



[REDACTED]

3<sup>rd</sup> December 2020

**Subject:** Appeal FAC585/2020 and FAC599/2020 regarding licence WW02-FL0083

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 WW02-FL0083 for felling and replanting of 4.68 ha at Ballyreagh, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 9<sup>th</sup> July 2020.

#### **Hearing**

An oral hearing of appeals FAC585/2020 and FAC599/2020 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 FAC599/2020: [REDACTED]

Appellant's representative FAC585/2020: [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 set aside and remit the decision of the Minister regarding licence WW02-FL0083.

The licence pertains to felling and replanting of 4.68 ha at Ballyreagh, Co. Wicklow. The forest is currently comprised of Sitka spruce and Noble fir planted in 1976 and would be replanted with Sitka spruce and rowan. The application was referred to Inland Fisheries Ireland and Wicklow County Council

and the latter provided a reply submitting that the only acceptable haul time is late summer/early autumn while ground conditions are dry, that discharges must be avoided on the public road and noted the recreational use of the road. The DAFM undertook an appropriate assessment screening of eleven sites and determined that two, Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040, should proceed to appropriate assessment on the basis of their proximity to the proposal. An Appropriate Assessment (AA) report and determination were prepared with ecological review on 6<sup>th</sup> July 2020. The licence was approved with a number of conditions attached which related to water and the environment generally and mitigation measures and is exercisable until 31<sup>st</sup> December 2022.

There are two appeals against the licence. FAC585/2020 submits that the Appropriate Assessment screening did not comply with the decision of Finlay J in Kelly and that under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. It further contends that there has been no investigation as to whether the application site has complied with the requirements of EU law and that according to the heads of the new bill the Minister has assumed control of the FAC. FAC599/2020 submitted that there was a breach of Article 4(3) and 4(4), in particular that there was no screening of the proposal and that the developer has not adequately described the aspects of the environment likely to be affected. It is further submitted that there is insufficient evidence that a walking trail and designated site have been considered, that the licence and operations threaten the underlying waterbody, and that the harvest plan is not consistent with the interim standards for felling and reforestation. The grounds suggest that the stage 1 and stage 2 appropriate assessments are not legally valid and that the opinion of the public on the determination was not sought. It is submitted that the Forest Service failed to supply on request information in an appropriate timeframe. A number of additional grounds submit that there are shortcomings in the licence conditions.

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) and 4(4) had not occurred. Regarding recreational use the DAFM submit that the nearest waymarked way is c. 520 m to the south east of the felling and reforestation project in question, that existing forest tracks and roads provide access to Coillte managed forest areas via this waymarked way and that the application included measures related to health and safety. The DAFM submit that information provided by the Applicant in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Pre-screening Report considered during the licensing process and that standard procedures in terms of assessment of required referrals and issuing of associated referral correspondence to statutory authorities were adhered to including their appropriate assessment screening procedure.

It is submitted that an appropriate assessment screening was undertaken that determined that an appropriate assessment was required in relation to Wicklow Mountains SPA 004040 and Wicklow Mountains SAC 002122. In relation to these two sites the DAFM submit that potential for the project to

result in impacts on the Special Conservation Interests and Qualifying Interests of the sites was identified on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described. It is submitted that the site-specific mitigations identified in the AA Report and Determination Statement were attached as conditions of the licence issued and that the proposal either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. Regarding water quality and the water framework directive the DAFM submits that they apply 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) and that 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 and examples of such measures are provided. The DAFM submitted details of the public consultation process provided for in the processing of an application. 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 statement further contends that the Appellant of FAC599/2020 had requested files for 451 licences, that they had been provided with the information requested on 11/08/2020 and that a number of licences had subsequently been appealed. Regarding the use of plant protection products (PPPs) the DAFM submit that this 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). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products.

An oral hearing was held at which representatives of the DAFM restated the contention that the proposal is for felling and replanting with no change in land use and was not a class of development covered by the EIA Directive and does not comprise deforestation. The processing of the application and the information supplied by the Applicant and the appropriate assessment process were described and the associated measures outlined. It was submitted that the measures and screening process were developed by an ecologist and that the appropriate assessment was undertaken with review by an ecologist. The referrals made to statutory bodies were described and it was submitted that Inland Fisheries Ireland had requested that felling guidelines would be adhered to and that their officers be contacted prior to felling commencing and the DAFM submitted that the responses are reflected in the licence conditions which were included to facilitate the statutory function of the referral bodies. An 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. It was suggested that reforestation could not occur without deforestation having taken place and reference was made to the definition of a forest and the protections provided to forests under the Forestry Act 2014. The Appellant further submitted that the

appropriate assessment was not sufficiently detailed regarding the bird species associated with Wicklow Mountains SPA and the otter, a qualifying interest of the SAC. It was submitted that all of the activities associated with the proposal were not considered. The Appellant submitted that they did not know the site directly and that their contentions were based on a desk assessment. The Applicant's representative submitted that they agreed with the appropriate assessment undertaken by the DAFM. They submitted that the land generally drains into the Glenree river and enters the sea at Bray. They submitted that the proposal does not comprise deforestation and is not covered by the EU EIA Directive. They submitted that there are recreational trails in the area and that safety signage would be erected and that parts of the forest will be closed to the public in line with the licence.

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 Forestry Regulations 2017, 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 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 20 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 4.68 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.

In regard to the protection of birds and animals, 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. The licence conditions include specific exclusions of activities and measures in relation to the bird species associated with Wicklow Mountains SPA.

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 undertook a Stage 1 screening in relation to eleven Natura 2000 sites. In considering the appeal, the FAC

examined publicly available information on European sites on the website of the EPA and identified the same eleven sites within 15km and having regard to the scale, nature and location of the proposal is satisfied that this radius did not need to be extended in this case. The area around the forest drains into the Glenree river to the north which flows easterly and enters the sea at Bray and does not enter any European site. The forest is situated at a considerable remove from nine of the identified site and lies outside but adjoining the Wicklow Mountain SAC and SPA and a stream rises to the east of the site. The DAFM considered each site in turn and provides reasons for its screening decision in each case. The grounds of appeal do not identify any specific concerns regarding specific European sites or effects considered at the screening stage. Having regard to the nature, scale and location of the proposal the FAC considers that no serious or significant errors were made in screening the project for appropriate assessment. The DAFM prepared an appropriate assessment report and determination that considered potential effects on Wicklow Mountains SPA and SAC. The DAFM submitted that appropriate assessment was undertaken on a precautionary basis in this case. The AA report identifies potential impacts on specific special conservation interests and qualifying interests and identifies associated mitigation measures. The report goes on to identify the Environmental Management Framework that the operations would be undertaken within and Site Specific Mitigation Measures to be attached to the licence. While an Appellant questioned the measures no convincing evidence that contradicted the scientific basis of the appropriate assessment was provided. The FAC also considered that the measures were developed by ecologists and that the report was undertaken with ecological input. An AA Determination was also produced that provides an overview of the screening and appropriate assessment and the associated mitigation measures to be attached to the licence conditions. The FAC noted that while most of the mitigation measures were subsequently attached to the licence, adherence with the Forestry and Otter guidelines (DAFF,2009) was not included. As this is expressly identified as a mitigation measure in both the AA Report and Determination the FAC is satisfied that this constitutes a serious error in the making of the decision in relation to the appropriate assessment.

Regarding other licence conditions the FAC considered that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied that the licence conditions reflect the submissions from referral bodies, both the County Council and Inland Fisheries Ireland and provide an acceptable level of protection for water and requires the erection of safety signage and the closing of parts or all of the forest used for recreation as outlined in the Standards for Felling and Reforestation. Aside from the conditions related to appropriate assessment as noted, the FAC is satisfied that a serious or significant error or series of errors were not made in the decision-making process regarding licence conditions.

The DAFM contended that an Appellant had made a submission on the application and had also 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, 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 concluded that the decision of the DAFM regarding WW02-FL0083 should be set aside and remitted to the Minister to attach licence conditions that include all the measures identified as necessary in their appropriate assessment.

Yours sincerely,

Vincent Upton On Béhalf of the Forestry Appeals Committee