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26 March 2021

Subject: Appeal FAC 183/2020 regarding licence TY01-FL0045

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 TY01-FL0045 for felling of 3.66 ha, in Killurane, Co Tipperary was approved by the Department of Agriculture, Food and the Marine (DAFM) on 25 March 2020.

Hearing

An oral hearing of appeal FAC 183/2020 of which all parties were notified, was held by a division of the FAC on 23 March 2021.

In attendance

FAC Members:	Mr Des Johnson (Chairperson), Mr Donal Maguire, and Mr Luke Sweetman
Secretary to the FAC:	Mr Michael Ryan
Appellants:	[REDACTED]
Applicant:	[REDACTED]
DAFM Representatives:	Ms Eilish Kehoe and Mr Luke Middleton

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 vary the licence (Reference TY01-FL0045).

The proposal is for clearfelling (in 2021) and restocking on a stated site of 3.66ha at Killurane, Co. Tipperary. The species to be felled is Norway spruce, planted in 1975. The proposed restock species would be 100% Sitka spruce (3.48ha) with 0.18ha of open space provided. The site is surrounded by

agricultural fields to the north-west and south and there is existing mature forestry adjoining to the north-east. The soils are stated to be Basin Peats, Blanket Peats (some)(100%), and the slope is predominantly moderate.

The DAFM referred the application to Tipperary County Council and the National Parks and Wildlife Service (NPWS). No responses are recorded on file.

The DAFM carried out a screening for Appropriate Assessment on Natura 2000 sites within a 15km radius of the project site. The following sites were screened out for Stage 2 Appropriate Assessment - Scohaboy (Sopwell) Bog SAC, Liskeenan Fen SAC, Aharavogue Bog SAC, Kilcarren-Firville Bog SAC, Arragh More (Derrybreen) Bog SAC, Lough Derg, North-east Shore SAC, Ballyduff/Clonfinane Bog SAC, Lough Derg (Shannon) SPA, and Lisduff Fen SAC. The reasons given for the screening conclusion are absence of direct upstream hydrological connection and lack of pathway, location of project lands within a separate water body catchment, no upstream connection and no pathway, and separation distance to the SPA. An in-combination report (confirmed at the Oral Hearing as dated 25.03.20) lists non-forestry projects as including dwellings, domestic extensions, all weather training surface, agricultural building, and horticultural park, and forestry related projects (since 2015) as private felling (1) (3.14ha), and Coillte felling (2) (11.46ha).

The licence was issued on 25.03.20 and is exercisable until 31.12.2022. It is subject to standard conditions (a)-(g) plus additional condition (h) requiring a Harvest Plan to be completed prior to the commencement of development.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Article 4(3) of the EIA Directive. A number of criteria in Annex III do not form part of the Forestry Service screening assessment. The site is on peat soil, but there is no indication if this is shallow or deep peat. The proposed re-stocking could be contrary to Government policy on Climate Change. There is no evidence that Scohaboy NHA (937) has been considered. Part of this bog is in an SAC. There is potential for re-seeding of Sitka spruce with resulting impacts on vegetation, nutrient status and the hydrology of the site. Licence conditions do not provide for the protection of all wild birds during breeding and rearing season. There was inadequate consultation with Prescribed Bodies. The site is in the river sub-basin Ballyfinboy 040. The current status of this waterbody is 'Moderate' and 'At Risk'. The achievement of good ecological status recovery objective for the underlying waterbody in the WFD cannot be assured. There is a breach of Regulation 21(1) of the Forestry Regulations. There is a breach of Article 10(3) of the Forestry Regulations. The Forestry Service failed to make available for inspection a copy of the application.

In response, the DAFM state that felling and restocking is not a class of development covered by the EIA Directive. The Scohaboy Bog NHA is a large raised bog 4km south-east of Borrisokane. It consists of areas of high bog and cutover bog. There is evidence of some peat cutting, recent drainage and burning. These activities have resulted in a loss of habitat and damage to the hydrological status of the site. The proposed development is part of a larger block of forestry (c. 9.5ha) to the south of the NHA. The

proposed development was referred to National Parks and Wildlife Service (NPWS) on 10.12.2019 and there was no response. The DAFM procedures required the applicant to seek consent from the Minister of Housing, Local Government and Heritage for notifiable activities in the NHA. Due to an oversight, this licence was issued without consent from the NPWS being furnished to the DAFM. It is a principle of law that unless the grant of a first statutory consent expressly exempts the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities where such is set out in statute elsewhere, those other obligations and restrictions apply. The site is not hydrologically connected to any waterbody. The DAFM applies a wide range of checks and balances in respect of the protection of water quality. Any felling licence is issued conditional on adherence to the Interim Standards for Felling and Reforestation. The DAFM is fully informed of its responsibilities regarding the achievement of objectives under the Water Framework Directive (WFD). The appellant has exercised his right to appeal.

An Oral Hearing was convened on 23.03.21 and all parties were invited to attend and participate. The FAC sat remotely. The applicants and the DAFM attended and participated remotely. The appellant was not in attendance. The DAFM detailed the procedures followed in processing the application and deciding to grant the licence. Referrals had been made to the County Council and NPWS but no responses received. The proposal included notifiable activities in the Scohaboy Bog NHA and consent from the NPWS is required but had not been received by the DAFM at the time of the granting of the licence, and there is no record of any consent since. The applicants stated that the site is a cutaway bog with good access, is level and dry with no relevant watercourse or hydrological connection to any European site. There is a watercourse approximately 30m to the north-west of the project lands and this drains about 2.9km to the north-west and west to the Clarkhill River, which in turn flows about 1.2km to the Ballyfinboy River and then about 12.8km to the Lough Derg North East Shore SAC. There is no hydrological connection from the project site to the initial watercourse. The site is within the Scohaboy Bog NHA and the applicant has no record of any consent from the NPWS in respect of notifiable activities on this site. There would be no objection to a condition being attached to the licence requiring the relevant consent from the NPWS before any operations commenced. The site was visited on 21.10.20 and confirmed that there is no waterbody on the site.

In addressing the grounds of appeal, the FAC considered, in the first instance, the 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 there is no convincing evidence before it that the purpose of the proposed felling is for the conversion to another type of land use. Furthermore, the FAC concludes that the proposed development does not include any works which, by themselves would constitute a class of development covered by the EIA Directive. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

The FAC considered the procedures followed by the DAFM in the screening for Appropriate Assessment and concluded that they are consistent with the requirements of the Habitats Directive. Noting that there is no direct hydrological connection between the project site and any European site, the FAC considered that the screening conclusions reached are sound.

The Natural Heritage Area (Scohaby Bog NHA 000937) Order 2005 came into operation on 01.02.2005. This is a large raised bog with areas of high bog and cutover bog. In the written grounds of appeal, the appellant contends that there is no evidence that the NHA was considered by the DAFM and that there is potential for re-seeding of Sitka spruce with impacts on vegetation, nutrient status and the hydrology of the site. The DAFM stated that the NHA had been subject to peat cutting, recent drainage and burning, and that these activities had resulted in the loss of habitat and damage to the hydrological status of the NHA. The application was referred to the NPWS but there is no response on record. In submissions, the DAFM state that their procedures required the applicant to seek consent from NPWS but that this had not happened in this case. The FAC notes that there is no evidence of any consent being sought or granted by the NPWS for proposed 'notifiable activities' on this site. In the circumstances presented, the FAC concluded that a consent from the NPWS should have been obtained before the granting of the licence for proposed 'notifiable activities', and that this constituted a significant error in the making of the decision. The FAC further concluded that the issue could be addressed by way of a condition attached to the licence, subject to all other aspects of the proposed development being acceptable.

The appellant contends that the licence conditions do not provide for the protection of all wild birds during the breeding and rearing season. The FAC notes that Article 1 of the Birds Directive relates to all species of naturally occurring birds in the wild, and covers their protection, management and control. Article 5 of the Directive requires Member States to establish a general system of protection for all species of naturally occurring species of birds in the wild, prohibiting their deliberate killing, deliberate destruction of, or damage to their nests and eggs or removal of their nests, taking of eggs in the wild, deliberate significant disturbance of species of wild birds particularly during the period of breeding and rearing, and the keeping of birds of species the hunting and capture of which is prohibited. The FAC notes that the appellant has not provided any information of the existence of species of wild birds on the subject site or any convincing evidence to indicate that the proposed development would lead to the deliberate killing or capture, or the deliberate, significant disturbance of species of wild birds during the period of breeding and rearing. In these circumstances the FAC concludes that additional conditions relating to the protection of species of wild birds should not be attached to the licence in this case.

The appellant contends that site is in the river sub-basin Ballyfinboy 040, and the current status of this waterbody is stated to be 'Moderate' but 'At Risk'. It is further contended that the achievement of a good ecological status recovery objective for the waterbody cannot be assured. Th FAC considers that the appellant has failed to provide any significant information to substantiate the contention made, or that there is any convincing evidence before it to indicate that the proposed development would inhibit the achievement of the objectives for the underlying waterbody under the WFD.

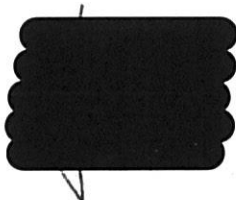
The FAC considers that the appellant has exercised his right to appeal the decision of the Minister in this case and that his grounds of appeal have been considered in full.

The FAC concluded that there was a significant error in the making of the decision to grant the licence TY01-FL0045 by not requiring and receiving a necessary NPWS consent from the applicant in respect of notifiable activities on the Scohaboy Bog NHA before the decision to grant the licence was made. The FAC concluded that the decision to grant the licence should be varied by the inclusion of the following additional condition:

Before any operations relating to this licence commence on the site, the applicant is required to submit a copy of consent issued from the NPWS in respect of the proposed notifiable activities on Scohaboy Bog NHA to the satisfaction of the DAFM, and a copy of this consent and acceptance of same by the DAFM shall be placed permanently on the DAFM file relating to this case.

Reason: In the interest of the protection of Scohaboy Bog NHA.

Yours sincerely

A large black rectangular redaction box covering the signature of the official.

On behalf of the Forestry Appeals Committee