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9th April 2021

Subject: Appeal FAC 339/2020 in relation to licence TY06-FL0087

Dear [REDACTED]

I refer 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 TY06-FL0087 for felling and replanting of 10.38 hectares at Garryglass & Gortahumma, Co. Tipperary was granted by the DAFM on 19th June 2020.

Hearing

An oral hearing of appeal FAC 339/2020, of which all parties were notified, was held by the FAC on 10th February 2021. In attendance:

FAC Members:

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

Appellant:

Applicant / Representative(s):

Department Representative(s):

Secretary to the FAC:

Mr. Luke Middleton & Ms. Eilish Keogh

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 set aside and remit the decision of the Minister to grant this licence TY06-FL0087.

The licence pertains to the felling and replanting of an area of 10.38 hectares at Garryglass & Gortahumma, Co. Tipperary. The forest is currently composed of predominately Sitka Spruce and replanting would be of 100% Sitka spruce with 5% open space. As per the DAFM documentation, the site's underlying soil type is Acid Brown Earths, Brown Podzolics (97%) & Surface water Gleys, Ground water Gleys (3%) the slope is predominately steep 15-30%, the habitat is predominantly coniferous forest

(WD4) and the project is located in the Shannon Catchment (100%), the Clodiagh (Portlaw) SC_010 (100%) sub catchment, and the Nenagh_20 (100%) Water body.

The application pack included maps, inventory data, a harvest plan and an Appropriate Assessment pre-screening report. The DAFM referred the proposal to Tipperary County Council and Inland Fisheries Ireland (IFI). No response is on file from Tipperary County Council, the IFI in a response dated 21st January 2020 stated they had no objections to the felling and gave some recommendations. The DAFM undertook and documented an Appropriate Assessment screening dated 4th June 2020, screening for ten European sites; one of which was said to be overlapping the site (Slievefelim to Silvermines Mountains SPA 4165), eight others found within 15km and also extending this radius in this case to include Lough Derg (Shannon) SPA 4058. The screening determined that an Appropriate Assessment was required for Slievefelim to Silvermines Mountains SPA, but not required for all other sites, 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 recorded as consulted and other plans and projects in the vicinity of the site listed.

An Appropriate Assessment report and determination was produced by DAFM both dated 10th June 2020 and signed off following ecological review on 12th June 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 site screened in, Slievefelim to Silvermines Mountains SPA, with its special conservation and qualifying interests, the Hen Harrier, reviewed and it found that no mitigation was required, that it is in a Green Area and identifies site specific conditions if the licence is approved.

The licence issued on 19th June 2020 with conditions attached.

The decision to grant the Licence is subject to one appeal. The grounds of the appeal broadly are;

- 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.
- A further breach of Article 4 (4) of the EIA Directive 2014/52/EU through failure to describe aspects of the environment which are like to be significantly affected by the development.
- That the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework Directive River Basin Management Plan for Ireland 2018-21.
- That the Stage 1 & 2 Appropriate Assessment determinations are not valid through the absence of complete, precise and definitive findings.
- That DAFM has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination,
- That the licence conditions that 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 should contain a condition to notify the Minister of the commencement and conclusion of operations.
- That the licence should contain a condition that plans and works must be inspected by the Forestry Service prior to, during and post works,
- 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 each of the grounds of appeal.

At the oral hearing, DAFM summarised their approach to processing the application including referencing the spatial layers and other data employed for this purpose. They outlined the Appropriate Assessment process they followed and noted that they have responded to each ground of appeal in their written statement. The appellant contextualised his grounds of appeal and made more specific references to some of the grounds. He queried the process of the ecological review of the DAFM's Appropriate Assessment Report and Determination and he submitted that the NPWS should have been consulted even as a precautionary principle given the proposal was identified as being in a Hen Harrier green area within a SPA and the most up to date red area data may not have been available to the ecologist or the DAFM. He also submitted that there was no assessment of the restocking of the site in the Appropriate Assessment, that an area in the application categorised as scrub was mapped under a NPWS Native Woodland Survey as native woodland, containing Oak, Birch and Holly, and that this was further evidence it should have been referred to the NPWS, that the licence conditions were not robust enough with regard to the aquatic buffer and retention of broadleaf trees, and that the site has direct hydrological connection to the Lower River Shannon SAC. The applicant described the information submitted with the application and described the site. It was submitted there was a relevant watercourse on the site but that the nearest European site was at a hydrological distance of 38km and that given the nature of the watercourse and the distance to the SAC that no significant effects would arise. It was also submitted that the area referred to as scrub contained willow and hazel, that there was no oak, and that it was included in the application as it will be necessary to cross through this area to get access to the east of the proposal area, while also referring to another area adjoining the proposal area of similar composition. The DAFM submitted their reasons for screening out the Lower River Shannon SAC, including that the site drains to Lough Derg SPA first and that it was screened out and also the hydrological distance to it. The appellant further submitted that the project needed to be considered in combination with other projects with regard to an effect on the River Shannon and that the NPWS survey is in conflict with the applicant's evidence. The applicant further submitted that the area surveyed contained naturally occurring scrub that can be found along a stream and that other areas adjoining the stream did not form part of the application as indicated on the submitted maps, that it was considered these features wouldn't be of interest to the NPWS and clarified that they consider scrub as broadleaves that haven't the potential to reach high forest.

