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9th April 2021

Subject: Appeal FAC 076/2020 regarding licence TFL00274319

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 TFL00274319 is for the felling of 3.89 ha of woodland in two contiguous plots at Powerswood, County Kilkenny which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 10th February 2020.

Hearing

An oral hearing of appeal FAC076/2020 was held by the FAC on 25th March 2021.

In attendance:

FAC Members: Mr. John Evans (Chairperson), Mr Luke Sweetman, Mr. Derek Daly

Secretary to the FAC: Mr. Michael Ryan

DAFM Representatives: Ms. Eilish Kehoe, Mr. Robert Hamilton.

Applicant represented by [REDACTED]

Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence TFL00274319.

Licence.

The licence pertains to felling of 3.89 hectares in two contiguous plots at Powerswood, County Kilkenny. The soil type underlying the project area is stated as predominantly brown podzols in nature. The slope

is predominantly flat to moderate. The project area does not contain/adjoin an aquatic zone. The vegetation types within the project area comprise 100% Sitka Spruce conifer plantation with hedgerows.

The file was referred to Kilkenny County Council and no response was received.

The project was also referred to the National Parks and Wildlife Service who in a response dated 28/03/2019 indicated no comment.

The file was also referred to the DAFM Archaeologist who in a response indicated no objections to the project but recommended specific conditions which were subsequently included in the licence.

An Appropriate Assessment (AA) screening was carried out and recorded on the file. The screening considered 4 sites within 15km and that there was no need to expand this radius in this case and other plans and projects considered are recorded. The European sites considered were Hugginstown Fen SAC 000404; River Nore and River Barrow SAC 002162; River Nore SPA 004233 and Thomastown Quarry SAC 002252. The proposal's potential in-combination effect was also assessed. The overall conclusion was to screen out all sites concluding no possibility of a significant effect on any Nature site, and that Appropriate Assessment was not required owing to the absence of aquatic zones; the absence of pathways to Natura sites; unsuitability of the site and beyond the foraging range of any of the Qualifying Interests and the scale and location of the project.

The licence was issued on the 22nd July 2020 subject to standard conditions.

Appeal.

There is one appeal against the decision.

The grounds in summary refer to the River Nore and River Barrow SAC ;to seasonal drains in the winter and harvesting occurring in the summer when there is no flow. Reference is made to the Otter species. It is indicated that the project requires AA. Reference is made to Court decisions on the matter including Kelly v An Bord Pleanála, to judgement C258/11 and the requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment and there is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect. That the FAC be aware of its requirements in relation to the Habitats Directive as a public authority and that it must comply fully with the attached document; General observations from the National Parks and Wildlife Service (NPWS) of the Department of Culture, Heritage and the Gaeltacht in relation to forestry application referrals. Reference is made to EUCJ Judgements C258-11 and C323-17 in relation to assessment and that it is not appropriate at screening stage to take account of the measures to avoid or reduce the harmful effects of the project on the site. Reference is also made to obligations under 2011 EC (Birds and Natural Habitats) Regulations referring specifically to the keeping of records. There is reference made to a turlough.

In a statement to the FAC, in regard to the granted licence the DAFM states that the decision was issued in accordance with the DAFM procedures, SI 191/2017 and the Forestry Act. It also states that DAFM is satisfied that all criteria as outlined in the standards and procedures have been adhered to in making the decision on the application. The statement from the Forestry Inspectorate indicates that the site was screened for AA and Natura sites were identified within a 15 kilometre radius and were screened out and the reasons are indicated in the statement. The project was also assessed for any in- combination effects. The proposed project contains seasonally water-filled drains and there is no possible adverse effect from the proposed project itself on Natura sites. A specific condition based on the DAFM Archaeologist's report relating to potential impact on archaeological remains was included on the licence.

An oral hearing was held of which all parties were notified and representatives of the applicant, the DAFM and the FAC sat remotely. The DAFM presented an overview of their processing of the licence and the screening assessment undertaken; that a desk assessment was undertaken and relevant database layers were examined in certifying the application and although no field inspection of the site was undertaken the Forestry Inspector was familiar with the site from previous inspections. All Natura sites were screened out. No watercourse was identified on or adjoining the site and that there are seasonally water-filled drains. The site is not a suitable habitat for Kingfishers.

At the hearing the FAC raised issues relating to the Otter species and the applicant and the DAFM indicated that they were not aware of the presence of the species and that it a site unsuited to the species. The issues of road access and ground conditions were raised. The question of possible mitigation measures was raised and that no specific mitigation measures were proposed only adherence to best forestry practice. Any proposal such as the planting of broadleaves were to enhance the site rather than mitigation measures. Drainage on the site was also raised and it was indicated that there was no direct flow off the site. The issues were addressed by the DAFM to the satisfaction of the FAC.

In considering the appeal the FAC examined the AA screening undertaken by the DAFM. The FAC examined publicly available information from the Environmental Protection Agency and NPWS and identified the same four sites as the DAFM within 15km from the proposal, Hugginstown Fen SAC 000404; River Nore and River Barrow SAC 002162; River Nore SPA 004233 and Thomastown Quarry SAC 002252. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified and their Qualifying Interests, Special Conservation Interests and conservation objectives and the reasons for screening out for Stage 2 AA provided by the DAFM. The DAFM considered each site in turn and provided the reasons for screening all the sites out for AA.

Details relating to Qualifying Interests including the Kingfisher and Otter species were also considered and based on the information available there is nothing to indicate that the project will give rise to the possibility of a significant effect. In relation to turloughs there is no evidence of the presence of a turlough or hydrological connection to a turlough from the project site. Details of other plans and

projects were also examined by the DAFM concluding the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions and the DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura sites.

The FAC is satisfied that the DAFM did not make any serious or significant error in their AA screening and there is no convincing evidence before the FAC to disagree with the conclusions reached.

The Inspector's Certification was also reviewed by the FAC at the oral hearing in relation to AA screening and the consideration of in-combination effects prior to the issuing of the licence. The FAC concluded it is adequately reasoned based on the responses received and the documentation forming the application.

In relation to general hydrological connections the site is within the Arrigle_30 River Waterbody WFD the status of which is indicated is moderate. The FAC is satisfied based on the information available to it, that there is an absence of an aquatic zone on or proximate to the site and there is no direct or proximate hydrological connection to a waterbody.

The FAC therefore considers and is satisfied that no issues arise to constitute errors in the making of the decision regarding licence TFL00274319. 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 no serious or significant error or a series of errors was made in making the decision and that the decision was made while complying with fair procedures. The FAC is thus affirming the decision of the Minister regarding licence TFL00274319 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government Policy and Good Forestry Practice.

Yours sincerely,

A black rectangular redaction box covering the signature of the official.

Derek Daly On Behalf of the Forestry Appeals Committee