



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19th March 2021

Subject: Appeal FAC 313/2020 regarding licence WW09-FL0168

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 WW09-FL0168 for felling and replanting of forest on 2.6 ha at Templelyon Lower, Co Wicklow, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 12TH June 2020.

Hearing

An oral hearing of appeal FAC 313/2020, of which all parties were notified, and representatives of the DAFM and the Applicant attended, was held by the FAC on 10th February 2021.

In Attendance at Oral Hearing:

Department Representative(s):	Mr. Luke Middleton, Ms. Eilish Kehoe,
Appellant:	Not in attendance,
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr Seamus Neely, and Mr James Conway,
Secretary to the FAC:	Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence WW09-FL0168.

The licence pertains to the felling and replanting of an area of forest on 2.6 ha at Templelyon Lower, Co Wicklow. The forest is currently composed of Sitka Spruce and replanting would be of Sitka Spruce (98%) and Broadleaf (2%) with 5% open space. The slope of the site is described as predominantly moderate (0-15 %) and the underlying soil type is described as Surface water Gleys and Ground water Gleys. The

project is described as being within the Redcross_010_SC and the Redcross_020 waterbody (100%) for which the WFD status was recorded as high during the 2013-2018 assessment. The application was referred to Wicklow County Council on 9th January 2020. The response from the Council noted that the biology status of the water had improved to high in 2018. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. The DAFM undertook and documented an Appropriate Assessment screening that found eight European sites within 15km and there was no reason to extend this radius in this case. All eight sites considered (000729 Buckroney-Brittias Dunes And Fen SAC, 001766 Magherabeg Dunes SAC, 000717 Deputy's Pass Nature Reserve SAC, 000733 Vale Of Clara (Rathdrum Wood) SAC, 004127 Wicklow Head SPA, 002274 Wicklow Reef SAC, 004186 The Murrough SPA, and 002249 The Murrough Wetlands SAC) were screened out for the purposes of Appropriate Assessment. The licence was approved on 12th June 2020 with conditions attached, which included those related to environmental protection and sustainable forest management, road network and traffic safety.

The decision to grant the Licence is subject to one appeal. The grounds of appeal include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU submitting a failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting a failure to describe any aspects of the environment which are likely to be significantly affected, that the 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, that the Stage 1 AA conclusion is not legally valid as it has relied on an inadequate pre-screening report from the Applicant, that the Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, that the licence should require notification obligations on the applicant regarding commencement and conclusion of operations, that the licence should include a condition that the Forestry Service should inspect the Plans and Works prior to, during and after operations, and that there should be conditions requiring notification to appropriate bodies, groups and the public concerned in the case of spraying of chemicals.

In a statement to the FAC, the DAFM provided responses to each of the grounds included in the appeal. In the statement it submitted that it is satisfied that all criteria as outlined in the relevant standards and procedures were adhered to in making the decision on the application and that Standard Operating Procedures were applied. The DAFM statement sets out that the standard operational activities of clear-felling and replanting already established forests areas are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred. At the oral hearing a DAFM representative reasserted the contention that the proposal does not include a class of project covered by the EIA Directive or by National legislation. The statement also describes the Appropriate Assessment screening procedure carried out by the DAFM in processing the licence. It is also submitted in the statement that for consideration of in-combination effects of the proposed project, DAFM carried out an in-

combination assessment and included an associated in-combination statement based on this and that a felling licence was issued for the clear-fell and reforestation project having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence. It was stated that standard procedures were followed in respect of issuing referrals for this licence application. In relation to the contention in the appeal that there should be conditions requiring notification to appropriate bodies groups and public concerned in the case of spraying of chemicals, the DAFM submitted that the use of plant protection products in Ireland is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, that these Statutory Instruments are published by the DAFM and provide the basis for the proper and appropriate use of these products. The statement also submitted that there is no legal requirement for forest owners to inform adjacent landowners of their intention to spray, nor is there a need for animals in adjacent properties to be moved as the application of this plant protection product is by hand in a very targeted manner that minimises exposure of the environment.

In the course of considering the appeal in this case it came to the attention of the FAC that a document (an Appropriate Assessment Pre-Screening Report dated the 7th May 2020 as submitted by the applicant) that formed part of the DAFM decision file in this case, had not been provided to the FAC or the appellant. This document was provided to the appellant by email and a period was allowed within which observations / submissions could be made to the FAC. That period has now expired and a submission has been made by the appellant. This submission, which was made by email dated 26th February 2021, has been considered by the FAC in its overall consideration of the appeal in this case.

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 2.6 ha. 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 FAC therefore agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.


In relation to the contention that the 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, the FAC noted the content of the DAFM statement dated 10th December 2020 in this connection, wherein it outlines the checks and balances that DAFM applies during the evaluation of felling licence applications, in relation to the protection of water, and the confirmation therein that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. The statement also sets out that in relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The FAC noted that the project is located within the Redcross_020 waterbody (100%) for which the WFD status was recorded as high during the 2013-2018 assessment. The Appellant in the submission dated 26th February 2021 submitted that *'The Harvest Block is located in a River Sub-Basin that has hydrological connectivity to the SAC which can be impacted hydrologically'*. The FAC in considering this submission, noted the contribution made by the applicant's representative at the oral hearing wherein he asserted that there is no defined watercourse flowing out of the site being the subject of this application. In response to questions at the oral hearing the applicant's representative also outlined that the applicant's assessment of the hydrological connectivity of the site in this case was both desk and field assessed. He indicated that the site had many drains with evidence of waterflow that connects to the Redcross river at some 600 metres distance and that the hydrological distance to the Buckroney-Brittis Dunes And Fen SAC is a further 6.6 km. The DAFM representative in response to question at oral hearing indicated that the old 6 inch maps showed a watercourse on the western boundary. The FAC finds that an examination of publicly available mapping and imagery supports the appearance of a watercourse on the western boundary.

In relation to the contention in the grounds that the Stage 1 AA conclusion is not legally valid as it has relied on an inadequate pre-screening report from the applicant, the FAC noted the content of the DAFM statement provided, wherein it stated that in relation to the Felling licence application WW09-FL0168, information submitted by the applicant in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as Appropriate Assessment Pre-screening documentation and associated Pre-screening Report methodology document were considered during the licencing process. It also states that the 2.6 ha felling and reforestation project licenced as WW09-FL0168 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019) and that the related AA screening document is on file and includes the screening rationale identified by the relevant inspector. Under Article 6(3) of the Habitats Directive, a plan or project not directly connected with, or necessary to, the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case the FAC finds (and as established at oral hearing) that the DAFM Appropriate Assessment screening placed a reliance on content of the Appropriate Assessment Pre-

Screening Report dated the 7th May 2020 as submitted by the applicant. The reliance referred to in this instance is in the reasoning for the screening conclusion reached in relation to the Buckrone-Brittas Dunes And Fen SAC, where the DAFM AAs includes the following *"I Conclude that there is no possibility that this project will have a significant effect on this NATURA site, due to the following factors: Having considered the expert opinion and the rationale presented in Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project"*. The FAC also finds that the Appropriate Assessment Pre-Screening Report dated the 7th May 2020 as submitted by the applicant (and which was relied on to some extent by DAFM in its screening assessment) itself contained a statement when describing the rationale for particular contentions relating to the Buckrone-Brittas Dunes And Fen SAC that they were *"Due to no hydrological connection....."*. As alluded to earlier in this letter the appellant made a response to the FAC (having been provided with a copy of the applicants Pre-Screening Report of 7th May 2020) wherein he submitted that the said Pre-Screening Report contains a fundamental error in terms of hydrological connectivity. In considering this ground of appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received, and submissions made by the representatives of the applicant and DAFM at the oral hearing, and having also viewed online maps on the EPA website and aerial imagery of the location. The FAC therefore concluded that the Appropriate Assessment screening submitted by the Applicant, and relied upon by the DAFM, relied on there being no hydrological connectivity between the site of the proposal and the Buckrone-Brittas Dunes And Fen SAC and that this was subsequently submitted by the Applicant not to be the case and that this constituted a serious error in the making of the decision. While noting the submissions made by DAFM at the oral hearing, the FAC concluded that a new screening of the application for Appropriate Assessment is required and should be undertaken regarding this proposal before a new decision is made.

In relation to the appellants stated ground 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 Article 5 of the Birds Directive, the FAC had regard to the statement provided by DAFM. The FAC considered the existing legislative safeguards in place with regard to these species and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC agrees that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the condition as raised in these grounds of appeal in this case, was not required. Regarding the conditions that the Appellant suggested should be attached to the licence relating to commencement and conclusion of operations, inspections and notification in the case of the spraying of any chemicals, the FAC noted the response provided to it by DAFM and considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions relating to these grounds in the appeal in this case, was not required.

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. In the above circumstances, the FAC concluded that a serious error or series of errors were made in the decision of the DAFM regarding licence WW09-FL0168 and that the decision should be set aside and remitted back to the Minister to undertake an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive before a new decision is made.

 _____
Seamus neely On Behalf of the Forestry Appeals Committee