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25 March 2021

Subject: Appeal FAC 292/2020 regarding licence CK24-FL0083

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 (DAFM). 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 CK24-FL0083 for felling and restocking of 17.14 ha of forest, at Cooranig, Co Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on 28 May 2020.

Hearing

An oral hearing of appeal FAC 292/2020 of which all parties were notified, was held by a division of the FAC on 23 March 2021.

In attendance

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| 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 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 CK24-FL0083.

The decision pertains to a felling licence for 17.14 ha of forest at Cooranig, Co Cork. This project lies in a rural landscape in the River Sub Basin Caha 020. The River Sub Basin Caha 020 has approximately 25%

forest cover which is higher than the national average of 11%. At 17.14 ha the project is considered medium in scale, the project adjoins another forest.

The Application, submitted on 02.12.19 includes inventory and stocking details, environmental information, a harvest plan including general environmental and site safety rules, an Appropriate Assessment (AA) pre-screening report and maps. The underlying soil type is described as being composed of Podzols (Peaty), Lithosols, Peats (100%). The slope is predominantly moderate 0-15%. The habitat is predominantly WD4. There are no significant water courses on the site.

The Application was referred to Cork County Council Cork who responded on the 30th of January 2020, raising no objection, but seeking that the standard condition for the protection of the Fresh Water Pearl Mussel be inserted in the licence conditions. It appears as Condition (h) on the licence.

A further extra condition was added to the licence as Condition (i) which reads "The adjacent unplanted areas, felled under licence CK24-FL0033, is to be replanted and have at least one growing season to 'Green-Up' prior to the commencement of Felling."

There was one appeal and the grounds of FAC767/2020 are; that there has been a breach of Articles 4(3) and 4(4) of EIA Directive 2014/52/EU in that the DAFM failed to carry out a screening for EIA as the licence is in a class of development covered under Annex II of the EIA Directive, that the application does not represent the whole project and that the application has not described aspects of the environment likely to be significantly affected. It is submitted that the licence and its associated operations threaten the achievement of the objectives of the River Basin Management Plan 2018-2021. It is submitted that the AA assessment is flawed and not legally valid. A number of grounds relate to licence conditions submitting that the conditions do not provide a system of protection for all wild birds during the period of breeding and rearing under the Birds Directive, that commencement and conclusion notifications should be required and that stringent and enforceable conditions should be attached regarding notification of the spraying of chemicals.

In a written response to the FAC, the DAFM submitted that it is satisfied that the decision was made following their procedures. Regarding this appeal It is submitted that the standard operational activities of clear-felling and replanting already established forests areas are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred. The statement submits that the DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water and that any felling licence issued is conditional on adherence to the Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. It is submitted that referrals to statutory consultees are undertaken on an automatic basis following certain spatial rules or on a discretionary basis. In this instance the application was referred to Cork County Council.

In relation to AA, the DAFM submitted that the application had been subject to the DAFM's AA Screening procedure, as set out in the document entitled AA Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors and that the rationale for the screening decision was recorded. Three Natura sites were determined to fall within 15kms of the project site. The Bandon River SAC, Screened out due to the absence of a direct upstream hydrological connection, and the subsequent lack of any pathway, hydrological or otherwise to it. The Gearagh SAC, also screened out due to the fact that the project area lies within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise between the project and the SAC. Finally, the Gearagh SPA was screened out because the separation distance between the Natura site and the project exceeded all of the distances set out in the standard foraging and disturbance tables used by the DAFM for the protection of flora and fauna. The DAFM contended that the measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AA Report and AA Determination statement ensure that the proposed felling and reforestation will not have an adverse effect on a European site.

Regarding licence conditions the DAFM submitted that it is "a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent 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." It was submitted that the conditions as submitted in the appeal were not considered warranted in this case.

The DAFM submitted that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market) and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It was submitted that there is no legal requirement for forest owners to inform adjacent landowners and that the PPE is used in a targeted way.

An oral hearing of the appeals was held of which all parties were notified and representatives of the DAFM and the Applicant, as well as the appellant, attended. The FAC noted that the Application included forest inventory and restocking details, a harvest plan including site safety and environmental rules, an AA pre-screening report, and maps. The DAFM outlined at the oral hearing other sources of information employed in the processing of applications, including spatial environmental layers and described the application processing that was undertaken and the dates of application, referrals, and approval. The FAC considers that the DAFM had sufficient information before it when making the decision.

The DAFM further submitted that the application did not represent deforestation, or any other activity included in the EU EIA Directive. The Applicant described the site and the application information submitted. They submitted that they inform local authorities of their plans to employ chemical spraying on an annual basis and notices are erected at the site. They submitted that spraying is undertaken based on a pest risk analysis and need. They submitted that the area would be felled and replanted without any change in land use and that the operation would not be included in the EU EIA Directive or the related National legislation.

The appellant, in his presentation to the FAC, made particular reference to his ground concerning the protection of wild birds. He drew attention to the size of the project site and expressed concern that the licence did not, in his view, provide an adequate system for the protection of wild birds, which he contended was required to comply with the requirements of the Birds Directive.

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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that 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 is 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 felling 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 similarly not covered by the Irish regulations (S.I. 191 of 2017). The Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 16.87 hectares. At the Oral Hearing the Applicant contended and the DAFM confirmed that the other plots under consideration in the locality for thinning/felling were well separated both spatially and temporally from the project under appeal. It was shown that they were several kilometres apart and that the time span for thinning/felling overall exceeded seven years.

The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. Therefore, the FAC concluded that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects

the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. The grounds do not identify a specific European site, significant effects, pathways, or measures of concern. An Appropriate Assessment Screening was undertaken by the DAFM and identified 3 sites within 15km and that there was no reason to extend the radius in this case. Each site was considered in turn and was screened for Appropriate Assessment and reasons were provided. The DAFM undertook and documented a consideration of the potential for in-combination effects and concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites in relation to those that were screened out.

Regarding the suggested impacts on the objectives of the River Basin Management Plan, given that it was confirmed at the Oral Hearing that there are no significant water courses on the site and that the licence conditions require measures to be implemented in relation to the avoidance of impacts on water including the use of silt traps and operational setbacks, the FAC does not conclude that the DAFM erred in this regard.

In relation to the appellant's stated ground of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive and of animal species under Article 12 of the Habitats Directive. The FAC had regard to the DAFM statement and note that the granting of a 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 or the presence of protected animal species on the proposed site in his grounds. At the Oral Hearing, the appellant conceded that he did not have any specific evidence of protected bird species nesting at the project site and neither did he have any evidence of plans or intentions for deliberate disturbance of protected bird species at the project site. The applicant submitted that prior to the commencement of any operations that site surveys are carried out which *inter alia* take note of any nesting birds and that these areas are preserved, with a buffer zone, during any felling that takes place during the nesting season. The FAC took the view that the existing suite of national and EU legislation protecting birds, together with the deliberative processes and the operational checks and balances employed by the DAFM in their decision making, do in effect constitute a system of protection for wild birds consistent with the requirements of the Birds and Habitat Directives and that the DAFM had not erred in its decision in this regard.

The DAFM have attached licence conditions that relate to the AA undertaken. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM.

Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence and that it would not be reasonable to attach a licence

condition requiring actions to be undertaken by the DAFM. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence and that it was not satisfied that the DAFM had erred in this regard.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours sincerely

A black rectangular redaction box covering a signature.

On behalf of the Forestry Appeals Committee