Poor status arising from that cycle.

In the first instance, the FAC considered those grounds of appeal relating to the EIA directive. Directive 2011/92/EU, as amended by 2014/52/EU, sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling of an area of 3.95 ha which is substantially sub-threshold. 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 as requiring EIA in Irish Regulations. The appellant submits that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III of the Directive shall be taken into account and submits that a number of those criteria do not form part of the Forest Service screening assessment, and so have not been taken into account, without specifying which criteria are referred to. The appellant further submits that there is no foundation for the conclusion reached on the basis of the responses to the checkbox queries, or any other basis on which the conclusion is made, and that as a consequence there is an error of law in the processing of the application. The FAC notes that in considering the requirement for EIA DAFM considered a wide range of criteria. These include the characteristics of the project, cumulative effect and the extent of the project, water, protection of Freshwater Pearl Mussel, archaeology, landscape, designated and non-designated habitats, social considerations, potential for accidents, and public participation. At an oral hearing, the FAC questioned the DAFM in relation to a number of the responses provided in the Inspector's Certification report, and is in the main satisfied with the responses received. However, in relation to Question 10, which considers whether the site is in an area designated



as potentially acid sensitive, the FAC notes that this question is answered Yes, that it is indicated that where such a response is given further details are to be given in a comment box, and that no such comment is provided. The FAC is of the opinion that this represents an error on the part of DAFM, but in light of the responses received at oral hearing in relation to water quality is satisfied that it is not of such a nature as to invalidate the certification.

The FAC considered the ground of appeal relating to the legitimacy of the forest as a result of an absence of screening for EIA at the time of afforestation. The FAC had regard to the submission at oral hearing by DAFM that the lands were planted in 1989 which follows the introduction of Directive 85/337/EEC but predates its amendment by Directive 97/11/EC which introduced the requirement for Member States to set thresholds for those activities set out in Annex II of the directive or to assess projects on a case-by-case examination. The appellant does not raise specific concerns in relation to the legitimacy of the forest, and the FAC is satisfied that the forestry under consideration was established in line with those statutory requirements which were in place at the time of its planting and that DAFM has not made an error in the processing of the decision in this regard.

When considering the grounds of appeal to the effect that the licence and its associated operations threaten the achievement of the objectives set for underlying waterbody under River Basin Management Plan for Ireland 2018-2021, the FAC had regard for the contributions made at oral hearing. While two waterbodies are in the vicinity of the project site, the closest being ca. 370m away, there is no direct hydrological connection from the site to a waterbody by way of drains, streams or other channels. No specific pathways were identified by the appellant, who points to the possibility of surface water run-off to the watercourses noted above. The site is flat to gently sloped, with a public road bisecting the forestry at its most elevated point. The site is surrounded with well vegetated peat lands. In the opinion of the FAC no possible pathway of effect has been demonstrated it is concluded that the proposal does not threaten the objectives of the River Basin Management Plan for Ireland 2018-2021.

The appellant further submits in the grounds of appeal that there is an absence of an adequate assessment of the cumulative impact of the project with other existing forestry and non-forestry projects and land uses, approved and proposed, in the same catchment and as a consequence the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured. The FAC notes the presence of a report considering possible in-combination effects of the project on the file, which considers planning applications granted and under consideration by the Local Authority, An Bord Pleanála, the EPA, and the Forest Service. The appellant does not provide details of any project which may not have been considered as part of this in-combination assessment or point to any specific inadequacy in the assessment. The FAC does not consider that there has been an inadequate assessment of cumulative impact of the project.

In addressing those grounds of appeal relating to the adequacy of the stage 1 Appropriate Assessment, the FAC considered, under Article 6(3) of the Habitats Directive, any 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, and found 11 European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were as noted above in summarising the Inspectors Certification Report file and have been confirmed by the FAC relying on publicly available information sources. The appellant submits that where lacunae occur in the Appropriate Assessment process the precautionary principle applies but does not provide details of what lacunae may exist. DAFM submit that a screening process considered each of the identified European Sites and their associated qualifying interests and determined that there was no requirement for a Stage 2 Appropriate Assessment. At oral hearing, the appellant submitted that the licence included licence conditions designed to protect nearby waterbodies. The FAC notes that these conditions are general in nature which reference good practice guidelines which are not specific to the project site under consideration and concludes that the stage 1 Appropriate Assessment was not deficient.

The appellant, in the grounds of appeal, submits that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, but does not specify what inconsistencies may have occurred. The FAC notes that the Inspector requested a Harvest Plan from the applicant on the 5<sup>th</sup> of June 2020, and that this was supplied on the 9<sup>th</sup> of June 2020, accompanied by maps showing direction of cultivation, hazards, access, stacking area and hedgerows. The FAC noted that the proposed development would have to be carried out in compliance with the terms of any licence granted.

In relation to the submitted grounds of appeal 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 the Birds Directive and relating to the requirements of Article 12 of the Habitats Directive, the FAC notes 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 noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site, or details of any animal species for which licence conditions should be provided. The FAC also notes that the licence conditions contain reference to standards of good forestry practice. Based on the evidence before it, the FAC concluded that no error arose in relation to the licence conditions of the nature described by the appellant.

In relation to those grounds of appeal relating to the imposition of licence conditions the FAC finds that the spraying of chemicals are subject to licencing processes and that the imposition of licence conditions relating to the commencement and completion of operations may be imposed at the discretion of the Minister.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was not a serious or significant error or series of errors in the making of the decision



to grant the licence. As a result, the FAC to affirm decision of the Minister regarding licence TFL00496620. In deciding to affirm the decision of the Minister to grant the licence, the FAC concluded that the proposed development would be consistent with Government policy and Good Forestry practice.

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John Evans On Behalf of the Forestry Appeals Committee

