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12th March 2021

Subject: Appeal FAC192/2020 in relation to felling licence TY06-FL0092

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 TY06-FL0092 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 25th March 2020.

Hearing

An oral hearing of appeals FAC192/2020 was held by the FAC on the 9th February 2021.

FAC:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Dan Molloy & Mr. Luke Sweetman
Secretary to the FAC:	Mr. Michael Ryan
Appellant:	Appellant did not participate
Applicant representative:	Applicant did not participate
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 TY06-FL0092.

The licence issued is for the clearfelling and replanting of 11.57ha of mixed species including Sitka spruce, Japanese larch, Douglas fir, and Hazel at Glenmore Upper, Co. Tipperary. The proposed restock species is 100% Norway spruce with 0.58ha of open space retained. The underlying soils are approximately 41% Acid Brown Earths, Brown Podzolics and 59% Lithosols, Regosols. The slope is predominantly steep (15-30%). The project site is located in the Lower Shannon Catchment, the Nenagh_SC_010 Sub-Catchment and the Nenagh_030 River Sub-Basin, a waterbody with 'Moderate' status deemed to be 'Not at Risk' by the Environmental Protection Agency (EPA) under their 2013 – 2018 assessment.

The Applicant submitted an application pack which included maps, inventory data, restock plan, a Harvest Plan document, and an Appropriate Assessment (AA) Pre-Screening Report. The DAFM completed an AA screening (AAS), dated 24th March 2020, that considered 6 Natura 2000 sites (5 SACs and 1 SPA) within 15km of the proposal. The following are the sites which were screened out for Stage 2 AA:

- **Kilduff, Devilsbit Mountain SAC and Bolingbrook Hill SAC** due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- **Lower River Suir SAC, Lower River Shannon SAC, and Silvermine Mountains 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.
- **Slievefelim to Silvermines Mountains SPA** was ruled out due to the separation distance between the Natura site and the project.

The DAFM completed an in-combination assessment of the proposed development's potential to contribute to a cumulative impact on Natura sites which focussed on the general vicinity of the project area in the River Sub-Basin Nenagh_030. The DAFM consulted various planning websites along with their own records for forestry and non-forestry plans and projects in the vicinity and also consulted the

North Tipperary County Development Plan 2010 (as varied) regarding objectives relating to Natura sites. The DAFM concluded that the proposed development, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any of the screened Natura sites.

The DAFM referred the application to Tipperary County Council, with no response, before issuing the licence issued on the 25th March 2020. The licence is exercisable until the 31st December 2022 and is subject to relatively standard conditions (a) to (g) plus (h) which requires the completion of a Harvest Plan prior to the commencement of felling, and (i) which requires the planting of broadleaves in the water setback.

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 EIA Article 4(3) - a number of Annex III criteria did not form part of the DAFM screening.
- Breach EIA Article 4(4) - the application for this licence does not represent the whole project.
- Breach of EIA Article 4(5) - since the application does not represent the whole project, any determination reached in terms of EIA screening is not valid.
- Inadequate consideration of Water Framework Directive (WFD) objectives. The current status of the Nenagh_030 waterbody is 'Moderate'. Clearfelling has the capacity to impact on water quality.
- 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 DAFM failed to supply, on request, a copy of the EIA screening report for this licence.
- The Minister has failed to comply with Regulation 21(1) of the Forestry Regulations - "I made a submission on this application and was not notified of the decision as required"
- Breach of Article 10(3) of the Forestry Regulations – failure to make available for inspection a copy of the application.

On the 12th May 2020 the FAC sought additional information from the Appellant relating to their grounds of appeal regarding the EIA Directive, and while a response was received on the 14th May 2020, the requested information was not provided.

The DAFM submitted a response to the appeal in a written statement to the FAC which was considered in full; the following is a summary:

- Article 4(3) of the EIA Directive - this Article requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), 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 Directive are not applicable.
- The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018)*. Critically, 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 DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD.
- 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 appeal – TY06-FL0092.
- The AA Screening report was completed by the Inspector and contains the recommendations regarding screened out European Sites. A number of the QIs/SCIs were truncated on the AA Screening form for project TY06-FL0092 when outputting the form related to the screening exercise. However, all QIs/SCIs were considered during the screening exercise itself and the

screening determination is considered sound. A revised AA screening form, including a full QIs/SCIs listing for all screened European sites, is included on file.

The FAC sought additional information from the Appellant on the 12th May 2020 and while the appellant responded, the information sought was not provided.

The FAC held an Oral Hearing on the 9th February 2021. The FAC members sat in person and remotely at this hearing. The Appellant and the Applicant did not participate and the DAFM participated remotely. The DAFM detailed the process leading to their decision to grant the licence and stated that no submissions had been received in this instance. They stated an AA screening of Natura sites within 15km had been completed and that all of these sites, listed in the updated AA screening form, had been screened out for AA. They contended that the licenced operation does not comprise deforestation. The DAFM stated that conditions (a) – (h) were standard at the time of issuing the licence. They stated that more recent licences contain more clarity as they provide reasons for each condition. The DAFM stated that condition (i) had been attached for the protection of water quality and the environment. A relevant watercourse (RWC) had been identified, using aerial photography and the OSi 6" Map, which runs along the western boundary of the project lands and provides a hydrological connection to the Nenagh River and so the additional planting of broadleaves within the water setback had been prescribed along with the water quality guidelines. The DAFM submitted that the water protection measures would reduce damage to soil and the mobilisation of silt and sediment while protecting soil stability. The DAFM, responding to a FAC query, confirmed the in-combination assessment had been considered prior to issuing the licence. The FAC questioned was a 'green-up' condition considered for this licence, given other clearfell licences in the vicinity. The DAFM responded that the site was less than 25ha and situated in an undulating landscape which the Forestry Inspector would have considered prior to deciding not to include a 'green-up' condition. In relation to the grounds of appeal regarding the DAFM's failure to comply with Regulation 21(1) and Article 10(3) of the Forestry Regulations, the DAFM stated that no submission by the Appellant had been received within the allowed 30-day period. The DAFM stated that the Appellant had made a request for documentation relevant to the file on the 30th March 2020 but were unable to locate a response to the request during the Oral Hearing. The FAC queried what inspections of the level of compliance with licence conditions did the DAFM carry out. The DAFM stated that 48 post-licence inspections had taken place in 2020 for felling licences issued to the Applicant. The FAC enquired as to what GIS layers were checked in respect of this application. The DAFM stated that

desk assessments are carried out using a GIS with all relevant layers included. They outlined that layers used to decide referrals to statutory bodies (Inland Fisheries Ireland, the National Parks & Wildlife Service etc.) are consulted first. The FAC queried why the forest road adjoining the application site, licenced under CN85914, along with private clearfell licences to the southeast had not been included in the DAFM's in-combination assessment. The DAFM stated that although these had not been included, given the soil type, and the level of road building in the vicinity of the application site, these additional projects would have been immaterial in the outcome. They stated that the road in question is on both sides of the hill and falls off to both sides of the watershed.

The FAC addressed the grounds of appeal, initially considering 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 11.57ha. 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.

The FAC had regard to the grounds relating to the WFD and the potential for clearfelling to impact on water quality. The FAC noted the inclusion of licence conditions (a), (b), (h) and (i) on the licence and that these provide various water protection measures. The FAC observed the DAFM had identified a hydrological connection between the felling site and the Nenagh River (which eventually flows to Lough Derg (Shannon) SPA, c.32km from the project site). The FAC noted that this SPA is a considerable distance from the project lands and considers there is no possibility of the licenced operations giving rise

to a significant effect on this Natura site. The FAC noted the current status of the Nenagh_030 waterbody is rated as 'Moderate'. The FAC is satisfied the protections afforded by the licence conditions will not lead to any effect on the water quality of this waterbody. Based on the information before it, the FAC concluded that there is no convincing evidence that the proposed development would give rise to a deleterious impact on water quality.

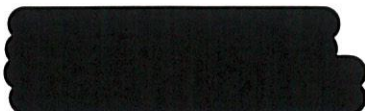
In relation to a requirement for the licence conditions to provide a system of protection for wild birds during the breeding and rearing season, the FAC noted that the Appellant did not provide any site-specific details in this regard. The FAC considers that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute.

The FAC noted the DAFM's statement that they had received no submission on this licence application from the Appellant within the allowed 30-day period. The FAC noted the DAFM's statement relating to their correspondence with the Appellant and the fact that, although delayed, the Appellant was provided with the relevant documents pertaining to this felling licence prior to the expiry of the 28-day period afforded for the submission of an appeal to the FAC.

The FAC noted the DAFM's confirmation at the Oral Hearing that a number of forestry projects in the vicinity had not been included in the DAFM's in-combination assessment, particularly forest road licence CN85914 which would serve the proposed development, and a private felling licence (TFL00218318) to the south-east of the proposal for c.20.9ha, the majority of which is in the Fishmoynes_020 River Sub-Basin. The FAC considers the omission of these projects to be an error on the part of the DAFM. However, based on the nature and scale of the proposed development, the soil type on site and the location of the majority of the privately licenced area to be felled within a separate Sub-Basin, the FAC did not consider this error to be serious or significant in the particular circumstances of this case.

Based on the information before it, the FAC concluded that the DAFM did not make a serious or significant error, or series of errors, in their decision to issue the licence, 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

