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23. December 2020

Subject: Appeal FAC 573/2020 regarding licence WW09-FL0165

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 WW09-FL0165 for felling and replanting of forest on 4.2 ha at Ballintombay Upper, Ballydowling Hill, Kirikee, Ballinabarny, Co Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 15th of July 2020.

Hearing

An oral hearing of appeal FAC 573/2020 was held by the FAC on the 11th of December 2020.

In Attendance at Oral Hearing:

Forestry Service: Mr Alan Sheridan and Mr Anthony Dunbar

Appellant: Not present

Applicant: [REDACTED]

FAC Members: Mr Donal Maguire (Deputy Chairperson) Mr Vincent Upton, Mr Derek Daly, Ms Mary Lawler

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 WW09-FL0165.

The DAFM undertook and documented an appropriate assessment screening, that found five European sites within 15km and found that there was no reason to extend this radius in this case.

The screening determined that an appropriate assessment was not required regarding the four SACs within the 15km radius by reason of there being no possibility of cumulative impacts on the Natura sites, with no upstream connections, and the subsequent lack of any pathway hydrological or otherwise. Having reviewed the details of relevant European sites, their Qualifying Interests and Conservation Objectives, the DAFM identified the possibility of the project having a significant effect on a screened European site (Wicklow Mountains SPA

004040), due to the proximity of potential habitat for the species listed as the Special Conservation Interest of this Natura site.

As such, the clear-fell and reforestation project was screened in and an Appropriate Assessment carried out. The exercise involved a review of Special Conservation Interests and the Conservation Objectives of the above European site (as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service). These have also been considered in the AA Report and AA Determination Statement on file. A licence was approved and dated the 15th of July 2020, with a number of conditions attached.

A single appeal was submitted against the decision to grant the licence. The grounds of appeal state that the Appropriate Assessment screening did not comply with "the decision of Finlay J in Kelly", the (DAFM's) decision is invalid under the principles of EU law as the Minister is being a Judge in their own case, there has been no investigation as to whether the application site has complied with the requirements of EU law, According to the heads of the new bill the Minister has assumed control of the FAC, and the basic requirements of the National Parks & Wildlife Service (NPWS) have not been complied with.

The DAFM responded to the Appellant's grounds of appeal in a written statement to the FAC. The DAFM stated that the proposed area for felling and reforestation was subject to the DAFM's Appropriate Assessment screening procedure in compliance with the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). This Stage 1 Screening for Appropriate Assessment included Natura 2000 sites within 15km of the project area. The screening identified the possibility of the project having a significant effect on one screened European site (004040 Wicklow Mountains SPA) therefore the proposed project was screened in and a Stage 2 Appropriate Assessment was carried out. This resulted in the production of an Appropriate Assessment Report and Appropriate Assessment Determination. The outcome of this process was that the potential impacts of the proposed project on the Special Conservation Interests of the Wicklow Mountains SPA were identified "on a precautionary basis" and so site-specific measures to mitigate these impacts were included by the DAFM in the conditions of the licence.

The DAFM contended that adherence to the prescribed conditions of the licence, in tandem with compliance with relevant environmental guidelines/requirements/standards and the measures laid out in the application documentation, would "ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservation Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive." The DAFM also stated that the proposed project will not result in any adverse effect on any European Site.

Furthermore, the DAFM 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." The DAFM's statement to the FAC stated that a number of the Special Conservation Interests / Qualifying Interests were truncated on the Appropriate Assessment Screening Form for project WW09-FLO165 when outputting the form related to the screening exercise but that all Special Conservation Interests / Qualifying Interests

were considered during the screening exercise itself, a revised screening form was provided with the statement.

The FAC carried out an Oral Hearing on the 11th of December 2020. The parties were invited to attend in person or to join electronically. The FAC sat in person at this hearing, the Appellant did not attend but the DAFM and the Applicant both participated electronically.

At the Oral Hearing the DAFM restated much of their previously submitted written response to the Appellant's grounds of appeal. The DAFM also confirmed that the Appropriate Assessment Report and Appropriate Assessment Determination had been concluded, and their conclusions considered, prior to the decision to grant felling licence WW09-FL0165. The forest was described as a mature, coniferous forest that is outside of the SPA and situated some 3.7km to the closest boundary. The DAFM outlined how referrals to statutory consultees, including the NPWS and local authorities, are automatically triggered according to interactions with certain spatial rules, and that this licence was not referred to the NPWS in this instance and that Wicklow County Council had responded but not raised any issues and Inland Fisheries Ireland had also responded and that their submission is reflected in the licence conditions.

In addressing the grounds of appeal, the FAC considered, in the first instance, the Appellant's contention that the Appropriate Assessment screening was not carried out in compliance with the decision of "Finlay J in Kelly". The Appellant did not participate in the Oral Hearing and so there was no opportunity for them to expand on the details of their contention. The FAC interpreted the Appellant's reference to "Finlay J in Kelly" as referring to the findings of Finlay Geoghegan J. in Kelly- v An Bord Pleanala.

Under Article 6(3) of the Habitats Directive, any 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 the proposed project alone would not be likely to have significant effects on four of the Natura 2000 sites. The Wicklow Mountains SPA was screened in for Stage 2 Appropriate Assessment. The FAC considered that the DAFM had carried out a Stage 2 Appropriate Assessment in alignment with the requirements of the Habitats Directive, which led to the making of an Appropriate Assessment Determination which was considered prior to the decision to grant the licence being made.

Specific conditions relating to the protection of the Merlin were incorporated into the licence issued by the DAFM. The FAC noted that Qualifying Interests were truncated on some of the DAFM documentation but considered that this omission was primarily of a clerical nature and was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites.

The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone, or in combination with other plans or projects, would not be likely to give rise to significant effects on any Natura site, were correct. Furthermore, the FAC

concludes that, if executed in accordance with the specific mitigation measures recommended in the Appropriate Assessment Determination, the proposed clear-fell and reforestation would not, individually, or in combination with other plans or projects, have an adverse effect on the integrity of any European site, with regard to their conservation objectives. Based on the evidence before it, the FAC is satisfied that the DAFM complied with the provisions of the Habitats Directive in carrying out its Appropriate Assessment screening.

Having regard to the Appellant's other contentions in their grounds of appeal, the FAC concluded, based on the information before it, that the DAFM's decision is valid and that the project site has been assessed in compliance with the requirements of the Habitats Directive. The FAC considered the Appellant's contention that "the basic requirements of the NPWS have not been complied with". The FAC also took into account the DAFM's statement regarding the referral of licence applications to the NPWS (and other statutory consultees) and that this proposed project was not referred for consultation because the criteria for doing so were not met. Based on the information before it, the FAC considers the processes completed prior to issuing the decision, including the Stage 2 Appropriate Assessment, have complied with the requirements of Article 6(3) and the absence of referral to the NPWS does not provide sufficient grounds on which to deem the licence decision should not be affirmed.

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

A large black rectangular redaction box covering the signature of Donal Maguire.

Donal Maguire on behalf of the Forestry Appeals Committee