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26th February 2021

Subject: Appeal FAC241/2020 in relation to felling licence DL21-FL0054

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

Felling licence DL21-FL0054 was issued by the DAFM on 1st May 2020.

Hearing

An oral hearing of appeal FAC241/2020 was held by the FAC on 19th January 2021. Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Pat Coman, Ms Paula Lynch & Mr Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Luke Middleton & Ms Eilish Kehoe

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant felling licence DL21-FL0054.

The licence granted is for the clearfell and replanting of 9.06ha at Croaghonagh, Co.Donegal. The species to be felled comprises 3.74ha Sitka spruce and 3.66ha of Lodgepole pine. A plot of 1.66ha described as bare, plantable area with incidental trees is also included. The restock species applied for is 100% Sitka spruce with 0.45ha of open space retained. The underlying soils are approximately 83% Blanket Peats and 17% Podzols (Peaty/ Lithosols/Peats) on a moderate slope facing north. The project lands are in the Foyle Catchment, the Finn[Donegal]_SC_040 Sub-Catchment and the Burn Darnett_010 River Sub-Basin. The Burn Darnett_010 is not a High Status Objective Waterbody, it is rated as 'Poor' and 'At Risk' by the Environmental Protection Agency (EPA).

The Applicant submitted a harvest plan document, inventory data, maps, and an Appropriate Assessment (AA) Pre-Screening Report which included 7 Natura sites (6 SACs & 1 SPA). The DAFM undertook and documented an AA screening (AAS) (dated 30th April 2020) that found 7 Natura sites (6 SACs & 1 SPA) within 15km and found that there was no reason to extend this radius in this case. The DAFM's AAS screened out all 7 Natura sites for the reasons stated below:

- **River Finn SAC (002301) and River Foyle and Tributaries SAC (UK0030320)**
 - Having considered the expert opinion and the rationale presented in the Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, DAFM has concluded that there is no likelihood of the project itself (i.e. individually) having a significant effect on this European site.
- **Lough Eske and Ardnamona Wood SAC (000163):**
 - Due to the location of the project area within a separate water body catchment to that containing the Natura site (Donegal Bay North Catchment), with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.
- **Croaghonagh Bog SAC (000129), Dunragh Loughs/Pettigo Plateau SAC (001125), and Moneygal Bog SAC (UK0030211):**

- Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- **Lough Derg (Donegal) SPA (004057):**
 - Due to the separation distance between the Natura site and the project (c.14.7km).

The DAFM completed an in-combination assessment (dated 1st May 2020) which consulted various planning websites and their own records of other forestry projects in the general vicinity of the proposed development. The DAFM concluded that the proposed project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed in the AAS.

The DAFM referred the application to the Donegal County Council and Inland Fisheries Ireland (IFI). The County Council did not respond and IFI responded 23rd December 2019 stating the application site was in the jurisdiction of the Loughs Agency.

The licence issued on the 1st May 2020 and is exercisable until 31st December 2022. It is subject to relatively standard conditions (a) to (g) plus additional condition (h) which requires the completion of a harvest plan prior to the commencement of felling.

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC, the following is a summary of the issues raised:

- Breach of Article 4 (3) of the EIA Directive - failure to carry out screening for EIA
- Breach of Article 4 (4) of the EIA Directive - this application has not described any aspects of the environment which are likely to be significantly affected.
- Breach of Article 4 (4) of the EIA Directive - project splitting is not allowed.
- No evidence that a nationally designated site has been considered as part of the approval process.
- Inadequate consideration of the objectives of the WFD River Basin Management Plan. This site is in the catchment of the Burn Darnett_010 which is in the Finn (Donegal) priority Area for Action under the Water Framework Directive (WFD) River Basin Management Plan and is listed as a catchment with an extant population of Freshwater Pearl Mussel (FPM).

- AA screening conclusion is flawed - The site is upstream and in the catchment of the River Finn SAC (2301). The project site is less than 300m from an EPA watercourse which connects to the SAC. On the basis of the Stage 1 AA it cannot be excluded that the project will have a significant effect on the site and Stage 2 AA is required.
- 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 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.

The DAFM responded to the Appellant's grounds of appeal in a written statement to the FAC. This submission was considered in full by the FAC and is summarised below:

- **Article 4(3) of the EIA Directive** requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable.
- The application site is located immediately to the north of Meenagarranroe Bog NHA. The northern section of the NHA itself contains areas of Coillte conifer forest planted in the 1970s and 1990s. This NHA was designated in 2005. The proposed development is located directly adjacent to existing conifer forest areas within the bounds of the NHA. While the National Parks & Wildlife Service (NPWS) site synopsis (<https://www.npws.ie/sites/default/files/protected-sites/synopsis/SY002437.pdf>) states that the main threats to the site are from damaging activities associated with forestry development and peat extraction, particularly drainage and burning, there is no specific mention of re-seeding representing a threat to this bog.
- The DAFM 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 (2018)*. Regarding consultations, referrals to statutory consultees, including IFI & the National Parks & Wildlife Service and local authorities, 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. As set out in Forests & Water, DAFM has developed considerable experience in relation to the protection of water during the forestry licensing process, and is actively engaged in the WFD process, contributing proactively to both the 2nd cycle and the 3rd cycle, the latter currently under development. Therefore, while referrals are an important part of the evaluation process, the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD.

