



[REDACTED]

26<sup>th</sup> November 2020

**Subject:** Appeal FAC173/2020 regarding licence WW06-FL0242

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**

Licence WW06-FL0242 for felling and replanting of 7.04 ha at Tuckmill Upper, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 11<sup>th</sup> March 2020.

#### **Hearing**

An oral hearing of appeal FAC173/2020 was held by the FAC on 5<sup>th</sup> November 2020. In attendance:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Bernadette Murphy, Mr. Vincent Upton

Secretary to the FAC: Ms. Ruth Kinehan

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 WW06-FL0242.

The licence pertains to the felling and replanting of 7.04 ha at Tuckmill Upper, Co. Wicklow. The forest is currently comprised of Sitka spruce and Japanese larch and the site would be replanted with Sitka spruce. The site was planted in 1971 and 1973 and is described as being on a steep slope and on mineral soils, comprised of lithosols and regosols. The forest lies in the Slaney (050) river basin. The proposal was referred to Wicklow County Council which replied that the felling was in the Blessington area and that there were no issues arising. The proposal was also referred to Inland Fisheries Ireland which replied that the proposal was in the headwaters of the Slaney River which is an important salmonid river

and that the river was a candidate special area of conservation. They further submitted that the cumulative effects of clearfelling operations, including the proposed felling, must not result in damage to downstream waters or any loss of biological water quality and that extra care should be taken in this regard. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application. The DAFM undertook and documented an appropriate assessment screening that found five European sites within 15km and found that there was no reason to extend this radius in this case and that the proposal would not give rise to the possibility of a significant effect on a European site itself or in-combination with other plans and projects. The licence was approved with a number of conditions attached which related to water and the environment generally and is exercisable until 31<sup>st</sup> December 2022.

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 EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. It is also submitted that the Forest Service failed to supply an EIA screening of the project when requested. The grounds also contend that the AA screening determination is flawed in respect of Slaney River SAC. It is submitted that licence conditions contain duplications and 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. It is contended that the Forest Service failed to provide a copy of the application when requested and that this represented a breach of Regulation 10 (3) of the Forestry Regulations 2017.

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 the appropriate assessment screening the DAFM submitted that their procedures had been followed and that Slaney River SAC had been screened out *"due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise"*. They submitted that duplicate conditions on a licence as a result of a clerical error were inconsequential. 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 had requested files for 451 licences and that a number of licences had subsequently been appealed. The statement goes on to describe the appropriate assessment procedure adopted by the DAFM in processing the licence and notes that a number of qualifying interests had been truncated on the original document but that the screening was sound. It is further submitted that the screening relied on information from the Applicant in relation to the consideration of the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequent to the licence being issued which was consistent with the first screening.

An oral hearing was held at which 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 and that such areas would be defined as non-forest areas in the CORINE land cover map coordinated by the EU EPA. They further submitted that the licence conditions did not provide sufficient protection for birds in line with EU legislation and that National legislation was lacking in this regard. The Appellant did not submit any evidence regarding species that related to the specific decision under appeal and submitted that their appeal was made based on a desk assessment of the proposal. They contended that the licence conditions did not include any reasons and were included to avoid damage on water quality as a result of the submission from the IFI. They suggested that the site was at risk from landslide and would threaten water quality and reference was made to a dataset prepared by the Geological Survey of Ireland. They submitted that the application should have been referred to the NPWS in relation to the SAC and that the referral system was flawed and unclear. The Applicant submitted that the proposal does not include any deforestation or land use change while noting that the application did include small unplanted areas. They suggested that their environmental officers undertake routine assessment of felling and other proposals, including considerations of habitats and environmental features, and had considered the site and did not identify any risk to water. They contended that the site had been visited after the appeal was made and that there was no hydrological connection between the forest and the SAC and that the marked stream to the south/southwest was found to be dry. They contended that surface runoff, were it to occur, could not reach a watercourse given the distance and intermediate land use. They submitted that the area of forest to the south of the proposal had been felled and replanted thirteen years previously and that a forest road is in place with extraction to the north of the proposed felling. They submitted that the amber rating noted on the application was generated through an automated system and probably related to proximity to the SAC and that an Environmental Officer had subsequently examined the application and determined that there was no connection with the SAC. They also submitted that the old forest category noted on their maps refers to areas where forests are present on historic Ordnance Survey maps and that the current forest was planted in the 1970s and is composed of commercial species. The DAFM reasserted their contention that the proposal does not include a class of project covered by the EIA Directive or National legislation and does not constitute deforestation or land use change. They submitted that the conditions on the licence referred to water quality generally and were

