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23 September 2021

Subject: Appeal FAC 308/2020 regarding licence TFL00318519

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 TFL00318519 for felling of 37.87ha, in Annacrivey, Co Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 5 June 2020.

Hearing

An oral hearing of appeal FAC 308/2020 of which all parties were notified, was held by a division of the FAC on 14 September 2021.

In attendance

FAC Members: Mr Des Johnson (Chairperson), Mr Luke Sweetman and Mr Seamus Neely
Secretary to the FAC: Mr 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 00318519).

The proposed development is for felling (thinning) on a stated site area of 37.87ha at Annacrivey, Enniskerry, Co. Wicklow. Thinning years are stated to be 2019, 2023, 2027, and 2029. All trees to be felled are Sitka spruce.

The DAFM referred the application to Inland Fisheries Ireland (IFI) and DAFM Archaeologist. No response is recorded from IFI. An Archaeological Report is dated 19.08.2019. This states the site contains a Recorded Monument – a linear earthwork – located along the southern boundary. It measures 400m from east to west. Portion of this feature forms the townland boundary. Also of note is a 19th/20th century structure located in the southern portion of the plot. Recommended conditions include:

- Adhere to the Forestry and Archaeology Guidelines
- Observe a minimum exclusion zone of 20m radius from the outermost extent of the outer fosse defining the Recorded Monument (sketch provided)
- Trees in this exclusion zone should only be felled following inspection by a qualified archaeologist and the preparation of a plan outlining the most appropriate means to fell and remove trees for the consideration of the Forest Service and the National Monuments Service
- Operational staff should be apprised of the exclusion zone and the monument
- Trees should be felled away from the zone and the harvester or forwarder should not enter the exclusion zone
- The area around the 19th/20th century structure should be treated as an operational buffer and generally avoided. A minimum buffer zone of 10m wide to be provided from the outermost extent of the structure.

The Inspector's Certification states that the application was desk assessed. The area is sensitive to fisheries and the project lands are within a potentially acid sensitive area. The site is not within 6km FWPM zone. This is a High Amenity Area as per the County Development Plan. Soils are predominantly Brown Earths, and the slope is predominantly flat to moderate. The site does not adjoin or contain an aquatic zone and is not within an area of high nutrient sensitivity. There would be no impact on any Way-Marked Way, or on a densely populated area. It is not in an area used by the general public for recreation. The site contains an archaeological feature.

An Appropriate Assessment Report (AAR) is dated 07.05.2020. Screening is carried out for 14 Natura 2000 sites, identified within a radius of 15km. Sites screened out for Stage 2 Appropriate Assessment are Wicklow Mountains SAC, Knocksink Wood SAC, Ballyman Glen SAC, Glen of the Downs SAC, Bray Head SAC, Glenasmole Valley SAC, Carriggower Bog SAC, Rockabil to Dalkey Island SAC, South Dublin SAC, the Murrough Wetlands SAC, the Murrough SPA, Dalkey Islands SPA, and South Dublin Bay & River Tolka Estuary SPA. The reasons given are that the sites are outside the range on impacts on listed qualifying interests, lack of hydrological connection, lack of pathway. Screened in for Stage 2 Appropriate Assessment is the Wicklow Mountains SPA. The special conservation interests for this site are the Merlin and Peregrine Falcon. The conservation objectives are listed and the potential for adverse effects is assessed. The AAR recommends mitigation measures to be included as conditions on the licence, if granted.

An In-combination Report lists a large number of non-forestry projects including domestic extensions, and dwellings, stables and workshops, light industrial building and a quarry, and the following forestry projects (in the last 5 years) - afforestation (1), forest roads (2), private felling (2), Coillte felling (10). An Appropriate Assessment Determination (AAD) is dated 07.05.2020. This screens 14 Natura 2000 sites for Appropriate Assessment. Thirteen sites are screened out for Stage 2 Appropriate Assessment

and reasons are given. The Wicklow Mountains SPA is screened in for Stage 2 Appropriate Assessment. Following the assessment, the AAD concludes that the proposed development, if managed, operated and controlled in accordance with specific conditions to be attached to a licence, will not result in the contravention of any environmental quality standards or cause environmental pollution. No specific mitigations are proposed in respect of the Peregrine Falcon. Mitigation measures for the Merlin are as follows:

1. No felling, thinning or other forestry operations associated with this licence during the period 1 March to 31 August, within 100m of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland, or within 100m of a clearing in the forest of greater than 1 ha.
2. Such operations can commence in sections of the project area away from the 100m exclusion zones and can progress towards the exclusion zone but can only enter it during the period 1 September to 29 February inclusive
3. Adhere to Felling and Reforestation Standards and Appendix 21 of the Forest Standards Manual

The AAD concludes that, based on best scientific knowledge, the proposed activity individually, or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Wicklow Mountains SPA, having regard to their conservation objectives, and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with the mitigations recommended.

The licence issued on 05.06.2020 and is subject to standard conditions plus a specific archaeological condition. The mitigations as contained in the AAD are not attached to the licence.

There is a single appeal against the decision to grant the licence. In summary the grounds of appeal contend that there is a failure to carry out an adequate EIA screening, exceeding the limits of the discretion under Article 2(1) and 4(2) of the Directive. The Inspector's determination is inadequately reasoned and there is no basis for the conclusions reached. There is a breach of Articles 4(4) and 4(5) of the EIA Directive. The licence and associated operations threaten the achievement of the objectives of the underlying waterbody in the River Basin Management Plan for Ireland 2018-21. Clearfelling has the capacity to impact on water quality. The Stage 1 and Stage 2 AA determinations are not legally valid. The DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive on the AAD. Licence conditions do not contain the mitigations in the Stage 2 AA Report. Licence conditions do not limit works to particular years. Licence conditions do not preclude damage to archaeological features. There should be a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive.

In response to the grounds of appeal, the DAFM state that the thinning operations proposed are not a class of development covered by the EIA Directive. The DAFM applies a wide range of checks and balances in relation to the protection of water. Operational measures prevent direct and indirect impact on water quality. The proposed development was subject to DAFMs screening procedures. The

Stage 1 and Stage 2 Determinations are legally valid and contain complete, precise and definitive findings and conclusions. The DAFM fully complied with the requirements for public participation. The Minister may, at any time, attach or vary conditions to any licence granted.

The FAC convened an Oral Hearing on 14.09.2021. The Committee sat remotely and the 1st and 3rd parties and the DAFM participated remotely. The appellant's connection was problematic throughout the hearing and most of his contribution was made using a 'chat' facility. At the outset the appellant stated that his participation was without prejudice as, it was his view, that the FAC was not an independent and impartial body. The DAFM outlined the procedures followed in the making of the decision. Under questioning by the FAC, the DAFM stated that the licence issued had omitted recommended mitigation measures as conditions due to clerical error. The appellant referred to the extent of afforestation within 500m of the project lands and stated that this raised the issue of a requirement for EIA to be carried out. The application should have been referred to the County Council as this is a high amenity area. The Harvest Plan submitted is contradictory. The project drains into Powerscourt Woodlands pNHA, but the NPWS was not consulted. Discrepancies are apparent between the Certification and the AAR – soil type differs. Most of this site is identified as being of medium to high risk in terms of landslides. The recommended mitigation for the Merlin does not have any scientific basis and was not developed by an ecologist. No scientific evidence has been submitted to prove that Merlin would not be disturbed by felling operations at a distance greater than 100m from the forest edge. Wicklow is a key area in the country for Merlin. The Otter was not covered in the screening conclusion for the Wicklow Mountains SAC. The Wicklow Mountains SAC is less than 75m from the site and there is potential for colonisation of Wet Heath and Blanket Bog. There is now a legal requirement to consult with the public under the Habitats Directive. The years of felling are not stated on the licence. In terms of cumulative impacts, other projects had not been properly referenced. Recommended mitigations were not attached as conditions to the licence. Responding to the FAC as to why the written grounds of appeal did not make specific reference to the Merlin, the appellant stated that the appeal was lodged at the time of the previous legislation and that the written grounds did challenge the validity of the Appropriate Assessment. The first party stated that there was no issue with complying with the recommended mitigations contained in the AAD. The County Council were consulted but did not respond. Operations would cease during heavy rainfall. Soils are predominantly podzols with very little peat. Run-off is minimal and this is a very dry site. No landslides are recorded in this area and are at higher elevations. There is no hydrological connection from the site and no potential for water flow. It is intended that the project lands will be managed as continuous forest cover. There are no otters on the site and Merlin have never been encountered, but the recommended mitigation for Merlin would be facilitated, if required. Responding to the FAC, the Inspector stated that there is an aquatic zone just outside the forest and up the hill. This is possibly a dry gully. There was no referral of the application to the County Council. The appellant submitted that there is an SPA for which Merlin is a qualifying interest, 400m away. Information on Merlin is contained in 'Merlin of the Wicklow Mountains' by Anthony McEheron. Academic papers indicate that Merlin nests can occur over 250m from the forest edge and that the human disturbance distance is 350m. Disturbance distance is critical.

In addressing the grounds of appeal, the FAC considered, in the first instance the contention that the decision to grant the licence is in breach of the provisions of the EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC noted that under Article 4(1) of the Directive projects

listed in Annex 1 must be made subject to an assessment and, under Article 4(2), Member States must determine through case-by-case examination, or thresholds or criteria set by the Member State if projects listed in Annex II should be made subject to assessment. The proposed development is for thinning of a stated site area of 37.87ha. over a ten-year period. Felling (thinning), as part of a forestry management operation, is not a class of development listed in either Annex I or II to the Directive. Furthermore, the proposed development does not include any works which, themselves, are a class of development listed in Annex I or II of the Directive. In circumstances where the proposed development is not a class of development covered by the Directive, the FAC found no reason to conclude that the licence granted is in breach of the provisions of the Directive, or that any significant or serious error was made in respect of this issue in the making of the decision to grant the licence.

The FAC considered if the procedures followed by the DAFM were in compliance with the provisions of Article 6(3) of the Habitats Directive. It was noted that the DAFM identified 14 Natura 2000 sites within a 15km radius of the project lands and, following reference to the EPA publicly available website, the FAC found this to be correct. The AAR, dated 07.05.2020, screened the 14 Natura 2000 sites for the requirement for Stage 2 Appropriate Assessment and concluded that 13 of the sites should be screened out for Stage 2 Appropriate Assessment, with reasons given that the sites are outside the range of impacts on listed qualifying interests, lack of hydrological connection, and lack of pathway for effects. The Wicklow Mountains SPA was screened in for Stage 2 assessment. The FAC noted that the rationale for the screening out conclusion in respect of the Wicklow Mountains SAC is "the project site is located over 400m from the SAC, and this is outside the range for impacts listed as Conservation Interests. In addition, the site is not hydrologically linked to the SAC and so no pathways for impacts exist". The FAC found that the separation distance is approximately 75m and that the qualifying interests for the Wicklow Mountains SAC include North Atlantic Wet Heaths, European Dry Heaths, Alpine and Boreal Heaths and Blanket Bogs. In these circumstances the FAC concluded that the screening conclusion in relation to the Wicklow Mountains SAC was based on an incorrect separation distance and that, having regard to the qualifying interests of the European site, this constituted a serious error. Furthermore, the FAC noted that the DAFM Habitats Table indicates that this Natura 2000 site should have been screened in, having regard to the separation distance involved.

An In-combination report, listing both forestry related projects and non-forestry related projects, was prepared and considered in the making of the decision to grant the licence.

In regard to the Stage 2 Appropriate Assessment carried out for the Wicklow Mountains SPA, the FAC noted that the qualifying interests are listed (Merlin and Peregrine Falcon), together with the conservation objectives, and that the potential for adverse effects was assessed. Specific mitigation measures are recommended in relation to the Merlin. The FAC noted that the AAD conclusion is based on the inclusion of the recommended mitigation measures as conditions to the licence. These mitigation measures are not included as conditions of the licence and the FAC found this to constitute a serious error in the making of the decision to grant the licence.

The appellant contends that the proposed thinning would threaten the achievement of the objectives for the underlying waterbody in the River Basin Management Plan for Ireland 2018-21, but does not submit any convincing evidence to substantiate this contention. The FAC noted that the site does not adjoin or contain an aquatic zone. Having regard to the nature and scale of the proposed development,

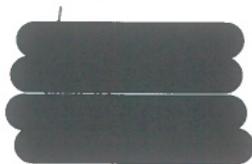
and to the characteristics of the project lands, the FAC found no reason to conclude that the proposed development would threaten the achievement of the objectives set for the underlying waterbody.

The FAC considered the conditions attached to the licence and the appellant's contention that there should be a standard condition requiring the licensee to inform the Minister at the commencement and conclusion of operations. The FAC noted that the Minister has powers to ensure compliance with the terms of any licence granted and found no reason to conclude that an additional condition is required. The FAC noted that the appellant has not provided any specific information in relation to species of wild birds on the project lands or reasons why the proposed development would have an adverse impact on them. The FAC found no reason to conclude that the proposed development would be likely to give rise to landslides on the project lands or that the proposed thinning would be likely to be affected by landslides.

At the Oral Hearing, the appellant contended that there is no scientific basis for the terms of the recommended mitigation measure in relation to the Merlin. The 1st party contended that Merlin had never been encountered on the subject lands but that the recommended mitigation would be facilitated, as necessary. The appellant referred to publications relating to Merlin. The FAC noted that the separation distance between the Wicklow Mountains SPA and the project lands is approximately 580m at its nearest. There is no specific information before the FAC in respect of Merlin on the project lands, including any nesting sites within the existing forest. Based on the information before it in relation to the proposed thinning, the FAC found no reason to conclude that it would be likely to have an adverse impact on the conservation status of the Merlin if the terms of the mitigations contained in the AAD were implemented.

In concluding that a series of errors occurred in the making of the decision to grant the licence in respect of the screening of the Wicklow Mountains SAC for the need for Appropriate Assessment, and the failure to attach necessary mitigation measures as conditions to the licence, the FAC decided to set aside and remit the decision of the Minister to carry out a new screening for the Wicklow Mountains SAC and, if necessary, a Stage 2 Appropriate Assessment and, in the event of a decision to approve the licence, to attach appropriate conditions in order to protect the qualifying interests of the Wicklow Mountains SPA.

Yours sincerely

A redacted signature consisting of three thick, black horizontal bars of varying lengths, completely obscuring the name and any handwritten notes.

Des Johnson on behalf of the Forestry Appeals Committee