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10 June 2021

**Subject:** Appeal FAC 021/2021 regarding licence DL30-FL0035

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 14A (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 DL30-FL0035 for clear-felling of 22.13ha, in Crocknacunny, Tievemore, Co Donegal was approved by the Department of Agriculture, Food and the Marine (DAFM) on 8 January 2021.

#### **Hearing**

A non-oral hearing of appeal FAC 021/2021 of which all parties were notified, was held by a division of the FAC on 8 June 2021

#### **In attendance**

FAC Members: Des Johnson (Chairperson), Luke Sweetman, Dan Molloy and Donal Maguire  
Secretary to the FAC: Michael Ryan

#### **Decision**

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to affirm the decision to grant this licence (Reference DL30-FL0035).

The proposal is for the clear-felling and restocking of a stated site area of 22.13ha at Crocknacunny, Tievemore, Co. Donegal. The current stock of Sitka spruce was planted in 1972 and 1974. The proposed restocking would be with 80% Sitka spruce (16.82ha) and 20% Lodgepole pine (4.20ha) and with 1.11ha open space provided.

The DAFM referred the application to Inland Fisheries Ireland (IFI) and Donegal County Council. There is no response from the IFI recorded. The FAC noted that the appropriate referral body in this case would be the Foyle & Carlingford Loughs Agency. The County Council responded on 28.09.2020 raising no objections but observing that the wider area contains a number of working farms, hillside forestry and a number of dwellings, there are no Tree Preservation Orders and no recent planning history of relevance, there would be no adverse impact on scenic amenities, there are no built heritage/conservation concerns and that, as the site is in close proximity to the River Finn SAC, regard should be given to the provisions of Article 6 of the Habitats Directive.

An Appropriate Assessment Pre-screening Report dated 06.11.2020 accompanied the application. This states that the site soils are predominantly Blanket Peat and the slope is gentle in a north-westerly direction. There is hydrological connection to the River Finn SAC (1.6km), River Foyle and Tributaries SAC (1.6km) and, at greater separation distances, Lough Foyle SAC (approximately 70km downstream), Bann Estuary SAC (approximately 80km downstream) and Skerries and Causeway SAC (greater than 80km downstream). The River Finn SAC and River Foyle and Tributaries SAC are screened in for Stage 2 Appropriate Assessment. The site is in the River Sub-Basin Owenboy Burn (1032.1ha) and this has 61% forest cover. In total, between 2016 and 2021, the proposed development would comprise 17.52% of a total of 180.85ha to be felled and restocked. There is a large area of Blanket Bog/Heath lying adjacent to the western boundary.

The applicants prepared a Natura Impact Statement (NIS) dated 06.11.2020. Following on from the Appropriate Assessment Pre-screening Report, the NIS carries out a Stage 2 Appropriate Assessment in respect of the River Finn SAC and the River Foyle and Tributaries SAC. The qualifying interests and conservation objectives for each designated site are listed and there is an examination of potential threats. The relevant qualifying interests for the River Finn SAC are Atlantic Salmon and the Otter, and the qualifying interests for the River Foyle and Tributaries SAC are Atlantic Salmon, Otter, and Watercourses of plain to montane levels. Site specific mitigation measures are recommended relating to exclusion zones for machinery, silt and sediment control during felling and reforestation, extraction and removal of felled timbers, brush management, reforestation, chemical use, and monitoring and contingency planning.

An Appropriate Assessment Determination (AAD) is dated 23.12.2020. The conditions recommended in the AAD are consistent with the recommended conditions in the NIS apart from extended setbacks to cater for the peaty nature of the soil type. A 20m setback is required in the interest of the protection of water quality and to ensure the protection of the European sites during restocking operations. The AAD concludes that the proposed development individually, or in combination with other plans and projects, will not adversely affect the integrity of any of the listed European sites, having regard to their conservation objectives and subject to compliance with recommended site-specific conditions. The mitigations relate to the protection of the adjoining/downstream aquatic based species and habitat, and the Otter.

A DAFM in-combination report is dated 17.12.2020. There are no non-forestry projects listed. Forestry projects (since 2015) listed are afforestation (1), forest roads (0), Private felling (0), Coillte felling (14). The licence was issued on 08.01.2021 and is exercisable until 31.12.2022. It is subject to standard conditions plus the site-specific conditions as per the AAD, including a 20m setback at reforestation.

There is a single appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- The FAC does not have an independent and impartial role as required by law.
- The restocking of the site has not been assessed, other than basic operational details. This is a serious error in the processing of the licence. The Appropriate Assessment does not contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on designated sites.
- Generic mitigations do not exclude the possibility of residual impacts and no alternatives to restocking have been assessed
- The site is in the River Sub Basin Owenboy Burn. There is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive (WFD). Based on a recent High Court judgment, the licence should not have been granted
- A proxy evaluation does not constitute compliance with the WFD. Specific steps in the architecture of the WFD must be followed. There is no evidence that the EPA has been consulted regarding the status of the waterbody.

In response, the DAFM state as follows:

- The FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process
- Sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands
- The Hyland JR decision is dated 10.01.2021. The licence pre-dates this. The appeal was submitted on 29.01.2021.
- DAFM applies a wide range of checks and balances during the evaluation of felling licence applications in relation to the protection of water. Adherence to specific measures in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD, and attached as conditions to the licence, ensure that the proposed development will not result in any adverse effect on any European site not on water quality or on waterbody status, regardless of hydrological connectivity.

At a hearing of the appeal held on 11 May 2021, the FAC considered the written grounds of appeal, and the response received from the DAFM. The appellant contends that the FAC does not have an independent and impartial role as required by law. There are no other arguments presented to substantiate this contention. The FAC operates under the Forestry Act 2001 as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The appellant contends that the restocking of the site was not assessed by the DAFM and that this represents a serious flaw in the processing of the licence. The FAC noted that the proposed project (clear-fell and restocking) was subject to Appropriate Assessment screening and, following the submission, examination and assessment of a NIS, was the subject of an AAD by the DAFM. In addition, a referral submission from Donegal County Council was sought and considered prior to the making of the decision to grant the licence. Based on the information before it, the FAC finds no reason to conclude that the proposed restocking was not properly assessed, or that the overall conclusion

reached in the AAD is not sound. The FAC are satisfied that the procedures followed, leading to the making of the decision to grant the licence, were consistent with the requirements of Article 6(3) of the Habitats Directive.

The appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence issued contains 31 conditions in total. Conditions 1-7 are of a standard nature. The additional conditions are attached for reasons relating to the protection of water quality, the protection of European sites during harvesting and restocking, protection of soil stability, and to minimise disturbance and protect established Habitat in designated European sites. Many of these conditions contain site specific requirements. Considering the information before it, the FAC finds no basis for the appellants contention on this issue. The appellant contends that no alternatives to restocking have been considered. In this case, the proposed development has been subject to Appropriate Assessment screening and Determination and this concluded that no significant effects would arise on any Natura 2000 site, having regard to the qualifying interests and conservation objectives of such sites and having considered the potential for in-combination effects. In such circumstances, the FAC concludes that there is no obligation to consider alternatives to the proposed restocking on the project lands.

The appellant contends that the site is in the River Sub Basin Owenboy Burn, that there is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive (WFD) and that, based on a recent High Court (Hyland) judgment<sup>1</sup>, the licence should not have been granted. The FAC noted that the project lands are proximate to the Owenboy Burn and that this has a waterbody code of UKGBNI1NW01003065. The Owenboy Burn has an unassigned status (2007-09, 2010-12, 2010-15), is under 'Significant Pressure' and 'Forestry' is listed as the 'Pressure Category'. Forestry pressures arise from acidification, drainage, road construction, planting and clear-felling. The Owenboy Burn is in the Leaghany River Sub-catchment (113.5km<sup>2</sup>) and is recorded as 12.49km in length. The 'Hyland' judgment concluded that, in circumstances where there would be a direct impact on an unassigned lake waterbody, the efficacy or appropriateness of mitigation measures could not be evaluated by reference to the requirements of the WFD. The adoption of 'some type of proxy evaluation' which did not follow steps identified in the WFD for the assignment of status to all waterbodies, 'does not constitute compliance with the WFD'.

The FAC considered the implications of the 'Hyland' judgment for the current case under appeal. The FAC noted that, in the 'Hyland' case, it is accepted by all parties that there would be a direct physical impact on the unassigned lake waterbody, and that the mitigations proposed were designed to reduce the impacts on the ecological and chemical status of the waterbody. The appellant's contention in the current appeal appears to be based on an assumption that the licensed development would give rise to an impact or impacts on the unassigned waterbody, Owenboy Burn, but does not submit any evidence to demonstrate how or why this would be the case.

The FAC considered the possibility of the licensed development giving rise to impacts on Owenboy Burn. The site soils are stated to be Blanket Peats and the slope is stated to be gentle towards the

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<sup>1</sup> Judgment of Ms. Justice Niamh Hyland delivered on 15 January 2021. Sweetman v An Bord Pleanála and Others. High Court 2018 740 JR.

north-west. The existing stock on the site is 100% Sitka Spruce (.11ha of the site is stated to be Heather and Rushes) whereas the proposed restock species are 76% Sitka spruce, 19% Lodgepole pine and with 5% (1.11ha) open space provided. The project lands adjoin existing forestry on three sides with Owenboy Burn in close proximity to, but separated from, the north-western boundary. The Burn flows to the north-east in a gap between two areas of maturing forestry before turning in a north-westerly direction and skirting further forestry before merging with the River Finn. The FAC examined the conditions attached to the licence granted and, in particular, those requiring site specific measures designed to protect water quality and European sites during harvesting and restocking operations. In summary, these measures include the following:

- Water setback to be applied and maintained during reforestation is 20m
- 20% of buffer zone to be pit planted with broadleaves. No trees permitted within 10m of an aquatic zone
- Establishment of a clearly marked exclusion zone of 10m around identified water hot spots
- Location of timber landing bays at least 50m from nearest aquatic zone
- No brash mats within environmental setbacks along aquatic zones
- Historic drains with direct connectivity to relevant watercourses or aquatic zones to be identified and blocked before commencement of operations
- Avoidance of machinery crossing internal drains
- Geotextile silt traps to be installed in new and existing drains
- No discharge of roadside drains into aquatic zones
- Restriction on fertiliser application to elemental phosphate at no more than 42kg/ha
- Storage of chemicals, fuel and machinery oils etc. at a dry, elevated location onsite at least 50m from nearest aquatic zones
- During felling, extraction and reforestation, application of a 10m exclusion zone from an aquatic zone on or adjoining site.

Having regard to the nature and extent of these site-specific requirements set out in these reasoned conditions and to the physical characteristics of the project lands, the FAC concluded that the conditions attached to the licence would prevent any impacts occurring on the Owenboy Burn or on water quality in general.

On this issue, the FAC concluded that the circumstances of the development in the 'Hyland' judgment were fundamentally different to the circumstances in the current appeal case. In the former, there were accepted, direct physical impacts on an unassigned lake waterbody involving water abstraction and the lowering of the lake water level, and the mitigations proposed were designed to reduce these impacts. In the latter, there is no evidence that the licenced development, the subject of this appeal would have any impact on Owenboy Burn, and that the conditions of the licence require measures to be taken designed to protect water quality and prevent impacts, that could reasonably be avoided, occurring.

The FAC noted that the DAFM had referred the application to the IFI whereas the appropriate referral body would be the Foyle & Carlingford Loughs Agency. The FAC concluded that, in circumstances where the licensed development would not impact on water quality, this did not constitute a significant or serious error.

Based on its consideration of the information before it, the FAC concluded that no significant or serious error occurred in the making of the decision to grant the licence by the Minister and that the decision was made in accordance with fair procedures. In deciding to affirm the decision, the FAC concluded that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours sincerely



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Des Johnson on behalf of the Forestry Appeals Committee