- Regarding evaluating the application for DL21-FL0054, supporting information submitted by the Applicant was considered during the licencing process. Standard procedures were followed in respect issuing referrals for this licence application. The 9.06 ha felling and reforestation project licenced as DL21-FL0054 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The related AA screening document is on file. AA screening was carried out by DAFM for European sites within 15 km from the clearfell and reforestation project submitted for licencing.
- 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.
- The use of plant protection products (PPPs) in Ireland, 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.

The FAC held an Oral Hearing on the 19th January 2021. The FAC members sat in person and remotely at this hearing. The Appellant, the Applicant, and the DAFM all participated remotely. The DAFM detailed the process of deciding to grant the licence following a desk assessment. The Applicant stated they had completed a site visit on 23/10/2020 and described the site as being generally dry underfoot with an

intermediate northerly slope. They stated there is one relevant watercourse which bisects the site and exits the north-east edge, flowing c.400m to the (Burn)Daunett River which then flows c.6.7km to the River Finn SAC. The Applicant stated that there would be no change of land use and that the adjacent NHA (002437) would be protected from impact by their adherence to good forestry practice as per the guidelines prescribed in the licence conditions.

The Appellant stated that the site is on 83% Blanket peat and adjacent to an NHA for which damage from forestry operations is described as a main threat. They stated that colonisation by Sitka spruce could impact the NHA and there was no evidence of the DAFM assessing this. They also stated that Meenagarranroe Bog is home to Irish Red Book bird species which are entitled to protection. The Appellant stated that the IFI response directed the DAFM to the Loughs Agency but that this hadn't been addressed in the DAFM's statement to the FAC and that the DAFM failed to consult the National Parks & Wildlife Service (NPWS). They stated that the licence does not contain any conditions to protect water quality and contended that the hydrological connection which the Applicant had identified is not visible on any maps, indicating that a desk assessment by the DAFM was not sufficient. The Appellant stated that the hydrological distance between the application site and the River Finn SAC was listed as 7.5km in the Applicant's AA Pre-Screening Report and c.7.1km in the Oral Hearing and contended that this report only lists data but does not state the scientific basis for its conclusions. The Appellant stated that aquatic qualifying interests (QIs) of the River Finn SAC had been screened out based on separation distance but that this does not rule out the possibility of a significant effect on these QIs.

The FAC queried the DAFM as to how the harvest plan required by condition (h) is managed. The DAFM stated that the harvest plan is primarily to inform operators on-site of the relevant environmental features and that it would not necessarily be supplied to the DAFM unless requested during or following a site inspection. They stated that they do not carry out mandatory checks on felling licence operations. In response to questions by the FAC, the Applicant confirmed that the 1.66ha "bare" plot in the proposed area was included to allow them remove residual individual trees. Responding to FAC questioning, the DAFM were unable to confirm if thinning licences were included in their In-Combination Report but stated that all clear-fell licences had been. They stated that there was no established procedure for referral to the Loughs Agency at the time of processing the application but that one was being developed more recently. The DAFM indicated that the application had not been referred to the NPWS as the project site was not within the NHA, in line with procedures. Responding to the FAC, the Appellant stated that NPWS data listed the Burn Daunett_010 as a catchment for an extant population of FPM and that a suggested 200m buffer zone to prevent Sitka spruce colonisation of

protected areas was based on a Norwegian study. In response to FAC questions, the DAFM confirmed that the River Finn SAC had been screened out for AA based on the rationale in the Applicant's Pre-Screening Report and the separation distance. The FAC queried the DAFM's assessment of potential impacts on the adjoining NHA, particularly in relation to the species listed in the NPWS's site synopsis. The DAFM stated that only the physical disturbance of the NHA had been considered and that the area of NHA currently under conifers had been planted prior to its designation. They indicated that, prior to felling that area, the Applicant would need to notify and consult the NPWS as such operations would constitute a 'Notifiable Action'.

