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2nd December 2020

Subject: Appeal FAC 534/2020 regarding licence WW01-FL0094

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 WW01-FL0094 for felling and replanting of forest on 5.77 ha at Ballylow, Co Wicklow, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 3rd July 2020.

Hearing

An oral hearing of appeal FAC 534/2020 was held by the FAC on 18th November 2020 at the Killeshin Hotel, Dublin Rd, Portlaoise, Co. Laois.

In Attendance at Oral Hearing:

Department Representative(s):	Mr. Luke Middleton, Mr. Alan Sheridan,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr Seamus Neely,
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, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence WW01-FL0094.

The licence pertains to the felling and replanting of an area of forest on 5.77 ha at Ballylow, Co Wicklow. The forest is currently composed of Sitka Spruce and replanting would be of the same species. The slope of the site is described as predominantly steep 15 – 30 % and the underlying soil type as Podzols (Peaty) Lithosols, Peats (100%). The project lies within the Liffey (09_01) catchment and waterbody Liffey sub

catchment (010). The application was referred to Inland Fisheries Ireland on 11th December 2019 and to Wicklow County Council on 9th January 2020. The Inland Fisheries Ireland made a submission on 27th January 2020 which suggested attaching a number of stated conditions to any licence issued. The submission from Wicklow County Council received on 6th February 2020 raised no issue with the application. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. The DAFM undertook and documented an appropriate assessment screening that found six European sites within 15km and found that there was no reason to extend this radius in this case and that appropriate assessment was required regarding 4040 Wicklow Mountains SPA as an effect was considered possible due to the proximity of the project to the Natura site. An appropriate assessment report and determination was undertaken that had a final sign off on 1st July 2020. The licence was approved with a number of conditions attached, which included those related to the mitigation of effects as outlined in the appropriate assessment report.

The decision to grant the Licence is subject to one appeal. The grounds of appeal include; Breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, Breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application does not represent the whole project and that the application does not describe any aspects of the environment which are likely to be significantly affected, that the licence and its associated activities have the potential to impact on a National Monument citing that there is no evidence that the appropriate authorities have been consulted, that the licence and its associated operations threaten the achievement of objectives of the River Basin Management Plan for Ireland 2018-21, that there was inadequate consideration of feedback from a consultation body, that the Stage 1 and Stage 2 AA determinations are not legally valid, that DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination, that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Birds Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, that the Licence conditions do not provide a general system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, that the licence should require notification obligations on the applicant regarding commencement and conclusion of operations, that the license should include a condition that the Forestry Service should inspect the Plans and Works prior to, during and after operations, and that there should be conditions requiring notification to appropriate bodies, groups and the public concerned in the case of spraying of chemicals.

In a statement to the FAC, the DAFM provided responses to each of the grounds included in the appeal. In the statement it 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. At the oral hearing the DAFM reasserted its contention that the proposal does not include a class of project covered by the EIA Directive or by National legislation. The statement also describes the appropriate assessment procedure adopted by the DAFM in processing the licence

and the date at which the appropriate assessment determination was signed off. The statement also confirms that the site-specific mitigations identified in the Appropriate Assessment Report and Appropriate Assessment Determination Statement were attached as conditions of the licence issued for this felling and reforestation project. It is also submitted in the statement that the potential for the proposed project to contribute to an in-combination impact on the Wicklow Mountains SPA 004040 was considered by DAFM and that it was concluded that there is no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects.

In relation to the contention in the appeal that there should be conditions requiring notification to appropriate bodies groups and public concerned in the case of spraying of chemicals, the DAFM submitted that the use of plant protection products in Ireland is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, that these Statutory Instruments are published by the DAFM and provide the basis for the proper and appropriate use of these products. The statement also submitted that there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray, nor is there a need for animals in adjacent properties to be moved as the application of this plant protection product is by hand in a very targeted manner that minimises exposure of the environment.

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 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 decision under appeal relates to a licence for the felling and replanting of an area of 5.77 ha. 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 as requiring EIA in Irish Regulations. Therefore that FAC agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

In relation to the contention that the licence and its associated activities have the potential to impact on a National Monument and that there is no evidence that the appropriate authorities have been consulted, the FAC considered the response of DAFM in its statement to the committee and the

documents on file in this connection, including the Senior Archaeologists memo dated 17th October 2019. This memo detailed the determination that the application did not, in this case, require a mandatory (nor warrant) a discretionary referral to National Monuments Service (NMS), DCHG for further advice. Based on the information available to it, and in the absence of any specific information regarding potential impact related to the proposal, the FAC is satisfied that the proposal does not pose a significant threat to a National Monument and that mandatory or discretionary referral to the National Monuments Service was not required in this case.

In relation to the contention that the licence and its associated operations threaten the achievement of objectives in the River Basin Management Plan for Ireland 2018-21, the FAC notes the content of the DAFM statement dated 1st October 2020 in this connection, wherein it outlines the checks and balances that DAFM applies during the 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). The FAC also considered the submission from Inland Fisheries Ireland in relation to this application and noted the inclusion of a condition in the licence to notify the IFI two weeks in advance of commencement of operations. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the proposal. Based on the information available to it, the FAC is satisfied that the proposal does not pose a significant threat to water quality.

In relation to the contention that there was inadequate consideration of feedback from a consultation body regarding this application the FAC noted the response in the DAFM statement provided and considered the relevant documents on file in this connection. When asked at the oral hearing whether the DAFM had any further comment to make on this ground of appeal, its representative reiterated that DAFM had taken full consideration of submissions received from consultation bodies in this case. The FAC is satisfied, based on the information available to it, evidence on the file, including the inclusion of specific conditions, that the feedback from consultation bodies received was adequately considered.

The FAC noted the content of the DAFM statement provided in relation to the contention that the Stage 1 and Stage 2 AA determinations are not legally valid. 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 proposed felling and reforestation project (WW01-FL0094) is not directly connected with or necessary to the management of any European Site. DAFM undertook a Stage 1 screening in relation to six Natura 2000 sites. The FAC examined publicly available information from the NPWS and EPA and identified the same six sites 2122 Wicklow Mountains SAC (0.6km), 4040 Wicklow Mountains SPA (0.6km), 4063 Poulaphouca Reservoir SPA (5.4km), 1209 Glenasmole Valley SAC (9.1km), 397 Red Bog, Kildare SAC (9.8km), and 725 Knocksink Wood SAC (14.4km). Each site is considered in turn along with its qualifying interests and conservation objectives and the reasons for the screening conclusions. The grounds of appeal do not identify any specific concerns with the conclusions reached. The DAFM concluded that an appropriate assessment should be

undertaken in relation to the 4040 Wicklow Mountains SPA with other sites screened out. An appropriate assessment report and determination was prepared with ecological review, and mitigation measures were derived and incorporated into the licence conditions. The reasons on which the screening decisions were made are set out and recorded in the screening and AA reports for the project. The special conservation interests, conservation objectives, adverse impacts and the species specific mitigation measures in relation to the SPA are described. The grounds of appeal do not identify a specific concern regarding effects, impacts or mitigation measures described in the appropriate assessment report and determination. Other plans and projects considered in-combination with the proposal are described. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM determination concludes that;

“the Department of Agriculture, Food & the Marine has determined, pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

For the purposes of 42(16) of S.I.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any European Site.”

Based on the information available to it, the FAC is satisfied that a serious or significant error or series of errors were not made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

The grounds submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, archaeological features, designated sites and other environmental features. The DAFM submitted at the oral hearing that the Applicant provided such plans and that all materials submitted with this application were fully assessed by DAFM in considering the application. The FAC is satisfied that the Harvest Plan submitted with the application is sufficient to inform the decision-making process in this case. Regarding the conditions that the Appellant suggested should be attached to the licence, including those relating to protections for birds, notifications or inspections specific to this licence, the FAC 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, including the information provided at the oral hearing by the applicant as to the process it follows to ensure that

conditions of licence are complied with, and the information provided by DAFM on its approach to enforcement inspection that it considers necessary, that the inclusion of the conditions as raised in the grounds of appeal in this case, was not required.

In deciding to affirm the decision to grant the licence, on the balance of evidence, the FAC is satisfied that there was no serious or significant error or series of errors made in making the decision or that the decision was made without complying with fair procedures. The FAC concluded that the proposed development would be consistent with Government policy and Good Forestry Practice. Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.



Seamus Neely On Behalf of the Forestry Appeals Committee