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29th January 2021

Subject: Appeals FAC 575/2020 & 620/2020 in relation to licence OY08-FL0045

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 OY08-FL0045 for felling and replanting of 13.58 hectares at Tulla and Crumlin, Co. Offaly was granted by the DAFM on 15th July 2020.

Hearing

An oral hearing of appeals FAC 575/2020 & 620/2020, of which all parties were notified, was held by the FAC on 13th January 2021.

In Attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant (FAC 575/2020):	Not present
Appellant (FAC 620/2020):	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 OY08-FL0045.

The licence pertains to the felling and replanting of an area of 13.58 hectares at Tulla and Crumlin, Co. Offaly. The forest is currently composed of Sitka Spruce and replanting is to be of Sitka Spruce (90%) and Birch (10%) with 5% open space. As per the DAFM documentation, the site's underlying soil type is Blanket Peats (66%) & Peaty Gleys (33%), & Podzols (Peaty), Lithosols, Peats (1%), the slope is moderate 0-15%, the habitat is predominantly WD4 and the project is located in the Shannon Catchment_010 (100%) the Camcor SC 010 (100%) sub catchment and Roscomore Stream 010 (100%) waterbody (which has a high WFD status 2013-2018).

The application included maps, inventory data, a harvest plan and an Appropriate Assessment pre-screening report. The DAFM referred the proposal to Offaly County Council and NPWS. Offaly County Council's response was received on 13 January 2020 and includes; that the site is located within the Slieve Bloom Mountains SPA, it is in an area of high amenity, and classified as high landscape sensitivity area, that the subject lands are located within close proximity to a designated mountain walk, care should be taken on entering and exiting the site, that it is important that every effort is made to implement measures that protect water quality, and ensure there is no negative impact on the water quality as a result of the development, and that the development should be carried out in accordance with stated guidelines. NPWS' response was received on the 4th February 2020 raising their awareness of recent works related to forestry activities in the Slieve Bloom Mountains SAC and SPA sites, specifically the creation of a substantial ploughed fire break near the Cut and of concerns regarding the applicant's submitted pre-screen report and stated that they "cannot recommend approval for this application as the AA screening is incomplete when excavated fire breaks are not mentioned or their effects on the designated sites not adequately addressed".

The DAFM undertook and documented an Appropriate Assessment screening dated 29th June 2020, screening for thirteen European sites; two of which were said to be overlapping the site, eight others within 15km and the likely zone of impact was extended to include three more. The screening determined that an Appropriate Assessment was not required, giving reasons, regarding eleven of the sites; 002162 River Barrow And River Nore SAC, 002332 Coolrain Bog SAC, 000859 Clonaslee Eskers And Derry Bog SAC, 002236 Island Fen SAC, 004233 River Nore SPA, 002333 Knockacoller Bog SAC, 002147 Lisduff Fen SAC, 000585 Sharavogue Bog SAC 004137 Dovegrove Callows SPA, 004086 River Little Brosna Callows SPA and 006410 River Shannon Callows SAC. Two sites were screened in for Appropriate Assessment; 000412 Slieve Bloom Mountains SAC (possible effect - due to the proximity of the project to the Natura site) and 004160 Slieve Bloom Mountains SPA (possible effect - due to the location of the project within the Natura site).

An Appropriate Assessment report and determination was produced by DAFM both dated 30th June 2020 and signed off following ecological review on 10th July 2020. The Appropriate Assessment report reviewed the screening of the European sites and agreed with the conclusions reached in the screening, an Appropriate Assessment was then undertaken for the two sites screened in, 000412 Slieve Bloom Mountains SAC and 004160 Slieve Bloom Mountains SPA, with their special conservation and qualifying interests reviewed and mitigation listed if required, site specific measures were identified and stated to be inserted as conditions of the licence if it approved. 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 15 July 2020 with a number of conditions attached, which included those related to the mitigation of effects as outlined in the Appropriate Assessment report and determination statement.

The decision to grant the Licence is subject to two appeals. The grounds of the first appeal include; the Appropriate Assessment screening did not comply with the decision of *Finlay J in Kelly*, under the basic principles of EU law the decision is invalid as the Minister is being a judge in his/her 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 NPWS have not been complied with. 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 licence and its associated operations take inadequate consideration of the River Basin Management Plan for Ireland 2018-21, that the Stage 1 & 2 Appropriate Assessment 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, the licence conditions do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC, 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 harvest plan is not consistent with requirements of the Interim Standard for Felling and Reforestation, that the licence should contain a condition to notify the Minister of the commencement and conclusion of operations, that the licence should include a condition that the Forestry Service should inspect the plans and works prior to, during and after 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 and provided responses to the grounds of appeal. At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence and the applicant provided information on the site, its environs and associated operations.

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 13.58 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.

The FAC considered the contention in the grounds of appeal that in granting the licence DAFM had taken inadequate consideration of the objectives of the River Basin Management Plan 2018-2021. In doing so, the FAC noted the content of the DAFM statement, which outlines the checks and balances applied 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 that the licence includes a condition that requires that all felling and planting adheres to the *Forestry & Water Quality* document along with a number of other Guidance and Standards documents published by the Department, in addition it includes a specific condition on water quality and protection of the environment that was identified in the appropriate assessment report and determination. 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 and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality.

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 ten European sites overlapping or within 15 km of the proposal area, and extended the zone of influence to include three more European sites. The FAC examined publicly available information from the NPWS and EPA to verify this information. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. Eleven of the sites were screened out, and the 000412 Slieve Bloom Mountains SAC and 004160 Slieve Bloom Mountains SPA were both screened in for appropriate assessment. An appropriate assessment report and determination was prepared with ecological review, and mitigation measures were derived and incorporated into the licence conditions. The reasons for the screening decisions taken are set out and recorded in the screening and appropriate assessment reports for the project. The special conservation and qualifying interests, conservation objectives, adverse impacts and the species-specific mitigation measures in relation to the two screened in sites 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. However the grounds of the first appellant do contend that the basic requirements of the NPWS have not been complied with. The FAC considered this contention and reviewed the referral response of NPWS with regard to this. The FAC noted the DAFM had referred the application to the NPWS and considered they responded to their remarks regarding the fire line at The Cut by including that feature in their in-combination assessment, in which they also examined other plans and projects in the area, including planning applications, and other forestry projects. The FAC noted the inclusion in this assessment that this fire line measures c. 920m in length and is 9294m from the project area for OY08-FL0045 and that maintenance and upkeep of fire lines is not licenced by the DAFM. In this instance, the FAC is satisfied that the DAFM had sufficient regard to the response from the NPWS.

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 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 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 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, and a similar ground with respect to the protection of certain animal species under Article 12 of the Habitats Directive, the FAC had regard to the statement provided by DAFM and the confirmation that site-specific mitigations identified in the appropriate assessment report and determination were attached as conditions of the licence issued in this case. The FAC considered the existing legislative safeguards in place with regard to these species and 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 agrees that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required.

The appellant's grounds submit that the harvest plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. The DAFM in their statement stated they considered the application and associated information submitted and deemed this information meeting DAFM requirements. The FAC find a harvest plan was provided with the application and concluded that it is a document outlining general environment and safety rules and that other accompanying documents outlined inventory and restocking details and that maps identified the proposal area, river waterbodies, designated sites and other features. The FAC is satisfied that the information submitted with the application is sufficient to inform the decision-making process in this case and that all of the licenced operations on site must comply with the conditions of the felling licence.

In relation to the appellant's grounds that the licence should contain conditions to notify the Minister of the commencement and conclusion of operations, and of inspections prior to, during and post operations, the FAC finds that the licence includes a condition that a site notice must be completed and erected in accordance with directions provided and that the DAFM have powers to undertake inspections in line with Forestry legislation as is considered appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions relating to these grounds 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

