



[REDACTED]

3<sup>rd</sup> December 2020

**Subject:** Appeal FAC208/2020 regarding licence DL27-FL0012

Dear [REDACTED]

I refer to the 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 DL27-FL0012 for felling and replanting of 11.74 ha at Fintragh, Co. Donegal. was approved by the Department of Agriculture, Food and the Marine (DAFM) on 3<sup>rd</sup> April 2020 and is exercisable until 31<sup>st</sup> December 2022.

#### **Hearing**

An oral hearing of appeal FAC208/2020 was held by the FAC on 27<sup>th</sup> November 2020. In attendance:

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

Secretary to the FAC: Ms. Marie Dobbyn

Appellant: [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Anthony Dunbar

#### **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 affirm the decision of the Minister regarding licence DL27-FL0012.

The licence pertains to the felling and replanting of 11.74 ha at Fintragh, Co. Donegal. The forest was planted in 1967 and is currently comprised of Sitka spruce with smaller areas of lodegpole pine and unplanted areas and replanting would be of Sitka spruce. The site is described as being predominately steep and on blanket peat soils and situated in the Glenaddragh river basin. The application was referred to Donegal County Council and Inland Fisheries Ireland. Inland Fisheries Ireland responded that the

applicant should adhere strictly to forestry guidelines. The DAFM undertook a screening for appropriate assessment and identified nine sites within 15km and concluded that appropriate assessment was not required. The licence was issued on 3<sup>rd</sup> April 2020 with conditions attached.

There is one appeal against the approval of the licence. The grounds of appeal contend that there has been a breach of Article 4 (3), 4 (4) and 4 (5) of the EIA Directive 2014/52/EU. The FAC understands these grounds to relate to Directive 2011/92/EU as amended by Directive 2014/52/EU. In particular, it is submitted that a number of criteria in Annex III have not been taken into account in a screening and that the developer did not submit details of the whole project and that the competent authority did not make a determination on the whole project. It is further submitted that the Forest Service failed to supply, on request, a copy of the EIA screening report. It is submitted that there has been inadequate consideration of the objectives of the WFD (Water Framework Directive), that the waterbody status is good but at risk and that forestry is listed as a significant pressure. It is submitted that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with Article 5 of the Birds Directive. It is submitted that there was a breach of Regulation 10 (3) of the Forestry Regulations as there was a failure to make available for inspection a copy of the application.

The FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant responded that his appeal should be considered on its own merits and that the applicability of EU Law and National Law are matters for the FAC but did not state the class of development included in the EIA Directive to which the proposal belongs.

In a statement to the FAC, the DAFM contended that the standard operational activities of clearfelling and replanting already established forests 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), 4(4) and 4(5) had not occurred. The DAFM submitted that it 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)*. It is further submitted that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation and these measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. It is submitted that referrals are triggered by spatial rules or are made on a discretionary basis. Regarding licence conditions and the protection of birds the DAFM submit that *"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.*" In relation to the suggested breach of Regulation 10 (3) the DAFM submit that the appellant had requested a number of files and that some were subsequently appealed. While not raised in the grounds of appeal the DAFM submitted that an appropriate assessment screening had been undertaken in line with procedures and that a number of special conservations interests (SCIs) and qualifying interests (QIs) of sites were truncated in the screening document and that a revised form was submitted.

An oral hearing was held of which all parties were notified and which was attended by representatives of the DAFM and the Applicant. The DAFM repeated its contention that the proposal did not constitute a class of development covered by the EU EIA Directive and that it did not constitute deforestation. The DAFM Representatives submitted that the application was processed following procedures and that the applicant had submitted a range of information, including maps, which were considered in processing the application. They provided an overview of the processing including the issuing of referrals, to the County Council and Inland Fisheries Ireland (IFI) in this case, and the undertaking of an appropriate assessment screening. The DAFM contended that the licence conditions reflect the response received from the IFI. The applicant submitted an overview of the application. They submitted that the general area drains to the sea after 12.5km and that the West Donegal SPA was located along this coast but that it did not consider that there as any possibility of effects. They contended that the proposal did not involve deforestation and was not covered by the EIA Directive.

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 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 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 FAC concluded that the felling and replanting 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 Forestry Regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 11.74 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

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 provided a record of a Stage 1 screening in relation to nine Natura 2000 sites, 190 Slieve Toomey/Tormore Island/Loughros Beg Bay SAC, 4150 West Donegal Coast SPA, 4115 Inishduff SPA, 197 West Of Ardara/Maas Road SAC, 189 Slieve League SAC, 191 St. John's Point SAC, 4110 Lough Nillan Bog SPA, 165 Lough Nillan Bog (Carrickatlieve) SAC, and 4090 Sheskinmore Lough SPA. Each site is considered in turn and reasons are provided for the conclusions reached. The DAFM recorded other plans and projects that were considered in combination with the proposal in its assessment and it was confirmed and the oral hearing that the screening was completed before the issuing of the licence. The FAC considered the truncation of the SCIs and QIs of the European sites on the record and concluded that this was an obvious clerical error and should not affect the overall decision. The FAC is satisfied that a serious or significant error, or a series of errors did not occur in the making of the decision regarding appropriate assessment screening.

In regard to felling activities during the bird breeding and rearing season, the granting of the 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 this site while contending that there is potential for the presence of birds on the site. Regarding water quality and the Water Framework Directive (WFD), the licence conditions included adherence with the Standards for Felling and Reforestation which require the use of silt traps and other measures for managing sediment and licence conditions specify the planting of broadleaves and the maintenance of an unplanted buffer from the aquatic zone when replanting. There are also a number of other licence conditions that relate to the protection of water and the FAC is satisfied that these reflect the responses received from referral bodies. Having regard to the scale and nature of the proposal and the conditions under which operations would be undertaken, the FAC is satisfied that the proposal does not represent a significant threat to water quality. The FAC is satisfied that a serious or significant error, or a series of errors did not occur in the making of the decision regarding licence conditions.


Regulation 10(3) of the Forestry Regulations 2017 (SI 191 of 2017) states that,

*(3) The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.*

The FAC considers that this particular Regulation does not provide a right to the Appellant to access information but instead provides powers to the Minister to make such information available. The DAFM contended that the Appellant had requested files for 451 licence applications and that this information was provided to them, although a number of months after the request was made. The FAC is satisfied that the Appellant was provided with an opportunity to appeal the licence and provided with further opportunities to make submissions on the licence decision including at an oral hearing.

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, including at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors was not made in making the decision and neither that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence DL27-FL0012 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

  
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Vincent Upton On/Behalf of the Forestry Appeals Committee