



[REDACTED]

3rd December 2020

Subject: Appeal FAC390/2020 regarding licence WW07-FL0152

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 WW07-FL0152 for felling and replanting of 3.94 ha at Clohernagh, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 26th June 2020.

Hearing

An oral hearing of appeal FAC390/2020 was held by the FAC on 13th November 2020. In attendance:
FAC Members: Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Ms. Claire Kennedy, Mr. Vincent Upton

Secretary to the FAC: Ms. Ruth Kinehan

Appellant [REDACTED]

Applicant's Representatives [REDACTED]

DAFM Representatives: Mr. Frank Barrett (Forestry Inspector), Ms. Eilish Kehoe (Executive Officer)

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence WW07-FL0152.

The licence pertains to the felling and replanting of 3.94 ha at Clohernagh, Co. Wicklow. The forest is currently comprised of Sitka spruce, with a small area described as felled, and the site would be replanted with the same species. The site is described as having been planted in 1986 and located on a steep slope and on mineral and organic soils, comprised of podzols (peaty), lithosols and peats. The forest lies in the Ovoca-Vartry catchment and Avonbeg_010 sub-catchment. The proposal was referred

to Wicklow County Council and Inland Fisheries Ireland (IFI). Inland Fisheries Ireland replied requesting that operations abide by forestry guidelines and not create ground instability and that their officer be contacted prior to works commencing. The application included a harvest plan, including maps identifying the proposal, roads and environmental information, 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 five 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 four of the sites. One European site, 004040 Wicklow Mountains SPA, was screened in due to the proximity of potential habitat for the species listed as the Special Conservation Interest of this Natura site. An appropriate assessment report and determination dated 15th June 2020 with ecological review on 24th June 2020 was prepared by the DAFM which outlined potential adverse impacts of the proposal and mitigation measures to be implemented. The licence was approved 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 undertake an EIA screening and that the proposal is within a class of development covered by Annex II of the EIA Directive, that the application does not represent the whole project and that the developer did not submit a description of aspects of the environment likely to be significantly effected by the project. It is submitted that there was no evidence of a nationally designated site being considered in the approval process and that there was inadequate consideration of feedback from a consultation body. It is submitted that the licence and its associated operations threaten the achievement of the objectives set for the waterbody or waterbodies under the River Basin Management Plan. 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 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 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 contended that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In a statement to the FAC, the DAFM contended 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 and that

breaches of Article 4(3) and 4(4) of the EIA Directive had not occurred, while further contending that no project splitting had been undertaken. The DAFM submitted that the felling and reforestation project licensed as WW07-FL0152 has been subject to the DAFM's appropriate assessment screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note and iFORIS SOP (standard operating procedures) for DAFM Forestry Inspectors (v.05Nov19)* (DAFM, 2019), that standard procedures in terms of assessment of required referrals for designated sites and related spatial assessment in terms of other environmental constraint layers were adhered to and that referral correspondence returned from referral bodies was considered during the licensing process. The statement describes the application and screening process and that the decision under appeal relates to a licence which underwent appropriate assessment after Wicklow 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 (WW07-FL0152), 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 WW07-FL0152. The statement further contends 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, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (2018) and that in relation to felling that felling licences are issued 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 are provided. 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.

Regarding system of protection for species, 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.*" and that the site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of the licence. In relation to additional conditions on the licence the DAFM submitted that it is the Minister that may at any time attach or vary conditions to any licence granted and made reference to Section 17.4 of the 2014 Forestry Act. 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.

An oral hearing of the appeal was held, 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. They submitted that referrals were considered and conditions were included that related to responses received. 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. They submitted that there was no aquatic zone on or adjacent to the forest and that the land generally drains easterly and enters the sea at Arklow at that there was no hydrological connection with a Natura site. They submitted that the use of chemicals is undertaken in a controlled and targeted manner and on a risk base and in line with regulations and the requirements of the sustainable forest management certification scheme of which they are a member. They submitted that the DAFM can and does include commencement notice conditions where it is deemed necessary on a risk basis and that the licence requires the erection of a site notice when operations commence.

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 and replanting 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 Forestry Regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 3.94 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other 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 Wicklow Mountains SAC, Vale of Clara (Rathdrum Wood) SAC, Slaney River Valley SAC, Deputy's Pass Nature Reserve SAC and Wicklow Mountains SPA. The FAC considered the reasons provided for screening out four 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 FAC also considered the reasons provided for screening in Wicklow Mountains SPA due to proximity to the site. The proposal is for felling and replanting of an area of 3.94 ha outside of the SPA at a distance of approximately 1.2km from the boundary. Details of other plans and projects considered by the DAFM in combination with the licence decision under appeal are provided and described. 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 Wicklow Mountains SPA. 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 proposed mitigation measures, which includes restriction on activities in part of the site during a specified period and the retention of existing scrub. The DAFM appropriate assessment determination concludes,

"...that the activity proposed under WW07-FL0152 , individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Wicklow Mountains SPA 004040, 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 specific mitigation to be attached as conditions to the licence..."

And 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."

The appropriate assessment was described as having been prepared by the DAFM based on measures developed by an ecologist and with input from an independent ecologist. While raising general concerns regarding the content of appropriate assessment, the grounds did not submit any specific information regarding European sites, significant effects, pathways, mitigation measures, the proposal or other plans and projects in relation to the appropriate assessment undertaken. The DAFM provides a system for public participation in relation to the applications that it processes and as noted in the DAFM statement is required to consider submissions in making decisions. 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.

Regarding water quality the proposal is described as not containing an aquatic zone. Based on the maps provided, the border of the proposed felling lies approximately 90 metres from the closest stream identified as the Drumgoff by the EPA. This stream flows to the east and joins the Avonbeg river and flows to Arklow as submitted by the Applicant. The licence conditions require the implementation of a series of measures designed to protect water quality during operations, including the management of existing drains, and reflect the submission made by Inland Fisheries Ireland. The Applicant must also contact the IFI prior to operations commencing. The Appellant did not submit any specific information regarding effects on water quality or pathways related to the licenced proposal. Based on the information available to it and having regard to the nature, scale and location of the proposal and the conditions under which it would be undertaken, the FAC is satisfied that the proposal does not pose a significant threat to water quality.

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 in this case and that no significant or serious errors or a series of errors were made.

Regarding the 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. In this instance, the licence requires the erection of a site notice following the directions of the DAFM. 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 grounds suggest that there was inadequate consideration of feedback from a Consultation Body. The application was referred to the County Council and Inland Fisheries Ireland (IFI) and the FAC was provided with the response from IFI and is satisfied that the licence conditions demonstrate a consideration of the response provided. In

regard to protected species, the granting of the 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 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. The Appellant further submitted that notifications are made under the voluntary sustainable forest management certification scheme of which it is a member. 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 considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors were not made in making the decision and neither that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence WW07-FL0152 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee