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11th May 2021

Subject: Appeal FAC 276/2020 and 290/2020 regarding licence TFL00417019

Dear [REDACTED]

I refer to the 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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

A licence for felling and replanting of an area of 32.93ha in Annagharthy, Rathmulpatrick, Co. Sligo was issued by the Department of Agriculture, Food and the Marine (DAFM) on 25/05/2020.

Hearing

A hearing of appeals FAC 276/2020 & 290/2020 was held by the FAC on the 4th of May 2021. In attendance:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Donal Maguire, Mr. Dan Molloy

Secretary to the FAC: Mr. Michael A Ryan

DAFM Representatives: Ms. Mary Coogan, Mr. Martin Regan

Applicant Representatives: Not present

Appellants: FAC 276/2020: Not present [REDACTED]

FAC 290/2020: Not present [REDACTED]

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the Oral Hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister regarding licence TFL00417019 by the addition of an extra condition to the

licence requiring the applicant to produce a map and a quantified planting schedule, to be approved by DAFM in advance of operations commencing, showing where on site the required additional broad leaf planting is to take place.

Background

This project comprises 32.93 hectares of felling & reforestation. The predominant soil type underlining the project area is described as predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is not crossed by and is not closely adjoined by an aquatic zone, although there is a stream running along the north eastern boundary of the site, which eventually drains into the Fearish River, which in turn joins the Shannon shortly before it enters Lough Allen. The vegetation type within the project area is comprised of conifer forest. Existing access to the site is described as adequate.

The application was referred to Sligo County Council on the 04/12/2019 and a reply was received on the 12/12/2019, no objections to the proposed development were raised, although the local authority did request an extension to the setbacks along the bordering stream to the north east. The Forestry Inspector determined that the application should be referred to the DAFM archaeologists and a report with recommendations was received. The application was also referred to NPWS and IFI on the 4.12.2019. NPWS responded on the 18.12.2019, raising no objection, IFI did not respond.

The decision to approve the licence, subject to standard conditions, other than those regarding archaeology, was issued on the 25/05/2020.

The DAFM recorded an AA screening of Natura sites within 15km, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), concluding that there was no possibility of the project TFL00417019 having any significant effect, either individually or in combination with other plans or projects, on any of the following European site and screened them out. These were, 1. Ballysadare Bay SAC 000622, 2. Ballysadare Bay SPA 004129, 3. Bricklieve Mountains and Keishcorran SAC 001656, 4. Lough Arrow SAC 001673, 5. Lough Arrow SPA 004050, 6. Lough Gill SAC 001976, 7. Union Wood SAC 000638, and 8. Unshin River SAC 001898. All of the sites were screened out for the following reasons. Sites 1-8, because of the absence of any significant relevant watercourse within or adjoining the project area. Site 3, because the position of the project area is downstream from the Natura site, and the subsequent lack of any hydrological connection. Sites 4-8, because the location of the project area is within a separate water body catchment to that containing the Natura sites, with no upstream connection, and the subsequent lack of any hydrological connection

A consideration of other plans and projects in-combination with the proposal was carried out on the 05.05.20 and was also recorded on the file. DAFM concluded that, 'the proposed works will not result in any residual adverse effects on any of the European Sites, their integrity or their conservation objectives when considered on its own. It has been determined that there are no other extant or proposed plans or

projects within those listed above that are likely to give rise to significant effect or effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. This is because it is considered that the regulatory systems in place for the approval, operation and monitoring of the effects of those other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on any European Site when considered in-combination with other plans and projects. The DAFM concluded that "Individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed. Consequently, the DAFM deems that there is no potential for the project to contribute to any effects. when considered in combination with other plans and projects."

There are two appeals against the granting of the licence. The grounds of FAC 290/2020 contend, *inter alia*, that there has been a breach of Article 4(3) of the EIA Directive 2014/52/EU (The FAC understands this to refer to Directive 2011/92/EU as amended by Directive 2014/52/EU) in that a number of criteria required under Annex III are not taken into account. It is further submitted that the Determination reached by the DAFM is inadequately reasoned, that the application was delinquent in terms of the details submitted and that there are errors in the certification. Further grounds contend that the licence conditions are inadequate *viva vis* control of the sequencing of harvesting, control of the use of pesticides and commencement and conclusion reporting and that a condition requested by the local authority had not been adopted. It is further submitted that the licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. It is also submitted that the licence conditions do not provide a system of protection for wild birds and fauna as set out under the Birds & Habitats Directives.

The grounds of FAC 276/2020 contend that DAFM's decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive.

In a statement to the FAC, the DAFM submitted that decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. It was submitted that both a desk audit and field inspection were carried out and that all submissions and appeals were reviewed and that all criteria have been fully adhered to and that the approval was in order. The Department additionally submitted that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, were adequately considered within the current procedures. The Department submits that it complied with these requirements by assessing the information submitted by the applicant, which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account the results of the preliminary verifications or assessments of the effects on the environment carried out under the Birds and Habitats Directives and the Water Framework Directive.

An oral hearing of the appeal was held on 4th of May 2021, of which all parties were notified, and attended by representatives of the DAFM. The DAFM outlined their processing of the application and

read through their written statement. The DAFM submitted that all criteria and procedures were adhered with and that the site was field inspected and that the DAFM is satisfied that the particulars of the application are correct. Regarding the proposed felling, the DAFM submitted that it would be carried out in three coupes, over an eight-year period with the recently felled area being allowed to green-up prior to the next being felled. The DAFM submitted that the application had been referred to the archaeological service and that specific conditions had been added to the licence. It was confirmed to the FAC that the licence terms and conditions were sufficient to ensure that there would be no possibility of a pathway of effect being created between the proposed development and any of the Natura sites listed.

The FAC considered in the first instance the grounds that relate to the information provided in the application. The grounds contend that the application contains inaccurate and insufficient information with reference to the EU EIA Directive. The FAC noted that the application includes harvesting plan details, environmental considerations, maps showing the areas to be felled, the route of extraction, the location of the site notice and environmental information as well as aerial imagery and a location map. This includes information regarding the location of the proposal in relation to areas designated for conservation and other environmental information. The maps submitted, including a Biomap, identify the location of the proposal and any environmental features proximate to the proposal. The FAC is satisfied that the information submitted by the Applicant was appropriate and acceptable in this case and is not satisfied that the DAFM have erred in this regard.

Regarding the remaining Environmental Impact Assessment (EIA) and related matters in the grounds, the FAC considered that the EU EIA Directive sets out in Annex II 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. 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. In this instance the proposal is considered across a number of criteria including the Project Description, Cumulative effect and extent of project, Water, Soil, terrain, slope and other factors. The DAFM also completed an Appropriate Assessment Screening and considered other conservation sites and issues, including archaeological interests.

Regarding the ground concerning the Water Framework Directive, the FAC noted that there was no relevant watercourse actually on the site and when that is taken into consideration together with the comprehensive measures attached to the licence as conditions that no pathway of effect would exist. The FAC is satisfied that given the nature, scale and phasing of the proposal, including the specification and licencing details, that no relevant waterbodies would be affected and that there is no convincing evidence that the DAFM have erred regarding the requirements of the Water Framework Directive.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in

combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. As noted, the DAFM recorded an Appropriate Assessment Screening that included plans and projects considered in-combination with the proposed works. The FAC considered the range and type of plans and projects considered in-combination with the proposed road and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same Natura sites within 15km of the proposal. The DAFM had completed each section of its determination and the responses appeared to the FAC to be in keeping with the facts of the matter.

The FAC questioned the DAFM in relation to a number of anomalous responses provided in the electronically completed certification report, the FAC was satisfied that these were either minor clerical errors or electronic anomalies inherent in the system. The FAC concurs with the conclusions reached in the DAFM assessment that the proposal was not required to proceed to Appropriate Assessment under Article 6(3) of the Habitats Directive. The FAC is not satisfied that the determination contains significant or serious errors.

The DAFM submitted that it was satisfied with the plan to clear-fell and replant the site and that the Application was satisfactorily prepared. The FAC noted the details of the application and the nature of the proposal. The FAC consulted publicly available maps and information and confirmed the details and noted that historic maps show a history of land management in the area. The FAC considered that the harvesting and replanting proposals were appropriate and acceptable and that there was no evidence that significant environmental damage would occur. 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. Based on the evidence available to it, the FAC is not satisfied that an error occurred in the EIA determination recorded by the DAFM. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached.

Concerning the appellant's ground that the DAFM had not taken account of a request by the local authority to extend the setbacks close to the stream bordering the site, the inspector explained to the FAC that he had considered the matter carefully and concluded, in his expert and experienced opinion, that it was not necessary and that the standard conditions were adequate considering the flat nature of the site. The FAC were satisfied with this response.

The grounds also refer to conditions that one of the appellants suggested should be attached to the licence. The FAC considered that the Minister may attach conditions concerning environmental or

silvicultural requirements as the Minister considers appropriate. The FAC considers that an authorised officer of the DAFM may undertake such inspections as they consider necessary in line with the Forestry Act 2014. Regarding the use of chemicals, the FAC considers that such use is regulated through national legislation and requirements concerning their proper use are included in the licence conditions.

In relation to the appellant's stated grounds 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. The FAC had regard to the DAFM record, including the screenings and assessment undertaken. The FAC noted that no details or evidence of the presence of species on the site were provided by the Appellant. The FAC considered that the granting of a licence does not exempt the holder from meeting any legal requirements set out in any other statute.

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 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 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 FAC is not satisfied that an error was made in making the decision in this regard in relation to TFL00417019.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC considers that the appellants have exercised their right to appeal the decision of the Minister in this case and that their grounds of appeal have been considered in full. The FAC is satisfied that a significant error was made in not mapping and adequately quantifying the required broad leaf replanting to be carried out after felling. The FAC is therefore varying the decision of the Minister regarding licence TFL00417019 in line with Article 14B of the Agricultural Appeals Act 2001 to include a condition which will read as follows:

'Before any development commences on the site on foot of this licence, the applicant shall submit to the DAFM, and receive their written agreement, a scaled drawing clearly showing where on site the required additional broad leaf planting is to take place. The development shall be carried out in accordance with the details contained in this agreed drawing, and a copy of the drawing and written agreement shall be placed on the case file.'

Reason: To ensure that areas for the additional planting of broadleaves is clearly delineated and agreed prior to the commencement of development.'

Yours sincerely,

A black rectangular redaction box covering the signature of Donal Maguire.

Donal Maguire on behalf of the forestry Appeals Committee

