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23rd December 2020

Subject: Appeal FAC 191/2020 regarding licence CK27-FL0003

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 CK27-FL0003 for felling and replanting of 4.62 ha at Derreenacusha, Co. Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 26th March 2020.

Hearing

An oral hearing of appeal FAC191/2020 was held by the FAC on 18th December 2020. In attendance:
FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Ms Claire Kennedy, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellant: [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Ms Eilish Kehoe, Mr. Anthony Dunbar,

Decision

The Forestry Appeals Committee (FAC) having considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, has decided to set aside and remit the decision of the Minister regarding CK27-FL0003.

The licence pertains to the felling and replanting of 4.62 ha at Derreenacusha, Co. Cork. The site would be replanted with what is indicated as standard conifer reforestation for roundwood production. The site is on the lower slopes of a north facing upland area to the south of Loch Ghuagán Barra with a predominantly steep slope 15-30% with underlying soil types comprising peaty gleys (1%) and podzols (peaty), lithosols, peats (99%). The application included a harvest plan, including maps, and general

environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application.

The DAFM undertook and documented an appropriate assessment screening that found five European sites within 15km, 1873 Derryclogher (Knockboy) Bog SAC, 2315 Glanlough Woods SAC, 364 Kilgarvan Ice House SAC, 365 Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC and 2041 Old Domestic Building, Curraglass Wood SAC and found that there was no reason to extend this radius in this case. All the sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites in the report dated 25/03/2020.

The development it is noted was referred to Cork County Council on the and in a response dated 30th January 2020 requires agreement on a haulage route and compliance with standards in relation to road entrances.

The licence was approved on the 26th March 2020 with a number of conditions attached which include the recommendation as outlined in the submission of Cork County Council.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3) 4(4) and 4(5) of the EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex II of the Directive; that the DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA; that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening and the application has not described any aspects of the environment which are likely to be significantly affected.

Specifically, in relation to this appeal the licence is for an area of 4.62 ha in Coillte's Forest Management Unit (FMU) CK27. On the same date that the application for this licence was submitted a further application for clear felling licences were submitted for the same FMU totalling 24.71 ha. Article 4 (4) of the EIA Directive) requires a developer to submit details of the whole project. The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive. All projects within a Coillte FMU must be considered to form a part of the whole project.

Reference is made to the proximity approximately 40 metres of the project to Loch Ghuagán Barra pNHA and 80 metres to the lake itself. Reference is also made to the Pearl Water mussel as the site is within the catchment of the Upper Lee. There is no protection provided in the conditions in relation to the protection of birds in the breeding season and reference is made to the breach of Article 10(3) of the Forestry Regulations in relation to the submission of information to the appellant.

DAFM in a statement to the FAC, that in regard to the granted Felling licence application CK27-FL0003, that the standard operational activities of clearfelling and replanting already established forests 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 for the standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities and thus Articles 4(3) and 4(4) of the Directive are not applicable.

In relation to the protection of water quality the DAFM applies a wide range of checks and balances during its 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); that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. Referrals to statutory consultees, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. No hydrological connection was identified in this instance

Attached to the submission is correspondence related to the requests from the appellant for copies of 451 Coillte felling licence applications and related documents. A number of the granted felling licences were subsequently appealed by the appellant. DAFM in the SOF notes that the appellant has successfully exercised their right to appeal the granted felling licence application CK27-FL0003.

The AA Screening report of DAFM was completed by the Inspector and contains recommendations regarding screened European Sites. All SCIs/QIs were considered during the screening exercise itself and the screening determination is considered sound. For consideration of in-combination effects of the proposed project, DAFM relied exclusively on Coillte's incombination statement. DAFM subsequently carried out a separate in-combination assessment and included an associated in-combination statement based on this information which is consistent with the licensee's incombination statement.

An oral hearing was held of which all parties were notified and representatives of the DAFM and the Applicant attended. The DAFM presented an overview of their processing of the licence and the screening and appropriate assessment undertaken.

The DAFM also at the hearing outlined non standard conditions specific to the licence and conditions which(i) and (j) reflect site specific requirements recommended by Cork County Council.

The Applicant's Representatives described the documents and information provided with the application. They submitted that the ground conditions were soft and wet. Reference was made to the site draining to Loch Ghuagán Barra. They further submitted that the proposal does not involve any

deforestation for the purposes of land use change and does comprise a class of project covered by the EU EIA Directive.

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 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 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 4.62 ha. The FAC does not consider that the proposal comprises a type of activity that falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

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 DAFM undertook a Stage 1 screening in relation to five Natura 2000 sites and concluded that an appropriate assessment was not required and all sites were screened out.

In considering the appeal and before making a decision, the FAC examined the information submitted in relation to the proposal including AA screening of DAFM. The FAC examined publicly available information and identified the same five sites as the DAFM within 15km from the proposal. These are 1873 Derryclogher (Knockboy) Bog SAC, 2315 Glanlough Woods SAC, 364 Kilgarvan Ice House SAC, 365 Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC and 2041 Old Domestic Building, Curraglass Wood SAC and found that there was no reason to extend this radius in this case. All the sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites.

In regard to any requirement for conditions relating to protection of birds referred to in the appeal, the FAC noted that the site is not within or proximate to a Natura site or an identified qualifying interest and the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. DAFM indicated that site-specific mitigations identified in the AA Report were attached as conditions of the licence issued for felling and reforestation project CK27-FL0003 specific to the project itself.

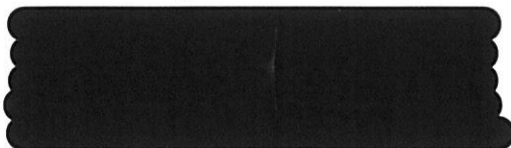
In relation to the pearl water mussel as referred to in the grounds of appeal the species has been identified in the upper catchment of the River Lee approximately 3 kilometres downstream and to the east of Lough Allua a long linear lake which in turn is approximately nine kilometres east of Loch Ghuagán Barra which is the headwater of the River Lee.

It is noted that condition (a) of the licence requires that the licensee shall ensure that all felling and planting operations are carried out in accordance with Forestry and Water Quality, Forest Biodiversity, Standards for Felling & Reforestation, Forestry and Archaeology, Forestry and the Landscape and Forestry and Aerial Fertilisation guidelines and the Code of Best Forest Practice - Ireland and the Irish National Forest Standard published by the Department, which requires protection of receiving waters. The FAC is satisfied that given the hydrological distance and the conditions as outlined that this matter is addressed.

The DAFM considered each site in turn and provided the reasons for screening all of the sites out for appropriate assessment. The grounds of appeal do not identify any specific effects or pathways of concern. Based on the information before it, the FAC is satisfied that the proposal itself would not be likely to have a significant effect on any European site itself. DAFM submitted that it relied exclusively on the Applicant's in-combination statement in its consideration of other plans and projects at the screening stage and the record of the incombination report of possible effects was carried out on the 27/03/2020 and was therefore completed after the issuing of the licence. The FAC considers and is satisfied that this issue constitute a serious error in the making of the decision regarding licence CK27-FL0003.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is satisfied that a serious error were made in making the decision and is setting aside and remitting the decision of the Minister regarding licence CK27-FL0003 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to undertake a screening of the likely significant effects on European sites of the proposal in-combination with other plans and projects.

Yours sincerely,



Derek Daly On Behalf of the Forestry Appeals Committee

