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25<sup>th</sup> February 2021

**Subject:** Appeal FAC 698/2020 regarding licence CE05-FL0109

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 CE05-FL0109 for a tree felling licence on a site of 13.83 ha at Cloongaheen West, Gortatrassa, Killokennedy, Co,Clare , was approved by the Department of Agriculture, Food and the Marine (DAFM) on 21<sup>st</sup> of August 2020.

#### **Hearing**

An oral hearing of the above appeal, of which all parties were notified and representatives of the DAFM and the Applicant attended, was held by the FAC on the 3<sup>rd</sup> of February 2020.

#### **In Attendance at Oral Hearing:**

Department Representative(s):

Mr. Frank Barrett, Ms. Eilish Keogh,

Appellant:

Applicant / Representative(s):

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway, and Mr. Seamus Neely.

Secretary to the FAC:

Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions received including at the oral hearing, clarifications obtained, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CE05-FL0109.

### **Summary of Departmental File**

The licence pertains to the felling and replanting of forest on 13.83 ha at Cloongaheen West, Gortatrassa, Killokennedy, Co,Clare. The application was dated the 2<sup>nd</sup> of December 2019 and indicates that the majority of the current stock was planted in 1977, with additional stock planted in 1987 and 1994. Most of the current planting is Sitka Spruce, with some Lodgepole Pine and a small area of scrub. Restocking is to be of Sitka Spruce (90%) and Lodgepole Pine (10%). The application includes site maps, a harvest plan and AA Pre-screening report. A standalone pre-screening report and a Natura Impact Statement (NIS), prepared by the applicant and dated the 30<sup>th</sup> of July 2020, are also on file. The NIS considers the Slieve Bernagh Bog SAC [2312] and considers each of the Qualifying Interests for the site and concludes that no mitigations are required arising from the proposed site activities. It also identifies European sites with a Downstream Hydrological Connection and concludes that none of these need to be considered by the NIS.

The site is described by DAFM in an Appropriate Assessment Screening as follows: having an underlying soil type made up of approximately Blanket Peats (54%), Peaty Gleys (39%), Podzols (Peaty), Lithosols, Peats (7%) & Surface water Gleys (Shallow), Ground water Gleys, (Shallow) (1%); a slope that is predominantly moderate (0-15%); a habitat that is predominantly conifer plantation (WD4). The project is described as being located in the Shannon catchment (100%), the Owenogarney\_Sc\_010 (100%) Sub-Catchment and proximate to the Owenogarney\_020 (100%) Waterbody.

A submission from the appellant dated the 3<sup>rd</sup> of January 2020 is on file. The proposal was referred to Clare County Council and no response was received. The licence issued has conditions a) through s). All contain reasons for their inclusion.

### **Screening for Appropriate Assessment and EIA.**

An Appropriate Assessment Screening Report prepared by the DAFM District Inspector, dated the 11<sup>th</sup> of August 2020, is on file. This identifies 9 Natura sites within 15 km, and a further site (the Lower River Shannon SAC) which was added by the Inspector for screening. The following sites are screened out: Danes Hole/Poulnalecka SAC [0030], Glenomra Wood SAC [1013], Slieve Aughty Mountains SPA [4168], Kilkishen House SAC [2319], Lough Derg (Shannon) SPA [4058], Ratty River Cave SAC [2316], Glendree Bog SAC [912], and Newgrove House SPA [2157]. Two sites are screened in for Appropriate Assessment: Slieve Bernagh Bog SAC [2312] and Lower River Shannon SAC [2165].

An Appropriate Assessment Determination prepared by an Ecologist on behalf of the Minister and dated the 18<sup>th</sup> of August 2020 is also on file. This observes that the NIS prepared by the applicant has screened out all sites but goes on to maintain that good practice in the locality is required to ensure significant sedimentation, siltation and nutrient leaching does not escape the site ultimately leading to the Lower River Shannon SAC [2165]. It goes on to list several mitigation measures to achieve this goal for inclusion in the licence.

## **Grounds of Appeal**

The decision to grant the Licence is subject to one appeal.

