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11 March 2021

Subject: Appeal FAC 618/2020 regarding licence OY08-FL0044

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 OY08-FL0044 for felling of 21.11 ha, in Pollduff, Co Offaly was approved by the Department of Agriculture, Food and the Marine (DAFM) on 15 July 2020.

Hearing

An oral hearing of appeal FAC 618/2020 of which all parties were notified, was held by a division of the FAC on 24 November 2020.

In attendance

FAC Members:	Mr Des Johnson (Chairperson), Mr Pat Coman, Mr. Luke Sweetman, and Ms Paula Lynch (observing)
Secretary to the FAC:	Mr Michael Ryan
Appellants:	[REDACTED]
Applicant:	[REDACTED]
DAFM Representatives:	Mr Frank Barrett and Ms Eilish Kehoe

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to grant this licence (Reference OY-FL0044).

The proposal is for clear-fell and restocking on a stated site area of 21.11ha at Pollduff, Co. Offaly. It is stated that the existing forestry was planted in 1988 and comprises 100% Sitka Spruce. The proposed restocking would be 100% Sitka Spruce (20.05ha) and open space (1.06ha) is provided for. A 'Harvest Plan' and Appropriate Assessment Pre-screening Report are submitted with the application.

The DAFM referred the application to Offaly County Council and the National Parks and Wildlife Service (NPWS). In response, the County Council stated that the site is within the Slieve Bloom Mountains SPA, in an Area of High Amenity and a landscape classified as High Sensitivity Landscape area. It is important to implement water quality protection measures. The development should be carried out in accordance with Forestry and Water Quality, Forestry Biodiversity, Forest Harvesting and the Environment, and Forestry and the Landscape Guidelines. The NPWS response states that the project lands are within a Natura 2000 site (the Slieve Bloom Mountains SPA). It also bounds the Slieve Bloom Mountains SAC. The NPWS cannot recommend approval of this application as the Appropriate Assessment screening is incomplete when excavated fire breaks are not mentioned or their effects on the designated sites adequately assessed.

The DAFM carried out a screening for Appropriate Assessment and identified Natura 2000 sites (9 SACs and 3 SPAs) within a 15km radius of the project lands. Sites ruled out for Stage 2 Appropriate Assessment are Island Fen SAC, River Barrow and River Nore SAC, Coolrain Bog SAC, River Nore SPA, Lisduff Fen SAC, Knockacoller Bog SAC, Clonaslee Eskers and Derry Bog SAC, Sharavogue Bog SAC, Dovegrove Callows SPA, River Little Brosna Callows SPA, and the River Shannon Callows SPA. Two sites were ruled in for Stage 2 Appropriate Assessment, namely Slieve Bloom Mountains SAC and Slieve Bloom Mountains SPA.

Following on from the Stage 1 screening assessment, the DAFM produced an Appropriate Assessment Report (AAR) and Appropriate Assessment Determination (AAD), both dated 1st July 2020 and ecologically reviewed (by an independent ecologist) on 9th July 2020. The AAR concluded that there is no possibility that the proposed development would have any significant effect, either individually or in combination with other plans or projects on 11 Natura 2000 sites, giving reasons for this conclusion in respect of each site. The AAR includes a Stage 2 assessment of the Slieve Bloom Mountains SPA and the Slieve Bloom Mountains SAC, listing each site's qualifying interests and conservation objectives, the potential for adverse impacts and recommending mitigation measures. The AAD concludes that, if carried out in accordance with specific mitigation measures (to be attached as conditions of the licence), the proposed development individually, or in combination with other plans or projects, would not adversely affect either of the listed Natura 2000 sites, having regard to their conservation objectives and will not affect the preservation of those sites at favourable conservation status. The specific mitigation measures recommended relate to measures designed to protect the Hen Harrier, including that no potential disturbance operations associated with the project take place during the Hen Harrier breeding season (1st April to 15th August), adherence to Appendix 21 of the Forestry Standards Manual (DAFM 2015) and the planting of an irregular row of broadleaves along the east border setback to Roscomore Stream to act as a corridor and haven for Hen Harrier prey species.

The licence issued on 15th July 2020 and is exercisable until 31 December 2022. It is subject to standard conditions plus additional conditions relating to Hen Harrier, protection of water quality and the environment.

There is a single appeal against the decision to grant the licence. The grounds contend that there are breaches of the Environmental Impact Assessment Directive and note that a further 3 applications for licences relating to a total of 32.06ha were lodged for the same Forestry Management Unit on the same day as the current proposal, project splitting has occurred. The licence and associated operations threaten the achievement of the objectives of the underlying waterbody as clear-felling has the capacity to impact on water quality. The Stage 1 and Stage 2 Appropriate Assessment determinations are not legally valid and the DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The site is within 120m of another site licensed or in the licensing process and licence conditions must reference other sites within 120m and the relevant restrictions. The licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. Licence conditions do not provide a system of strict protection for Annex IV species. The licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. The licence should include a condition that plans and works are inspected by the Forestry Service prior to, during and post works to ensure compliance. The licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM state that felling and reforestation are not categories of development covered by the EIA Directive. The licence contains measures aimed at the protection of water quality. The licence application was field inspected and no hydrological connection or other pathways were identified. The DAFM is actively engaged in the Water Framework Directive (WFD) process and is fully informed of its responsibilities regarding the achievement of the WFD objectives. The DAFM identified the possibility of significant effects on screened European sites. An Appropriate Assessment was carried out and a Determination made. Site specific measures prescribed by the DAFM were included as mitigation measures. There would be no adverse effect on any European site. Members of the public can make submissions to the DAFM in respect of the likely effects on the environment of the proposed felling activity. It is a principle of law that unless the grant of a first statutory licence expressly exempts the holder of any obligation to obtain a second licence required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply. The Minister may, at any time, attach or vary conditions to any licence. Users of Plant Protection Products must apply the principles of Good Plant Protection Practice. There is no legal requirement to inform forest owners or adjacent land owners of the intention to spray.

At the Oral Hearing, the DAFM confirmed that the AAR and AAD had both been considered and independently reviewed by an ecologist prior to the making of the decision to grant the licence. The conditions recommended (as mitigations) in the AAD had been incorporated into the licence as conditions. The appellant noted that he had not been informed that the NPWS had been consulted in

this case, but that it was clear that the NPWS had concerns regarding the proposal. The AAR had lacunae and was faulty. Condition (i) of the licence is stated to be mitigation but it is not clear what it is designed to mitigate. No account had been taken of potential impact on the Slieve Bloom Mountains SAC and there is no assessment of potential colonisation of Annex I habitats (dry heath, wet heath and blanket bog) in the area. The appellant questioned the veracity of the Red Area protocol and whether this had been agreed with the NPWS. The Appropriate Assessment had not considered the proposed restocking of the site. He stated that he was "not sure" about the independent ecological review of the AAR and AAD. The applicants stated that the nearest hydrological connection to a Natura 2000 site was approximately 24kms. The fire line referred to by the NPWS was over 10kms in separation distance and was the subject of ongoing discussion with the Service with a view to adopting Good Practice in respect of fire lines. Responding to questions, the appellant stated that the NPWS clearly had concerns regarding the in-combination impacts with the fire line, notwithstanding the separation distance. The DAFM stated that it had no role in the licensing of fire lines. The applicants stated that the fire line had been put in place in 2018 as an emergency measure on the advice of the Fire Service. The DAFM stated that the fire line had been considered as an in-combination effect in the AAR and AAD.

Addressing the grounds of appeal, the FAC considered the appellant's contention that the proposed development should have been addressed in the context of the EIA Directive. The EU 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 (nor clear-felling) 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 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 FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). The FAC considers that the proposed felling is for the purposes of producing timber for commercial purposes and that there is no convincing evidence that the purpose of the proposed felling is a change of land use. Small unplanted areas within the site would be ancillary to the forestry land use on the site. As such, the FAC concluded that there is no breach of the provisions of the EIA Directive.

The FAC noted that the DAFM had carried out a Stage 1 screening and Stage 2 assessment in accordance with the provisions of the Habitats Directive leading to the making of an AAD before the decision to grant the licence was made. The Assessment and the Determination had both been subject to independent ecological review and the recommendations of the Determination in respect of conditions to be attached to the licence relating to the protection of the Hen Harrier were incorporated into the DAFM decision. The FAC noted the separation distance to the fire line referred to by the NPWS (approximately 10.9km) and that there is no proposal for a fire line on the project site. The FAC noted that the

correspondence from the NPWS (dated 4th February 2020) stated that it is the Department's view, "when considering the in-combination impacts of these works that forestry activities in the Slieve Bloom Mountains SPA/SAC are impacting negatively on species and habitats of conservation concern – and for which the sites were designated". The submission does not expand on the nature and scale of the in-combination effects of concern. The DAFM AAR and AAD were prepared approximately 6 months after the date of the NPWS submission and contain significant information not contained in the original DAFM Appropriate Assessment screening. In these circumstances, the FAC considered that the DAFM AAR and AAD should be referred to the NPWS for comment and recommendation.

On 7th December 2020, the FAC requested the NPWS for observation, having regard to submissions received in advance of, and during the Oral Hearing, and to the AAR and AAD completed by the DAFM. The NPWS responded on 15th February 2021 to the following effect:

- The screening determination of DAFM that only the Slieve Bloom Mountains SPA and the Slieve Bloom Mountains SAC should be assessed for Stage 2 Appropriate Assessment is accepted
- In relation to the consideration of in-combination effects, given the identified separation between the fire line of concern and the application site, and their occurrence in separate sub-catchments, it is accepted that in-combination effects do not arise between these activities
- The Appropriate Assessment Determination is accepted.

The FAC circulated the NPWS submission to the parties and invited comments/observations. In a response dated 2nd March 2021, the appellant submitted the following comments:

- The specific qualifying interests for Slieve Bloom Mountains SAC which may be impacted are not identified in the Appropriate Assessment Report and Determination
- The NPWS statement in respect of in-combination effects does not preclude such effects with other plans and projects
- There is an inherent contradiction between the NPWS submission and the Appropriate Assessment Determination
- The Precautionary Principle should apply and the licence should not be affirmed.

Based on these submissions, the FAC is satisfied that the concerns originally expressed by the NPWS have now been satisfactorily addressed.

Based on the information before it, the FAC is satisfied that the procedures adopted by the DAFM in reaching its AAD are correct and in accordance with the provisions of the Habitats Directive. The FAC concludes that, subject to the implementation of the specific mitigation recommended in the AAD and inserted as conditions on the licence, the proposed development individually, or in combination with other plans or projects will not have an adverse effect on the integrity of any European site, having regard to their conservation objectives. The FAC considered that there is no convincing evidence to

indicate that the proposed development would be likely to have any significant effect on any Annex I habitat through colonisation.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the 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 this site. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence. In regard to the contention that the licence conditions should provide for a strict regime of control for Annex IV species, the FAC noted that there is no specific information submitted to indicate the presence of Annex IV species likely to be impacted by the proposed development and, in these circumstances, did not consider that additional conditions should be attached to the licence in relation to Annex IV species.

The 'Harvest Plan' is an operational plan for those carrying out the development. The FAC noted that the operational activities licensed must comply with the conditions of the licence in full. The DAFM has powers in respect of compliance with, and enforcement of, conditions attached to the licence, and the FAC considers that additional conditions in this regard are not required to be attached to the licence. The spraying of chemicals is controlled through Statutory Instruments but there is no legal requirement to inform adjacent landowners of the intention to spray.

In deciding to affirm the decision to grant the licence, the FAC considered that the development would be consistent with Government policy and Good Forestry practice.

Yours sincerely

A large black rectangular redaction box covering the signature of the Forestry Appeals Committee member.

On behalf of the Forestry Appeals Committee