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19th February 2021

Subject: Appeal FAC337/2020 in relation to licence TY03 FL0210

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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

Licence TY03 FL0210 for felling of 8.37 ha at Ballyhourigan, Boolatin, Doonane, Co. Tipperary granted by the DAFM on 30th April 2020.

Hearing

An oral hearing of appeal FAC337/2020, of which all parties were notified, was held by the FAC on 10th February 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr. Seamus Neely, Mr. Vincent Upton
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Luke Middleton & Ms. Eilish Keogh
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received including those at the oral hearing, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant the licence TY03 FL0210.

The licence decision pertains to the felling of 8.37 ha at Ballyhourigan, Boolatin, Doonane, Co. Tipperary. The forest is comprised of Sitka spruce planted in 1982. Replanting would be with Sitka spruce with 0.42ha of open space. The soil type described as primarily peats with some lithosol and on a gentle slope. The application included inventory, restocking, environmental information, a harvest plan including operational and environmental rules and maps. The Application was referred to Tipperary County Council and Inland Fisheries Ireland (IFI). The County Council made no response while IFI stated

that it has no objections to felling and requested that the local office be contacted prior to operations commencing, to avoid siltation, for ground stability to be kept under constant review and for all work must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines. A submission from the Appellant was also made at the application stage. The DAFM undertook a screening for Appropriate Assessment and identified ten European sites within 15km of the proposal. Each site is considered in turn and its qualifying interests and special conservation interests are listed and reasons for screening each out are provided. The DAFM also recorded a consideration of other plans and projects in combination with the proposed felling. A decision to approve was made on 19th June 2020 and licence conditions include measures identified in the Appropriate Assessment Determination and issues raised by Inland Fisheries Ireland.

There is one appeal against the decision. The grounds submit that there has been a breach of Article 4(3) and 4(4) of the EIA Directive 2014/52/EU in that a screening for EIA has not been carried out and that the developer has not submitted a description of the aspects of the environment likely to be significantly affected by the project. That the activities threaten the achievement of the objectives of the WFD River Basin Management Plan. That the Stage 1 and Stage 2 Appropriate Assessment are not legally valid and the DAFM have not sought the opinion of the general public of the Appropriate Assessment Determination. That the extraction route has the potential to pass through the zone of notification of a number of archaeological sites. That the licence conditions do not provide a system of protection for wild birds consistent with Article 5 of the Birds Directive and that the licence should contain commencement and conclusion notices and a condition that the works should be inspected prior and post operations, and a condition regarding notifications in relation to the spraying of chemicals.

In a written response to the FAC, the DAFM submitted that it is satisfied that the decision was made following their procedures. It is submitted that the standard operational activities of clear-felling and replanting already established forests areas 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 and that breaches of Article 4(3) and 4(4) had not occurred. The statement submits that the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. It is submitted that referrals to statutory consultees are undertaken on an automatic basis following certain spatial rules or on a discretionary basis. In this instance the application was referred to Tipperary County Council and Inland Fisheries Ireland.

In relation to Appropriate Assessment, the DAFM submit that the application had 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 and that the rationale for the screening decision was recorded. The measures described in the application documentation, together

with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AA Report and AA Determination statement ensure that the proposed felling and reforestation will not have an adverse effect on the SPA.

The statement outlines the public consultation process employed by the DAFM and that the Minister has regard to submissions made in their decision making. It is submitted that the closest recorded monuments to the area proposed for felling are a Mass Rock (RMP No. TN 032-015) and a Sweathouse (RMP No. TN 032-010) located some 440m and 730m distant to the southwest and that the haulage route would not be likely to pass these sites as it would require following a sub-optimal route. Regarding licence conditions the DAFM submitted that it is "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." It was submitted that the Minister may attach or vary licence conditions but that notices as suggested by the Appellant were not considered necessary in this case. The DAFM submitted that 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) and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPP is used in a targeted way. The DAFM further submitted that the felling licence application had undergone an appropriate assessment screening inline with stated procedures but that during that some qualifying interests/special conservation interests had been truncated on the recorded form and that a revised full form was also submitted.

An oral hearing of the appeal was held and attended by the Appellant and representatives of the DAFM and the Applicant. The DAFM outlined the application that was made and their processing of the application including referencing the spatial layers and other data employed for this purpose. They noted that they have responded to each ground of appeal in their written statement. They outlined their Appropriate Assessment screening and Appropriate Assessment and submitted that it was carried out in line with their procedures and that they were satisfied with their decision. They submitted that the proposal would not involve deforestation and would not fall within a class of development covered by the EU EIA Directive. The Appellant submitted that the proposal should have proceeded to Appropriate Assessment (AA) regarding the Lower River Shannon SAC if it could not be confirmed that there was no hydrological connection. It was submitted that the proposal lies within the same townland as part of the SAC. The dates of the AA report and determination was queried, and it was submitted that the Hen Harrier protocol adopted by the DAFM was not sufficient for an AA. It was submitted that the Appellant may have made a mistake regarding recorded monuments in the area and that the FAC could disregard this ground. The Applicant described the information submitted with the application and described the site. It was submitted that an Environmental Officer had visited the site in November 2020 and found

the site to be soft in places and that a relevant watercourse surfaced in the south east corner of the site and left the site at the north west corner and flowed 160 metres northerly to join an aquatic zone that flowed westerly to the Newport River which forms part of the Lower River Shannon SAC. They submitted that given the nature of the watercourse and the distance to the SAC that no significant effects would arise. They submitted that plants used in restocking site would be treated in the nursery and that any spraying at the site would be undertaken based on needs and risk. It was submitted that the local authority is informed where spraying is undertaken and signs are erected.

