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12<sup>th</sup> March 2021

**Subject:** Appeals FAC 273/2020 and 289/2020 regarding licence CK14-FL0145

Dear [REDACTED]

I refer to the appeals 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 CK14-FL0145 is for the felling of 14.95 ha at Ballynabrannagh East, Leamlara, County Cork. which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 22<sup>nd</sup> May 2020.

#### **Hearing**

An oral hearing of appeals FAC 273/2020 and 289/2020 was held by the FAC on 5th March 2021.

In attendance:

FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Mr. Iain Douglas, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellants: Not present

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Anthony Dunbar, Ms. Eilish Kehoe.

#### **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, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister regarding licence CK14-FL0145 to include the following additional condition,

*At restocking stage, at least 35% of the canopy of the application area to be comprised of beech, sycamore or an acceptable broadleaf native tree species in the Forestry Standards Manual through the retention of existing trees or through replanting with these species. Provide tree guards or other suitable protection from browsing for planted broadleaves. Reason: In the interest of Good Forest Practice and Visual Amenity.*

### **Licence**

The licence pertains to the felling of 14.95 hectares of woodland at Ballynabrannagh East, Leamlara, County Cork. The site is described as level. The underlying soil type is described as surface water gleys and ground water gleys, (100%). The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was provided with the application and recorded on the file. The felling area is a mixed woodland was mainly planted in the in the 1960s with a majority of the species Douglas Fir. Some older planting on the site is referenced to 1890 and in addition to Douglas Fir there is a current mix of broadleaf species including beech, alder and ash, other conifer species and areas of scrub providing biodiversity on the site.

The application was referred to Cork County Council with no response received.

The DAFM undertook screening considered three sites within 15km; that there was no need to expand this radius in this case and other plans and projects considered are recorded. The European sites considered were 2170 Blackwater River (Cork/Waterford) SAC; 1058 Great Island Channel SAC and 4030 Cork Harbour SPA. Each site is considered in turn with its qualifying interests and conservation objectives and reasons are provided for the screening decisions. All of the sites were screened out based on hydrological distance, project area, soil type and depth, site slope and project separation distance. An in-combination assessment of possible In-Combination Effects was also carried out and recorded.

The licence was issued on the 22<sup>nd</sup> May 2020 with conditions.

### **Appeal.**

There are two appeals against the decision.

In the first appeal the grounds contend that the licence was issued in breach of Articles 4(3) and 4(4) of the EU EIA Directive. In particular, it is submitted; that the DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA and the application has not described all aspects of the environment which are likely to be significantly affected and does not represent the whole project. The Stage 1 AA conclusion is not legally valid as it is has relied on an inadequate pre-screening report of an assessment carried out under Article 6 (3) of the Habitats Directive by the applicant. Reference is made that no evidence has been provided that the impact on a nationally designated site has been adequately considered as part of the approval process. Condition m) of the licence is internally incoherent. The Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing. 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.



In the second grounds of appeal, it is stated that the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive. Reference is made to Court decisions on the matter.

In a statement to the FAC, that in regard to the granted licence for the proposed felling under CK14-FL0145 the DAFM indicated that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act and the Department is satisfied that all criteria as outlined in the following standards and procedures have been adhered to in making a decision on the application. They submit that they followed the current DAFM AA Screening guidance document and considered Natura 2000 sites within 15km. in this regard, the qualifying interests of the Natura 2000 sites in question by using the latest information available and subsequently all Natura 2000 sites were assessed and screened out. It was also indicated that the site was the subject of a desk assessment and having considered the information gathered and assessed including in-combination it was recommended that this licence proceed. It is submitted that the standard operational activities of clear-felling and replanting of an already established forest area are not included in the Annexes of the EU EIA Directive nor considered for EIA in Irish Regulations. Leamlara wood pNHA is the nearest designated site located c. 1.5 km downstream of the Leamlara river and to the south east of the felling and reforestation project licenced as CK14-FL0145. The felling and reforestation project licenced as CK14-FL0145 is separated from the Leamlara pNHA by existing agricultural lands dominated by cereal and grassland production.

It is submitted that the felling and reforestation project licenced as CK14-FL0145 has been subject to the DAFM's AA Screening procedure, the Department deemed that the project, when considered in combination with other plans and projects as identified in the pre-screening report, will not give rise to the possibility of a significant effect on the relevant screened European sites. The clearfell and reforestation project was screened out and an Appropriate Assessment deemed not required in relation to the European sites considered during the screening exercise. It is submitted that a number of qualifying interests and special conservation interests were truncated in the record but that all QIs and SCIs were considered in the screening and an updated version of the screening was submitted.

Condition 'm' it is stated specifically applies to public road setbacks.

Regarding licence conditions the DAFM submitted that it is "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." It is submitted that the Minister may attach or vary licence conditions and that in this instance a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM. The DAFM submitted that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market) and that users of PPPs shall apply



the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPE is used in a targeted way.

Specifically, in relation to EIA, Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed). Furthermore, 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. On the other hand, there is also 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, including for example Continuous Cover Forestry (CCF) which involves the periodic felling of portions of the trees from the canopy to promote the regeneration of young trees.

An oral hearing of the appeal was held of which all parties were informed and attended by representatives of the DAFM and the Applicant. The DAFM outlined their processing of the application including the data sets and analysis undertaken and referrals made. They submitted that the application was referred to Cork County Council and no response was received were considered and reflected in the licence conditions. The Applicant described the site and the information provided during the application and also how the site is managed. The applicant also described hydrological connections in relation to the site and distance from the nearest Natura site. It was submitted that the operation does not comprise deforestation or a change in land use and that it is not included in the Annexes of the EU EIA Directive. It was submitted that plants would be treated in the nursery and that spraying would be undertaken following the Applicants Integrated Pest Management system and signs would be erected to inform the public. It was submitted that the operation would involve the removal of the coniferous species and that the broadleaves would be retained where it was possible and safe to do so.

At the hearing the FAC raised queries relating to the watercourse crossing the site, aspects of the assessment of the application, the species mix in particular in the context of the current level of broadleaf species on the site and the retention of this mix, the use of the site for amenity purposes given the site's proximity to the village of Leamlara; access to the site, clarification on aquatic zones and condition "m". The issues were addressed by DAFM and applicant to the satisfaction of the FAC. The inspector's screening and determination was also reviewed by the FAC at the hearing and is considered adequately reasoned based on the responses received and the application details.



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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 14.95 hectares.

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. Therefore, the FAC concluded that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

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 projects, having regard to the conservation objectives of that designated site.

The FAC consulted publicly available information from the NPWS and the EPA and identified the same three sites. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered nature, scale and location of the proposal, the European sites identified and their conservation objectives and the reasons provided by the DAFM. The DAFM considered each site in turn and provided the reasons for screening all the sites out for appropriate assessment. Details of other plans and projects were also examined. The FAC is satisfied that the DAFM did not make any serious or significant error in their Appropriate Assessment screening and concurs with the conclusions reached.

The proposal is for the felling of a mature forest approximately 12.6 km from the nearest Natura site and there is no evidence of any protected habitats or species on the site. The DAFM recorded forestry and non-forestry projects considered in combination with the proposal. Having regard to the record of the decision, the submitted appeal and available information, the FAC is satisfied that the proposal would not result in any significant effects on any European site, itself or in combination with other plans or projects and that the DAFM did not err in its screening for Appropriate Assessment.

Regarding water quality the site is within the Ownacurra \_30 waterbody. In relation to River Waterbodies Risk, the projection is indicated as not at risk as documented by the EPA. There is a watercourse on the site and flows off site to another watercourse. There is historical evidence of sluices and other manmade water channels on the site, of long established wooded areas and the forest is on a well drained soil. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality.

In relation to the appellant's 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 the Birds Directive or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM statement and note 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 or animals on the proposed site. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM.

Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence as stated in the licence conditions. Based on the evidence before it, the FAC concluded that there was no reason to attach additional conditions of the nature described by the appellant.

In relation to condition "m" stated in the grounds of appeal DAFM in the response to the appeal and also at the oral hearing clarified that this condition refers to setback from public roads and FAC is satisfied with this response.

The forest is currently a diverse species mix comprised of primarily of Douglas fir, but also includes broadleaves species Beech, Ash, Alder, Sycamore and also Japanese larch and other species in variable amounts. There is also scrub areas affording a mix of biodiversity. At the oral hearing although the licence as submitted and approved refers to replanting with 100% Douglas Fir, it was submitted that the operation would involve the retention of broadleaves and attention was drawn to the Environmental rules submitted with the application which includes the retention of veteran trees. The current forest would currently be classified as a mixed forest and would represent an important environmental feature within the wider landscape the FAC concluded.

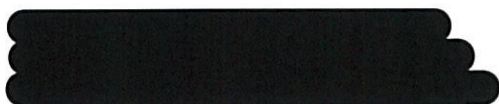
Having regard to the submissions made at the oral hearing, the FAC concluded that the licence as issued does not provide sufficient clarity regarding the broadleaf component of the forest and that this



represents a serious error in the making of the decision. The FAC is, therefore, varying the licence to include the identified condition for clarity and in keeping with Good Forest Practice. The FAC considers the licence conditions can be met through the retention of most of the current broadleaf component but that where felling occurs that it may be required to replace felled trees to meet the stated canopy proportion.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is varying the decision of the Minister regarding licence CK14-FL0145 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to include the stated additional condition. 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 Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee

