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12 March 2021

Subject: Appeal FAC 766/2020 regarding licence GY10-FL0151

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 GY10-FL0151 for felling of 3.92 ha, in Cappaghcon, Co Galway was approved by the Department of Agriculture, Food and the Marine (DAFM) on 28 August 2020.

Hearing

An oral hearing of appeals FAC 766/2020 of which all parties were notified, was held by a division of the FAC on 4 March 2021.

In attendance

FAC Members: Mr Des Johnson (Chairperson), Mr Pat Coman, Mr Dan Molloy, and Mr Luke Sweetman
Secretary to the FAC: Mr Michael Ryan
Appellants: Not in attendance
Applicant: [REDACTED]
DAFM Representatives: Ms Eilish Kehoe and Mr Luke Middleton

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 affirm the decision to grant the licence (Reference GY10-FL0151).

The proposal is for clearfelling and replanting on a stated site area of 3.92ha at Cappaghcon, Co. Galway. The existing stock is Japanese larch (0.26ha) planted in 1986, and Sitka spruce (3.66ha) planted in 1983 and 1979. The proposed stock is to be 100% Sitka spruce (3.72ha) with 0.20ha open space provided. Fertiliser at a rate of 350kg/ha is proposed along with windrowing and mounding. Documents submitted with the application include 'Harvest Plan' and AA Pre-screening Report.

The DAFM referred the application to the County Council and NPWS. There is no record of a response from the County Council. The NPWS response recommends conservation conditions if the licence is to be granted - Forestry Best Practice should be followed, invasive species, if present, should be managed so as to avoid their spread, and reference is made to an Appendix of 'General Points'.

The DAFM prepared an Appropriate Assessment Report (AAR) and Appropriate Assessment Determination (AAD), both dated 11.08.20. The AAR records the soils as 100% Peaty Gleys and the slope as moderate. The project lands are in the Shannon Catchment (100%), the Cappagh (Galway)_Sc_010 Sub-Catchment, the Ballinlough Stream_010 (62%) and the Ballinlough Stream_020 (38%) waterbodies. Natura 2000 sites within 15km radius were examined (13 SACs & 4 SPAs). The following sites are screened out for Stage 2 Appropriate Assessment - Pollnaknockaun Wood Nature Reserve SAC, Derrycrag Wood Nature Reserve SAC, Rosturra Wood SAC, Cloonmoylan Bog SAC, Barroughter Bog SAC, Lough Derg SPA, Loughatorick South Bog SAC, Pollagoona Bog SAC, River Shannon Callows SAC, Middle Shannon Callows SPA, Sonnagh Bog SAC, Lough Rea SPA, Lough Rea SAC and Ardraigue Bog SAC. The reasons for the screening conclusions are absence of upstream hydrological connectivity, lack of pathway, separation distance (SPAs) and location in a separate waterbody catchment with no upstream connection, lack of pathway (Sonnagh Bog SAC and Lough Rea SAC). An in-combination report listed non-forestry projects as dwellings, slatted shed, and dairy goat sheds, and forestry related projects as afforestation (2), forest road (1), private felling (3), Coillte Felling (8) (all since 2015). The AAR screened in the following sites for Stage 2 Appropriate Assessment - Slieve Aughty Mountains SPA – for reason of location within the Natura site, Lough Derg, North-East Shore SAC – for reason that hydrological connection exists, and Lower River Shannon SAC – for reason that there is direct hydrological connectivity.

The applicants submitted a Natura Impact Statement (NIS), dated 04.08.20. This was not solicited by the DAFM. This records the site as being on a downhill gentle northerly slope. There are no aquatic zones within or adjacent to the project site. There is no hydrological connection to any European site. The nearest Stream is the Ballinlough Stream approximately 200m to the north-west of the site. The NIS screens in the Slieve Aughty Mountains SPA for Stage 2 assessment. It lists the qualifying interests (Hen Harrier and Merlin) and conservation objectives for the Natura 2000 site, and examines the potential for adverse effects. In respect of the qualifying interests, the NIS records as follows:

- Hen Harrier – there are no suitable habitats for Hen Harrier adjacent to the project site. The Project lands are not within a Red Zone. The project site is approximately 3.4km north-east of the nearest known breeding pair. No mitigations needed.

- Merlin – most of the project lands are adjacent to coniferous forestry. The western boundary is adjacent to agricultural grasslands and these are not favourable habitat. The northern boundary is adjacent to potentially more favourable habitats for nesting. Mitigations recommended.

The NIS concludes that the proposed mitigation measures will ensure that the project individually will not prevent or obstruct the qualifying interests of Slieve Aughty Mountains SPA from reaching favourable conservation status.

The NIS considers the potential for in-combination effects. It records the percentage forest cover in the Ballinlough Stream_010 Sub-basin as approximately 17%, and approximately 29% in the Ballinlough Stream_020 Sub-basin. No non-Coillte forestry licences are recorded but there are 7 Coillte harvesting licences covering 116.68ha recorded over the last 5 years. The NIS concludes that there is no potential for the proposed development to contribute to cumulative adverse effects on the Slieve Aughty Mountains SPA in combination with other plans or projects.

The DAFM Determination (AAD) is dated 24.08.20. The AAD screens out the Lough Derg North-East Shore SAC due to the hydrological separation distance and insensitivity to the qualifying interests, and the Lower River Shannon SAC due to the hydrological separation distance. It screens in the Slieve Aughty Mountains SPA for Stage 2 Appropriate Assessment. The AAD includes the following mitigation measures in respect of the qualifying interests of the Natura 2000 site:

Hen Harrier

- This is a Hen Harrier Green Area. If notified by the NPWS of a Hen Harrier nesting site within or partially within 1.2km of this location, the licence is to be amended to exclude potential disturbance operations taking place within the Hen Harrier breeding season (1st April – 15th August)
- Measures to protect adjoining/downstream aquatic based species and habitats

Merlin

- No operations during the period 1st March – 31st August (Inclusive) within 100m of the forest edge, where the forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland, or within 100m of a clearing in the forest greater than 1ha. Operations can commence in sections of the project area furthest away from the 100m exclusion zone and can progress towards the exclusion zone, but can only enter it during the period 1st September – 29th February.

The AAD concludes that the proposed development, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, having regard to the conservation objectives, provided that the site-specific mitigations are implemented.

The licence issued on 28.08.20 and is exercisable until 31.12.2022. It is subject to standard conditions, with additional conditions relating to the Merlin, Hen Harrier, water quality, inspection of protective measures, retention of broadleaves (where safe), and adherence to specified Guidelines and Standards.

There is a single appeal against the decision to grant the licence. The grounds of the appeal contend that there was a breach of Regulation 21(1) of the Forestry Regulations. The Forest Service failed to supply, in an appropriate timeframe, relevant records that informed the decision. There is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. A number of criteria set out in Annex III have not been considered, there is a breach of Article 4(4) of the EIA Directive. On the same date as this application was made a further 16 applications were made for the same FMU totalling 167.96ha. The application does not cover the whole project. Project splitting is not permitted. The licence and associated operations threaten the achievement of the objectives for the underlying waterbody as set under the River Basin Management Plan. There is no evidence that potential impact on a Nationally designated site has been fully considered. The Stage 1 screening did not consider potential impact on SAC 001913. The screening conclusion is not legally valid. The mitigation measures in the AAD are not precise enough. The in-combination assessment is not sufficiently developed. The opinion of the general public was not sought under Article 6(3) of the Habitats Directive. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation. Licence conditions do not provide for the protection of all wild birds during the breeding and rearing season. Licence conditions do not provide for the strict protection of Annex IV species. There should be a standard condition requiring the licensee to notify the Minister at the commencement and conclusion of operations. There should be a condition requiring the Forest Service to inspect plans and works prior to, during and post works to ensure compliance. There should be stringent and enforceable conditions regarding notification of appropriate bodies, groups and the public of the spraying of chemicals.

In response, the DAFM state that the appellant requested 351 felling licence applications on 03.01.20, and has exercised his right to appeal. The proposal is not a class of development to which the EIA Directive applies. The DAFM applies a wide range of checks and balances in relation to the protection of water, and measures applied cover a wide range of issues. The application was referred to the County Council and NPWS. DAFM is actively engaged in the WFD process and is fully informed of its responsibilities regarding the achievement of the objectives of the WFD. Impacts on Slieve Aughty Mountains SPA were considered in the NIS and the related AAD prepared by the DAFM. The original Appropriate Assessment screening was subject to ecological review before the AAD was produced. There is no potential for the proposed works to contribute to any cumulative effects on the Slieve Aughty Mountains SPA, when considered with other plans or projects. The proposed development is consistent with national forestry policy. Specific mitigations identified in the AAD were attached as conditions to the licence. The DAFM fully complied with the requirements of Article 6(3) of the Habitats Directive. It is a legal principle that if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar, where set out in statute elsewhere, those other obligations and restrictions apply. Additional conditions are not warranted in this case. The use of PPPs is governed by Statutory Instruments. There is no legal requirement to inform others of the intention to spray.

An Oral Hearing was convened on 4th March 2020 and all parties were invited to attend and participate. The FAC sat in person and remotely. The applicant and DAFM participated remotely. The appellant did not attend. The DAFM outlined the background to the making of its decision to grant the licence, and confirmed that the AAD had been taken into consideration in the making of the decision. The initial Appropriate Assessment screening had been subject to ecological review. The NIS was not solicited but had been fully considered prior to the making of the AAD. The applicant described the site as gentle and north facing, and with good access. The underlying soil is a peaty gley. The Ballinlough Stream is about 200m from the north-western end of the site but is not hydrologically connected. The Stream flows approximately 9.3km to Barroughter Bog SAC but does not drain into the Natura 2000 site. It eventually flows into Lough Derg, North-East Shore SAC at approximately 10.4km. In response to FAC questions, the DAFM stated that it was now satisfied that there is no direct hydrological connection to the Ballinlough Stream or to any Natura 2000 site, but if any such connection does exist, there is no likelihood of it being a pathway for significant effects on any designated site. The Ecologist had confirmed that there is no potential for impact on either the Lough Derg, North-East Shore SAC or the Lower River Shannon SAC. Section 2 of the AAD addressed this issue by identifying the sites screened out for Stage 2 Appropriate Assessment and the reasons why they were screened out. Sonnagh Bog SAC is to the north-east at a separation of approximately 14.2km and in a different river sub-basin. The Slieve Aughty Bog NHA is approximately 670-700m separated and at the extremes of possible colonisation range.

Addressing the grounds of appeal, the FAC noted that the appellant had exercised his right to appeal the DAFM decision. The FAC considered 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 the licence and associated operations threaten the achievement of the objectives set for the underlying waterbody under the River Basin Management Plan, but no convincing supporting

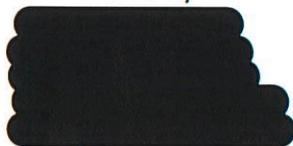
evidence is submitted in support of this contention. In these circumstances, and having regard to the licence conditions, the nature and scale of the proposal and the evidence from each party, the FAC concludes that the proposed development on a site of 3.92ha, would not threaten the achievement of the objectives of the underlying waterbody.

The FAC considered the procedures followed, and conclusions reached in respect of Appropriate Assessment screening and the AAD completed by the DAFM. The FAC noted that the original screening had concluded that 3 Natura 2000 sites should undergo Stage 2 assessment, and the evidence presented that this conclusion was based on a false assumption of direct hydrological connection to the Lough Derg, North-East Shore SAC or the Lower River Shannon SAC. The FAC is satisfied that this matter is addressed in Section 2 of the AAD which lists the sites screened out for Appropriate assessment and the reasons for this screening conclusion. The FAC noted that the AAD had considered the NIS submitted and the Determination contains site specific mitigation measures in respect of the Hen Harrier and Merlin, which were carried forward as conditions attached to the licence. Based on the evidence before it, the FAC is satisfied that the procedures followed by the DAFM are consistent with the requirements of Article 6(3) of the Habitats Directive, and that the conclusions of the AAD are sound. The FAC is satisfied that there is no likelihood for significant effects on Sonnagh Bog SAC for the reasons stated at the Oral Hearing, or for significant impacts on Slieve Aughty Bog NHA.

The contention that licence conditions do not provide for the protection of all wild birds during the breeding and rearing season is not supported by any specific evidence of the presence of wild birds on the project lands or reasons why the proposed development would threaten their protection. No specific evidence has been submitted in respect of the presence of Annex IV species or reasons why the proposed development would threaten their protection. In these circumstances, the FAC concludes that the inclusion of additional conditions to the licence would not be warranted. Compliance with, and enforcement of conditions are matters for the DAFM who have the required legislative powers. The spraying of chemicals is governed by way of Statutory Instruments and the FAC sees no convincing reason for the inclusion of specific conditions attached to the licence in this regard. The 'Harvest Plan' is an operational document, but all operations carried out must be in strict accordance with the conditions of the licence.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours sincerely

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On behalf of the Forestry Appeals Committee