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3rd November 2021

Subject: Appeals FAC342/2020 & FAC413/2020 in relation to felling licence TFL00460420

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, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Hearing

Felling licence TFL00460420 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 17/06/2020. An Oral Hearing of appeals FAC342/2020 & FAC413/2020 was held by the FAC on the 16/09/2021 and was reconvened on the 14/10/2021. In attendance:

FAC Members - Mr Des Johnson (Chairperson), Mr Seamus Neely & Mr Luke Sweetman.

FAC Secretary - Mr Michael Ryan.

Appellant - [REDACTED]

Applicant - [REDACTED]

DAFM - Ms Eilish Kehoe & Mr Robert Windle participated on both occasions.

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions at the Oral Hearings and all other submissions, before deciding to affirm the decision to grant licence TFL00460420.

Background

This licence is for the thinning of 28.26ha of coniferous forestry in Tinode, Co. Wicklow. The proposal is in three plots. Plot 1 is 3.79ha, Plot 2 is 15.68ha and Plot 3 is 8.79ha. Each plot contains 80% Sitka spruce and 20% Japanese larch. The Inspector's Certification states the soil type is predominantly brown earths in nature. The slope is predominantly flat to moderate (<15%) and the project area does not adjoin or contain an aquatic zone(s). The majority of the site is in the Goldenhill_010 River Sub-basin. This waterbody has 'Unassigned' status under the Environmental Protection Agency (EPA) 2013-2018 reporting period. A sliver in the north-west of the proposed area is in the Rathmore Stream_010 River Sub-basin. This waterbody has been assigned 'Poor' status. The nearest downslope, EPA-mapped river is the Goldenhill (3rd Order) which is c.620m straight-line distance to the south-east, separated by a number of buildings, agricultural fields and the N81.

The Harvest Plan (HP) states there are steep slopes on-site. It is proposed to thin each plot four times in the next 10 years. A Bio plot within Plot 3 contains Eucalyptus. These, along with any other broadleaves within the site or the boundary will be retained. The HP states the site is c.2.5km from the closest SAC, Red Bog, Kildare SAC. It states that the proposal is not hydrologically connected to this SAC as there are no watercourses on or leaving the site.

The Inspector's Certification document states that the application was desk-assessed. The proposal is in a fisheries-sensitive area, is not in an acid-sensitive area, is not within the 3km buffer zone upstream of, and hydrologically connected to, an NHA, SAC or SPA, is not within a Freshwater Pearl Mussel 6km zone, is within 200m of an archaeological site or monument, is not within a high amenity area or prime scenic area and there are no high amenity landscape considerations. The proposal is within the catchment of a Local Authority designated water scheme. The application, together with existing thinning and/or clearfelling of three years or less within a 500m equates to 74.01ha. The application, together with other thinning and/or clearfelling applications within 500m and recommended for a clearfell licence, constitutes an area of 74.01ha.

The application was referred to Inland Fisheries Ireland (IFI) and the DAFM's Archaeologist. No response was received from IFI. The DAFM's Archaeologist's report (dated 22/05/2020) states there is a Recorded Monument in Plot 1 (a historic quarry) and another Recorded Monument (a levelled cropmark enclosure) contiguous to Plot 3 (c.20m to the southeast of the proposal). The report includes an annotated map and lists conditions to be adhered to during the proposed works.

In processing the application, the DAFM completed a Stage 1 Appropriate Assessment (AA) Screening which screened the following five European sites within 15km of the proposal: (i) Glenasmole Valley SAC, (ii) Poulaphouca Reservoir SPA, (iii) Red Bog, Kildare SAC, (iv) Wicklow Mountains SAC, (v) Wicklow Mountains SPA. All five sites were screened out due to "the absence within and adjacent to the project area, of any habitat(s) listed as a Qualifying Interest of the Natura site."

The DAFM considered the proposal's potential to contribute to an in-combination effect on European sites. Various planning websites were consulted along with the DAFM's internal records for other plans and projects in the general vicinity of the project area in the River Sub-Basins Goldenhill_010 and the Rathmore Stream_010. The final paragraph in the in-combination statement lacks any specific details of the project and appears to be a generic template. The conclusion states 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 site(s) listed above."

The DAFM issued the licence on the 17/06/2020 and it is valid for 10 years. Schedule 2 lists conditions 1-5 which are relatively standard. "Other conditions attached to this licence" are also listed also in Schedule 2. Conditions (a) - (g) are relatively standard. Condition (h) details archaeological conditions and (i) states "Strictly adhere to Standards for Felling & Reforestation (October 2019). These replace Forest Harvesting & the Environment Guidelines (2000)."

Grounds of Appeal

There are two appeals against the licence. The written grounds of appeal were considered in full by the FAC and are summarised below:

FAC342/2020

1. The Forest Service failed to supply, on request, relevant records that have informed its decision to award this licence as would be required under the EIA Directive. No copies of any AA reports have been provided.
2. No Harvest Plan has been provided for this licence.

3. Proposal threatens the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-2021.
4. Licence conditions do not limit works to particular years.
5. Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive.
6. Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive.

FAC413/2020

- Decision does not comply with the Habitats Directive, the Birds Directive and the EIA Directive.
- “Under the EIA Directive the minimum time permitted is 30 days.”
- The test for Appropriate Assessment Screening in Irish and EU law is it is merely necessary to determine that there may be such an effect.
- If the development which is within 15km of a Natura 2000 site it has been screened in.
- References Case C-323/17 - it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.
- An assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae.
- If it is said to be in a different catchment, the screening must state the catchment that the application is in.
- A map showing the SACs and SPAs and the site of the proposed development should be attached.
- It is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha.
- It is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development that includes thinning and clearfell.
- It is the duty of the FAC to carry out both a full AA Screening and a full EIA Screening in accordance with the law.
- References the opinion of Advocate General Kokott in Case C-254/19, stating this must apply to the FAC as the obligation is binding on all the authorities of Member States.

The DAFM provided the same written response to the grounds of both appeals in a Statement of Facts to the FAC: *“The relevant AA procedure was applied in approving this licence. The screening information can be found on file. An in-combination assessment was also carried out for this application and can also be found on file. Using the current AA procedure in conjunction with the Habitat & Foraging guidance tables all Natura 2000 sites have been screened out as outlined on file. This application alone or in-combination with other forest and non-forest plans/projects in the area will not have a significant impact the qualifying interests of the Natura 2000 sites screened as part of the AA.”*

Oral Hearing

The FAC convened an Oral Hearing on the 16/09/2021. The FAC sat remotely for this hearing. The DAFM and the applicant participated remotely. Neither of the appellants participated in this Oral Hearing. The first appellant notified the FAC that they could not participate due to circumstances out of their control. They submitted a written statement which was read into the record of the hearing. In summary, this submission stated that the appellant requested a copy of “all records that informed the decision on this licence” on the 19/06/2020. The request specifically sought that consultation responses, the EIA screening report (IFORIS), and the Stage 1 and Stage 2 AA reports (including any NIS's) be included in the DAFM's response. The appellant states that some records were provided to him on the 22/06/2020 but

no consultation responses, inspectors certification (including the iFORIS EIA screening) or any other AA documentation were provided. The appellant submitted that it was not possible for him to make a proper assessment of the application based on the records provided, which represents a failure of due process. The appellant also stated that the DAFM's Statement of Facts had not addressed his grounds of appeal. Responding to the FAC, the DAFM and the applicant stated they had no objections to the FAC considering the appellant's written statement.

The DAFM described the background to the processing of the application. Responding to FAC questions, the DAFM confirmed that there is a Harvest Plan on file and that no referral response had been received from IFI. They stated the inclusion of yellow highlighted text in the in-combination report was a clerical error and the key information in the report is the conclusion which states the proposal doesn't represent a source for an effect on any of the Natura sites listed in the AA screening. The DAFM stated they are satisfied there will be no impact on the underlying waterbodies from this proposal. The DAFM Forestry Inspector stated that this application was desk-assessed but that he was familiar with the area from carrying out reforestation inspections nearby. He stated there are sand and stone quarries near the proposal, which is sited on a drumlin-type hill, and no water leaves the site as the soils are so free-draining.

The applicant stated that they had worked in the area for 30 years and that this crop is the second rotation. They submitted that the site is extremely dry and there has never been any water run-off. They had no other comments on the grounds of appeal.

Responding to the FAC, the DAFM confirmed that the appellant had not been sent a number of requested documents. The DAFM stated the appellant had not made a submission on the application so would not have automatically received relevant documents. The DAFM confirmed that the information which the appellant did not receive would not be publicly available elsewhere.

Responding to FAC questions regarding the grounds of appeal, the DAFM stated the fell years are indicated on the application. The DAFM submitted it is the applicant's responsibility to abide by legislation, including the Wildlife Act, regarding the protection of Annex IV species or wild birds.

The FAC queried the applicant regarding planned fell years. The applicant stated that thinning interventions would take place with three-year intervals over a 10-year period and that a further licence may be required for the planned fourth intervention. Regarding Annex IV species or species of wild birds within the project lands, the applicant stated that they knew the site over 30 years and there are no such species present.

In the particular circumstances of appeal FAC342/2020, the FAC notified all parties that, based on the evidence provided at the Oral Hearing, and having regard to a written submission from the appellant, the FAC decided to reconvene the hearing to be heard on 14/10/2021. The agenda for this reconvened hearing was limited to the first and second grounds of appeal of FAC342/2020 to provide an opportunity to make oral submissions in respect of the documents referred to in those grounds.

The FAC sat remotely for the reconvened Oral Hearing. The DAFM and the first appellant participated remotely, and the second appellant did not participate. The applicant was represented by a different Forester than in the initial Oral Hearing. The appellant's audio quality was very poor from the outset, so he made written submissions via the Webex 'Chat Box'. The appellant submitted that the Wicklow Mountains SPA and Poulaphouca SPA are screened out based on habitats not species. As was the Wicklow Mountains SAC but Otter is a Qualifying Interest.

The appellant contended that the River Sub-Basin drains to Poulaphouca SPA and forestry is listed as a high external pressure on this SPA. The appellant raised a number of issues in the Inspector's Certification. Q26 and Q27 indicate it was referred to an Ecologist or the National Parks & Wildlife Service but there is no evidence that it was. Q12 states the application was referred to the Local Authority but this is wrong. Q24 acknowledges hydrological connectivity with Poulaphouca SPA. The appellant submitted that groundwater in this River Sub-Basin is at risk and this has not been identified

by the applicant or the Inspector. There are bore holes /private wells at lower elevations in the catchment. Goldenhill_010 has 'Unassigned' status. There is a relevant watercourse and two small pools/ponds shown on OS mapping not identified on the Harvest Plan. According to the Harvest Plan the site has wetter areas. Why does the Harvest Plan limit operations to dry weather (which is not included in the licence conditions) and daily visual monitoring of water if there is no significant risk to water quality? In response the DAFM stated that the site has been visited for other inspections and is known to be very dry, surrounded by sand and stone quarries and provides no source or pathway for effect on Natura 2000 sites. The DAFM stated that, although historical water features may be visible on OS mapping there is no evidence of their presence on the site now and one of the areas shown as a pond is shown as grass in aerial photography from 2004. The DAFM also stated that the AA screening had considered all Qualifying Interests of the screened Natura sites and the proposal posed no potential threat to these and therefore had been screened out.

The applicant stated that there is no hydrological connectivity from the proposal and no related issues arising.

Responding to the FAC, the appellant was unable to confirm when he realised the correspondence received from the DAFM on the 22/06/2020 did not contain the documents he had requested and could not confirm if he had responded to this correspondence.

In response to FAC queries the DAFM stated that the proposal is in a catchment which drains to the Poulaphouca Reservoir and Q24 was answered 'Yes' as the proposal is technically within 3km upstream of the Poulaphouca SPA but there is no hydrological connection and no potential for surface water run-off from the site, even in extreme weather. The appellant queried could the pond on the OS map be seasonal. The applicant stated that the Foresters who work on the site have stated it is very dry and that reference to 'wetter areas' on the Harvest Plan is to mitigate risk.

In considering the grounds of appeal, the FAC noted that a number of the grounds of the second appeal are related to the obligations and functioning of the FAC and are not grounds related to the decision of the DAFM to grant licence TFL00460420.

Regarding the first appellant's grounds of appeal on the failure of the DAFM to provide certain documents, the FAC is of the view that this does not constitute an error in the DAFM's decision-making process as this sequence of events occurred after the issuing of the licence under appeal. However, the FAC decided that, in the interest of fair procedures for all parties, the most appropriate way to address these grounds of appeal was to reconvene the Oral Hearing to allow all parties to make oral submissions regarding the pertinent documents.

The FAC considered the grounds common to both appeals regarding the Habitats Directive and the DAFM's AA screening procedures. As detailed above, the DAFM screened five European sites within 15km of the proposal. The reasons for screening out all five sites were recorded in the Inspector's Certification document. The DAFM also stated at the Oral Hearing that all Qualifying Interests (habitats and species) of these European sites had been considered. The FAC consulted publicly available information on the EPA website which showed the same five sites as the DAFM screened within 15km of the proposal. The DAFM also recorded their consideration of the potential for the proposal to contribute to an in-combination effect. The FAC considered the first appellant's submission at the reconvened Oral Hearing that the screen-out reasons listed in the Inspector's Certification did not reference species as Qualifying Interests. However, based on the nature and scale of the proposal, the separation distances involved, and the lack of hydrological connection, the FAC did not find any reason to conclude the DAFM made a serious or significant error, or series of errors, in their AA screening process. Based on the evidence before it, the FAC is satisfied that the DAFM's AA screening process was in line with the

requirements of the Habitats Directive and the FAC considers the conclusions reached by the DAFM regarding AA screening to be sound. Regarding Article 12 of the Habitats Directive, there is no evidence before the FAC regarding Annex IV species present within the project lands. The FAC considers 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 is satisfied that the DAFM did not make a serious or significant error or series of errors in relation to the Habitats Directive.

The FAC considered the grounds of appeal regarding the EIA Directive. The FAC noted that the 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 felling of trees, as part of a thinning intervention, 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 FAC does not consider that the proposal falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish transposing Regulations. The FAC is satisfied that the DAFM did not make a serious or significant error or series of errors in relation to the EIA Directive.

Both appellants made submissions relating to the Birds Directive. The FAC noted the second appellant did not specify which element(s) of the Birds Directive they contend the decision to grant TFL00460420 does not comply with. Regarding Article 5 of the Birds Directive, there is no evidence before the FAC in respect of the existence of species of birds likely to be affected by the proposed development. The FAC considers 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 is satisfied that the DAFM did not make a serious or significant error or series of errors in relation to the Birds Directive.

The FAC had regard to the first appellant's grounds relating to the proposal's potential impact on the underlying waterbodies. The FAC noted that the majority of the site is within the Goldenhill_010 River Sub-Basin which has an 'Unassigned' status. The FAC noted that the DAFM did not employ a proxy status to assess possible impacts on the status of the waterbody and that they contended in the Oral Hearing that the licenced proposal will have no impact on the underlying waterbodies. The FAC is mindful of the judgment in 2018 740 JR (Sweetman v An Bord Pleanála), the 'Hyland' judgement, which addressed the Water Framework Directive in the context of a development that would impact an unassigned waterbody. The FAC considered the particular details of the proposal under appeal to be fundamentally different to the project at issue in the Hyland judgement. That judgement was in relation to a project with a direct impact on an unassigned waterbody (including water abstraction). The evidence before the FAC is that the proposal is for the thinning, in stages, over a 10-year period on a site that is free-draining and is not hydrologically connected to any EPA-mapped watercourse. The evidence from the DAFM Inspector and the applicant's representatives is that the site is very dry and water run-off is not a risk. The FAC noted that the proposal involves second-rotation forestry and that there is no evidence of previous on-site operations impacting on the underlying waterbodies or water abstraction points elsewhere in the River Sub-Basin. Based on the evidence before it, the FAC is satisfied that the licenced project under TFL00460420 will have no impact on the underlying waterbodies. In these circumstances, the FAC found no reason to conclude that the DAFM made a serious or significant error, or series of errors, in relation to the proposal's potential to impact the underlying waterbodies.

In relation to the first appellant's grounds regarding licenced fell years. The FAC noted that the fell years are listed in Schedule 2 of the felling licence. The FAC considers that a further licence may need to be applied for in order to facilitate the thinning schedule set-out therein.

Based on the information before it, as outlined above, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in deciding to issue TFL00460420 and did so in compliance with fair procedures. In deciding to affirm the decision of the Minister, the FAC considered that the proposed development is in line with Government policy and good forestry practice.

Yours sincerely,

A large black rectangular redaction box covering the signature of the official.

Luke Sweetman on Behalf of the Forestry Appeals Committee

