



[REDACTED]

30<sup>th</sup> November 2020

**Our ref: 211/2020**

**Subject: Appeal in relation to felling licence DL31-FL0060**

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 (DAFM). 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 DL31-FL0060 was issued by the DAFM on 3<sup>rd</sup> April 2020.

#### **Hearing**

An oral hearing of appeal FAC211/2020 was held by the FAC on 12<sup>th</sup> November 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Pat Coman, Ms Bernadette Murphy  
& Mr Luke Sweetman

Secretary to the FAC: Ms Ruth Kinehan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Luke Middleton & Mr. Joe O'Donnell

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing and submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence DL31-FL0060.

The licence pertains to the clearfelling and replanting of an area of 19.24ha in the townland of Boeshil, Co. Donegal. The proposed clearfell area was planted in 1979 and is comprised of 92.2% Sitka spruce, 4% Japanese larch, 3.6% Lodgepole pine and 0.2% Birch. The proposed restock species is 100% Sitka spruce with 0.96ha of open space retained. The site is described by the DAFM as being on a moderate slope and on 100% blanket peat soil. The forest lies in the Billary\_SC\_010 sub-catchment of the Erne catchment and in the Sessiaghkeelta\_010 (17%) & Waterfoot\_010 (83%) river sub-basins.

The proposal was referred to Donegal County Council (DCC) and Inland Fisheries Ireland (IFI). DCC did not provide a response. IFI's response stated that the Applicant should adhere strictly to the appropriate

sections of the Forestry and Water Quality Guidelines, the Forest Harvesting and Reforestation Guidelines and the Code of Best Forest Practice – Ireland.

The application included a harvest plan, including maps, and general environmental and site safety rules related to the planned operations. An Appropriate Assessment Pre-Screening Report was also submitted with the application. The DAFM undertook and documented an Appropriate Assessment screening that found 11 Natura 2000 sites (9 SACs and 2 SPAs) within 15km.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the Environmental Impact Assessment (EIA) Directive 2014/52/EU. In particular, it is submitted that the licence is in a class of development which is covered under Annex II of the Directive and that the DAFM did not have regard to the relevant criteria set out in Annex III of the Directive at the EIA screening stage. It is also argued that the information submitted by the Applicant did not represent the whole project and that the Competent Authority did not consider information for the whole project in a screening. On the same date that this application was submitted, a further six applications were submitted for the Forest Management Unit totalling 103.58ha. Since this application does not represent the whole project, any determination made by the DAFM regarding EIA screening is invalid.

The grounds for appeal also state that the proposed felling site is partially within the sub-basin district of the Seesiaghkeelta\_010, that forestry is a significant pressure on this waterbody and that, although its current status is “unassigned”, it is listed as being for review. It is submitted that no evidence has been provided that all of the relevant prescribed bodies have been consulted and that, in the absence of adequate consultation, the achievement of the “good ecological status” recovery objective set for the underlying waterbody under the Water Framework Directive River Basin Management Plan cannot be assured and that an EIA should be required.

It is the Appellant’s contention that the site is partially within the catchment of the Lough Derg (Donegal) SPA, that the site was screened out for Stage 2 Appropriate Assessment on the basis of a lack of direct hydrological connection and that a proportion of the surface waters from this site drain into this SPA. It is further submitted that there is an Environmental Protection Agency (EPA) stream mapped 15m from the site boundary and that it cannot be excluded, on the basis of objective information, that the project will have a significant effect on the SPA and therefore Stage 2 Appropriate Assessment is required.

It is further submitted that this site is in a catchment (Erne-Ominey) with an extant population of Freshwater Pearl Mussel (FPM), 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 DAFM have breached Article 10 (3) of Forestry Regulations by failing to make available for inspection a copy of the application, and the DAFM failed to supply, on request, a copy of the EIA screening report for this licence.

In response, the DAFM submitted 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 no breach of Articles 4(3), 4(4) or 4(5) had occurred.

In a statement to the FAC the DAFM stated 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 (DAFM, 2018) and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019). Regarding consultations DAFM stated that referrals to statutory consultees, including IFI, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. The DAFM also submitted that it is fully informed of its responsibilities regarding the achievement of objectives under the WFD.

The DAFM stated that the proposed felling has been subject to the DAFM's Appropriate Assessment Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). Appropriate Assessment screening was carried out by the DAFM for European sites within 15 km of the proposed clearfell and reforestation project submitted for licencing. Streams connected to the north and south of the project area project area run south and connect to Lough Erne which is connected ultimately to the Donegal Bay SPA. The Donegal Bay SPA was not determined to be within 15 km from the project and therefore was not considered during the screening exercise. The DAFM stated that in the screening report a number of the Special Conservation Interests (SCIs)/Qualifying Interests (QI's) were truncated when outputting the form related to the screening exercise. However, all SCIs/QIs were considered during the screening exercise itself and the screening determination is considered sound. A revised Appropriate Assessment screening form was completed which includes all SCIs/QIs of the screened European Sites. The DAFM deemed that this project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site.

The DAFM stated that It is a condition of the licence issued (condition a)) that the Applicant ensures that all felling and replanting operations are carried out in accordance with Forestry and Water Quality Guidelines and the Interim Standards for Felling and Reforestation (DAFM, 2019). 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. Licence Conditions i)-bb) also identify specific requirements in relation to harvesting and replanting operations for the reasons of protecting water quality and the environment. The DAFM deemed that this project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura 2000 site.

In relation to the contention that a condition should be attached to the licence in relation to birds, 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"*. The DAFM submitted a record of their correspondence with the Appellant in relation to their request for copies of 451 Coillte felling licence applications and related files.

An oral hearing was held at which the DAFM detailed the background to the processing of the application and the decision to grant the licence. The Appellant stated that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EIA Directive. They further submitted that the proposed clearfell area was only one part of a wider operational plan for the surrounding forest, including six other clearfell applications totalling 103.58ha, and that this overall plan must be considered by the DAFM in its entirety. The Appellant also stated that forestry was a significant pressure on the associated river sub-basin and that, in order to grant a felling licence, the DAFM must be certain that there will be no impact on nearby watercourses. To this end, the Appellant stated an EIA screening was needed to assess the potential in-combination affect of the proposed project on the river catchment, that under the requirements of the Water Framework Directive, the DAFM must refuse to

authorise a project where it *may* cause deterioration in water quality. The Appellant raised the issue of nearby clearfell applications and highlighted the requirement of the Interim Standards for Felling and Reforestation (DAFM, 2019) which states that no other coupe within 120m can be clearfelled until the original coupe has greened up, and no less than 12 months after the completion of felling. The Appellant contended that the additional licence conditions concerning protection of water quality amount to mitigation measures and therefore should not be attached to the licence in the absence of a Stage 2 Appropriate Assessment. The Applicant responded with their contention that the “open space” sought in their licence application does not constitute deforestation as the site will continue under forest management and the land use type will continue to be coniferous forest. They further argued that clearfell and reforestation is not a class of development covered by the EIA Directive or the Irish forestry regulations. The Applicant submitted that the project site does not have any direct hydrological connection to any Natura 2000 site and that the hydrological distance to the Donegal Bay SPA was approximately 40km. The Applicant stated that daily water monitoring forms are used by their contractors on site throughout operations. The Applicant stated that the distance between the proposed project and nearby felling licence reference DL31-FL0031 ranges from 250m – 600m. They further stated that the replanting of the proposed felling site will not take place until two years after felling is completed (2023) as part of an ongoing restructuring of a large (c. 4,500 ha), contiguous block of coniferous forestry in the area. The Appellant argued that the NPWS should have been consulted regarding the presence of an FPM population in the river catchment and also stated a condition should be attached to the licence giving protection to wild birds during the nesting and rearing seasons. The Appellant also provided details of their correspondence with the DAFM in relation to their claim that they failed to make available for inspection a copy of the application.

In addressing the grounds of appeal, the FAC considered, in the first instance, 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 an 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 felling and replanting of an area of 19.24ha. Based on the information before it, 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 the Irish Regulations.

The FAC had regard to the Appellant’s contention that in the absence of adequate consultation the achievement of the “good ecological status” recovery objective set for the underlying waterbody under the Water Framework Directive River Basin Management Plan cannot be assured and an EIA is required. The FAC notes that the proposal is situated in the Erne catchment and is not within the same catchment as the Lough Derg (Donegal) SPA as stated in the grounds of appeal. The FAC considered that the DAFM had referred this licence application to, and subsequently received a response from, IFI. The FAC also noted that in addition to standard conditions attaching to the licence for the reason of protecting the

environment during harvesting and restocking, specific conditions (i), h), i) (which was incorrectly labelled in the licence issued), k), l), m), n), o), p), q), r), t), u), v), w), x), z), Appropriate Assessment)) were inserted in the interest of protecting water quality and the environment. Based on the information before it, the FAC considers that, if carried out in adherence to the conditions of the licence, there is no reason to conclude that the licensed development would give rise to adverse impacts on water quality.

The FAC had regard to the Appellant's statement that the project site is within a catchment (Erne-Ominey) with a recorded population of FPM. The Appellant did not provide any specific information relating to the location of a population of FPM but stated their concern was the in-combination impact of the proposed operations, along with further planned clearfell activities, on FPM within the catchment. The FAC also considered the DAFM's statement that all relevant Qualifying Interests were taken into account when undertaking a Stage 1 screening for Appropriate Assessment. Furthermore, the FAC notes that the project site is not within 15km of an SAC designated for FPM and that there is no evidence before the FAC of the presence of a population of FPM downstream from the project site. As such, the FAC concludes that the licenced clearfell and reforestation is not likely to give rise to any significant effects on any FPM population.

In relation to a requirement for the licence conditions to provide a system of protection for wild birds 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 and, as such, is not necessary as a condition attaching to the felling licence. The Applicant indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. 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 coniferous forests would generally support some bird species. In these circumstances, the FAC concluded that a condition of the nature detailed by the Appellant should not be attached to the licence.

The FAC noted the DAFM's confirmation that records concerning 451 licences were sought by, and provided to, the Appellant and the email evidence showing dates of requests and provisions. At the hearing the Appellant stated this was due to the DAFM issuing as many licences in one day. In not accepting this ground, the FAC noted the Appellant made a submission on the subject licence on 4<sup>th</sup> January 2020 and evidence shows the DAFM entered into dialogue with the Appellant and shows provision of documents on 19<sup>th</sup> February 2020. The Appellant made no further submissions to the DAFM following the production of the documents. The FAC noted that the written grounds of appeal would indicate that the appellant had knowledge of the proposed development at the time of lodging their appeal.

The FAC had regard to the DAFM's statement that the list of QIs in their Appropriate Assessment Screening Form was truncated on their original submission and that an updated version was submitted to correct this error. However, the FAC observes that the list of screened Natura sites on the updated Appropriate Assessment Screening Form contains a double entry of the "Pettigoe Plateau" SAC located across the border in Northern Ireland. The Annex I habitats that are listed by the UK's Department for Environment, Food & Rural Affairs as the primary reasons for the selection of this site as an SAC are the presence of Natural Dystrophic Lakes and Ponds, and Blanket Bogs. However, the DAFM's Appropriate Assessment Screening Form lists the Qualifying Interest for the Pettigoe Plateau (in both entries on its list) as the Eurasian Golden Plover (*Pluvialis apricaria*). The FAC notes that the Eurasian Golden Plover is

the sole QI for the Pettigo Plateau SPA UK9020051, a site which was not listed as being screened for Appropriate Assessment in the DAFM's Appropriate Assessment Screening Form.

As outlined above, the FAC considers that a series of errors occurred in the DAFM's processing of, and subsequent decision to grant, licence DL31-FL0060. Therefore, the FAC concludes that the decision of the DAFM should be set aside and remitted to the Minister to carry out an assessment of the proposed development on Natura 2000 sites on its own and in combination with other plans and projects, before making a new decision in respect of the licence.

Yours sincerely



Luke Sweetman on behalf of the Forestry Appeals Committee