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29 June 2021

Subject: Appeal FAC 726/2020 regarding licence TFL00377119

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 14A (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 TFL00377119 for felling of 52.94ha, in Kilkillahora, Co Tipperary was approved by the Department of Agriculture, Food and the Marine (DAFM) on 31 August 2020.

Hearing

An oral hearing of appeal FAC 726/2020 of which all parties were notified, was held by a division of the FAC on 22 June 2021.

In attendance

FAC Members: Mr Des Johnson, Mr Luke Sweetman, Mr Dan Molloy and Mr Donal Maguire

Secretary to the FAC: Mr Michael Ryan

Appellants:

[REDACTED]
[REDACTED]
[REDACTED]

DAFM Representatives: Ms Eilish Kehoe and Mr Ciaran Nugent

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all submissions/observations, before deciding to vary the decision to grant the Licence (TFL 00377119).

The proposal is for felling (thinning) of a stated site area of 52.94ha at Kilkillahora, Co. Tipperary. Existing stock is 95% Ash (49.59ha) and 5% Beech (2.61ha). Thinning is proposed in 2020. Thinning

methods proposed would utilise harvester, chainsaw, forwarder, and/or tractor/quad. Hedgerows are to be retained where safe to do so. Site access is stated to be available. There is a 10 -20kV ESB line crossing the northern section of the site. There are no water or aquatic sensitivities on the site, and no landscape sensitivities. Some archaeological features are located outside the site boundary.

The Inspector's certification states that the site is not sensitive to fisheries, not in a High Amenity Area or Prime Scenic Area as per the County Development Plan, is not within an NHA, SAC or SPA but is within 3kms of a buffer zone, upstream and hydrologically connected to NHA, SPA or SAC. Soils are stated to be predominantly podzols, and the slope is predominantly flat to moderate. The site is crossed by/adjoins an aquatic zone. The site is not located within the catchment of a Local Authority designated water scheme, does not impact on a Way-Marked Way, does not impact on a densely populated area and does not impact on an area commonly used by the general public for recreation. It is not located within the catchment of a Local Authority designated water scheme. Appropriate Assessment screening assessed Natura 2000 sites within a 15km radius. Two sites were identified - Kilduff, Devilsbit Mountain SAC and the Lower River Suir SAC. Both were screened out for reason of Appropriate Assessment Determination. The approximate % of digitised forest area for thinning and or clearfell within 5km is stated to be 2.43%.

The DAFM referred the application to the National Parks and Wildlife Service (NPWS). The response submission contains nature conservation recommendations as follows:

- The site is upstream of the Lower River Suir SAC (approximately 20km). Guidelines in relation to harvesting and water quality should be strictly adhered to. Silt traps should be considered.
- It is unclear if the entire woodland is to be thinned. If thinning is to take place during the Buzzard nesting season (1 March to 31 August), nesting Buzzards should be identified by a qualified ornithologist and thinning operations directed away from the nesting site, until nesting is complete.
- Each block to be thinned should be assessed for Badger Setts by a qualified Ecologist prior to thinning. If a Sett is located, the NRA Guidelines in relation to working near Badger Setts should be applied. A licence may be needed if disturbance of the Sett is being considered.

A DAFM Archaeologist's report recommends conditions in the event of the licence being granted as follows:

- Forestry and Archaeological Guidelines and Forest Harvesting and the Environment Guidelines should be adhered to
- Two historic lime kilns are recorded in the forest. An area of 10m radius around each should be treated as operational exclusion zones
- Any previously unrecorded site or artifact discovered must be left undisturbed and the relevant authorities notified. A minimum exclusion zone of 20m, preferably 100m or more, must be left pending proper investigation.

An Appropriate Assessment Report (AAR) states that the project area is within the Suir_020 sub-catchment. There are no mapped watercourses in the project area, but there are agricultural drains connecting to a river which, in turn, drains into the Farneybridge_030 waterbody. This tributary connects to the Lower River Suir SAC c.12kms downstream via a network of agricultural drains and

tributaries. The waterbody is at 'Good' status and not at risk. A Stage 2 Appropriate Assessment is carried out for Lower River Suir SAC. Qualifying interests and conservation objectives are listed and there is an examination of the potential for adverse impacts. Mitigations are recommended in respect of silt and sediment control, and the Otter. In-combination plans or projects include non-forestry - dwellings, agricultural sheds, milking parlour, school extension, playing pitches etc. Forestry related projects are afforestation (1), and private felling (2) (109.6ha). The site is in the River Sub-basin Suir_050 and this has about 3% forest cover, and Farneybridge_030 has about 2% forest cover.

An Appropriate Assessment Determination (AAD) states that the Kilduff, Devilsbit Mountain SAC is screened out for Stage 2 Appropriate Assessment for reason of the position of the project area downstream of the Natura 2000 site, lack of hydrological connection, and the absence of any species or habitats of the qualifying interest for the SAC. The Determination refers to the NPWS referral submission which contains recommendations relating to Buzzards and Badgers. Neither are qualifying interests or supporting species for the European sites, but appropriate conditions will be applied to the licence outside the Appropriate Assessment process. The Determination concludes that the proposed development, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, having regard to their conservation objectives, provided mitigation measures are implemented relating to Silt and Sediment run-off, and the Otter.

The licence was granted and issued on 31.08.2020. It is subject to standard conditions and the following specific conditions:

- Strict adherence to Standards for Felling and Reforestation (October 2019)
- Adherence to conditions of the Forest Service Archaeologist's report 04.01.2020
- Adhere to mitigation measures as outlined on pages 3 and 4 of the AAD dated 29.07.2020
- 30% of tree stocking evenly distributed to be removed at thinning.

There is a single appeal against the decision to grant the licence. The grounds of appeal contend that no EIA screening has ever been carried out. It is necessary to establish if the planting of the forest complied with the law. No Appropriate Assessment screening was carried out according to the requirements of the EU Directive and Irish implementing law.

In response, the DAFM state that the application was both desk and field assessed. Referrals and screening for Appropriate Assessment were based on DAFM procedures and guidance. The AAD included mitigations that were included as conditions of the licence. An in-combination analysis was carried out. All procedures and standards were adhered to.

An Oral Hearing was convened on 22.06.2021, and all parties were notified. The FAC sat remotely. The first party (and his advisors) and the DAFM participated remotely. The appellant was not in attendance. The DAFM detailed the procedures followed leading to the decision to grant the licence. The in-combination report was considered prior to the making of the decision. The NPWS raised issues in respect of Buzzards and Badgers on the site but these do not appear to have been addressed by way of specific conditions on the licence. However, the Otter Guidelines would provide for the general protection of Buzzards and Badgers if found on the project lands. There are relevant watercourses, identified by the Inspector, on the site. With reference to the Inspector's certification, the answers to questions 3 and 4 were incorrect and should have been answered in the affirmative. This is not a

heavily forested area generally and the wider area is dominated by agriculture. The applicant stated that he was very familiar with the area and that there were no Buzzards or Badgers on the site. He outlined his family's background and experience in the forestry industry. He expressed extreme frustration with the delays caused in the licensing and appeals processes, stating that substantial expenses had been incurred in this case. Forestry developers required certainty in order to make the industry attractive. The applicant's solicitor stated that his client had followed all of the proper procedures in this case. In response to the FAC, the applicant stated that no operations had yet commenced following the granting of the licence. The DAFM confirmed that there was no indication that any operations had been carried out on the site in relation to the licence under appeal. The DAFM stated that there were drains on the site which were dry for periods and only contained water after heavy rain. This is a dry site with no permanent EPA watercourses. It was good quality land well suited to forestry operations. Hedgerows on the site would be left intact.

The written grounds of appeal contend that no EIA screening has ever been carried out on this site and that it is necessary to establish if the planting of the forest complied with the law. No specific details are submitted in support of this contention. There is no information before the FAC to indicate that the forestry (95% Ash and 5% Beech), the subject of this thinning proposal, did not meet legal requirements at the time of planting and is unauthorised. Thinning as part of a forestry management scheme, is not a class of development covered by the EIA Directive or the transposing Regulations. Based on the information before it, the FAC found, on this issue, no reason to conclude that there was any significant or serious error in the making of the decision to grant the licence by the Minister.

The FAC examined the procedures followed by the DAFM in respect of the requirements of the Habitats Directive. Natura 2000 sites within a 15km radius were assessed and, having regard to the nature of the proposal and site characteristics, the FAC found no reason to consider that this radius should have been extended in this case. This included the production of an AAR as detailed above leading to an AAD, which includes recommended mitigations in respect of silt and sediment run-off and the Otter. These are carried forward to the licence where they are attached as conditions. The FAC noted that the Kilduff, Devilsbit Mountain SAC was screened out for Stage 2 Appropriate Assessment for reason of the position of the project area downstream of the Natura 2000 site, lack of hydrological connection, and the absence of any species or habitats of the qualifying interest for the SAC. The FAC found no reason to conclude that the procedure followed in the AAR and the AAD were not consistent with the requirements of Article 6(3) the Habitats Directive or that the overall conclusions reached were not correct.

The FAC noted that the AAD referred to the NPWS referral submission which contained recommended conditions in relation to Buzzards and Badgers on the project lands and, while noting that neither were qualifying interests or supporting species for the Natura 2000 sites considered, the AAD stated that appropriate conditions would be applied to the licence outside the Appropriate Assessment process. Based on the information before it, the FAC concluded that no such specific conditions are attached to the licence and, as this was a specific conclusion of the AAD, this constituted a significant error in the making of the decision to grant the licence. In coming to this conclusion, the FAC did note that there was conflicting evidence before it in relation to the existence of either species on the project lands.

The FAC concluded that there was a significant error in the making of the decision to grant the licence by the Minister by not including specific conditions in respect of the Buzzard and Badger on the project lands. In deciding to vary the decision to grant the licence, the FAC requires the following conditions to be attached to the licence.

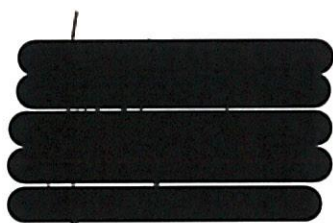
Before any operations commence on the site on foot of this licence, the applicant shall submit for the written agreement of the DAFM, a survey of the site, carried out by a suitably qualified ornithologist, identifying the existence of any extant Buzzard nests on the project lands. In the event of any such nest(s) being identified, site operations to be carried out during the period 1 March to 31 August shall be subject to an exclusion zone to be agreed with the DAFM. The development shall be carried out in accordance with the written agreement, and a copy of the agreement shall be placed on the case file.

Reason: In the interest of protecting any Buzzard nesting sites identified on the project lands.

Before any operations commence on site on foot of this licence, the applicant shall submit for the written agreement of the DAFM, a survey by a suitably qualified ecologist, identifying the existence of any extant Badger Sett(s) on the project lands. In the event of any such Sett(s) being identified, the development shall be carried out in accordance with the requirements of the National Roads Authority (NRA) Guidelines in relation to working near Badger Setts. A copy of the written agreement shall be placed on the case file.

Reason: In the interest of protecting any Badger Setts identified on the project lands.

Yours sincerely

A redacted signature block consisting of four horizontal black bars of varying lengths, obscuring the name and any handwritten notes.

Des Johnson, on behalf of the Forestry Appeals Committee

