



[REDACTED]

3rd December 2020

Subject: Appeal FAC394/2020 regarding licence TY06-FL0091

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 has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TY06-FL0091 for felling and replanting of 2.21 ha at Commaun Beg, Gortahumma, Co. Tipperary was approved by the Department of Agriculture, Food and the Marine (DAFM) on 25th June 2020.

Hearing

A hearing of appeal FAC394/2019 was held by the FAC on 13th November 2020.

In attendance:

FAC Members: Mr. Donal Maguire (Chairperson), Ms. Claire Kennedy, Mr. Vincent Upton, Mr Derek Daly

Secretary to FAC: Ms. Ruth Kinehan

Appellant: [REDACTED]

Applicant: [REDACTED]

DAFM Representatives: Mr. Anthony Dunbar (Forestry Inspector), Ms. Eilish Kehoe (Executive Officer)

Decision

The 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 other submissions, before deciding to affirm the decision to grant this licence TY06-FL0091.

The licence pertains to the felling and replanting of 2.21 ha at Commaun Beg, Gortahumma, Co. Tipperary. The forest is currently comprised of Sitka spruce and the site would be replanted with the same species. The site is described as being on an east facing slope which is predominantly steep with a 15-30% gradient and on mineral and peat soils, comprised of Lithosols, Regosols (100%). The application

included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application. The DAFM undertook and documented an appropriate assessment screening that found nine European sites within 15km and found that there was no reason to extend this radius in this case and that the proposal would not give rise to the possibility of a significant effect on a European site itself or in-combination with other plans and projects in relation to eight of the sites. One European site, 0004165 Slievefelim to Silvermines Mountains SPA, was screened in due to the location of the project within the Natura site for the species listed as the Special Conservation Interest of this Natura site.

An appropriate assessment report and determination was undertaken and dated 10th June 2020 with ecological review on 18th June 2020 was prepared by the DAFM which outlined potential adverse impacts of the proposal and mitigation measures to be implemented. The development it is noted was referred to Inland Fisheries Ireland and, in a response, dated the 21st of January 2020 IFI indicated no objections and indicated a number of recommendations. The licence was approved on the 25th June 2020 with a number of conditions attached which related to water and the environment generally, including contacting an IFI officer, and the mitigation measures outlined in the appropriate assessment and is exercisable until 31st December 2022.

There is one appeal against the decision.

The grounds contend that the licence was issued in breach of Articles 4(3) and 4(4) of the EU EIA Directive. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex II of the Directive; that the DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA; that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening and the application has not described any aspects of the environment which are likely to be significantly affected. It is stated that the purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the EIA Directive.

It is also stated that this Licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018- 21.

It is contended that the stage 1 and stage 2 AA (appropriate assessment) determinations are not legally valid and that the DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive.

It is also submitted that the harvest plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation and that the licence should include commencement and conclusion notices

and that inspections must be carried out by the FS (DAFM). It is contended that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive or a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive. It is also contended that the licence should include stringent and enforceable conditions regarding notification of commencement and conclusion of operations to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In a statement to the FAC, the DAFM submitted that the standard operational activities of clearfelling and replanting already established forests 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 for the standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department and thus Article 4(3) of the Directive is not applicable.

In relation to Article 4(4) of the Directive which requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation because the standard operational activities of clear-felling and replanting an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for subthreshold EIA did not need to be carried out by the Department in this case and thus Article 4(4) of the Directive is not applicable.

In relation to threatening the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018- 21. The DAFM response is that it applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018). Critically, any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impacts on water quality arising from the operation and examples of such measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works.

In relation to the contention that that the Stage 1 and Stage 2 AA determinations are not legally valid, the DAFM indicated that the 2.21 ha felling and reforestation project licenced as TY06-FL0091 has been subject to the DAFM's AA Screening procedure and the statement goes on to describe the appropriate assessment procedure adopted by the DAFM in processing the licence and the date at which the appropriate assessment determination was signed off. It is further submitted that the screening relied on information from the Applicant in relation to considering the potential for in-combination effects

with other plans and projects and that a separate in-combination assessment was undertaken subsequent to the licence being issued.

The statement describes the application and screening process and that the decision under appeal relates to a licence which underwent appropriate assessment after Slievefelim to Silvermines Mountains SPA was screened in. It is contended that the mitigations measures described ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservation Interests or Qualifying Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive and that the DAFM determined, based on objective information, that the project (TY06-FL0091), either individually or in-combination with other plans or projects, would not adversely affect the integrity of any European site and that the site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project TY06-FL0091.

It is submitted that opportunities for public participation in decision-making are provided for under Part 6 of the Forestry Regulations 2017 and details are provided on the Department's website and that these Regulations require the Minister to have regard to any written submissions or observations made in respect of screening and appropriate assessment.

The site-specific mitigations identified in the AA Report and AA Determination Statement it was indicated are attached as conditions of the licence issued for felling and reforestation project TY06-FL0091.

Regarding the use of chemicals, 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 that 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). It is further submitted that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012 and that there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray, nor is there a need for animals in adjacent properties to be moved as the application of this PPP is by hand in a very targeted manner that minimises exposure of the environment. Regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

At the hearing of which all parties were notified, and representatives of the DAFM and the Applicant attended the DAFM submitted that they were satisfied that the decision was made following their procedures and restated their processing of the licence and procedures. They contended that the proposal did not involve any change in land use or deforestation and was not included in any class of project covered by the EU EIA Directive and that screening was not required in this instance. They described the appropriate assessment process that was undertaken and that the measures that were included as conditions on the licence. The conditions other than the general conditions were outlined and the reasons for these conditions. They submitted that referrals were considered and conditions

were included that related to responses received. The licence includes conditions specific to the protection of the hen harrier species. The licence also included conditions for the protection of water quality.

The Applicants described the application information that they provided and submitted that it was their view that the proposal did not include a class of project included in the EIA Directive or National legislation. They submitted that their protocols were developed with ecologists and the NPWS and that they are satisfied that they were acceptable which in this particular case applied to the hen harrier species and that DAFM receives ongoing updates in relation to the species in the area. The licence includes conditions specific to the protection of the hen harrier species. The licence also included conditions for the protection of water quality. It was indicated that the site was a dry site and there was no hydrogeological path from the site to any water SAC.

In response to questions at the hearing it was indicated that no responses were received from the County Council and the site was not fisheries sensitive. In relation to the hen harrier species it was indicated that the most recent update on the hen harrier species in the area was received in April 2020.

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 EIA Directive. 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 are 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 decision under appeal relates to a licence for the felling and replanting of an area of 2.21 ha. 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.

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. In this case, the DAFM provided a record of a Stage 1 screening in relation to five European 2000 sites. The FAC examined publicly available information on the EPA website and confirmed that the following sites are within

15km of the proposed felling Lower River Shannon SAC 2165; Bolingbrook Hill SAC 2124; Lower River Suir SAC 2137; Anglesey Road SAC 2125; Silvermine Mountains SAC 939; Keeper Hill SAC 1197; Silvermines Mountains West SAC 2258; Kilduff, Devilsbit Mountain SAC 934 and Slievefelim to Silvermines Mountains SPA 4165.

The FAC considered the reasons provided for screening out eight of the sites including the degree of separation and absence of hydrological connection and having regard to the nature and scale of the proposal. The proposal is not connected with or necessary to the management of these European sites. The FAC also considered the reasons provided for screening in Silvermines Mountains SPA 4165 due to the site being located within the SPA reasonable.

Details of other plans and projects considered by the DAFM in combination with the licence decision under appeal are provided and described in the report. The Appellant did not submit any specific information regarding European sites, significant effects, pathways, the proposal or other plans and projects in relation to the screening undertaken. The FAC is satisfied that no serious or significant error or series of errors were made at the stage 1 or screening for appropriate assessment.

The DAFM provided an appropriate assessment report and determination in relation to Silvermines Mountains SPA 4165. These documents provide details of the licensed proposal, the SPA and its conservation objectives, adverse effects that could occur on the special conservation interests of the SPA and the proposed mitigation measures. The DAFM appropriate assessment determination concludes,

"the basis for this AA determination is as follows: the felling and reforestation site is not within 1.2km of a known nesting site within the SPA. The habitat of the site in question is also not suitable for Hen Harrier foraging, nesting or roosting. With the conditions outlined above, no impact is anticipated to the Qualifying Interest with some additional broadleaf habitat facilitating prey species. If notification of a new Red Area is given during the breeding season, any disturbance operations associated with the Felling Licence will cease immediately on receipt of notification, and unless otherwise agreed can only recommence after the breeding season".

It is noted that mitigation measures are outlined and are included in the conditions of licence.

The determination continues;

"Therefore, the Department of Agriculture, Food & the Marine has determined, 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), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site. For the purposes of 42(16) of S.I.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any European Site."

In considering the appeal and before making a decision, the FAC examined the information submitted in relation to the proposal including AA screening and determination of DAFM. In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. DAFM indicated that, as a matter of course, updates in relation to the status of the species occur and conditions and site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project TY06-FL0091 specific to the protection of the species.

In relation to this species the AA determination was that no mitigation is required. It was indicated that the project lies wholly within a Green Area in relating to Hen Harrier, the Special Conservation Interest of the SPA. Therefore, potential disturbance operations associated with this project can take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, operations will be restricted within the Hen Harrier season if the NPWS notify DAFM of a new HLNA encompassing / intersecting this project. Two rows of broadleaves on southern border of site to provide opportunities for prey species.

It is noted by the FAC that regular updates are received by DAFM from the NPWS in relation to the species in the area of the project the most recent in April 2020 and that there is a protocol in appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out an agreed protocol regarding breeding Hen Harrier and potential disturbance operations, developed by the Forest Service of the DAFM and the National Parks & Wildlife Service (NPWS). There is no reason therefore for the FAC to conclude that the proposed development would impact on the favourable conservation condition of the bird species listed. There are specific measures and conditions identified to protect the favourable condition of the species. The FAC is satisfied, on the balance of evidence, that no serious or significant error or series of errors were made at stage 2 or appropriate assessment of the proposal.

The FAC considered that it had adequate information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts in order to determine if the proposed development, alone or cumulatively with other plans and projects, would be likely to have significant effects on the environment. The procedures adopted by the DAFM in their assessment are considered acceptable. The FAC concurs with the conclusion that there is no likelihood of significant effects on any Natura 2000 site arising from the proposed forest felling.

The FAC concluded that the proposal will not impact a European site due to the absence of hydrological connectivity, the degree of separation and the nature of the species and habitats concerned. The FAC noted a number of conditions related to the protection of species protection and water quality on the licence. The FAC does not consider that the proposal would result in any real likelihood of a significant effect on the environment given the nature, small scale of the proposal and the characteristics of the surrounding area.

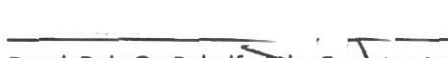
The grounds submit that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, while not submitting specific concerns. A harvest plan was provided with the application which outlined inventory and restocking details and maps identifying the proposal, forest roads, water courses, archaeological features, designated sites and other environmental features. The DAFM submitted at the oral hearing that the applicant provided such plans as a matter of course on its felling applications. Further details of the proposal are provided in the appropriate assessment report. The FAC is satisfied that the application contains sufficient information to facilitate the decision-making process of the DAFM and that no significant or serious errors or a series of errors was made in this case.

The grounds also refer to conditions of a licence and to conditions that the appellant suggested should be attached to the licence, the FAC considered that the Minister may attach conditions including the erection of site notices and any other environmental or silvicultural requirements as the Minister considers appropriate. The grounds do not provide reasons for the suggested attachment of conditions regarding notifications or inspections to this specific licence. 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. The FAC noted that the Appellant did not submit any specific details in relation to protected species and the licensed activity. Regarding the use of chemicals, the FAC considers that such use is regulated through national legislation and restrictions are included in the requirements of the licence conditions.

Regarding the conditions attached to the licence the approval of which forms the subject of the appeal, the FAC concluded that a significant or serious error or series of errors had not been made in the decision making process and that it would not vary the licence to attach further conditions in this case.

In deciding to affirm the decision of the Minister to grant the Licence, the FAC concluded that the proposed development would be consistent with Government policy and Good Forestry Practice. The FAC is satisfied that there was no serious or significant error or series of errors made in making the decision and neither that the decision was made without complying with fair procedures. Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.

Yours sincerely,


Derek Daly On Behalf of the Forestry Appeals Committee