The grounds of appeal include: a need for clarification whether a forest road licence installed circa 2006 was subject to EIA and AA screening, and whether retrospective assessment is required; that a breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out a screening for EIA; that the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework Directive River Basin Management Plan for Ireland 2018-2021; that there is an absence of evidence that the impact on a non-designated European Annex I habitat has been adequately considered as part of the approval process; that the Appropriate Assessment Determination is inadequately presented, and it is not possible to determine from the document whether a legal determination has been made; that the mitigations presented in the Appropriate Assessment Determination (and consequently the licence) are not adequate to ensure compliance with Article 6(3) of the Habitats Directive; that residual effects from the project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed; that the AA in-combination assessment is flawed as the regulatory systems in place for the approval, operations and monitoring of the effect of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives; that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination; that the harvest plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation; that the Forest Service failed to supply, on request, in an appropriate timeframe, relevant records (including a copy of the licence) that have informed its decision to award this licence, as would be required under the EIA Directive; that the licence conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the overall environmental regulatory framework, including Article 6(3) of the Habitats Directive; that 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; that the licence conditions that do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, reading hibernation and migration; that the licence should contain a condition to notify the Minister of the commencement and conclusion of operations; that the licence should contain a condition that plans and works must be inspected by the Forestry Service prior to, during and post works; that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

## **Consideration by FAC**

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the Statement of Fact provided by the DAFM (dated the 30<sup>th</sup> of December 2020), and the record of the application and licensing process. The FAC also consulted with several publicly available information sources such as mapping from the EPA, the DAFM and the OSI. These indicate that the Owengarney\_020 river passes through the site, while OSI aerial imagery shows well developed roads in the site.

In the first instance, the FAC considered the first ground of appeal, that there is a need for clarification whether a forest road licence installed circa 2006 was subject to EIA and AA screening, and whether retrospective assessment is required. At oral hearing the applicant stated that a road that travels from the southern tip of the site which travels north west before veering east is a long established road that was in place before the establishment of the plantations. A section of road to the north of the site was built in 2013 but is well under the 2km that would trigger the mandatory submission of an EIAR. The DAFM Statement of Fact asserts that consideration of this appeal is confined to licence CE05-FL0109. The FAC considers that no evidence has been presented to suggest that the status of the roads on the site are relevant to the appeal at hand.

The FAC considered the contention set out in the grounds of appeal 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 is 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 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 13.83 ha. 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 Irish Regulations and therefore considered that a breach of Article 4(3) had not occurred.

In relation to the contention in the grounds of appeal that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the FAC notes the Statement of Fact from DAFM wherein it outlines the checks and balances that DAFM

applies during the 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)*. The FAC notes that the proposal was referred to Clare Co. Council and that no reply was received. Examination of EPA WFD Catchment data by the FAC indicates that the Owenogarney\_020 Waterbody has an ecological water status designation of Good, and that the licence contains conditions designed to protect the water body during felling and replanting operations. Having regard to the information available to it, the submissions and clarifications made to the oral hearing, and having examined the relevant maps and data publicly available on the EPA website, the FAC is satisfied that the proposal does not pose a significant threat to water quality.

When considering the ground that there is an absence of evidence that the impact on a non-designated European Annex I habitat has been adequately considered as part of the approval process, the FAC had regard for the Statement from the DAFM. This outlines that the lands to the south of site are part of the Coillte landholding, while public mapping and the licence application indicates that other surrounding areas are conifer plantations. No evidence was presented to the FAC of any non-designated European Annex I habitat that may be impacted. The FAC is satisfied no error was made in this regard in the granting of the licence.

The grounds of appeal state that the Appropriate Assessment Determination is inadequately presented, and it is not possible to determine from the document whether a legal determination has been made. In assessing this ground, the FAC considered the Statement of Fact presented by the DAFM which summarises the process followed by that Department in arriving at the Appropriate Assessment Determination as having been as follows (the dates of which are contained in the section of this letter entitled *Summary of Departmental File* above). It outlines that on receipt of an application from the applicant, this was considered together with the applicant's pre-screening report and the methodology used for its preparation which was also supplied to the Department by the applicant. The application was considered in line with the Department's own procedures and was subject to an Appropriate Assessment Screening (AAS) which considered European sites within a 15km radius of the proposed site. This resulted in two European sites being screened in for Appropriate Assessment, namely the Slieve Bernagh Bog SAC [2312] and the Lower River Shannon SAC [2165]. The applicant submitted a Natura Impact Statement (NIS) to assist the Minister to carry out the Appropriate Assessments of the project, which considered *inter alia* residual effects and in-combination plans. The Department then carried out an Appropriate Assessment, the results of which are recorded in an Appropriate Assessment Determination (AAD) prepared by an Ecologist.

At oral hearing it was confirmed by the applicant that this NIS was submitted of the applicant's own volition, and that the NIS was considered critically by the DAFM and an AA Determination was arrived at based on the information contained in the NIS and other expertise available to the Minister. The FAC notes that the applicant's NIS screened out the Lower River Shannon SAC, in contrast to the Department's AAS which screened that site in for Appropriate Assessment, and that in respect of the

Slieve Bernagh Bog carried out a review of each of the qualifying interests and identified no mitigating activities as being required. The AAD refers to the Applicant's NIS and the Department's own AAS. The FAC further notes that the AAD states that:

*While the NIS screens out all sites we have maintained that good practice this locality is required to ensure sedimentation, siltation and nutrient leaching does not escape the site effecting ecology downstream ultimately leading to the Lower River Shannon SAC.*

The FAC is satisfied with the view put forward at Oral Hearing by the DAFM that the reference to all sites being screened out in the AAD refers to the fact that the NIS screened out the Lower River Shannon SAC and identified no mitigations for the Slieve Bernagh Bog. The Appropriate Assessment undertaken by the DAFM requires the insertion of conditions in the licence to ensure that the project will not adversely affect the integrity of the Lower River Shannon. The FAC is satisfied that both the NIS and AAS were considered in reaching the determination, and indeed that the fact that the AAD includes more stringent mitigations than proposed in the NIS is evidence of the independent nature of the Determination arrived at by the DAFM. The basis for these mitigations is well reasoned in the AAD, and therefore, the FAC is not satisfied that the AAD is inadequately presented.

Similarly, with regard to the ground that the mitigations presented in the Appropriate Assessment Determination (and consequently the licence) are not adequate to ensure compliance with Article 6(3) of the Habitats Directive, the FAC is satisfied that the process outlined by DAFM in the Statement of Fact and at Oral Hearing was correct and the mitigations identified ensure that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The FAC considered the process operated by the DAFM, as outlined at oral hearing, in conducting an Appropriate Assessment when considering the ground of appeal that the AA in-combination assessment is flawed as the regulatory systems in place for the approval, operations and monitoring of the effect of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. Under Article 6(3) of the Habitats Directive, a 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 addition to consideration of each Natura Site within a defined search radius, and the qualifying interests and conservation objectives in each case, a Stage 1 assessment identified, described and considered other plans and projects considered in-combination with the proposal. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal itself, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC considers the terms of the granted licence to be appropriate, and as described elsewhere in this decision that the licence conditions described by the appellant in other grounds are not required.

The FAC also has regard to the assertion in the Statement of Fact that the DAFM has no regulatory or licencing role in regard to the other non-forest plans and projects considered in the in-combination assessment. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM determination concludes that;

*“the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats Regulations 2001 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended) based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.*

Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

The grounds submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, archaeological features, designated sites and other environmental features. The Statement of Fact provided by the DAFM to the FAC asserts that application and associated information as submitted by the applicant in support of the applicant was considered and deemed by the DAFM as meeting that Department’s requirements. The FAC is satisfied that the Harvest Plan submitted with the application is sufficient to inform the decision-making process in this case.

In relation to the ground that the Forest Service failed to supply, on request, in an appropriate timeframe, relevant records (including a copy of the licence) that have informed its decision to award this licence, as would be required under the EIA Directive, the FAC considered the contents of the DAFM Statement of Fact. This notes that the decision in relation to this licence was made on the 21<sup>st</sup> of August 2020, and was advertised on the DAFM website on the 24<sup>th</sup> of August. In normal course those making a submission to the licence process such as the appellant in this instance should be notified of the decision being made, which on this occasion did not occur. A period of 21 days is allowed under legislation from a decision being made for an appeal to be made to the FAC. In the case of this appeal, an appeal was received by the FAC dated the 4<sup>th</sup> of September which is 14 days following the date of submission. Having considered the particulars of the above, the FAC is satisfied that the appellant was able to bring an appeal to the FAC on the particulars of the licence and was not materially disadvantaged as a result.

In relation to the appellants stated grounds of appeal that 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 FAC had regard for the statement provided by DAFM and agrees that the granting of a license does not preclude or remove obligations under other legislation. The FAC also had regard to the statement by the DAFM , in consideration of the grounds of

appeal relating to the requirements of Article 12 of the Habitats Directive and that the licence conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the overall environmental regulatory framework, including Article 6(3) of the Habitats Directive. The DAFM submit that there are site-specific mitigations identified in the AA Determination Statement, and that relevant environmental guidelines, requirements and standards are also referred to in the licence. The FAC is satisfied that these were attached as conditions of the licence issued, and that all conditions include a reason for their inclusion.

Regarding the submission in the grounds of the appeal that certain conditions should be attached to the licence, including those relating to notification and inspections specific to this licence, the FAC considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in the grounds of appeal in this case, is not required.

In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM.

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds in the appeal, other submissions received, the submissions made and clarifications obtained at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. In deciding to affirm the decision of the Minister regarding licence CE05-FL0109 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

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John Evans On Behalf of the Forestry Appeals Committee