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31st March 2021

Subject: Appeal FAC244/2020 in relation to licence WD02-FL0163

Dear [REDACTED]

I refer to your appeal 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 WD02-FL0163 for felling of 4.06 ha at Boola, Coolishal, Co. Waterford granted by the DAFM on 7th May 2020.

Hearing

An oral hearing of appeal FAC244/2020, of which all parties were notified, was held by the FAC on 24th March 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas, Mr. Seamus Neely, Mr. Vincent Upton
Appellant:	Not present [REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Anthony Dunbar & Ms. Eilish Kehoe
Secretary to the FAC:	Ms. Marie Dobbyn, Ms. Heather Goodwin (observing)

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received including those at the oral hearing, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant the licence WD02-FL0163.

The decision pertains to the felling of 4.06 ha Boola, Coolishal, Co. Waterford. The forest is currently comprised of Sitka spruce planted in 1986 and replanting would be of the same species. The stand is bordered by forest roads to the north and south and is situated in a larger complex of managed forest. The application, dated 2nd December 2019, included inventory and environmental information, an Appropriate Assessment pre-screening report, a harvest plan and maps. A second Appropriate Assessment pre-screening report dated 29th April 2020 was also submitted by the Applicant. This

describes the site as a coniferous plantation (WD4) on a poorly, drained mineral soil and described the proposed operations. It identifies three Natura sites within 15km, Comeragh Mountains SAC (001952), Lower River Suir SAC (002137), and Nier Valley Woodlands SAC (000668), and describes the qualifying interests of each and reasons for not proceeding to Appropriate Assessment and identifies other plans and projects in the area.

The DAFM completed and recorded an Appropriate Assessment screening of the proposal, dated 5th May 2020. This identifies the same European sites as the pre-screening report, lists the associated qualifying interests and provides reasons for screening each site out for Appropriate Assessment. A separate consideration of other plans and projects in combination with the proposal was also recorded dated 7th May 2020.

The application was referred to Inland Fisheries Ireland and Waterford County Council. A response was provided by Inland Fisheries Ireland which described the site as being on thin peat/peaty soils with wet/saturated area upon inspection and area located in the headwaters of a tributary of the Suir. They noted rutting and Rhododendron at adjacent areas and requested that a detailed overview of the drainage of the site is undertaken and that the Applicant demonstrates how operations can be undertaken without resulting in soil erosion and nutrient losses. The licence was issued on 8th May 2020 and includes general and specific conditions.

There is one appeal against the decision. The grounds submit that there has been a breach of Article 4(3) and 4(4) of the EIA Directive 2014/52/EU in that the DAFM failed to undertake a screening for EIA and that the application does not describes aspects of the environment likely to be affected and that cumulative effects have not been considered. The grounds contend that there has been inadequate consideration of the objectives of the WFD (Water Framework Directive) River Basin Management Plan with reference to responses from referral bodies and licence conditions. It is submitted that the AA (Appropriate Assessment) screening conclusion is flawed with reference to the pre-screening report submitted by the Applicant and the referral body response. The grounds contend that the licence conditions do not provide a system of protection for wild birds consistent with the Birds Directive and should include notification requirements in relation to the spraying of chemicals.

In a statement to the FAC, the DAFM submitted that because the standard operational activities of clear-felling and replanting of an already established forest area are not categorised in Annex II of the Directive or in the national transposing legislation, a screening assessment for sub-threshold EIA was not required and thus Article 4(3) and 4(4) of the Directive is not applicable. It is submitted that 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) and 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. It is submitted that the DAFM considered the correspondence submitted by IFI in respect of felling licence application WD02-FL0163 and deemed a specific request for

removal of rhododendron was not warranted. Best forest practice in terms of restocking of the site subsequent to felling will necessitate the control of competing vegetation in the licenced area, including rhododendron control where appropriate.

It is submitted that the 4.06 ha felling and reforestation project licenced as WD02-FL0163 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19)* (DAFM, 2019). Having reviewed the details of relevant European sites their qualifying interest and conservation objectives the Department deemed that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on the relevant screened European sites. In relation to the protection of wild birds it is submitted that it is a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply. It is submitted that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012 and examples of restrictions regarding the use of such products are submitted.