The Applicant contended that their Pre-Screening Report was based on scientific data and quoted a number of studies which supported their rationale for screening out based on separation distance. They stated that the 7.1km figure for hydrological connection to the River Finn SAC was based on field and desk assessment whereas the 7.5km figure in the Pre-Screening Report was an output of their digital elevation model which indicated the presence of a hydrological connection despite the lack of visible evidence for such. The FAC queried should the information required by condition (h) have been included with the licence application. The Applicant stated that the harvest plan is not a static document and that there are typically a number of years between the application and operations commencing. They stated the harvest plan informs all on-site operations but is changeable depending on factors like weather, fire damage, windblow etc. and that it is updated as needed from harvesting through to replanting. The Appellant submitted that the Pre-Screening Report does not reference the supporting studies mentioned by the Applicant, that off-site operations could impact the ecology of the NHA and that they believed the DAFM's In-Combination Report does include thinning licences but if it does not then that is a serious issue. They also stated that they believed the harvest plan should contain all relevant information that might influence the DAFM's assessment of the proposal.

Having regard to the grounds of appeal, the FAC considered 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 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 9.06ha. 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.

The FAC had regard to the Appellant's contention that there is no evidence that a nationally designated site had been considered as part of the approval process. The FAC noted the southern boundary of the proposed project is in relatively close proximity to the northern part of Meenagarranroe Bog NHA, separated by an area of conifer forest which is c.100m wide at its narrowest point. The NPWS site synopsis for this NHA describes the northern section as having several separate areas of very deep, intact blanket bog, surrounded by mature conifer plantation. Two of these areas are slightly domed and are completely undisturbed by human influences. They are un-grazed, except by small numbers of Red Deer, and undamaged by burning, drainage or peat cutting. The areas of intact blanket bog support a continuous cover of characteristic vegetation. The synopsis states the site hosts several Irish Red Data Book species, including Irish Hare, Hen Harrier, Golden Plover and Merlin, as well as a diverse dragonfly fauna. The main threats to the site are described as damaging activities associated with forestry development and peat extraction, particularly drainage and burning. The description further states that Meenagarranroe Bog NHA is a site of considerable conservation value due to the high state of integrity of the blanket bog habitat and the occurrence of particularly wet areas with notable and characteristic species. The FAC observed that the application site is on a moderate, generally northerly slope away from the NHA. The FAC noted the Applicant's evidence of a relevant watercourse leaving the project site at its north-east edge. The FAC observed the NPWS's description of the threat of forestry to the integrity of the NHA as being associated with drainage operations and that colonisation by conifers does not appear to be considered a threat in this instance. The FAC noted that the conifers present within the NHA are part of a plantation and that there is no evidence before the FAC to indicate that encroachment is an issue. The FAC also noted the description of the adjoining areas of intact blanket bog, where not subject to commercial forestry operations, as being in a state of high integrity. However, the FAC

considers that, in the particular circumstances of this case, a discretionary referral to the NPWS would have been beneficial.

The FAC considered the Appellant's grounds related to the WFD and the potential impact of the proposed development on the Burn Durnett_010 waterbody, including potentially effecting an extant population of FPM. The FAC noted the DAFM included conditions (a) and (b) on the felling licence which require adherence to the Forestry & Water Guidelines and the Interim Standards for Felling and Reforestation and prescribe water quality protection measures to be adhered to during operation. The FAC noted that the listed guidelines also require the establishment of water setbacks at replanting for the protection of water quality. Based on the information before it, the FAC considered that there is no convincing evidence to show that the DAFM had not given consideration to the potential impacts of the proposed project on water quality.

The FAC had regard to the Appellant's submission that the River Finn SAC should have been screened in for AA. The FAC noted that the DAFM relied on the Applicant's Pre-Screening Report in order to screen out this SAC. The FAC also noted the Applicant's evidence of a relevant watercourse leaving the site and providing a direct hydrological link to this SAC, and that this information became available following a field inspection after the licence had been issued. The FAC considered that the AAS of the River Finn SAC was undertaken without regard to the presence of a direct hydrological link to the River Finn SAC at c. 7.1 km and that this constitutes a significant error.

Regarding a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season, the FAC noted that the Appellant referenced the presence of several Irish Red Data Book species in the nearby NHA but did not provide any site-specific details in relation to any species of concern. The FAC noted the DAFM's submission that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute.

The FAC considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. The FAC noted the DAFM's contention that the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU 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 plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. On balance, the FAC concluded that there is insufficient basis on which to apply a condition related to spraying as contended by the Appellant.

In the above circumstances, the FAC considers that the DAFM made a significant error in the processing of this licence application by not adequately assessing the potential for the proposed project to have a significant effect on the River Finn SAC. As such, the FAC concluded that the decision to issue felling licence DL21-FL0054 should be set aside and remitted to the Minister to carry out a new AA screening of the proposed development regards Natura 2000 sites within a 15km radius, on its own and in combination with other plans and projects, and resulting from the screening conclusion, an AA if necessary, before making a new decision in respect of the licence.

Yours sincerely,

A large black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee