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7th July 2021

Subject: Appeal FAC724/2020 & FAC750/2020 regarding licence TFL00285619

Dear [Redacted]

I refer to the appeals 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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TFL00285619 for felling on 63.12 hectares at Borrisnafarney, Co. Tipperary was issued by the Department of Agriculture, Food and the Marine (DAFM) on 26th August 2020.

Hearing

An oral hearing of appeals FAC724/2020 and FAC750/2020 was held by the FAC on 23rd June 2021. In attendance at Oral Hearing:

FAC Members: Mr. Seamus Neely (Deputy Chairperson), Mr. Iain Douglas, Mr. John Evans and Mr. Vincent Upton.

Secretary to the FAC: Ms. Marie Dobbyn.

Department Representatives: Ms. Eilish Kehoe and Mr. Ciaran Nugent

Appellant FAC724/2020: Not present.

Appellant FAC750/2020: Not present.

Applicant: Not present.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine regarding licence TFL00285619.

The licence decision pertains to five forest plots comprised of Sitka spruce and totalling an area of 63.12 ha at Borrisnafarney, Co. Tipperary. Plots 1 and 5 are proposed to be clearfelled in 2020, Plots 2 and 4 would be felled in year 2023 and Plot 3 would be thinned in 2021 and 2026 and clearfelled in 2028. Replanting is proposed with 90% Sitka spruce and 10% broadleaf species. The DAFM record describes

the site as lying on a primarily podzolic soil and on a predominantly steep slope (15% to 30%). The project area is crossed by or adjoins an aquatic zone and the vegetation type within the project area comprise conifers with some broadleaves.

The application was referred to Tipperary County Council and the NPWS. The NPWS replied and requested notification one month before operations commence and compliance with DAFM guidelines.

The application includes inventory and operational details, a Harvest Plan and maps. The DAFM undertook a screening for Appropriate Assessment and identified three sites within 15km of the forest and that the radius should be extended in this case to include three more sites due to hydrological connectivity; Kilduff, Devilsbit Mountain SAC 000934, Lough Derg (Shannon) SPA 004058, Lower River Shannon SAC 002165, Lower River Suir SAC 002137, River Shannon and River Fergus Estuaries SPA 004077 and Slievefelim to Silvermines Mountains SPA 004165. A consideration of other plans and projects in combination with the proposed felling is also recorded and the DAFM determined that it should proceed to Appropriate Assessment in relation to three European sites. A Natura Impact Statement was submitted by the Applicant and the DAFM recorded an Appropriate Assessment Determination. The DAFM also recorded a determination that the project should not proceed to the EIA process.

The licence was issued on 26th August 2020 with a number of general conditions and specific conditions to adhere with mitigation measures in the Appropriate Assessment Determination and notification of the NPWS.

There are two appeals against the decision and the full grounds of appeal were provided to all parties. The grounds of FAC724/2020 contend that the application is for felling and reforestation, the area of this felling is 63.77 ha and that no Environmental Impact Assessment has ever been carried out and that therefore no decision to replant can be made without an EIAR. No Appropriate Assessment screening has been carried out according to the requirements of the EU Directive and Irish implementing law. The grounds of FAC750/2020 contend that the afforestation of the lands, 66 ha, was carried out without appropriate screening for the requirement for an EIA and that retrospective assessment of the need for EIA was required. It is submitted that the proposal is a class of development in Annex II of the EIA Directive and that a number of criteria set out in Annex III do not form part of the FS screening assessment and have not been taken into account, and that there are no foundation to the conclusions reached therefore an adequate screening has not been conducted. It is submitted that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21 and that there is no evidence that IFI or EPA were consulted on this application. It is submitted that the Stage 1 Appropriate Assessment is not legally valid and that there is insufficient detail and clarity in the In Combination information. It is submitted that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. A number of grounds relate to licence conditions and it is submitted that the licence should include commencement and conclusion notifications,

inspection requirements on the FS (Forest Service), notification requirements regarding the spraying of chemicals and it is submitted that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive in their natural range or a system of protection of all wild birds consistent with the requirements of Article 5 of the Birds Directive.

In a statement to the FAC, the DAFM stated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria outlined in its standards and procedures policy have been adhered to in making a decision on the application and outlined the steps in the processing of the application. It is further submitted that the application was desk and field assessed. It is submitted that referral procedures and screening were based on Forest Service procedures and guidance, that an Appropriate Assessment Determination was prepared by DAFM ecologists and attached as conditions of approval, and that an in-combination consideration was completed by the DAFM.

An oral hearing of the appeal was held, of which all parties were notified, and attended by representatives of the DAFM. At the oral hearing the DAFM provided the dates and details of the application, assessment and licence. The DAFM Inspector submitted that the licence was issued following a desk and field assessment. In response to questions from the FAC, the DAFM submitted that they believed that the site was established in line with procedural requirements, that the EIA considerations would have been based on the application submitted and the inspections and assessments undertaken and that some recorded response would have been based on the assessment of the Applicant's Forester, that the proposal is of a standard nature and does not represent a risk to safety. It was submitted by the DAFM that the in-combination conclusions are correct and that the Harvest Plan was appropriate for the nature of the operations proposed.

The FAC considered the grounds related to Appropriate Assessment in the first instance. Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The DAFM undertook and recorded a screening for Appropriate Assessment and identified three sites within 15km and three more which are hydrologically connected to the proposal. The FAC employed publicly available information provided by the EPA and NPWS and identified the same sites and connections. Each site is considered in turn by the DAFM along with their qualifying interests and reasons are provided for the screening conclusion. The reasons are recorded in the Appropriate Assessment Determination recorded. A consideration of other plans and projects is also recorded that includes forestry and non-forestry activities. The sites screened in for Appropriate Assessment are at a significant remove and the FAC considers that the DAFM and the Applicant have adopted a precautionary approach. The FAC is not satisfied that an error was made in the screening conclusion.

The Applicant submitted a Natura Impact Statement (NIS). This document, prepared by an Ecologist, describes the operations proposed in detail and the nature of the lands following a field survey. It also

contains a screening for Appropriate Assessment, which considers six European sites, of which three are screened in, namely Lough Derg SPA 004058, Lower River Shannon SAC 002165, River Shannon and River Fergus Estuaries SPA 004077. These sites lie downstream from the proposal and are connected through a number of streams that lie adjacent to and within the operational lands. The nature of potential impacts are described and relate to impacts on water quality and specific qualifying interests/special conservation interests which are aquatic in nature and rely on aquatic habitats. Measures are outlined to mitigate these impacts and include setbacks and operational restrictions. Residual effects and other plans and projects are considered. The NIS concludes that the project either individually or in-combination with other plans and projects will not adversely affect the integrity of any European site.

The DAFM recorded an Appropriate Assessment Determination (AAD) which considered the application documents submitted, the screening for AA, referrals and submissions and the NIS. The AAD outlines the European sites considered and the mitigation measures considered necessary by the DAFM. Licence condition (i) requires adherence with the mitigation measures outlined on pages 4 and 5 of the AAD. The FAC considered the AAD and measures proposed in the NIS. The proposals must be undertaken in adherence with the *Felling and Reforestation Standards* which include a range of good practice measures. The FAC considered that a number of specific measures identified as necessary in the NIS were not included in the AAD and that reasons for or an assessment of this did not appear in the AAD. Notably, the NIS required that,

Crossing of relevant watercourses will be limited to the points shown on the Harvest maps (Maps 2-3 Appendix 1).

All timber to be stacked in a responsible manner in the areas marked in the Harvest maps (Maps 2-3 Appendix 1).

Onsite supervision to be present during operations to ensure that these are implemented.

With maps provided within the NIS, and these measures do not appear to have been transferred to the AAD and hence the licence. These measures are site specific operational measures that have been proposed and outlined and mapped, in some cases, in the NIS.

In addition, the NIS specifies a setback of 20 metres at reforestation while the AAD provides for setbacks of 10 metres or 20 metres depending on slope. The AAD also states *Do not operate during or immediately after instances of extreme weather* which the FAC considered to lack clarity and should be specified in a more precise and definitive manner. The FAC is satisfied that this represents a series of errors in the making of the decision and that the decision should be remitted to the Minister to undertake a new Appropriate Assessment having regard to the best available scientific information and that reasons should be provided where measures proposed are not adopted.

The FAC considered the grounds related to water quality. The forest lies in Ollatrim_SC_010 subcatchment in Lower Shannon (25C Catchment). A number of streams flow from the lands and form part of the Ollatrim_020 waterbody which is classified as having a Moderate status and being At Risk by

the EPA in relation to the Water Framework Directive. The pressures on the waterbody have been identified as Agriculture, Farmyards, Forestry, Extractive Industry, Quarries. The application was referred to the Local Authority and the NPWS both of whom have a role in the protection of water quality and aquatic habitats. The FAC is satisfied that the referrals were appropriate in this case and does not consider that the grounds of appeal identify risks to water quality. However, as identified a number of errors were identified in the AAD which must be addressed and relate to the protection of water quality.

The harvest plan was submitted on a template provided by the DAFM and includes operational maps that identify stacking areas, fuel storage areas, and extraction routes. This was submitted in addition to specification details and a number of other maps and information. The grounds do not identify specific deficiencies in the plan. The FAC considered that the information provided, including the NIS, was sufficient and clearly outlines the operations that would be undertaken.

The FAC also considered whether the proposed development should have been addressed in the context of the Environmental Impact Assessment (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 Forestry Regulations 2017 (S.I. 191 of 2017), 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 decision before the FAC relates to the felling of 66.12 ha of commercial managed forest. A number of different areas were recorded in the file and the DAFM submitted that differences in areas can stem from the digitisation of maps. The FAC concluded that 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 not covered by national regulations and that screening for significant effects under the EIA Directive was not required in this case.

In relation to the assessment of the original planting, these grounds are not elaborated on and no evidence was submitted regarding the planting or the lands. The current forest appears to have been planted in 1991 and the FAC has not been provided with any evidence that this did not adhere to any requirements of the time. The FAC is not satisfied that the DAFM have erred in this regard.

In relation to the Appellant's stated ground of appeal regarding licence conditions and the protection of wild birds and animals. The FAC considered the existing legislative safeguards in place with regard to these species and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC considers that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC considered that no specific information or evidence

was submitted to substantiate the grounds. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, are not required. Regarding the conditions that the Appellant suggested should be attached to the licence relating to commencement and conclusion of operations, inspections and notification in the case of the spraying of any chemicals, the FAC noted the response provided to it by DAFM and considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions relating to these grounds in the appeal in this case, was not required. The FAC is not satisfied that the DAFM erred in this regard.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. The FAC is satisfied that a series of errors was made in making the decision. The FAC is thus setting aside and remitting the decision to the Minister regarding licence TFL00285619 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to complete a new Appropriate Assessment and address the issues identified before a new decision is made.

Yours sincerely,

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

Vincent Upton On Behalf of the Forestry Appeals Committee