An oral hearing of the appeal was held and attended by representatives of the DAFM and the Applicant. The DAFM outlined the application that was made and their processing of the application including referencing the spatial layers and other data employed for this purpose. They noted that they have responded to each ground of appeal in their written statement and submitted dates of application, processing and issuing. They outlined their Appropriate Assessment screening and submitted that it was carried out in line with their procedures and that they were satisfied with their decision. They submitted that the proposal would not involve deforestation and would not fall within a class of development covered by the EU EIA Directive. It was submitted that the additional conditions specified on the licence related to the referral made by the IFI. It was submitted that a field inspection had been carried out subsequent to the appeal and that this found that there was a watercourse running from north to south which is marked on historic Ordnance Survey maps of the land and that the DAFM considered that standard guidelines would address any concerns regarding water quality. It was submitted that no invasive species were found on the site in questions whereas some are present in adjoining areas. The Applicant submitted details of the site and the application details. They submitted that two relevant watercourses or drains drain into the aquatic zone noted by the DAFM and that it was their opinion that based on the characteristics of the site and the nature of the operations that no impact on a European site would arise. They outlined their policies regarding the use of plant protection products.

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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered 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 4.06 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 concluded that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

The water course to the south of the proposed felling forms part of the Glasha (Waterford) 010 waterbody which has been assigned a High status for the third cycle of the Water Framework Directive (based on 2013-2018) and flows easterly to meet the Lower River Suir SAC. In relation to the grounds that pertain to the Water Framework and the Habitats Directive, the FAC had particular regard to the licence conditions which contain both generic and specific conditions. In particular condition i) requires that *“The harvest plan should also contain a drainage overview and detail of how heavy machinery can move through the site without causing significant soil erosion.”* It was submitted that this condition related to the response provided by the IFI which noted that the lands drain into a tributary of the Suir system and that protection of water quality was of particular importance. The FAC concluded that, if the production of the information was deemed to be necessary as a licence condition, the information specified under condition i) should have been submitted and considered by the DAFM prior to the issuing of the licence. The FAC considered that, where the production of such information is considered necessary, that it should be assessed to ensure that the operations would not result in a deterioration of water quality, and that there was no potential for significant effects to arise on a European site in the absence of any measures to avoid or reduce such effects. The FAC concluded that the requirement to produce such information after the licence had been issued represented a serious error in the making of the decision.

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. An Appropriate Assessment Screening was undertaken by the DAFM and identified three sites within 15km and that there was no reason to extend the radius in this case. Each site is considered in turn and reasons are provided for the screening conclusions reached in respect of each site. The DAFM undertook and documented a consideration of the potential for in-combination effects and concluded that the project,

when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites in relation to those that were screened out. In relation to the Lower River Suir SAC the screening notes that the DAFM had regard to the pre-screening report submitted by the Applicant and the characteristics of the site. The aquatic zone that flows through the site flows southerly to enter the Glasha River that continues easterly and flows into the boundary of the Lower River Suir SAC after some 4km. The Lower River Suir SAC has been designated for the conservation of a number of habitats and species, both terrestrial and aquatic. As noted, the FAC considered that the information specific in condition i) should have been requested prior to the issuing of the licence. As this information provides further information regarding the proposed operations, the FAC considered that a new screening for Appropriate Assessment should also be undertaken taking account of any new information provided.

In relation to the appellant's stated ground 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 the Birds Directive. The FAC had regard to the DAFM statement and the submission that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The DAFM had undertaken and documented a screening for Appropriate Assessment in relation to European sites, both SACs and SPAs. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

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 satisfied that a serious error was made in making the decision regarding WD02-FL0163 and that the decision should be remitted to the Minister to request from the Applicant a Harvest Plan that contains a drainage overview and detail of how heavy machinery can move through the site without causing significant soil erosion and taking account of this information, if provided, to undertake a new screening for significant effects on European sites of the proposal itself and in combination with other plans and projects in line with Article 6(3) of the EU Habitats Directive before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee

