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29th January 2021

Subject: Appeals FAC 272/2020 & 288/2020 in relation to licence CE07-FL0200

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence CE07-FL0200 for felling and replanting of 3.91 hectares at Carncreagh and Tullaghboy, Co. Clare was granted by the DAFM on 22nd May 2020.

Hearing

An oral hearing of appeals FAC 272/2020 & 288/2020, of which all parties were notified, was held by the FAC on 20th January 2021.

In Attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway

Appellants: Not present

Applicant / Representative(s): [REDACTED]

Department Representative(s): Mr. Luke Middleton & Ms. Eilish Keogh

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 to grant this licence CE07-FL0200.

The licence pertains to the felling and replanting of an area of 3.91 hectares at Carncreagh and Tullaghaboy, Co. Clare. The forest is currently composed of Sitka Spruce and replanting is to be of Sitka Spruce (95%) and Broadleaves (5%) with 5% open space. As per the DAFM documentation, the site's underlying soil type is Blanket Peats (89%) & Podzols (Peaty), Lithosols, Peats (11%), the slope is moderate 0-15%, the habitat is predominantly coniferous forest (WD4) and the project is located in the Mal Bay WFD Catchment, Annageeragh_010 Sub Catchment and Annageeragh_020 Water Body (which has a poor WFD status 2013-2018).

The applicant's application pack included maps, inventory data, a harvest plan and an Appropriate Assessment pre-screening report. The DAFM referred the proposal to Clare County Council and Inland Fisheries Ireland (IFI). Evidence presented shows no response was received from Clare County Council, while IFI's response dated 14th January 2020 stated they had no objection to the felling and made recommendations with regard to ground stability, crossing of watercourses and internal forestry drains, contacting the local IFI office one month before works commence, and for the works to be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines.

The DAFM undertook and documented an Appropriate Assessment screening dated 19th May 2020, that identified six European sites within 15km and that there was no reason to extend this radius in this case. The screening determined that an Appropriate Assessment was not required, giving reasons for screening out each of the sites. The proposal's potential to contribute to in-combination effects on European sites was also considered, with various planning sites and DAFM internal records consulted, with other plans and projects in the vicinity of the site listed. The licence issued on 22nd May 2020 with a number of conditions attached.

The decision to grant the Licence is subject to two appeals. The grounds of the first appeal include: this decision does not comply with the Habitats Directive, the Birds Directive or the EIA Directive; that the Court of Justice has repeatedly held that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts, point (3) of the Judgement states the obligation of a national court to interpret national law as far as possible in accordance with EU law does not require that the parties to the proceedings before it expressly assert that specific interpretation, if those parties allege at least an infringement of the relevant provisions of EU law, and this must apply to the FAC as the obligation is binding on all the authorities of Member States;

The grounds of the second 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 there is no evidence that the cumulative impact on a nationally designated site has been adequately considered; that the Stage 1 Appropriate Assessment conclusion is not legally valid as it relied on an inadequate pre-screening report; that licence condition k is not internally (sic) coherent; that several licence conditions are merely recommendations/guidelines that are not verifiable or enforceable; that the 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; that the licence should contain a condition to notify the Minister of the commencement and conclusion of operations; and that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In a statement to the FAC, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, that the licence as granted is consistent with the requirements of the Habitats Directive, Birds Directive and EIA Directive, and provided responses to the grounds of appeal. At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence, they also clarified that it was the applicant's Appropriate Assessment pre-screen report dated 14th May 2020 that they took account of in their Appropriate Assessment screening, that the in-combination statement was completed before the licence issued and was part of the decision making process and that they believe the licence conditions are clear so that all sensitivities will be protected. The applicant provided information on the site, its environs and proposed operations under the licence, they also explained how they submitted a second Appropriate Assessment pre-screen report.

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. In its statement to the FAC, the DAFM 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.

In considering this aspect, the FAC notes that 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 3.91 hectares. 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 for EIA in Irish Regulations. Therefore, the 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 addressing the Appropriate Assessment grounds of appeal, the FAC considered, 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 projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening, and found six European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Lower River Shannon SAC, Carrowmore Point to Spanish Point and Islands SAC, Mid Clare Coast SPA, Knockanira House SAC, River Shannon and River Fergus Estuaries SPA and Pouladatig Cave SAC. The FAC consulted publicly available information from the NPWS and EPA and identified the same six sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. DAFM's reasons for screening out the different sites was site dependant, including reasons such as due to the separation distance between the Natura site and the project, location of the project outside core foraging range or the project being within a separate water body catchment and with regard to the Carrowmore Point to Spanish Point and Islands SAC DAFM's reason referred to having considered the expert opinion and the rationale presented in the pre-screening report. The DAFM undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site.

The grounds of one of the appeals submitted specifically contended that that the Stage 1 Appropriate Assessment conclusion is not legally valid as it relied on an inadequate pre-screening report. The applicant submitted two pre-screening reports, one with the application on 2nd December 2019 and a second/revised one dated 14th May 2020, which they indicated was submitted to update the process. The DAFM at the oral hearing stated that it was this pre-screening report dated 14th May 2020 that they had regard to in their Appropriate Assessment screening. The FAC finds this second pre-screen report gives some additional details on operations, its rationale for screening out the six relevant European Sites, it identified, references to further forestry projects in the vicinity of the site and the cumulative impact on river water bodies and its conclusion that the project did not need to go for Appropriate Assessment. The applicant's pre-screen report dated 14th May 2020 identifies a hydrological distance of 12.5km to the Carrowmore Point to Spanish Point and Islands SAC in its rationale for not having the possibility of significant effect on this site/its qualifying interests. The FAC find the direct distance from the project area to this European site to be of this magnitude and the applicant gave additional commentary at the oral hearing of the watercourse that bisects the project area passing through two lakes before reaching this European site at an even greater hydrological distance than that stated. The FAC having considered all of this and the Carrowmore Point to Spanish Point and Islands SAC qualifying interests, is satisfied that no likelihood of significant effects arise from the proposal itself or in combination with other plans and projects, due to the distance involved, the size and nature of the proposal and having regard to other plans and projects. In addition, 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 procedures adopted by the DAFM in their assessment are considered to be acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

In relation to the appellant's grounds that licence condition k is not internally (sic) coherent, and that several licence conditions are merely recommendations/guidelines that are not verifiable or enforceable, the DAFM in their statement to the FAC outlined condition k and that the conditions that issued on the felling licence are consistent with DAFM/Forest Service standard procedures, forest policy and best forest practice. Condition k states;

"As per page 13 of the Code of Best Forest Practice and page 9 of Forestry and Landscape Guidelines, no conifers are to be replanted within 20m of the public road. Broadleaves and diverse conifers should be planted within the strip 10-20m from the public road, in an undulating fashion to create a sequence of varying spaces. Sharply defined edges should be avoided to create a gradual transition from forest to open ground. The minimum initial planting density required within the buffer zone is 1,100 stems / ha."

The DAFM at the oral hearing stated that stocking density outside of setbacks are at commercial levels, with the stems per hectare identified to be 2,500 in schedule 3, replanting, under the licence. The FAC reviewed the conditions of the licence, noted eighteen conditions listed from a) to r), most with stated reasons, some of which arise from the IFI referral response and consider they are sufficiently coherent and articulated in this particular case and that the DAFM have powers to undertake inspections of operations under the licence and take actions under Forestry legislation as is considered appropriate.

In relation to the appellant's stated grounds of appeal that the 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 the FAC, the FAC observed that the appellant did not provide any site-specific details in relation to any species of concern. The FAC had regard to the DAFM statement and note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant were not required.

In relation to the appellant's grounds that the licence should contain conditions to notify the Minister of the commencement and conclusion of operations, the FAC finds that the licence includes a condition that a site notice must be completed and erected in accordance with directions provided. The FAC is satisfied, based on the information available to it, that the inclusion of conditions relating to this ground in the appeal in this case, was not required.

In relation to the appellant's grounds that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals, the DAFM in their statement outlined that the use of plant protection products (PPPs) in

Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, which give effect to EU legislation on PPPs and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. In addition they set out that there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray, and gave reassurances as to the use of the PPP approved for use. Based on the information available to it, the FAC is satisfied that licence conditions as proposed by the appellant are not required in this case.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision, 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 James Conway.

James Conway, On Behalf of the Forestry Appeals Committee