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22nd December 2020

Subject: Appeal FAC 635/2020 regarding licence WW04-FL0084

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 WW04-FL0084 for felling and replanting of 7.07 ha at Carrigeenduff, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 24th July 2020.

Hearing

An oral hearing of appeal FAC635/2020 was held by the FAC on 11th December 2020. In attendance:
FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Ms Mary Lawlor Mr. Vincent Upton
Secretary to the FAC: Ms. Marie Dobbyn

Appellant: [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr Alan Sheridan, Mr. Anthony Dunbar,

Decision

The Forestry Appeals Committee (FAC) having 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, has decided to set aside and remit the decision of the Minister regarding WW04-FL0084.

The licence pertains to the felling and replanting of 7.07 ha at Carrigeenduff, Co. Wicklow. The site would be replanted with what is indicated as standard conifer reforestation for roundwood production. The site is on the lower slopes of an upland area with a moderate slope 0-15% with underlying soil types comprising approximately blanket peats (92%) and podzols (peaty), lithosols, peats (8%). The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application.

The DAFM undertook and documented an appropriate assessment screening that found six European sites within 15km, 004040 Wicklow Mountains SPA, 002122 Wicklow Mountains SAC, 000716 Carriggower Bog SAC, 004063 Poulaphouca Reservoir SPA, 000733 Vale of Clara (Rathdrum Wood) SAC and 000781 Slaney River Valley SAC and found that there was no reason to extend this radius in this case. Two sites were screened in due to the site being within the 004040 Wicklow Mountains SPA, proximity to 002122 Wicklow Mountains SAC. The remaining four sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites.

The development it is noted was referred to Wicklow County Council on the 9th of January 2020 and a response received which indicated highest level of water protection required; check water protection compliance during felling and that this is a high priority area for action for pH under the current River Basement Management Plan.

The NPWS also submitted a response to the licence application which indicated conservation recommendations in relation to felling periods and the species associated with the SPA and also liaison with local Conservation Rangers to ensure adequate protection measures are in place. Inland Fisheries Ireland also provided a response that the proposal must adhere with Forestry Harvesting and Environmental Guidelines and that notification of the decision and operation should be made.

The licence was approved on the 24th July 2020 with a number of conditions attached which include contact with the IFI, liaison with local conservation rangers and recommendations outlined in the DAFM screening report.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3) and 4(4) of the EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex II of the Directive; that the DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA; that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening and the application has not described any aspects of the environment which are likely to be significantly affected.

Specifically, in relation to this appeal the licence is for an area of 7.07 ha in Coillte's Forest Management Unit (FMU) WW04. On the same date that the application for this licence was submitted a further two applications for clear felling licences were submitted for the same FMU totalling 22.69 ha. Article 4 (4) of the EIA Directive) requires a developer to submit details of the whole project. The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive. All projects within a Coillte FMU must be considered to form a part of the whole project.

It is stated that there is inadequate consideration of feedback from consultation bodies; the Stage 1 and Stage 2 AA determinations are not legally valid. It is submitted that this licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies

under the River Basin Management Plan for Ireland 2018-21 Clear felling has the capacity to impact on water quality. The cumulative impact of this project with other licensed and proposed projects has not been adequately assessed. The mitigation presented is not adequate to ensure that the proposed development will not adversely impact on the protected European species in question and does not conform with the advice from a Consultation body. In addition, a potential source of impact on a designated site has not been identified and consequently no mitigation has been proposed. DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination.

Reference is also made to and that the AA In-Combination assessment is flawed; that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation; reference is also made to the conditions of the licence and the absence of a general system of protection for all species of birds, absence of detail to notify the Minister at both the commencement and conclusion of operations pertinent to the licence; ongoing inspection and 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.

DAFM in a statement to the FAC, that in regard to the granted Felling licence application WW04-FL0084, that the standard operational activities of clearfelling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case for the standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities and thus Articles 4(3) and 4(4) of the Directive are not applicable.

In relation to the protection of water quality 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); that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. This licence application was field inspected and no hydrological connection or other pathways from this licenced felling and reforestation project to the adjacent waterbody were found during the field survey.

Information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Prescreening Report and associated Pre-screening Report methodology document were considered during the licencing process. The DAFM stated that they are satisfied that the decision met their criteria and guidelines and that they confirm

the licence. They submit that they followed the current DAFM AA Screening guidance document and considered Natura 2000 sites within 15km.

Having reviewed the details of relevant European sites their qualifying interests and conservation objectives the Department in the screening report identified the possibility of the project having a significant effect on the screened European sites (Wicklow Mountains SPA 004040 and Wicklow Mountains SAC 002122). As such, the clearfell and reforestation project was screened in and an Appropriate Assessment carried out.

The potential for the project to result in impacts on the Conservation Interests and Qualifying Interests of the Wicklow Mountains SPA 004040 or Wicklow Mountains SAC 002122 was identified on a precautionary basis and site specific measures prescribed by the DAFM to mitigate against such impacts were described. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set in the AA Report and AA Determination statement ensure that the proposed felling and reforestation project WW04-FL0084 will not result in any adverse effect on any European Site

DAFM subsequently carried out a separate in-combination assessment and included an associated in-combination statement based on this information which is consistent with the licensee's in-combination statement. A felling licence was issued for the clearfell and reforestation project having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence application.

In relation to the use of chemicals there are standards of good practice and regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

An oral hearing was held of which all parties were notified and representatives of the DAFM and the Applicant attended. The DAFM presented an overview of their processing of the licence and the screening and appropriate assessment undertaken.

The DAFM also at the hearing outlined non standard conditions specific to the licence and conditions (h) to (p) reflect site specific requirements in relation to the protection of water and conservation interests.

The appellant restated matters raised in the written grounds of appeal and in particular commented on the submission of NPWS and the absence of ambiguity of their condition in comparison to condition (m) of the licence. Reference is made to the absence of clear scientific data and the scientific basis in relation to the 100 metres buffer area. The appellant contended that the precautionary principle should apply and in relation to the qualifying interests the absence of assessment of these in the AA process. It was indicated that 92% of the site was blanket bog, that no site inspection was carried out and that there was from the site to Lough Dan. Colonisation by Sitka Spruce outside of the site was referred to and the issue of potential landslides with potential impacts on water quality.

The Applicant's Representatives described the documents and information provided with the application. They submitted that the ground conditions were good. A hydrogeological pathway to Lough Dan was described. They further submitted that the proposal does not involve any deforestation for the purposes of land use change and does comprise a class of project covered by the EU EIA Directive.

In relation to the merlin species and scientific material available this was further discussed at the hearing and also hydrological connections from the site to receiving waters. It was indicated by the applicant that the licence provides for protection of water which was disputed by the appellant who raised the issue of felling during periods of rainfall and the consequent implications on water quality.

In 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 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 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 7.07 ha. The FAC does not consider that the proposal comprises a type of activity that falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

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 this case, the DAFM undertook a Stage 1 screening in relation to six Natura 2000 sites and concluded that an appropriate assessment should be undertaken in relation to Wicklow Mountains SPA and Wicklow Mountains SAC with other sites screened out. An appropriate assessment report and determination were prepared, and mitigation measures were derived and incorporated into the licence conditions.

In considering the appeal and before making a decision, the FAC examined the information submitted in relation to the proposal including AA screening and determination of DAFM. The FAC examined publicly available information and identified the same six sites as the DAFM within 15km from the proposal. These are 004040 Wicklow Mountains SPA, 002122 Wicklow Mountains SAC, 000716 Carriggower Bog SAC, 004063 Poulaphouca Reservoir SPA, 000733 Vale of Clara (Rathdrum Wood) SAC and 000781

Slaney River Valley SAC and found that there was no reason to extend this radius in this case. Two sites were screened in due to the site being within the 004040 Wicklow Mountains SPA, proximity to 002122 Wicklow Mountains SAC. The remaining four sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. DAFM indicated that site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project WW04-FL0084 specific to the protection of the species.

The Appropriate Assessment Report does not refer to the specific licence application under consideration in the body of the text while a document identified as the application is referred to in the Appendix. While this appears to be a clerical error, the FAC considers that there must be no question regarding the proposal under assessment and that this should be addressed.

The felling would occur in a forest block within a commercial forest planted in 1979 and managed for timber production and lies c.175 metres from the closest outer edge of the SAC and separated by existing forest blocks on all side although some of these may have failed. The closest non-forest habitat within the SAC lies c.300 metres to the south of the proposal. The FAC is satisfied that the habitats included as qualifying interests of the SAC are not present on or adjacent to the proposal site. At the oral hearing it was submitted by the Applicant's Representative that there is a hydrological link from the forest site to Lough Dan and there is no evidence that this was assessed during the screening or appropriate assessment. Lough Dan is identified in the Conservation Objectives for the SAC as being likely to be classified as Oligotrophic waters containing very few minerals of sandy plains (*Littorelletalia uniflorae*) [3110]. The FAC considers the failure to identify and consider this connection or watercourses in the area during the appropriate assessment to represent an error.

At the oral hearing the Appellant queried the mitigation measures included in the appropriate assessment report and determination regarding Merlin (*Falco columbarius*) [A098] in specific reference to the response provided by the NPWS which does not include a geographic qualifier. At the oral hearing the DAFM submitted that this response was provided prior to the licence decision being made and would have been considered as part of the appropriate assessment. It is noted that the Appropriate Assessment Determination as carried out by DAFM included an ecological review. The Appellant did not provide any scientific evidence to contradict the proposed mitigation measures while querying the scientific basis for the measures themselves. The FAC is not satisfied that an error occurred in the making of the decision regarding the nature of the mitigation measures themselves and notes the scientific reference provided.

The FAC is satisfied that a series of errors occurred in making the decision regarding licence application WW04 FL0084 and that the decision should be set aside and remitted to the Minister to undertake and

document a new appropriate assessment of the proposal in relation to the Wicklow Mountains SAC and address the errors identified before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee

