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26th March 2021

Subject: Appeal FAC190/2020 in relation to felling licence CK24-FL0087

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

Felling licence CK24-FL0087 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 26th March 2020.

Hearing

An oral hearing of appeal FAC190/2020 was held by the FAC on the 16th February 2021.

FAC:	Mr Des Johnson (Chairperson), Mr Pat Coman, Mr Dan Molloy & Mr Luke Sweetman
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
Applicant's representative:	[REDACTED]
DAFM representatives:	Ms Eilish Kehoe, Mr Frank Barrett

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 affirm the decision to grant felling licence CK24-FL0087.

This licence is for the clearfelling and replanting of 14.30ha on a site of in Barnagowlane East, Co. Cork. The species to be felled and restocked is 100% Sitka spruce, with 0.72ha retained as open space at replanting. The underlying soils are 44% Peaty Gleys, 56% Peaty Podzols, Lithosols and Peats. The slope is predominately steep (15 - 30%). The application site is in the Dunmanus-Bantry-Kenmare Catchment, the Mealagh_SC_010 Sub-Catchment and the Mealagh_010 River Sub-Basin. The Mealagh_010 Waterbody was rated as having 'High' status and 'Not at Risk' by the Environmental Protection Agency (EPA) during the 2013-2018 reporting period. EPA mapping shows a tributary to the Barnagowlane East River rises within the site, and flows c.315m to the Barnagowlane East River, which then flows c.460m to the Mealagh_010.

The Applicant submitted an application pack which included a Harvest Plan document, and an Appropriate Assessment (AA) Pre-Screening Report. The DAFM completed an AA Screening (AAS) which screened two Natura 2000 sites within 15km of the application site. Both sites were screened out for Stage 2 AA for the following reasons:

- **Bandon River 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 pathway, hydrological or otherwise.
- **Derryclogher (Knockboy) Bog SAC**
 - Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

An in-combination assessment which consulted various planning websites and the DAFM's internal records for both forestry and non-forestry projects in the general vicinity of the Mealagh_010 River Sub-Basin. The DAFM concluded that that the proposal, when considered in combination with other plans and projects, "will not give rise to the possibility of an effect on the Natura sites listed above."

The DAFM referred the application to the Cork County Council (CCC) who responded with a request that two licence conditions be attached if the application is approved, both of which were attached to CK24-

FL0087 which was issued on the 26th March 2020 and is exercisable until 31st December 2022. It is subject to relatively standard conditions (a) to (g) plus (h) requiring completion of a Harvest Plan prior to commencement of operations, (i) and (j) which were requested by the CCC and (k) which requires an adjacent unplanted area to 'green-up' prior to the felling of the application site.

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC, the following is a summary of the issues raised:

- Breach of Article 4(3) of the EIA Directive 2014/52/EU - a number of criteria set out in Annex III do not form part of the Forest Service screening assessment. This site is on a (possibly deep) peat soil. There is an argument that, on a deep peat soil, re-stocking would be acting contrary to Government Policy on Climate Change.
- Breach of Article 4(4) of the EIA Directive 2014/52/EU – On the same date that the application for this licence was submitted a further four applications for clearfelling licences were submitted for the same Forest Management Unit totalling 64.77 ha. The purpose of the EIA directive cannot be circumvented by the splitting of projects.
- Breach of Article 4(5) of the EIA Directive 2014/52/EU – the application for this licence does not represent the whole project therefore any determination reached in terms of EIA screening is invalid.
- Potential (cumulative) impact on protected species. This site is in the headwaters of the River Mealah with an extant population of Freshwater Pearl Mussel. There is another significant Coillte clearfelling under application in the same Sub-Basin. No evidence has been provided to me that the relevant prescribed bodies have been consulted.
- 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.
- Breach of Article 10(3) of Forestry Regulations – Failure to make available for inspections a copy of the application - In response to the public consultation on this application I sought electronic copy of all the relevant information in respect of the application which would be consistent with my rights under Forestry Regulation 10 (3). The Forest Service failed to honour this request. The process of awarding this licence was legally flawed in respect of the consultation process.

The FAC sought additional information from the appellant relating to their grounds of appeal regarding the EIA Directive, and while a response was received, the requested information was not provided.

The DAFM responded to the grounds of appeal in a written statement to the FAC. This submission was considered in full and is summarised below.

- Clearfelling and replanting of an already established forest area 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 Articles 4(3), 4(4) and 4(5) of the EIA Directive are not applicable.
- Condition (a) of the licence requires that the applicant ensures that all felling and planting operations are carried out in accordance with Forestry and Water Quality Guidelines and the Standards for felling and reforestation. The reason for Condition (a) is to ensure protection of water quality and the environment. Adherence to Condition (b) of the licence ensures the licensee follows appropriate stump treatment procedures in the application of urea to protect water quality and the environment. The DAFM has considered the project and deemed that there is no potential for the project to contribute to any effects, when considered in combination with other plans and projects.
- 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.
- Please see file for correspondence with DAFM related to requests from the appellant for copies of 451 Coillte felling licence applications and related files. A number of the granted licences were subsequently appealed by the appellant including the current licence under consideration by the FAC – CK24-FL0087.
- The project licenced as CK24-FL0087 has been subject to the DAFM's AAS procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The AA Screening report was completed by the Inspector and contains the recommendations regarding screened European Sites. A number of the SCIs/QIs were truncated on the AA Screening form for project CK24-FL0087 when outputting the form related to the screening exercise. However, all QIs were considered during the screening exercise itself and the screening determination is considered sound.

The FAC held an Oral Hearing on the 16th February 2021. The FAC members sat in person and remotely at this hearing. The appellant did not participate; the applicant and the DAFM participated remotely. The DAFM detailed the process leading to their decision to grant the licence and provided reasons for the additional licence conditions attached. They confirmed that the adjoining parcel, harvested under CK24-FL0034, and required by condition (k) to green-up prior to clearfelling of the application site, had actually been restocked in 2020.

The applicant described the hydrological connectivity of the site, identified by desk-assessment, and described the soils on site as Peaty Gleys and stated access would be from the north on existing forest roads. Responding to FAC questions, the applicant stated the site contains some rocky outcrops amongst very fertile areas. There was some windblow present and that some areas had produced Yield Class 28 Sitka spruce. They stated a number of tributaries rise within, and in the vicinity of the project site before flowing c.700m to the River Mealagh and then c.16km to Bantry Bay and that the proposal is not hydrologically connected to any Natura sites. Regarding the grounds of appeal relating to the Freshwater Pearl Mussel (FPM), the applicant stated there are no FPM populations on the River Mealagh and that there are FPM in the Bandon River SAC but this is c.11km to the east of the proposal with no hydrological connection. Responding to FAC questions, they confirmed that they have access to National Parks and Wildlife Service (NPWS) datasets regarding FPM and that the CCC's referral response was a stock answer, that the timber would be removed by a designated haulage route and that they regularly consult with the CCC around these issues.

The FAC queried the DAFM in relation to the appellant's submission regarding Article 10(3) of the Forestry Regulations. The DAFM reiterated parts of their written statement and stated that the appellant had received a notice of the DAFM's decision along with a copy of the licence and associated documents on the 15th April 2020.

In addressing the grounds of appeal, in the first instance, the FAC considered the appellant's contention that the DAFM had breached Article 10(3) of the Forestry Regulations. The FAC noted the DAFM's submission that they had provided a copy of licence CK24-FL0087 and associated documentation on the 15th April 2020, within 28 days of the issue date, and that the appellant had exercised their right to appeal the DAFM's decision.

The FAC considered the submission that the proposed development should have been addressed 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 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 decision under appeal relates to a licence for the clearfelling and replanting of an area of 14.3ha. 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 for EIA in Irish Regulations. Regarding the appellant’s submission regarding soil type and reforestation, there is no evidence before the FAC that the application site is underlain by deep Peat soil.

The FAC considered the grounds relating to the FPM. The FAC had regard to the applicant’s submission at the Oral Hearing that there is no hydrological connectivity between the application site and any Natura site (including the Bandon River SAC) and noted their statement that there are no FPM populations on the River Mealagh. However, the FAC observed that the NPWS map showing Margaritifera Sensitive Areas (May, 2017) indicates that the Mealagh_SC_010 contains extant populations of FPM, outside of the SAC FPM populations listed in S.I. 296 of 2009. The FAC observed that licence conditions (a), (b) and (h) describe specific requirements, measures and adherence to various standards and guidelines for the protection of water quality. Given the nature and scale of the proposed development, the FAC concluded that there is no convincing evidence that the licenced development would give rise to a negative impact on either water quality or any FPM populations.

Regarding a requirement for the licence conditions to provide a system of protection for wild birds during the breeding and rearing season, the FAC noted that the appellant did not provide any site-specific details in relation to any species of concern. The FAC noted that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. In these circumstances, the FAC concluded that an additional condition of this nature should not be attached to the licence.

In the circumstances outlined above, and based on the evidence before it, the FAC concluded that the DAFM did not make a serious or significant error in their decision to issue felling licence CK24-FL0087 and did so in compliance with fair procedures. In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee