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12th March 2021

Subject: Appeal FAC722/2020 & FAC767/2020 in relation to licence GY10 FL0153

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence GY10 FL0153 for felling of 14.43 ha Alleendarra West, Toorleitra, Co. Galway granted by the DAFM on 28th August 2020.

Hearing

An oral hearing of appeals FAC722/2020 & FAC767/2020, of which all parties were notified, was held by the FAC on 5th March 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly Mr. Iain Douglas, Mr. Vincent Upton

Appellant FAC722/2020: Not present [REDACTED]

Appellant FAC767/2020: Not present [REDACTED]

Applicant / Representative(s): [REDACTED]

Department Representative(s): Mr. Anthony Dunbar & Ms. Eilish Keogh

Secretary to the FAC: Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received including those at the oral hearing, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant the licence GY10 FL0153.

The decision pertains to a felling licence for 14.43 ha Alleendarra West, Toorleitra, Co. Galway. The forest is currently comprised of Sitka spruce, lodgepole pine (south coastal) and birch and replanting is proposed of Sitka spruce, lodgepole pine (south coastal) and other broadleaves. The Application, submitted on 12th December 2019 includes inventory and stocking details, environmental information,

a harvest plan including general environmental and site safety rules, an Appropriate Assessment pre-screening report and maps. The Application identifies that the forest lies within the boundaries of the Slieve Aughty Mountains SPA. The site is described as a mixture of blanket peat and poorly drained mineral soils on a gentle north-westerly slope.

An additional Appropriate Assessment Pre-Screening Report was submitted by the Applicant dated 7th August 2020. This submits that three sites should be screened in and proceed to Appropriate Assessment, Slieve Aughty Mountains SPA, Lough Derg (Shannon) SPA, Lough Derg and North-East Shore SAC, Barroughter Bog SAC, Cloonmoylan Bog SAC, Derrycrag Wood Nature Reserve SAC, Loughatorick South Bog SAC, Pollagoona Bog SAC, Pollnaknockaun Wood Nature Reserve SAC, Rosturra Wood SAC, Sonnagh Bog SAC were screened out and reasons are provided. A Natura Impact Statement was submitted by the Applicant. The forest is bordered by a public road to the north and is crossed by a stream. The stream is unnamed and flows northerly to join the Woodford River that flows easterly. A forest road enters the forest at the southwestern corner. A report was prepared by a DAFM Archaeologist and related conditions are attached to the licence.

The Application was referred to Galway County Council and the NPWS and the latter provided a response. The NPWS submitted that the forest lies within a known breeding zone (Higher Likelihood of Nesting Area (HLNA) for Hen Harrier) and that work should not be carried out between 1st of April and 15th August. It was also submitted that nests of the Hairy wood ant are present in the locality and damage should be avoided, that the Woodford River is part of the Local Water Authorities Programme and water quality should be considered, that Forestry best practice should be followed, and that invasive species if present should be managed appropriately. An appendix of general points regarding obligations on public authorities was also provided.

There are two appeals against the decision. The grounds of 722/2020 submit that the application is for felling and reforestation and that no EIA has ever been carried out. It is submitted that it is necessary to establish if the planting of the forest complied with the law and that no decision to replant can be made without an Environmental Impact Assessment Report screening. It is submitted that no Appropriate Assessment screening has been carried out according to the requirement of the EU Directive and Irish implementing law. The grounds of FAC767/2020 submit that the Appellant was not informed of the decision despite making a submission and that the DAFM failed to supply, in an appropriate timeframe, relevant records that have informed the decision. It is submitted 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 and that there is no evidence that the Moderately-High Risk of landslide on part of the site has been assessed. It is submitted that mitigation measures and licence conditions are not written with sufficient precision or clarity to ensure compliance with the Habitats Directive, that residual effects cannot be excluded, that the AA in-combination assessment is flawed and that the Minister has not sought the opinion of the general public

on the Determination. It is submitted that the Harvest Plan is not consistent with the requirements of the Interim Standards for Felling and Reforestation. 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, a strict system of protection for animal species in Annex IV(1) of the Habitats Directive, that commencement and conclusion notifications should be required, that a conditions should require inspection by the FS, 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 appeal FAC767/2020 it is submitted that the Appellant had requested files in relation to a number of applications. 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 Interim 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 Tipperary County Council and Inland Fisheries Ireland.

In relation to Appropriate Assessment and the grounds in both appeals, the DAFM submit that the application had been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors and that the rationale for the screening decision was recorded. 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. The opportunities of the public to engage in the decision making process are detailed in the statement.

It is submitted that DAFM has no regulatory or licencing role in regard to the other non-forest plans and projects considered in the in-combination report and that it is satisfied that the information provided by the Applicant was sufficient in this case.

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. It is submitted that the elevation of the site is 140-160 m and the slope is c.11% and that the DAFM had adopted its procedures 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 is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPE is used in a targeted way. The DAFM further submitted that the felling licence application had undergone an appropriate assessment screening inline with stated procedures but that during that some qualifying interests/special conservation interests had been truncated on the recorded form and that a revised full form was also submitted.

An oral hearing of the appeals was held of which all parties were notified and representatives of the DAFM and the Applicant attended. The DAFM described the application processing that was undertaken and the dates of application, referrals and approval. The DAFM submitted that the files related to the decision were sent to the Appellant on 18th September 2020. They re-submitted aspects of their written statement and submitted that the application did not represent deforestation or any other activity included in the EU EIA Directive. On questioning the DAFM agreed that the Lower River Shannon SAC had been screened in to proceed to Appropriate Assessment but was not addressed in the Natura Impact Statement. The application had been referred to the local District Inspector who had not raised any concerns and it was submitted that the location of Hairy Wood Ant nesting sites had been recorded and are available to the DAFM in their decision making process. 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 landuse and that the operation would not be included in the EU EIA Directive or the related National legislation.

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 14.43 hectares. 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 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 twelve sites within 15km and that there was no reason to extend the radius in this case. Each site is considered in turn and is screened for Appropriate Assessment and reasons are 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. The screening concluded that the proposal should proceed to Appropriate Assessment in relation to three European sites, Slieve Aughty Mountains SPA IE0004168, Lough Derg, North-East Shore SAC IE0002241, and Lower River Shannon SAC IE0002165. The Natura Impact Statement submitted by the Applicant addresses potential impacts on three sites in detail and outlines mitigation measures to avoid an impact on the integrity of a European site. These are Slieve Aughty Mountains SPA IE0004168, Lough Derg, North-East Shore SAC IE0002241, and Lough Derg (Shannon) SPA IE004058. The Appropriate Assessment (AA) Determination undertaken by an Ecologist on behalf of the DAFM concluded that measures were required in relation to Slieve Aughty Mountains SPA IE0004168 and Lough Derg, North-East Shore SAC IE0002241 while no specific mitigation measures would be required for Lough Derg (Shannon) SPA IE004058 and reasons are provided. The Lower River Shannon SAC does not form part of the Natura Impact Statement nor are any specific reasons provided in the AA Determination as to why this site did not proceed to Appropriate Assessment after being screened in to proceed to this stage. The FAC is satisfied that this constitutes a serious error in the making of the decision. It is unclear from the record whether the screening decision itself was an error and in that regard the FAC concluded that the decision should be remitted to undertake a new screening for Appropriate Assessment under Article 6 of the EU Habitats Directive of the proposal.

Regarding the suggested impacts on the objectives of the River Basin Management Plan, the stream crossing site forms part of the Woodford (Galway)_020 waterbody which has been assigned a moderate status for 2013-2018 and classified as At Risk. The waterbody lies in the Bow_SC_010 Subcatchment of

the Lower Shannon Catchment (25C). Pressures identified for the second cycle of the WFD on this waterbody are Urban Waste Water and Agglomeration PE < 500. The application was referred to Galway County Council and the NPWS. The NPWS provided a response but did not raise any particular concerns in relation to impacts on water quality. 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. While the grounds contend that there is a moderately high risk of landslide in this area no evidence of this was submitted. The site is not particularly steep and is comprised of organic and organo-mineral soils. The proposal is for the felling and replanting of trees and no excavation or similar works are proposed. The FAC does not consider that the proposal as licenced would pose a significant risk to water quality or that there is any evidence that the proposal would result in destabilisation of the site. The FAC is not satisfied that the DAFM erred in this regard.

The Application included forest inventory and restocking details, a harvest plan including site safety and environmental rules, an Appropriate Assessment 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. The FAC considers that the DAFM had sufficient information before it when making the decision.

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. The DAFM have attached licence conditions that relate to the Appropriate Assessment 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 light of the information submitted at the oral hearing as noted, the FAC is satisfied that a serious error was made in making the decision regarding GY10 FL0153 and that the decision should be remitted to the Minister to undertake a new screening for Appropriate Assessment, and Appropriate Assessment as required, under Article 6 of the

EU Habitats Directive of the proposal itself and in combination with other plans and projects before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee

