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30th April 2021

Subject: Appeal FAC 604/2020 regarding licence TFL00321519

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 TFL00321519 for thinning and clearfell on a site comprising some 59.7 ha (as per revisions to the application and set out in correspondence on file dated 24/02/2020) at Mountainfarm, Co Laois was approved by the Department of Agriculture, Food and the Marine (DAFM) on 10th July 2020. Restocking is set out to be generally in the ratio of 90% Sitka spruce and 10% alder / birch. The application was referred to Laois County Council and Inland Fisheries Ireland by letter dated 27th August 2019 and no response is on file from either. The application was referred to the National Parks and Wildlife Service and a response is on file which references the original extent (126 ha) and draws to attention that the location is in a 'HNLA' for hen harrier. Suggestions as to conditions for inclusion in any licence issued are also recorded on the file as made by the DAFM Archaeologist and these are included in licence as issued.

Hearing

A hearing of appeal FAC 604/2020 of which all parties were notified was held on 19th April 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Orla Coffey, Mr Seppi Hona, Ms Martina Monaghan & Ms Eilish Kehoe.

Appellant:

[REDACTED]

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway,
Mr. Seamus Neely and Mr Derek Daly.

Secretary to the FAC:

Ms. Heather Goodwin.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision to the Minister regarding licence TFL00321519.

A Natura Impact Statement (NIS), which was completed on 14th May 2020 and titled '*for roading, thinning, clearfell and reforestation project TFL00321519 & CN86386 located at Mountainfarm, Mountrath, Co. Laois*' was prepared for and submitted to DAFM by the applicant. The site description in the NIS submitted is as follows;

'The conifer plantation (WD4) is located on an upland area of the Slieve Blooms on peaty gleys at ca. 230-250m OD. There is a road (BL3) running through the site from Clonaslee to Burke's crossroads and another road between plots 4 and 5. There is a small upland eroding watercourse (FW1) along the northern border of the site with adjacent earth banks (BL2) and scrub (WS1). This watercourse flows into the Delour River and from there to the River Nore downstream. The site was mounded when planted originally and drainage ditches (FW4) are found throughout. The surrounding landscape hosts conifer plantations, open wet heath (HH3) and acid wet grassland (GS3/4) habitat with drainage ditches (FW4).'

While the project site lies in an area that is to the east of the Delour_010 waterbody and for which the assigned WFD status in the 2013-18 assessment period is high, an examination of the EPA maps shows that the project area (as revised and set out in correspondence on file dated 24/02/2020) is in the Mountrath_010 subbasin and that waterbody has a good status assigned to it in the 2013-18 assessment period. The NIS sets out an Appropriate Assessment screening that found seven Natura 2000 sites within 15km. The seven sites screened are;

- River Barrow and River Nore SAC 002162 (920m),
- Slieve Bloom Mountains SAC 000412 (2491m),
- Knockacoller Bog SAC 002333 (8892m),
- Coolrain Bog SAC 002332 (9399m),
- Slieve Bloom Mountains SPA 004160 (0m),
- Clonaslee Eskers and Derry Bog SAC 000859 (11526m), and
- River Nore SPA 004233 (7597m).

Two of these seven sites were screened in for the purposes of Appropriate Assessment namely, River Barrow and River Nore SAC 002162 and Slieve Bloom Mountains SPA 004160. In relation to the Appropriate Assessment considerations the NIS sets out that it can be objectively concluded that, when the proposed mitigation(s) are implemented, there will be no direct, indirect or in-combination effects on the Qualifying Interests & associated conservation objectives of River Barrow and River Nore SAC 002162 or Special Conservation Interests & associated conservation objectives in Slieve Bloom Mountains SPA 004160 from the proposed forestry project TFL00321519. It also sets out that, in keeping

with Regulation 42(16) of the European Communities (Birds & Natural Habitats) Regulation 2011 (as amended) & based on objective information, that the project, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site.

The DAFM also undertook a screening for Appropriate Assessment which also found the same seven Natura 2000 sites within 15 km and the documentation relating to this screening is included within the '*Inspectors Certification*' on file. Each site is considered in turn along with its Qualifying Interests. On the face of it all seven sites are recorded as being screened out in this particular screening report although there is what appears to be a number of post script entries making reference to an 'AAD' of 26/06/20 (a copy of which is on file). The said Appropriate Assessment (AA) Determination dated 26th June 2020 sets out that in concluding the AA screening that DAFM has determined that there is no possibility of the project licenced under TFL00321519 having any significant effect, either individually or in combination with other plans or projects, on any of five European Sites (Knockacoller Bog SAC 002333 due to distance and absence of hydrological connectivity, Coolrain Bog SAC 002332 due to distance and absence of hydrological connectivity, Clonaslee Eskers and Derry Bog SAC 000859 due to distance and absence of hydrological connectivity, Slieve Bloom Mountains SAC 000412 due to distance and the nature of qualifying interests and River Nore 004233 SPA due to distance). Two sites (River Barrow and River Nore SAC 002162 and Slieve Bloom Mountains 004160 SPA) were screened in and proceeded to Appropriate Assessment. The report considers the sites, their qualifying interests and sets out the basis for the AA Determination. Mitigations are proposed for inclusion in the licence to be issued. An In Combination consideration relating to the project was undertaken and is recorded on the file.

There is one appeal against the decision. The grounds submit that there is a breach of Article 4 (3) of the EIA Directive 2014/52/EU contending that a number of criteria set out in Annex III do not form part of the Forest Service screening assessment and have not been taken in to account in the processing of the application, and that the Forest Service failed to supply, on request, in an appropriate timeframe, relevant records that have informed its decision to award the licence, as would be required under the EIA Directive.

In the statement to the FAC in relation to appeal 604/2020, the DAFM provide a response wherein it submitted that the decision was issued in accordance with the procedures S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures as listed on the statement have been adhered to in making a decision on the application. It also sets out that the application was desk and field assessed. At the oral hearing the appellant contextualised the grounds of appeal. He asserted that he had not been provided with a copy of records relating to the application to inform and assist in drafting an appeal in this case. He asserted that he had to make an application under the AIE process which he submitted on 15/07/20 and to which he received a reply on 13/08/20 some days after the latest date for submitting an appeal.

The FAC, in the first instance, considered the Appropriate Assessment considerations including the screening and determination as undertaken by the DAFM. The grounds of appeal do not make reference to any specific European site, specific pathways or specific effects of concern. The FAC found that the

DAFM undertook a screening for Appropriate Assessment and that the Appropriate Assessment Determination dated 26th June 2020 documented the screening conclusions and an Appropriate Assessment in respect of two European Sites namely, River Barrow and River Nore SAC 002162 and Slieve Bloom Mountains SPA 004160. The FAC also finds that mitigations are set out in the Appropriate Assessment Determination in respect of the two screened in sites and that these are included as obligations on the licence issued. In response to query at the oral hearing the DAFM representative confirmed that the contents of the NIS as submitted by the applicant was taken into consideration when carrying out the Appropriate Assessment and making the Appropriate Assessment Determination in this case. The DAFM representative also confirmed that the DAFM was satisfied that notwithstanding the NIS having been done for a road project as well as the felling project that it was clear that the mitigations proposed were clearly set out separately for the felling project. In response to further query the DAFM representative acknowledged that on the face of it the Appropriate Assessment screening as included in the Inspectors Certification recorded that all seven European Sites were screened out and that this was likely a clerical error as two of the said sites should have been screened in (and proceeded to Appropriate Assessment). It was further asserted by the DAFM representative that the screening conclusions relied on in the making of the decision were as set out in the Appropriate Assessment Determination report, and furthermore asserted that these were correct. While the FAC considered that errors were made in the initial Appropriate Assessment screening documentation as set out in the Inspectors Certification, it finds that the Appropriate Assessment screening, considerations and Determination relied on in the making of the decision are as set out in the Appropriate Assessment Determination dated 26th June 2020. The FAC examined publicly available information from the NPWS and EPA and found the same seven European Sites within 15 km of the project. The FAC finds that the DAFM also recorded other plans and projects that were considered in combination with the proposal. 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 and agrees with the conclusions reached.

In relation to the contention in the grounds of appeal that the Forest Service failed to supply, on request, in an appropriate timeframe, relevant records that informed its decision to award the licence, as would be required under the EIA Directive the DAFM asserted that there had been no submission made by the appellant in relation to the application during the currency of its processing. The DAFM further asserted that in such circumstances that the appropriate mechanism for a member of the public to seek a copy of the file was by use of the AIE procedure, that the timeline to respond to such requests was one month and that this deadline had been met in this case. Based on the information available to it the FAC is not satisfied that the DAFM erred in its processing of the licence application as it relates to this ground of appeal.

The FAC considered the contention in the grounds of appeal that there is a breach of Article 4 (3) of the EIA Directive 2014/52/EU and related matters. 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 are 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 Forestry Regulations 2017 (S.I. 191 of 2017), 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 decision before the FAC relates to the felling and subsequent replanting of 59.7 ha of commercial managed forest. The FAC concluded that the felling and replanting 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 not covered by Irish regulations and that the breach as submitted in this ground of appeal had not occurred.

The FAC examined the record available to it in relation to the Environmental Considerations relating to the project and notes that the answer on record to question 1.2 as it relates to the compatibility of the project with Water Framework Directive objectives, (i.e. to prevent any deterioration in status of the underlying waterbody) and assuming adherence to relevant environmental guidelines and any *conditions attached to the licence is 'N/A'.* The FAC finds that while the DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, that the failure to record a definitive answer to question 1.2, which is pertinent to the particulars of the licence application under consideration in relation to the Environmental Considerations, represents a serious and significant error as it relates to the record of considerations necessary under the Water Framework Directive in this case.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is satisfied that a serious error or series of errors was made in making the decision and is setting aside and remitting the decision to the Minister to carry out a new assessment to determine whether the project is in compliance with the objectives of the Water Framework Directive and to assess the potential for impacts (if any) of the project on water quality in general, and on the nearby waterbody(s) in particular, before a new decision is made.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

