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29th June 2021

Subject: Appeal FAC 693/2020 regarding licence TFL00481520

Dear [REDACTED]

I refer to the 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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

A licence for felling and replanting of an area of 7.91Ha at Cooilykeerane Co Cork was issued by the Department of Agriculture, Food and the Marine (DAFM) on 21.08.2020.

Hearing

A hearing of appeals FAC 693/2020 was held by the FAC on the 18th of June 2021. In attendance:
FAC Members: Mr. Donal Maguire (Chairperson), Mr. Vincent Upton, Mr. Derek Daly & Mr. Iain Douglas
Secretary to the FAC: Ms. Marie Dobbyn
DAFM Representatives: Ms. Eilish Kehoe, Mr. Brian Mahony
Applicant: [REDACTED]
Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the Oral Hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence TFL00481520.

Background

The project is an application for felling and reforestation of a conifer plantation, (habitat classification WD4), covering an area of 7.9ha, located at Cooilykeerrane Co Cork. It is located approximately 2.8km upstream of the Blackwater River (Cork/Waterford) SAC 002170 and

connected via a network of ephemeral agricultural drains to the Finnow (Blackwater)_030 waterbody.

The proposed felling is of Sitka spruce, aged 32 years and the proposed replanting is with 85% Sitka spruce and 15% additional mixed broadleaves. The site is described as being level to flat, with a gley soil to the north, peaty gley in the centre and peat soil to the south.

Cork County Council, IFI and NPWS were consulted. They all replied raising no objection but pointing out the fact that the site was proximate to the Blackwater SAC and requesting that this be borne in mind by the DAFM in making their assessment. The site was field inspected on the 20.08.2020. The inspector made the following observations and placed them on the file. *"The project area is located in an intensive agricultural landscape, with farmed gley soils immediately north and west of the area. The project area is bordered by old agricultural drains, with direct connections to the project area through internal collector drains. The internal drains are currently inactive but may become active once again when the canopy is removed. The boundary drains in turn, drain to the Finnow (Blackwater)_030 waterbody"*.

The inspector also recorded that *"the drain on the western boundary was dry at the time of inspection, with significant vegetation cover and little evidence of flow, with a flow direction to the west. The drains on the remaining boundaries flow towards the north-eastern corner of the project area and from there flow east. There was a low volume of water in these drains at the time of inspection, with a very low flow and little potential to transport sediment. As the drains accumulated water from neighbouring agricultural land east of the project area, the flow increased but was still low at the public road to the east. At this point, there is clear pressure from neighbouring agricultural land, with sediment deposition occurring"*.

The DAFM recorded an AA screening of Natura sites within 15km, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), concluding that there was no possibility of the project having any significant effect, either individually or in combination with other plans or projects, on any of the following European site and screened them out. These were the Killarney National Park, the Macgillycuddys Reeks And Caragh River Catchment SAC 000365, the Mullaghanish Bog SAC 001890 and the St. Gobnets Wood SAC 000106, which were screened out because the project area is located in a separate WFD waterbody catchment with no downstream hydrological connection and there was no possibility for effect.

The Mullaghanish to Musheramore Mountains SPA 004162 and the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 were also screened out because the project area is located outside of the SPA's, being 9Km distant to the first and 13.5km distant to the second and because it is entirely made up of mature conifer forest and is outside of the typical foraging distance for the relevant species.

In concluding the AA screening, the DAFM determined that there was the likelihood of felling and reforestation project TFL00481520 having a significant effect, either individually or in combination with other plans and projects, on the Blackwater River (Cork/Waterford) SAC 002170 because of there being hydrological connectivity via a network of ephemeral agricultural drains connecting to the FINNOW (BLACKWATER)_030, which in turn connects to the SAC approx. 2.8km downstream.

Dated the 10.08.2020 the DAFM prepared an Appropriate Assessment Determination (AAD) of the screened in Natura 2000 site. The AAD set out the following special conditions to be incorporated into any subsequent licence.

- ▶ Apply a 10-metre-wide machine exclusion zone along the edge of all relevant watercourses and water-related hotspots; exclude machine traffic and timber stacking from this area. Tree felling in this area to adhere to measures set out in Section 6.1 of the Interim Standards for Felling & Reforestation (DAFM, 2019).
- ▶ Prior to the commencement of operations, install silt traps within existing forest drains that connect with relevant watercourses. A geotextile membrane acting as a silt fence must be installed at the most downstream point of all collector drains, at the outflows connecting with relevant watercourses. (DAFM 2015, DAFM 2019).
- ▶ Silt traps should be staggered along the length of the drain and not only at the lower reaches towards its outflow. (DAFM 2015, DAFM 2019).
- ▶ Install silt fences in the forest road drain, downstream of the stacking area. Inspect daily to ensure their continued effectiveness.
- ▶ Once silt traps become functional, check regularly and maintain as necessary, in order to ensure continued effectiveness throughout operations. (DAFM 2015, DAFM 2019).
- ▶ Do not operate during or immediately after instances of extreme weather.
- ▶ Ensure sufficient brush mats are in place and brush mats are replaced when necessary
- ▶ Use temporary drain crossings where necessary as set out in the Standards for Felling and Reforestation.
- ▶ Adhere to all other water protection measures relating to water exclusion zones, silt and sediment control, temporary water crossings, extraction, timing of operations, and onsite storage and disposal of waste, as set out in Standards for Felling & Reforestation (DAFM, 2019).
- ▶ Apply a 5-metre setback along relevant watercourses at reforestation and plant 5 rows of broadleaves at the setback edge. This setback is to remain undisturbed during establishment (apart from fencing and blocking of existing mound drains) and throughout the forest rotation. Apply and maintain as per details set out in Tables 5 and 6 of the Environmental Requirements for Afforestation (DAFM, 2016).
- ▶ Block drains directly connecting to relevant watercourses where feasible. Temporary silt fences in drains not being blocked, are to be retained
- ▶ Adhere to the requirements of the European Communities (Sustainable Use of Pesticides) Regulations 2012 (S.1.155/2012) and the Environmental Requirements for Afforestation, in relation to pesticide use.

Otters

- ▶ No removal or disturbance of areas of thick scrub on the site within 20 m of a relevant watercourse.
- ▶ Regarding any existing relevant watercourses (e.g. existing forest drain), do not clean any section of such watercourses.

A consideration of other plans and projects in-combination with the proposal was carried out on the 09.04.2020 and was also recorded on the file. It observed that the project lies in a rural landscape in Coolykeerane Co. Cork in the River Sub Basin Finnow (Blackwater)_030. The River Sub Basin Finnow (Blackwater)_030 had approximately 12% forest cover, which was marginally higher than the national average of 11%. At 7.91 hectares the project was considered small in scale. Forestry activity including afforestation, forest roading and felling, in the River Sub Basin in the last 5 years were listed. It was noted that these are subject to environmental protection measures. It was also noted that a number of developments in the River Sub Basin Finnow (Blackwater)_030 had been granted planning permission over the last five years and were also subject to appropriate environmental protection measures.

DAFM concluded that *“the proposed felling and reforestation, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the Blackwater River (Cork/Waterford) SAC 0021 70. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects, as mitigation applied on the site will ensure no deleterious effect on aquatic zones downstream. There are no aquatic zones located on or adjacent the site, however there are ephemeral relevant watercourses, which will have mitigation measures applied”*.

The licence issued on the 21.08.2020, with a number of conditions attached, including a condition that adherence to the mitigations contained in the AAD was a mandatory element of the licence.

Appeal

The grounds for appeal were that: *“This is an application for felling and reforestation. It is our submission that: “Having examined, analysed and evaluated, in the light of the best scientific knowledge in the field, the following aspects of the project: the project design (including associated operations and ancillary works) and location; (Appellant’s Italics)*

That is a measures (sic) intended to avoid or reduce the harmful effects of the plan or project on that site.

AA Screening has been carried out in accordance with S.I.477 of 2011 (as amended) and S.I.191 of 2017 (as amended). This is not the correct legal screening. Kelly is”.

In a statement to the FAC, the DAFM submitted that decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. It was submitted that both a desk audit and field inspection were carried out and that all submissions and appeals were reviewed and that all criteria have been fully adhered to and that the approval was in order. The Department additionally submitted that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, were adequately considered within the current procedures. The Department submitted that it complied with these requirements by assessing the information submitted by the applicant, which it considered compliant

with the requirements set out in Article 4(4) and Annex IIA, while taking into account the results of the preliminary verifications or assessments of the effects on the environment carried out under the Birds and Habitats Directives and the Water Framework Directive.

An oral hearing of the appeal was held on 18th of June 2021, of which all parties were notified, and attended by the Applicant and representatives of the DAFM. The DAFM outlined their processing of the application and read through their written statement. The DAFM submitted that all criteria and procedures were adhered with and that the site was field inspected and that the DAFM is satisfied that the particulars of the application are correct. They noted that due to a technical issue the screening conclusions on the Inspectors Certification had to be reset to complete processing but that the Appropriate Assessment Determination recorded both screening and Appropriate Assessment conclusions. It was confirmed to the FAC that the licence terms and conditions were sufficient to ensure that there would be no possibility of a pathway of effect being created between the proposed development and any of the Natura sites listed.

The applicant made a submission to the FAC during the course of the hearing pointing out that the delays caused by the appeal process and its determination were causing him, his family and his family enterprise considerable financial hardship. It was noted that the forest had reached maturity and was ready for harvesting and that all conditions would be adhered to.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. As noted, the DAFM recorded an Appropriate Assessment that included plans and projects considered in-combination with the proposed works. The FAC considered the range and type of plans and projects considered in-combination with the proposed felling project and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same Natura sites within 15km of the proposal. The DAFM had completed each section of its determination and the responses appeared to the FAC to be in keeping with the facts of the matter. In considering the appeal, the FAC noted that the proposal lies in the Blackwater[Munster]_SC_040 of the Blackwater Catchment. The FAC is satisfied that the Blackwater River SAC is the only European site which could potentially be impacted by the proposal and that the DAFM did not err in not proceeding to Appropriate Assessment in relation to other sites.

With regard to the ground that the DAFM had applied mitigation during the AA screening, the FAC noted that the appellant deduced the DAFM statement *"Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives"*. The FAC is of the view that this is a generic statement by the DAFM in relation to other plans and projects and that it does not constitute mitigation, as such, at the AA screening stage of the assessment. While the FAC does not consider that it was necessary to include this text in the screening undertaken it does not consider that this text has any effect on the

conclusions reached regarding the proposed felling and so could not be considered to constitute a serious or significant error. In any regard, the proposal had proceeded to an Appropriate Assessment in relation to the Blackwater River SAC. While not raised in the grounds, the FAC further considered the Appropriate Assessment undertaken and considered it to be complete, precise and definitive in its findings. Having regard to the record of the decision, the grounds of appeal and submissions received, the FAC is not satisfied that the DAFM had erred in its consideration of the proposal in relation to the requirements of the Habitats Directive.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without regard to fair procedure. The FAC is thus affirming the decision of the Minister regarding licence TFL00481520 in line with Article 14B of the Agricultural Appeals Act 2001. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely,

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

Donal Maguire on behalf of the forestry Appeals Committee