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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). 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 8.37 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 and that breaches of Article 4(3) and 4(4) had not occurred.

Under Article 6(3) of the Habitats Directive, any 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 projects, having regard to the conservation objectives of that designated site. An Appropriate Assessment Screening was undertaken by the DAFM and identified ten sites within 15km and that there was no reason to extend the radius in this case. Each site is considered in turn and reasons are provided for the screening conclusions reached in respect of each site. The DAFM undertook and documented a consideration of the potential for in-combination effects and concluded that DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites in relation to those that were screened out. The proposal lies within the boundaries of Slievefelim to Silvermines Mountains SPA 004165 and the proposal proceeded to Stage 2 Appropriate Assessment in relation to this site. Potential impacts of the proposal are

described and mitigation measures are outlined and attached to the licence conditions. All considerations are dated prior to the licence being issued. The Appropriate Assessment Determination concludes that,

The basis for this AA determination is as follows: the felling and reforestation site is not within 1.2km of a known nesting site within the SPA. The habitat of the site in question is also not suitable for Hen Harrier foraging, nesting or roosting. With the conditions outlined above, no negative impact is anticipated to the Qualifying Interest. If notification of a new Red Area is given during the breeding season, any disturbance operations associated with the Felling Licence will cease immediately on receipt of notification, and unless otherwise agreed can only recommence after the breeding season.

The FAC considered publicly available information and identified the same ten sites within 15km, most of which lies at a considerable distance from the felling, and considered the reasons provided for screening by the DAFM. The forest falls within the boundaries of Slievefelim to Silvermines Mountains SPA and the next closest SPA is Lough Derg SPA which is 12.5km from the felling site. Lower River Shannon SAC is the closest SAC at c.1.1 km at its closest and boundaries lie to the west and east. The FAC is satisfied that there is no hydrological connection with any other European site and that given the nature of the proposal and degree of separation that it concurs with the DAFM conclusion that no significant effects would arise at these other sites. In relation to Slievefelim to Silvermines Mountains SPA, the FAC is satisfied that the DAFM undertook an Appropriate Assessment of the likely significant effects of the proposal on the SPA and that it would not have an impact on the integrity of the site. The truncation of parts of the screening record was considered to be an obvious clerical error that would not impact on the outcome of the decision. In relation to the Lower River Shannon SAC, the DAFM screened out this site,

Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

The Applicant submitted information collected during a site visit that a relevant watercourse leaves the site at the northwesterly corner and flows to an aquatic zone to the north that flows westerly and into the SAC. This contradicts the screening undertaken by the DAFM and the FAC concluded that a failure to identify and account for this watercourse at the screening stage represented a serious error in the making of the decision. On this basis the FAC concluded that the decision should be remitted to the Minister to undertake a new screening of the proposal itself and in-combination with other plans and projects in relation to the Lower River Shannon SAC.

The Rossaguile and Clonygaheen streams lie to the north of the proposal which form part of Newport (Tipperary)_030 waterbody which has been assigned a Good status and Not at Risk by the EPA for 2013-2018. The proposal would involve the felling and replanting of a forest stand of 8.37 ha and associated operations and the licence includes a number of conditions related to the protection of water quality. A forest road that would be employed for haulage is already in place. The application was referred to the

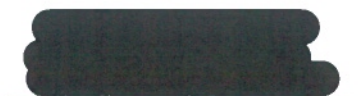
County Council and Inland Fisheries Ireland both of which would have an interest and remit in the protection of water quality. The licence conditions reflect the submission made by the IFI and no response was made by the County Council. The FAC concluded that there was no information before it that the proposal as licenced threatens the achievement of the objectives of the River Basin Management Plan and that there is no evidence that the DAFM have erred in this regard.

While the Appellant submitted at the oral hearing that the FAC could disregard the grounds related to recorded monuments and notification areas, the DAFM provided a response to this ground. Based on the information submitted to it, the FAC considered that there is no evidence that the operations would pass through a notification area and that the DAFM did not err in this regard.

In relation to the appellant's stated ground of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. The FAC had regard to the DAFM statement and note 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 noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. The DAFM have attached licence conditions that relate to the Appropriate Assessment undertaken in relation to Slievefelim to Silvermines Mountains SPA and its related conservation interest. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM. Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence and that it would not be reasonable to attach a licence condition requiring actions to be undertaken by the DAFM. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. In light of the information submitted at the oral hearing as noted, the FAC is satisfied that a serious error was made in making the decision regarding TY03 FL0210 and that the decision should be remitted to the Minister to undertake a new screening for significant effects in relation to the Lower River Shannon SAC of the proposal itself and in combination with other plans and projects before a new decision is made.

Yours sincerely,

A large black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee