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12 March 2021

**Subject:** Appeal FAC 245/2020 regarding licence LS13-FL0058

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 LS13-FL0058 for felling of 10.38 ha, in Brennanshill, Coolglass, Scotland, Co Laois was approved by the Department of Agriculture, Food and the Marine (DAFM) on 1 May 2020.

#### **Hearing**

An oral hearing of appeal FAC 245/2020 of which all parties were notified, was held by a division of the FAC on 21 January 2021.

#### **In attendance**

FAC Members: Mr Des Johnson (Chairperson), Mr Pat Coman, Ms Paula Lynch, Mr Luke Sweetman and Mr Dan Molloy (observing)  
Secretary to the FAC: Mr Michael Ryan  
Appellants: [REDACTED]  
Applicant: [REDACTED]  
DAFM Representatives: Ms Eilish Kehoe and Mr Frank Barrett

#### **Decision**

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 set aside and remit the decision to grant this licence (Reference LS13-FL0058).

The proposal is for the clearfelling and replanting of a stated site area of 10.38ha in the townlands of Coolglass, Scotland, Brennanshill, Co. Laois. The nearest village is The Swan. Felling and replanting would be of 100% Sitka Spruce. The Underlying soil type is surface water gleys, ground water gleys (100%). The slope is predominantly moderate 0-15% and the habitat is predominantly WD4 (Fossett code for Conifer Plantation). The application includes a document titled 'Harvest Plan' and a Pre-screening Report. The site is located within the Nore Catchment and the Dinan (North)\_Sc\_010 Sub-catchment and the Clogh\_010 River Waterbody.

The DAFM carried out a Stage 1 screening for Appropriate Assessment, identifying the following Natura 2000 sites within a 15km radius of the project lands – River Barrow & River Nore SAC, Ballyprior Grassland SAC, River Nore SPA and Lisbigney Bog SAC. All sites were screened out for Stage 2 Appropriate Assessment (AA). In the case of the River Barrow & River Nore SAC, the DAFM screened the site out having considered the expert opinion and rationale presented in the Pre-screening Report regarding hydrological distance, project area, soil type and depth, site slope and project separation distance. Ballyprior Grassland SAC is screened out for reason of the location of the project lands within a separate waterbody with no upstream connection and no pathway. The River Nore SPA is screened out for reason of separation distance, and the Lisbigney Bog SAC is screened out for reason of no direct upstream hydrological connection and no pathway. An in-combination assessment considers non-forestry projects - dwellings (22), farm structures (5), wind turbine and Urban Waste Water, and forestry related projects - afforestation (19), forest roads (7), private felling (3), Coillte felling (27). The overall conclusion is that, when considered in combination with other plans and projects, the proposed development will not give rise to the possibility of an effect on the Natura sites referenced.

DAFM referred the application to Laois County Council. In a response (read to the Oral Hearing) the County Council stated that EIA is not required, the project lands are not within a designated site or within an archaeological/architectural site. This is not a Prime Scenic Area. The site is on a local secondary road.

The licence issued on 1 May 2020 and is exercisable until 31 December 2022. It is subject to standard conditions.

There is a single appeal against the decision to grant the licence. The grounds of appeal contend that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. There is a breach of Article 4(4) of the EIA Directive as details on the aspects of the environment likely to be significantly affected have not been described. On the same date as the application for this licence was submitted a further 2 applications were submitted for clear felling licences for the same Forestry Management Unit (FMU) totalling 40.29ha. Inadequate consideration was given to the objectives of the WFD River Basin Management Plan. Clear felling has the capacity to impact water quality. The current status of the waterbody is "Good". There is no evidence that Prescribed Bodies have been consulted. The Appropriate Assessment screening is flawed. The applicants state that the harvest block is within a water basin that has hydrological connectivity to an aquatic SAC. The site is upstream and in the catchment of the River Barrow & Nore SAC, and there is hydrological connection. The site synopsis for this SAC states that it is

very important for the presence of a number of Annex II animal species including aquatic species. Forestry exerts medium level pressure on the qualifying interests of this SAC. Stage 2 Appropriate Assessment is required. The licence does not provide a system of protection for all species of birds during the period of breeding and rearing consistent with the requirements 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 the spraying of chemicals.

In response, the DAFM state that the proposed development is not of a class covered by the EIA Directive. Article 4.4 of the Directive is not applicable. The Applicant's planning units are not part of a statutory process and are a matter for them. DAFM applies a wide range of checks and balances in relation to the protection of water quality. A wide range of operational measures are applied to prevent direct and indirect impacts on water quality. For reforestation, standards require setbacks from aquatic zones. Silt trapping and slow-water damming of forest drains are required during felling. Regarding consultations, mandatory referrals are triggered by the system and discretionary referrals may also be made if deemed necessary. The application was subject to the DAFM's screening procedure (November 2019). The screening rationale is identified by the Inspector. For the purposes of Article 42(16) of S.I.477/2011, the DAFM determined that the project would not adversely affect the integrity of any European sites. Regarding the Interim Standards for Felling and Reforestation (DAFM, 2019), these set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. It is a principle of law that, unless the grant of a first statutory licence expressly exempts the holder of any obligation to obtain a second licence 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. There is no legal requirement to give prior notice of the spraying of chemicals.

An Oral Hearing was held on 21 January 2021. All parties were invited to attend. The FAC sat in person (one member sat remotely). The parties attended and participated electronically. The Laois County Council referral response was read to the Hearing. The DAFM detailed the procedures followed in coming to its decision. The appellant stated that water flowing from the site would pass through a water source protection area (Swan PWC). There is an upstream connection from the River Barrow & River Nore SAC at 6.75km. There is no assessment of elevations and the appellant voiced particular concern regarding potential for effects on Crayfish. This Natura 2000 site had been screened out for AA without any specialist input. Forestry is recorded as a 'medium pressure' on the qualifying interests of this site. No referral had been made to the NPWS or Inland Fisheries Ireland (IFI). There is no rationale for the professional opinion given in the Pre-screening Report, which had omissions. The slope, elevation of the site and SAC are not stated. The River Barrow and River Nore SAC is 4.5km to the west in direct distance. The possibility of chemical spills during operations had not been assessed. The applicants stated that the site had been field assessed on 19 November 2020. This is a gentle south facing slope with a gley soil type and there is an existing road infrastructure to service the site. There is a complex drainage pattern within the site with evidence of relevant watercourses exiting to the western and south-eastern boundaries of the site. The eastern part of the site drains east to the Brennanshill Stream at 410m and the remainder to the west to the Clogh River. The project lands are separated by 6.7 – 8.0kms from the

River Barrow & River Nore SAC. The FAC queried why the field inspection was not carried out before the application was submitted and the applicants contended that adequate information had been submitted with the application. Under questioning by the FAC, the DAFM stated that it had carried out its own AA screening but had taken account of the expert opinion of the Ecologist and the Hydrogeologist in the applicants Pre-screening Report. There are no Freshwater Pearl Mussel populations downstream of the project lands. The appellant contended that there are Crayfish populations recorded downstream. The applicants stated that lands to the north (approximately 22ha) of the project had been planted in 2019. Other forestry lands in the vicinity were privately owned. With reference to the 'Source Protection Area', the DAFM stated that Irish Water can be consulted in specific cases but were not consulted in this case but water abstraction points for group water schemes were looked at using the GIS layers.

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 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. Afforestation or deforestation (nor clear-felling) are not 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 FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). Furthermore, the FAC concluded that the proposed development does not include any works, which themselves would constitute a class of development to which the EIA Directive applies. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive as the proposed development is not of a class of development covered by the Directive.

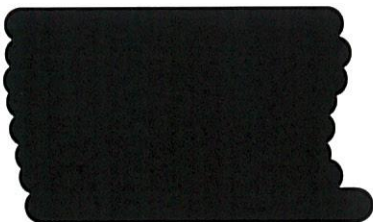
It is contended that inadequate consideration was given to the objectives of the WFD River Basin Management Plan, and that clear felling has the capacity to impact water quality. No convincing evidence is submitted in support of this contention. The site is located within the Nore Catchment and the Dinan (North)\_Sc\_010 Sub-catchment and the Clogh\_010 River Waterbody. The current status of the waterbody is "Good". The appellant further stated that water flowing from the site would pass through a water source protection area (Swan PWC). It is noted that, while Irish Water were not consulted, Laois County Council responded to a referral but did not offer any comment in regard to the water source protection area. Based on the evidence before it, the FAC concluded that there is no convincing evidence to indicate that the proposed development would have any detrimental impacts on the objectives of the River Basin Management Plan. The FAC also concluded that there is no evidence to indicate any impact on any water source protection area, while considering that referral by the DAFM to Irish Water would have been appropriate in this case.

The appeal states that the licence does not provide a system of protection for all species of birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. No information is submitted regarding species of birds on the project lands or species likely to be adversely impacted by the proposed development. Having regard to the nature of the project lands and the proposed development, and to the character of the surrounding area, the FAC concludes that there is no likelihood of adverse impacts on species of wild birds arising from the proposed development. The spraying of chemicals is governed through Statutory Instruments and the FAC considers that there is no convincing reason for additional conditions to be placed on the licence in this regard.

The FAC considered the procedures followed by the DAFM addressing the provisions of Article 6(3) of the Habitats Directive. It noted that there is a hydrological connection from the western boundary of the project lands to the River Barrow and River Nore SAC at a hydrological distance of approximately 6.75km, and that the qualifying interests include important aquatic species, including the Annex II species – White-clawed crayfish. The DAFM carried out an Appropriate Assessment screening and a revised Appropriate Assessment screening in respect of the application, and both assessments screened out the River Barrow and River Nore SAC for Stage 2 Appropriate Assessment having considered the expert opinion and rationale presented in the applicant's Pre-screening Report. The FAC noted that neither the 'original' and 'updated' screening assessments considers the aquatic qualifying interests in the River Barrow and River Nore SAC. Having regard to the nature and scale of the proposed development, the direct hydrological connection to the Natura 2000 site, and to the nature of its aquatic qualifying interests, and applying the Precautionary Principle, the FAC concludes that the DAFM screening for Appropriate Assessment contained a serious and significant error.

In circumstances where the decision to grant the licence contained a serious and significant error as detailed, the FAC decided to set aside and remit the decision to grant the licence, and to require the DAFM to carry out a new screening for Appropriate Assessment and, if necessary, an Appropriate Assessment, before making a new decision in respect of the licence.

Yours sincerely

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On behalf of the Forestry Appeals Committee

