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24. February. 2021

**Subject:** Appeal FAC 610/2020 regarding licence no WW09-FL0163

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine (DAFM) in respect of licence WW09-FL0163

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 the parties to the appeal.

#### **Background**

Felling licence WW09-FL0163 was granted by the Department on 04.08.2020

An oral hearing of appeal FAC 610/2020 WW09-FL0163 was conducted by the FAC on 19.02.2021.

#### **Attendees:**

FAC: Mr Donal Maguire (Chairperson), Mr Vincent Upton, Mr John Evans & Mr Derek Daly

Secretary to the FAC: Ms Marie Dobbin

Applicant representatives: [REDACTED]

DAFM representatives: Ms Eilish Kehoe and Mr Anthony Dunbar

Notification and details were issued to the appellant, but the appellant did not attend the oral hearing

#### **Decision**

The appeal concerns a licence to fell 3.79ha of forest in Kilmagig Lower, Kilmagig, Co Wicklow. The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to grant this licence (Reference WW09-FL0163).

This project lies in a rural landscape in Kilmagig Lower and Kilmagig Upper, Co. Wicklow in the River Sub Basin Avoca. The River Sub Basin Avoca has approximately 27% forest cover which is higher than the national average of 11%. At 3.79 hectares the project is considered small in scale. The underlying soil type is described as being 5.42% Acid Brown Earths, Brown Podzolics and 94.60% Lithosols, Regosols.

The slope is predominantly Steep with a gradient of 15-30%. The habitat is predominantly coniferous plantation (WD4). The project is located in the Avoca catchment (100%), the Avoca\_Sc\_020 (100%) Sub-Catchment & the Avoca\_020 (100%) waterbody.

The application was referred to Wicklow Co Council on the 8<sup>th</sup> of September 2019 and to IFI on the 22<sup>nd</sup> of October 2019. Wicklow Co Council responded on the 6<sup>th</sup> October 2019, and did not raise any issues of significance other than noting that the water status in the Avoca catchment was classified as being 'bad', because of the history of mining in the area. IFI responded on the 26<sup>th</sup> of November 2019. They made no special comments and requested that standard water quality protection conditions be inserted into the licence and that their officers would be informed prior to the commencement of operations at the site.

The licence issued on 04.08.20 and is subject to standard conditions plus extra conditions stated to be in the interest of protecting sustainable forest management, residential amenity and conformance with a range of National Standards and Policies designed to protect the environment.

There is one appeal against the decision to grant the licence. *Inter-alia* the grounds contend that before granting a felling license, it was necessary for the Minister to establish the legitimacy of the actual forest, that the FS and the FAC have 'overruled' the Judgement of Finlay J, that 'incomplete' decisions should be returned to the forest service and that mitigation had been applied at the wrong stage of the AA process.

In a statement to the FAC, the DAFM submitted that Appropriate Assessment (AA) screening was carried out by DAFM for European sites within 15 km of the project on the 24<sup>th</sup> of July 2020 together with an in-combination assessment on the 30<sup>th</sup> of July 2020. The desk-based AA Screening report was completed by the DAFM Inspector and contains recommendations regarding screened European Sites. All QIs/SCIs were also considered during the screening exercise.

Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), DAFM determined that there was no possibility of the felling and reforestation project (WW09-FL0163) having any significant effect, either individually or in combination with other plans or projects, on Buckronev-Brittis Dunes and Fen SAC IE0000729, Vale of Clara (Rathdrum Wood) SAC IE0000733, Deputy's Pass Nature Reserve SAC IE0000717, Slaney River Valley SAC IE0000781 and Magherabeg Dunes SAC IE0001766 due to the location of the project area being within a separate water body catchment to that containing the Natura sites, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise. Kilpatrick Sandhills SAC IE0001742 was also screened out due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

The FAC held an oral hearing of the appeal on the 19<sup>th</sup> of February 2021. The DAFM participated electronically as did a representative of the applicant, the appellant was not represented.

The DAFM submitted its view that the proposed project did not constitute an activity covered by the EIA Directive. The DAFM further contended that the project design, together with adherence to the conditions set out in the licence, would ensure that potential residual impacts would not arise and that



the project will not prevent or obstruct the Qualifying Interests/ Special Conservation Interests of the relevant European sites. The Applicant described the application details and the proposed activities.

In addressing the grounds of appeal, the FAC considered, in the first instance, the question of the 'legitimacy' of the forest, it was noted that the forest had been planted in 1954 and no evidence had been submitted to the FAC to suggest an absence of 'legitimacy' of the forest.

With regard to the application of mitigation measures, the FAC noted that condition K of the licence contained a stipulation that the applicant must adhere to a range of National Standards and Policies detailing acceptable practice for the activities concerned. The FAC did not consider these to be site-specific mitigation measures and did not conclude that the DAFM had erred in this regard.

The contention that the proposed development should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU), was examined. The FAC considered that 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 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 twenty 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 3.79 hectares. 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. Therefore, the FAC concluded that screening for EIA was not required in this case.

The FAC noted the procedures adopted by the DAFM in its screening, listing the qualifying interests and conservation interests for each site and assessing the project design, location of the project and possible pathways to the listed designated sites. The FAC consulted publicly available information from the EPA and NPWS and identified the same six sites as the DAFM which does not include any Special Protection Areas. The closest watercourse to the forest lies c.180 metres to the south and there is no evidence of a hydrological connection to this watercourse and it would not be affected by the felling. This watercourse, Kilmagig Upper, flows to the Avoca and enters the sea at Arklow and does not pass through any European site. The proposal involves the felling of a managed forest and there is no evidence of protected habitats or species being present on the site. The FAC concurs with the conclusions reached by the DAFM and is not satisfied that an error was made in the Appropriate Assessment screening undertaken.

The NPWS were not consulted and the appellant did not specify which particular elements of the NPWS 'submission document' the grounds refer to. The FAC could not determine any error on DAFM's part in this regard.

With regard to the other legal issues raised, the FAC noted that these were general in nature and not specific to WW09-FL0163 and as such there was no evidence of any error having been made concerning these grounds in arriving at the licence decision.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours Sincerely



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Donal Maguire on behalf of the Forestry Appeals Committee