



[REDACTED]

3<sup>rd</sup> December 2020

**Subject:** Appeal FAC222/2020 regarding licence LM12-FL0031

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 LM12-FL0031 for felling and replanting of 4.58 ha at Clogher (Carrigallen By), Derrinkeher (Brady), Co. Leitrim. was approved by the Department of Agriculture, Food and the Marine (DAFM) on 31<sup>st</sup> March 2020.

#### **Hearing**

An oral hearing of appeal FAC222/2020 was held by the FAC on 25<sup>th</sup> November 2020. In attendance:  
FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Seamus Neely, Mr. James Conway, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellant: [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Frank Barrett, 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 set aside and remit the decision of the Minister regarding licence LM12-FL0031.

The licence pertains to the felling and replanting of an area of 4.58 ha at Clogher (Carrigallen By), Derrinkeher (Brady), Co. Leitrim. The current forest is comprised of Sitka spruce planted in 1991 and the same species would be replanted. The application includes inventory details, maps a harvest plan including general environmental and site safety rules and an appropriate assessment pre-screening

report. The site is described as being on a moderate slope (0-15%) with a mixture of mineral and organic soils, Basin Peats, Blanket Peats (some) (19%), Surface water Gleys (Shallow), Ground water Gleys, (Shallow) (23%) and Surface water Gleys, Ground water Gleys (58%) in the Yellow (Ballinamore) (030) river basin. The DAFM undertook an appropriate assessment screening of the proposal and considered three sites within 15km of the proposal, Cuilcaigh-Anieran Uplands SAC, Cuilcaigh Mountain SAC and Cladagh (Swanlinbar) River SAC which were screened out for appropriate assessment. The application was referred to Leitrim County Council and a response was provided. The County Council stated that the lands are not located within any designated area as identified in the County Development Plan 2015-2021, there is no tree preservation orders, the site does not appear to impact any recorded monuments, the Forest Service should satisfy itself regarding appropriate assessment and environmental impact assessment including other forestry and requested a number of conditions be included on the approval. A number of submissions were also made by members of the public. The licence was issued on 31st March 2020 with a number of 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 the local road infrastructure is not adequate to cope with the size and volume of traffic required to harvest the site. It is submitted that there has been inadequate consideration of the objectives of the WFD (Water Framework Directive), that the waterbody status is unassigned but is listed as at risk and that an unmarked watercourse bisects the site but is not shown on the application map and relevant bodies have not been consulted. 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. The grounds contend that there was a breach of Regulation 10(3) of the Forestry Regulations and that the application was not provided on request. The grounds query the planting year of the forest.

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. Regarding public roads the DAFM submits that it

“does not have a regulatory role in relation to tertiary, primary or secondary county road infrastructure or maintenance. However, the licensee may be held liable for any damage caused to a public road network as a result of works and/or haulage operations associated with utilisation of a tree felling licence under the Roads Act 1993, Section 13(10)(a). Prosecutions in relation to Section 13(10)(a) of the Roads Act that pertain to the local road network are a matter for the relevant Local Authority.” Regarding water quality the DAFM submits 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 *Forestry & Water: Achieving Objectives under Ireland’s River Basin Management Plan 2018-2021* (2018) and provides examples of such measures. The statement submits that referrals are automatically made in some circumstances or on a discretionary basis and that the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD. Regarding licence conditions 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.” It is submitted that the appellant requested copies of 451 felling licence applications and that a number of licences were subsequently appealed. The DAFM submits that it has verified the planting age of the forest. While not directly noted in the grounds of appeal, the statement makes reference to the appropriate assessment screening undertaken by the DAFM and submits that a number of qualifying interests were truncated on the form and that for consideration of in-combination effects the DAFM relied exclusively on the Applicant’s in-combination statement.

An oral hearing was held at which 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 and the undertaking of an appropriate assessment screening. At the oral hearing the Appellant submitted that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EU EIA Directive. Reference was made to the listing of open space in the application but that whether it involves a change of land use is questionable. Comparisons were made with the regulation of forest damage under the Forestry Act 2014. It was submitted that the harvest plan was not sufficiently detailed and that the road network is not suitable for haulage and that the submission from the County Council was not fully considered. It was submitted that the licence did not comply with the Habitats Directive. The applicant submitted an overview of the application. They contended that the proposal was not covered by the EIA Directive. They submitted that there are general haulage routes that have been agreed with County Councils and that they are in ongoing contact with local authorities.

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 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 4.58 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 three Natura 2000 sites. The boundaries of Cuilcaigh-Anieran Uplands SAC, Cuilcaigh Mountain SAC and Cladagh (Swanlinbar) River SAC lie approximately 2.9km, 12.4km and 15km respectively to the northwest and north of the proposal. The DAFM consider each site in turn and list the associated qualifying interests and the reasons for screening each site out is provided.. The FAC considered the truncation of qualifying interests to be an obvious clerical error in the record of the screening. The general proposal area drains into streams to the north of the site which flow south-westerly and westerly, away from the identified SACs, through a number of lakes and join the Woodford River. The FAC is satisfied that no serious or significant error occurred in considering the likelihood of significant effects of the proposal itself and concurs with the DAFM conclusion that the proposal itself would not give rise to the possibility of a significant effect on a European site. As noted in the statement from the DAFM, the FAC noted that the DAFM erred when carrying out an in-combination assessment before the decision to grant the licence was made in relying exclusively on plans and projects identified by the Applicant. The DAFM subsequently submitted to the FAC listings of other plans and projects not considered before the licence was issued. The FAC is satisfied that the failure of the DAFM to carry out a satisfactory in combination assessment prior to the granting of the licence constituted a serious error in the making of the decision the subject of the appeal.

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 local infrastructure, the FAC considers that responsibility for the management of the public road network falls to the local and roads authorities. The licence conditions require the applicant to contact the County

Council District Engineer and the County Council prior to the commencement of operations and it was submitted at the oral hearing that this was to facilitate its statutory functions. The applicant submitted that it has agreed general haulage routes and is in regular contact with local authorities. The FAC considered that the licence conditions include a requirement to establish a setback and broadleaf planting at the public road at replanting stage and to adhere with the Standards for Felling and Reforestation which requires the erection of safety signage where felling operations adjoin a public road. A stream is marked on historic Ordnance Survey maps across the site. The Standards for Felling and Reforestation 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. 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. In the above circumstances, the FAC concluded that the decision of the DAFM regarding LM12-FL0031 should be set aside and remitted to the Minister to carry out a screening for appropriate assessment under Article 6 of the Habitats Directive of the likely significant effects of the proposal in combination with other plans and projects before a new decision is made.

Yours sincerely,

A large black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton On Behalf of the Forestry Appeals Committee