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 10.38 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 WFD River Basin Management Plan. 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 reviewed EPA maps and data and find the proposal area is in the Shannon Catchment (100%), the Clodiagh (Portlaw) SC_010 (100%) sub catchment, and the Nenagh_20 (100%) Water body which has a good WFD status (2013-2018). The DAFM referred the proposal to Tipperary County Council, and no response was received. The DAFM also referred the proposal to IFI who stated they had no objections to the felling and gave some recommendations. A number of licence conditions relate to the IFI response and in addition the reasons stated for other licence conditions are in the interest of protection of water quality during harvesting and restocking operations. In summary based on the information available to it and having regard to the scale, nature and location of the proposal 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 considering 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 one site, Slievefelim to Silvermines Mountains SPA 4165, that overlapped with the proposal area, eight (Lower River Shannon SAC 2165, Bolingbrook Hill SAC 2124, Silvermine Mountains SAC 939, Keeper Hill SAC 1197, Lower River Suir SAC 2137, Silvermines Mountains West SAC 2258, Anglesey Road SAC 2125 and Kilduff, Devilsbit Mountain SAC 934) that are within 15km and extended this radius in this case to include Lough Derg (Shannon) SPA 4058. The FAC consulted publicly available information from the NPWS and EPA and identified the same ten sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. Nine of the sites were screened out, and the Slievefelim to Silvermines Mountains SPA was 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 interest, conservation objectives, adverse impacts and the species-specific mitigation measures in relation to the screened in site is described. The DAFM also 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 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. 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.

The FAC also considered the appellant's contentions that the NPWS should also have been consulted given that part of the proposal, categorised as scrub in the application, was mapped under a NPWS Native Woodland Survey as native woodland, containing Oak, Birch and Holly and there was insufficient conditions in the licence with regard to it, the aquatic buffer, and the retention of broadleaf trees. The area in question is plot 8 in the application. The applicant submitted that this area contained willow and hazel, that there was no oak, and that it was only included in the application as it will be necessary to cross through this area to get access to the east of the proposal area, that the application outlined that they would retain broadleaf trees, but accepted that they may have to remove some scrub or trees from this area for access purposes. The reforestation objective provided in the application is stated to be standard conifer reforestation for roundwood production. The DAFM Felling and Reforestation Policy (2017) states that this objective is generally not appropriate if the current forest to be felled mainly comprises broadleaf species. While noting the small scale of the plot in question and the description

provided in the application the FAC, in reviewing publicly available information, found this part of the proposal area to be mapped under the National Survey of Native Woodland (2003 – 2008) by the NPWS. The FAC further noted that other areas mapped under that survey had been excluded from the application. The FAC considered due to conflicting evidence about the composition of plot 8, a lack of detail with regard to it in the application, and the proposed use of this area for access through the site, that there was insufficient consideration of this area in the making of the decision in this case and that the licence conditions are not robust enough with regard to it. Consequently the FAC is remitting the decision to the Minister to request further information from the applicant regarding the operations that are proposed in this section of the forest, plot 8, before a new decision is made and at a minimum to restrict activities through licence conditions to those necessary for access purposes and to exclude the clearfelling of this area should an approval be granted. The FAC considers that this reflects the operations described at the oral hearing but considers that clarity and certainty should be brought to the issue through suitable licence conditions. The FAC's conclusion is based on the information available to it and should not exclude the Minister from attaining further information or attaching further conditions as is deemed necessary where a new decision to approve is made.

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 note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site but did refer to the categorisation of the area regarding Hen Harrier. The DAFM have attached licence conditions that relate to the Appropriate Assessment undertaken in relation to Slievefelim to Silvermines Mountains SPA and its related conservation interest, Hen Harrier. 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 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 and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that a significant error or series of errors was made in making the decision and is setting aside and remitting the decision to the Minister to request further information from the Applicant regarding the operations that will take place in this section of the forest, numbered as plot 8 on the application, before a new decision is made and at a minimum to restrict activities through licence conditions to those necessary for access purposes and to exclude the clearfelling of this area should an approval be granted.

Yours sincerely,

A black rectangular redaction box covering the signature of James Conway.

James Conway, On Behalf of the Forestry Appeals Committee

