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2ND June 2021

Subject: Appeal FAC 022/2021 regarding licence CK08-FL0120

Dear M [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 CK08-FL0120 for felling and replanting of forest on 4.12 ha at Glanakip, Co Cork was issued by the Department of Agriculture, Food and the Marine (DAFM) on 8TH January 2021.

Hearing

A hearing of appeal FAC 022/2021 was held by the FAC on 12th May 2021. The FAC Members in attendance at the hearing were Mr. John Evans (Chairperson), Mr. James Conway, Mr. Seamus Neely, and Mr. Vincent Upton.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister for Agriculture, Food and the Marine regarding licence CK08-FL0120.

General

The licence pertains to the felling and replanting of a forest on 4.12 ha at Glanakip, Co Cork. The forest is currently composed of 78.4% Sitka spruce, 16.8% LPS and 4.8% Western Hemlock and replanting would be of Sitka spruce with 5% open space. The application is accompanied by a location and bio map. The site is described as having a predominantly moderate slope (<15%), the habitat is described as predominantly coniferous plantation (WD4) and the soil type underlying the project area is described in the DAFM Appropriate Assessment screening documentation as being approximately; Acid Brown Earths, Brown Podzolics (94%), Peaty Gleys (1%) & Surface water Gleys, Ground water Gleys (4%). The project is located within the Blackwater (Munster) (100%) catchment, the Bride [Waterford]_SC_010 (100%) sub-

catchment, and the Bride (BLACKWATER)_020 (100%) sub basin. The BRIDE (BLACKWATER)_020 waterbody has a good WFD Status assigned to it for the 2013-18 assessment period.

Applicants Pre-Screening Report and Natura Impact Statement (NIS)

The applicant has submitted an Appropriate Assessment Pre-Screening report and an NIS relating to the project and both are dated 26th August 2020. The pre-screening report examined three Natura 2000 sites namely, Blackwater Callows SPA, Blackwater River (Cork/Waterford) SAC, and Blackwater Estuary SPA. It concluded that the project will have direct, indirect or in combination effect(s) on one European site, that being the Blackwater River (Cork/Waterford) SAC. The NIS submitted is titled as having been prepared for two clearfell and reforestation projects (CK08-FL118 and CK08-FL0120). It sets out that the Blackwater River (Cork/Waterford) SAC has been screened in for both projects. Mitigations where required, are set out as being specific to each application.

Appropriate Assessment screening and Determination

The Appropriate Assessment screening and Determination report undertaken by DAFM (dated 18th December 2020) identified three European Sites (Blackwater River (Cork/Waterford) SAC IE0002170, Blackwater Callows SPA IE0004094 and Blackwater Estuary SPA IE0004028) together with their qualifying / special conservation interests. The radius was extended in this case to include the Blackwater Estuary SPA IE0004028. The Blackwater River (Cork/Waterford) SAC IE0002170 was screened in and the project proceeded to Appropriate Assessment for the screened in site. The Appropriate Assessment Determination report (v08June20) is dated 30th December 2020. It states that the information provided in the NIS was sufficient to derive appropriate conditions for a Determination and sets out mitigations to be included in any licence to be issued. An examination of the licence issued shows that the mitigations set out in the Appropriate Assessment Determination relating to the project are clearly included in same (at conditions 8 – 23). The application was referred to Cork County Council and no record of a response is to be found on file. The file record shows that two third party submissions relating to the application were received on 21st August 2020.

Appeal

There is one appeal against the decision to issue the licence in this case. The grounds contend that the law requires that the public have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EU Directives relevant to the forestry approval process, that the FAC does not fulfil this independent and impartial role, that the AA has not assessed the impact of the re-stocking of the site (other than the basic operational details), that the failure to assess the potential impacts of the actual re-stocking of the clear-felled site on the conservation interests of the Natura 2000 site is an omission in the AA and is a serious error in the processing of this licence, that the Appropriate Assessment does not contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned, that the generic mitigations presented do not exclude the possibility of a residual impact and no alternatives to the re-stocking have been assessed, that this project lies within the River Sub-Basin Bride (Blackwater)_020 and that there is no evidence that this

waterbody has been assigned a water quality status in line with the Water Framework Directive (WFD) by the EPA, that in the absence of such an assessment, based on the High Court judgement in the case of the Judicial Review of Case 280 (Sweetman v An Bord Pleanala) 2018 the Forest Service (FS) should not have authorised this licence as to do so would be inconsistent with the requirements of Article 4(1)(a) of the WFD, that the FS is obliged to ensure that the test articulated by Article 4(1)(a) of the WFD is fully applied in individual authorisation decisions using the detailed and complex framework of the WFD, that where the EPA has not carried out or provided an assessment of a water body's status that it is not sufficient for the FS to apply an alternative (or proxy) assessment, that there is no evidence that the FS sought information from the EPA in respect of the status of waterbody and that in the circumstance the FS was required to refuse consent to the proposal.

DAFM Statement to the FAC

In a statement to the FAC, the DAFM stated that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria outlined in its standards and procedures policy have been adhered to in making a decision on the application. It also records the relevant application processing dates, sets out that there were two submissions received from third parties, that it was referred to Cork County Council and that it was desk assessed. The statement also sets out that the FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process, that sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands, that the appellant is factually incorrect in regard to the status of the waterbody i.e. BRIDE (BLACKWATER)_020, that this waterbody has been assigned a status of "Good", that the DAFM applies a wide range of checks and balances during the evaluation of felling licence applications in relation to the protection of water and that adherence to specific measures in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD, and attached as conditions to the licence, ensure that the proposed development (CK08-FL0120) will not result in any adverse effect on any European site nor on water quality or on waterbody status, regardless of hydrological connectivity.

Consideration of the appeal by the FAC

In considering the grounds of appeal, the FAC considered, in the first instance, the contention in the grounds of appeal that the law requires that the public have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EU Directives relevant to the forestry approval process and that the FAC does not fulfil this independent and impartial role. The FAC operates under the Agriculture Appeals Act 2001 as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The FAC considered the contention in the grounds that the Appropriate Assessment has not assessed the impact of the re-stocking of the site (other than the basic operational details) and related matters. In this case the FAC finds that the applicant carried out a pre-screening for the project which examined three European sites (Blackwater Callows SPA, Blackwater River (Cork/Waterford) SAC, and Blackwater Estuary

SPA) and concluded that one site, that being the Blackwater River (Cork/Waterford) SAC should be screened in. The FAC noted that the applicant submitted an NIS relating to the project which sets out that the Blackwater River (Cork/Waterford) SAC has been screened in and mitigations, where required, are set out which are specific to the application. The FAC finds that an Appropriate Assessment screening and Determination report was undertaken by DAFM (dated 18th December 2020) that identified three European Sites (Blackwater River (Cork/Waterford) SAC IE0002170, Blackwater Callows SPA IE0004094 and Blackwater Estuary SPA IE0004028) together with their qualifying / special conservation interests, that the radius was extended in this case to include the Blackwater Estuary SPA IE0004028, that the Blackwater River (Cork/Waterford) SAC IE0002170 was screened in and the project proceeded to Appropriate Assessment for this screened in site. The record of the file shows that the Appropriate Assessment Determination report (v08June20) is dated 30th December 2020, that it states that the information provided in the NIS was sufficient to derive appropriate conditions for a Determination and sets out mitigations to be included in any licence to be issued. The FAC observed that the mitigations set out in the Appropriate Assessment Determination relating to the project are clearly included in the licence as issued, and include conditions relating to restocking operations. While making reference to the restocking of the site, the grounds of appeal do not identify any specific European sites, measures or effects of concern. The DAFM recorded other plans and projects, including forestry and non-forestry projects and plans, that were considered in relation to potential in-combination effects of 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. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal and were consistent with the requirements of Article 6(3) of the Habitats Directive. The procedures adopted by the DAFM in their assessment are considered to be acceptable.

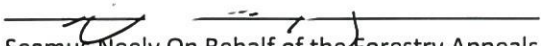
The appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence issued contains 24 conditions in total. Conditions 1-7 are of a standard nature. The additional conditions are attached for reasons relating to the protection of water quality, the protection of European sites during harvesting and restocking, protection of soil stability, and to minimise disturbance and protect established Habitat in designated European sites. Many of these conditions contain site specific requirements. Considering the information before it, the FAC finds no basis for the appellants contention on this issue. The appellant contends that no alternatives to restocking have been considered. In this case, the proposed development is for the felling and restocking of the site without any change in land use and has been subject to Appropriate Assessment screening and Determination and this concluded that no significant effects would arise on any Natura 2000 site, having regard to the qualifying interests and conservation objectives of such sites and having considered the potential for in-combination effects. In such circumstances, the FAC concludes that there is no obligation to consider alternatives to the proposed restocking on the project lands. Based on the information before it the FAC is not satisfied that a serious or significant error or series of errors occurred in relation to the processing of the application and as it relates to these grounds in the appeal.

In relation to the contention in the grounds of appeal that this project lies within the River Sub-Basin Bride (BLACKWATER)_020 and that there is no evidence that this waterbody has been assigned a water quality status in line with the Water Framework Directive (WFD) by the EPA and related matters. The FAC finds that an examination of EPA information which is readily available to members of the public, shows that the BRIDE (BLACKWATER)_020 waterbody has been assigned a Good WFD Status for the 2010-2015 and 2013-18 assessment periods. Considering the information before it, the FAC finds no basis for the appellants contention on this issue.

The FAC also considered whether the proposed development should have been addressed in the context of the Environmental Impact Assessment (EIA) Directive. 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 4.12 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 national regulations and that screening for significant effects under the EIA Directive was 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 other submissions received. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision and neither that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence CK08-FL0120 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,


Seamus Neely On Behalf of the Forestry Appeals Committee

