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20 May 2021

Subject: Appeal FAC 648/2020 & 658/2020 regarding licence TFL00304219

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 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 TFL00304219 for felling of 22.44ha, in Ballyfolan, Talbotstown Lower, Brittas, Co Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 11 August 2020.

Hearing

An oral hearing of appeal FAC 648/2020 and 658/2020 of which all parties were notified, was held by a division of the FAC on 13 May 2021.

In attendance

FAC Members:	Mr Des Johnson (Chairperson), Mr John Evans, Mr Dan Molloy and Mr Luke Sweetman
Secretary to the FAC:	Michael Ryan
Appellants:	[REDACTED]
Applicant:	[REDACTED]
DAFM Representatives:	Ms Eilish Kehoe and Mr Robert Windle

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all submissions/observations, before deciding to set aside and remit the decision to grant the Licence (TFL 00304219).

The proposal is for felling and restocking on a stated site area of 22.44ha (12 plots) at Ballyfolan, Talbotstown Lower, Brittas, Co. Wicklow. Thinning is proposed for years 2024, 2027 & 2029. Clearfell is proposed in year 2029. Restocking is proposed for site area of 13.39ha in Plots 1 – 9 (incl) with 90%

Sitka spruce and 10% Scots pine. It is stated that the plots are already serviced by farm roadways and no extraction of timber is planned across the field system. A 'Harvest Plan' is submitted with the application and states that there are good quality internal roads, tracks and a large stacking area. The site is mounded, and silt original traps are intact and functioning.

The Inspector's certification states that the application was field, and desk assessed. The area is sensitive to fisheries. It is not acid sensitive and has no high nutrient sensitivity. There is no Freshwater Pearl Mussel zone. There are archaeological sites adjoining. This is a Prime Scenic Area as per the County Development Plan. There is 8.21% forest area licensed for clearfell and/or thinning within 5km. DAFM referred the application to Wicklow County Council, Inland Fisheries Ireland (IFI), National Parks and Wildlife Service (NPWS) and the National Federation of Group Water Schemes (NFGWS). The NFGWS responded, following the submission of a revised 'Harvest Plan', stating that the felling poses no threat to the Ballyfolan GWS, the source and treatment plant is above the plantation, and a section of pipeline going through the forest was replaced some years ago. Machinery and equipment will not be traversing the pipeline. There is no record of any response from the County Council, IFI or NPWS. A DAFM Archaeologist's report states that Plot 3 contains a recorded Monument, there is a Hut Site located some 40m west of Plot 2, an enclosure is located in a pasture field about 50m north-west of Plot 7, and a Hut Site is located about 40m to the west of likely access route to Plots 3, 4, 5 and 6. Conditions are recommended.

An Appropriate Assessment Report (AAR) is dated 13.07.2020. This states that the soils are peaty podzols and peaty gleys, and the slope is moderate to steep. A Stage 1 Appropriate Assessment screening assesses Natura sites within a 15km radius. The following designated sites are screened out for Stage 2 Appropriate Assessment - Glenasmole Valley SAC, Knocksink Wood SAC, Poulaphouca Reservoir SPA, Red Bog Kildare SAC and Wicklow Mountains SAC. Reasons are given for the screening out including lack of surface water hydrological connectivity, the project lands being in a separate waterbody catchment with no upstream connection and a lack of hydrological connection, and the absence of any habitats suitable for use by the conservation interests of the Natura 2000 site. In combination effects are considered including non-forestry projects – dwellings, domestic extensions, reclaimed farmland, agricultural sheds, and forestry related - afforestation (8), forest roads (1), Private felling (18) and Coillte felling (25).

Wicklow Mountains SPA is screened in for Stage 2 Appropriate Assessment for reason that there is insufficient and/or conflicting information that prevents a sound judgement as to the possibility of significant effects on this Natura 2000 site. Qualifying interests and conservation objectives are listed and there is an examination of the potential for adverse impacts. Mitigation measures recommended included measures designed for the protection of Merlin and Peregrine, and general adherence to specified standards in relation to other species.

An Appropriate Assessment Determination (AAD) is dated 13.07.2020. It is determined that the proposed development individually or in combination with other plans or projects will not adversely affect the integrity of the listed European site, having regard to its conservation objectives, provided site-specific mitigation measures are implemented. The mitigation measures are as set out in the AAR. There is no reasonable scientific doubt remaining as to the absence of any adverse effect on the integrity of any European site.

The licence was issued on 11.08.2020 and is exercisable for 10 years. It is subject to standard conditions plus specific archaeological conditions.

There are 2 appeals against the decision to grant the licence. In summary the grounds of the first appeal argue that the development was screened in and no Appropriate Assessment according to EU and Irish law was carried out. The second appeal contends that there is a breach of Article 4(3) of the EIA Directive. This is a class of development covered under Annex II. A number of criteria set out in Annex III do not form part of the screening and have not been taken into account. The DAFM failed to carry out an adequate EIA screening of the proposed development. The determination is inadequately reasoned. The afforestation of these lands was carried out without any screening for the requirement for EIA. This is contrary to the Directive. A retrospective assessment should be carried out before any licence is granted. There is no evidence that potential impact on a non-designated Annex I habitat has been adequately considered. The licence and associated operations threaten the achievement of the objectives for the underlying waterbody under the River Basin Management Plan. Forestry activity has the potential to impact on water quality. There is an inadequate assessment of cumulative impacts. The Stage 1 conclusion is not legally valid as it excludes sites that should have been included for Stage 2 Appropriate Assessment. There is insufficient detail and clarity in the in-combination information to make a definitive assessment. There should be a standard condition requiring notification to the Minister at the commencement and conclusion of operations. The Harvest Plan is not consistent with the requirement of the Interim Standard for Felling and Reforestation. There should be stringent and enforceable conditions regarding notifications in the event of the spraying of chemicals. Licence conditions do not provide for the strict protection of all wild birds during periods of breeding and rearing consistent with the requirements of the Birds Directive. Licence conditions do not provide for the strict protection of Annex IV species in their natural range, prohibiting deliberate disturbance of these species.

In response, the DAFM submitted that the relevant procedures were followed in approving the licence. An in-combination assessment was carried out. Habitat and Foraging Guidance Tables were consulted. The proposed development is not of a class covered by the EIA Directive. These lands would have undergone a regulatory consent process before receiving approval and this would have involved an assessment of the requirement for an EIA. The DAFM applies a wide range of checks and balances in relation to the protection of water quality. The Harvest Plan is consistent with DAFM procedures. The use of PPPs is controlled by Statutory Instruments. Site-specific measures were identified in the AAD and specific conditions were attached to the licence.

An Oral Hearing was convened on 13.05.2021 and all parties were notified. The FAC sat remotely. The applicant and the DAFM participated remotely. The appellants were not in attendance. The DAFM outlined the procedures followed in the making of the decision. There was confirmation that referrals were made to IFI, NPWS, Wicklow County Council and NFGWS and the only response was received from NFGWS. An in-combination report was considered before the decision was made. An AAR and AAD were completed and contained recommended mitigation measures. The applicant stated that the project lands were in private ownership. Plots 1-7 were previously thinned. The project lands are well provided with roads. In response to questions from the FAC, the DAFM accepted that the mitigations contained in the AAD had not been transferred to the licence and that this was an error.

The applicant confirmed that the AAD had not been provided to him with the licence, but that he would have no problem complying with the AAD recommended mitigations if they were attached to the licence. The applicant stated that the water scheme was privately owned and that it was in his interests that it would be protected.

Addressing the written grounds of appeal, the FAC considered, in the first instance, the contention that the licence is in breach of the Environmental Impact Assessment (EIA) Directive. The proposal is for the felling and restocking on a stated site area of 22.44ha in 12 plots, as part of a forestry management operation. There is no change of use proposed. Felling and restocking does not comprise a class of development listed in either Annex I or Annex II of the Directive and does not involve the carrying out of works which, by themselves, would constitute a class of development to which the EIA Directive applies. One appellant contends that the original afforestation of these lands was carried out without screening for EIA but does not substantiate this contention or his assertion that a retrospective assessment is required at this stage. In these circumstances, the FAC concluded that the licence issued is not in breach of the provisions of the EIA Directive.

The FAC considered the procedures followed by the DAFM relating to the requirements of Article 6(3) of the Habitats Directive. Stage 1 screening was carried out for Natura 2000 sites within a 15km radius of the project lands. The FAC considered this reasonable in the circumstances of this case. The Glenasmole Valley SAC, Knocksink Wood SAC, Poulaphouca Reservoir SPA, Red Bog Kildare SAC and Wicklow Mountains SAC were all screened out for Stage 2 Appropriate Assessment with reasons given. In-combination effects were considered. The DAFM screened in the Wicklow Mountains SPA for Stage 2 assessment on the basis of possible significant effects on this Natura 2000 site. Qualifying interests and conservation objectives were listed and there was an examination of the potential for adverse impacts. Mitigation measures were recommended in respect of the Merlin, Peregrine and Otter. An AAD concluded that the proposed development individually or in combination with other plans or projects will not adversely affect the integrity of the listed European site (Wicklow Mountains SPA), having regard to its conservation objectives, provided site-specific mitigation measures are implemented. The mitigation measures are as set out in the AAR. The FAC concluded that the procedures followed by the DAFM leading to the Determination were consistent with the requirements of the provisions of Article 6(3) of the Habitats Directive, and found no reason to consider that the overall conclusion reached by the DAFM was not sound. A significant and serious error was made by the DAFM in the making of the decision by not including the mitigation measures contained in the AAD in the licence issued.

One appellant contends that the licence and associated operations threaten the achievement of the objectives for the underlying waterbody under the River Basin Management Plan but offer no specific evidence to support this contention. Based on the evidence before it, the FAC concluded that there is no reason to conclude that the proposed development would have adverse impacts on water quality.

Compliance and enforcement in respect of licence conditions are matters for the consenting authority. The DAFM have specific legislative powers for this purpose. The FAC concluded that there is no convincing reason to consider that additional conditions should be attached to the licence for this purpose. The 'Harvest Plan' submitted is an operational document for the contractor who must, in any event, comply fully with the conditions attached to the licence. The spraying of chemicals is controlled

through Statutory Instruments and no additional condition is required to be attached to the licence. One appellant contends that there is no evidence to indicate that adequate consideration was given to potential impacts on a non-designated Annex I habitat but does not expand on this contention. The appellant also contends that licence conditions do not provide for the strict protection of all wild birds during periods of breeding and rearing consistent with the requirements of the Birds Directive, and that licence conditions do not provide for the strict protection of Annex IV species in their natural range, prohibiting deliberate disturbance of these species. The appellant does not provide any specific details regarding species of wild birds or Annex IV species likely to be found on the project lands or provide any convincing evidence to indicate that the proposed development would be likely to have any significant adverse impact on species of wild birds or Annex IV species in their natural habitat.

The FAC concluded that there was a serious error in the making of the decision by the Minister in that the mitigation measures contained in the AAD were not included as conditions attached to the licence. The FAC decided to set aside and remit the decision requiring the Minister to attach site specific conditions, including conditions in relation to the Merlin and Peregrine, as outlined in the AAD, in the event of the decision being made to issue a licence for the proposed development.

Yours sincerely

A large black rectangular redaction box covering the signature of Des Johnson.

Des Johnson

On behalf of the Forestry Appeals Committee