not included as measures to reduce effects on an SAC. They contended that there was no hydrological connection with the SAC. They submitted that the condition that referred to WW06 FLO085 was included for reasons of visual amenity and that this stand is situated to the northwest of the licensed area and provided details of other forestry licences in the area.

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 decision under appeal relates to a licence for the felling and replanting of an area of 7.04 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 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. The licence conditions include a repetition of lettering but the FAC considered this to be an obvious clerical error and that it should not affect the overall decision.

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 five 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 following sites within 15km of the proposal and approximate distances Slaney River Valley SAC 0.6km, River Barrow and River Nore SAC 8.6km, Wicklow Mountains SAC 11.3km, Wicklow Mountains SPA 11.9km, Holdenstown Bog SAC 4.8km. As noted by the DAFM River Barrow and River Nore SAC is in a separate catchment, the Barrow Catchment, to the west and there is no hydrological connection with the proposal. Holdenstown Bog SAC 4.8km lies to the south and the DAFM states that there is no pathway of effects. Wicklow Mountains SAC and SPA lie to the northeast at over 11km and the DAFM

screen these sites out based on an absence of hydrological distance, degree of separation and absence of pathway of effects. In relation to the Slaney River SAC, the DAFM screened this site out for appropriate assessment *“Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise”*. The Appellant referred to the observations made by Inland Fisheries Ireland and contended that a risk of surface runoff could threaten the SAC. The FAC considered that the observations made by Inland Fisheries Ireland do not identify a particular pathway of effect but highlight the general sensitivity of the headwaters as a whole and the nature of such proposals. The FAC noted that many of the qualifying interests of the SAC are aquatic species that rely on high levels of water quality. An EPA marked stream is present some 150 metres to the south and southwest of the proposal and is separated by semi-mature forest, which would contain a high number of trees, and agricultural land. At its closest point to the forest this stream or drain is 560 metres from the SAC. A dataset prepared by the Geological Survey of Ireland classifies the proposal area as being at a moderately high to high risk of landslide susceptibility while no landslides have been documented in this area. The slope of the land is steeper to the east of the site and an existing forest road adjoins the western boundary. The FAC concluded that there was no evidence of a direct hydrological connection between the proposal lands and a watercourse and also that the scale of the proposal, degree of separation and intermediate land use would result in their being no likelihood of surface runoff reaching a watercourse were it to occur. While there are two forest types listed as qualifying interests of the SAC, including old oak woodlands, the felling would occur in a managed, mixed coniferous forest planted in the 1970s and would not meet the definition or criteria of the habitats listed as qualifying interests. Based on the evidence before it, the FAC is satisfied that it can be concluded that the proposal itself would not be likely to result in significant effects on a European site.

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. A condition of the licence relates to a separate felling block, WW06-FL0085, which is described as being adjacent to the proposal. At the oral hearing this was identified as being to the northwest of the proposal and that the condition related to visual amenity. The FAC is satisfied that the failure of DAFM to carry out a satisfactory in combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

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

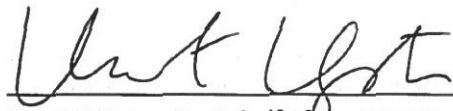
*(3) The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in 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 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 made a submission on the application and 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 WW06-FLO242 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,



Vincent Upton On Behalf of the Forestry Appeals Committee