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18th December 2020

Subject: Appeal FAC587/2020 and FAC595/2020 regarding licence WW05 FLO110

Dear [REDACTED]

I refer to your 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 WW05 FLO1100 of clearfell and reforestation of 12.40ha at Ballinagee, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 10th July, 2020.

Hearing

An oral hearing of appeals FAC587/2020 and FAC595/2020 was held by the FAC on 11th December, 2020. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Ms. Mary Lawlor, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Appellant's Representative: [REDACTED]

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Anthony Dunbar, Mr Alan Sheridan

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 set aside and remit the decision of the Minister regarding licence WW05-FLO1110.

The licence pertains to the felling and replanting of 12.40 ha at Ballinagee, Co Wicklow. This project lies in a rural landscape in the River Sub Basin King's (Liffey_010). The River Sub Basin King's (Liffey_010) has approximately 41% forest cover. This site would be replanted with Sitka Spruce and Birch. The slope is indicated as predominantly steep 15-30% with underling soil type comprising podzols (peaty), lithosols,

peats (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 six European sites within 15km, 004040 Wicklow Mountains SPA, 002122 Wicklow Mountains SAC, 000716 Carriggower Bog SAC, 004063 Poulaphouca Reservoir SPA, 000733 Vale of Clara (Rathdrum Wood) SAC and 000781 Slaney River Valley SAC and found that there was no reason to extend this radius in this case. Two sites were screened in due to the site being within the 004040 Wicklow Mountains SPA, proximity to 002122 Wicklow Mountains SAC. The remaining four sites were screened out due to distance and /or the absence of lack of any pathway, hydrological or otherwise between the site and the Natura sites.

The development it is noted was referred to NPWS on the 10th December, 2019 and a response received which indicated conservation recommendations in relation to felling periods and the species associated with the SPA and also liaison with local Conservation Rangers to ensure adequate protection measures are in place. Inland Fisheries Ireland also provided a response that the proposal must adhere with Forestry Harvesting and Environmental Guidelines and that notification of the decision and operation should be made.

The licence was approved on 10th July 2020 and is exercisable until 31 December 2022. It is subject to standard conditions together with 20 additional conditions, many of which relate to the protection of water quality and protection of the environment, which include contact with the IFI, liaison with local conservation rangers and recommendations outlined in the DAFM screening report.

There are two appeals 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.

Specifically, in relation to this appeal the licence is for an area of 12.4 ha in Coillte's Forest Management Unit (FMU) WW05. On the same date that the application for this licence was submitted a further two applications for clear felling licences were submitted for the same FMU totalling 32.87 ha. Article 4 (4) of the EIA Directive) requires a developer to submit details of the whole project. The application for this licence does not represent the whole project therefore it is in breach of the EIA Directive. All projects within a Coillte FMU must be considered to form a part of the whole project.

It is stated that there is inadequate consideration of feedback from consultation bodies; the Stage 1 and Stage 2 AA determinations are not legally valid. It is submitted 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 Clear felling has the capacity to impact on water quality. The cumulative impact of this project with other licensed and proposed projects has not been adequately assessed. The mitigation presented is not adequate to ensure that the proposed development will not adversely impact on the protected European species in question and does not conform with the advice from a Consultation body. In addition, a potential source of impact on a designated site has not been identified and consequently no mitigation has been proposed. DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive on the Appropriate Assessment Determination.

Reference is also made to and that the AA In-Combination assessment is flawed; that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation; reference is also made to the conditions of the licence and the absence of a general system of protection for all species of birds, absence of detail to notify the Minister at both the commencement and conclusion of operations pertinent to the licence; ongoing inspection and 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.

It is submitted that the Appropriate Assessment screening did not comply with the decision of Finlay J in Kelly. Under the basic principles of EU law, the decision is invalid as the Minister is being a judge in his/her case. There has been no investigation as to whether the application site has complied with the requirements of EU law. According to the heads of the new bill the Minister has assumed control of the FAC.

In a statement to the FAC, the DAFM submitted that in regard to the granted Felling licence application WW05-FLO110, 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 in the case of applications for TFLs for these particular activities and thus Articles 4(3) and 4(4) of the Directive are not applicable.

Standard procedures were followed in regard to spatial check related to designated sites at or near the project location. Standard procedures were followed in respect of referrals were issued to statutory bodies in respect of the licence application.

Information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an Appropriate Assessment Prescreening Report and associated Pre-screening Report methodology document were considered during the licensing process. The DAFM

stated that they are satisfied that the decision met their criteria and guidelines and that they confirm the licence. They submit that they followed the current DAFM AA Screening guidance document and considered Natura 2000 sites within 15km.

Having reviewed the details of relevant European sites their qualifying interests and conservation objectives the Department in the screening report identified the possibility of the project having a significant effect on the screened European sites (Wicklow Mountains SPA 004040 and Wicklow Mountains SAC 002122). As such, the clearfell and reforestation project was screened in and an Appropriate Assessment carried out.

The potential for the project to result in impacts on the Conservation Interests and Qualifying Interests of the Wicklow Mountains SPA 004040 or Wicklow Mountains SAC 002122 was identified on a precautionary basis and site specific measures prescribed by the DAFM to mitigate against such impacts were described. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set in the AA Report and AA Determination statement ensure that the proposed felling and reforestation project WW05-FL0110 will not result in any adverse effect on any European Site.

DAFM subsequently carried out a separate in-combination assessment and included an associated in-combination statement based on this information which is consistent with the licensee's in-combination statement. A felling licence was issued for the clearfell and reforestation project having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence application.

In relation to the use of chemicals there are standards of good practice and 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 was held at which each party was represented. The DAFM provided an overview of the processing of the application, including referrals, and reiterated the contentions outlined in its written statement. The Appellant contended that the processing of the licence and application was not made in compliance with Article 6 of the Habitats Directive, that it did not take account of submissions from referral bodies and considered that the potential for residual effects had not been fully considered. The Applicant outlined the information submitted with the application and described the site including stating that the forest was set back from the closest watercourse.

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 FAC considers that 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 Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than 20 per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the felling and replanting of an area of 12.4 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.

At the oral hearing the Appellant submitted that the appropriate assessment did not sufficiently consider habitats related to the SAC and questioned the appropriateness of the language used in particular the sentence pertaining to a habitat being unlikely to be in the vicinity. They referred to a dataset generated by the NPWS for the purposes of reporting under Article 17 of the Habitats Directive. The Appellant also queried the mitigation measures included in the appropriate assessment report and determination regarding Merlin (*Falco columbarius*) [A098] in specific reference to the response provided by the NPWS which does not include a geographic qualifier. At the oral hearing the DAFM submitted that this response was provided prior to the licence decision being made and would have been considered as part of the appropriate assessment. The DAFM submitted that its mitigation measures were developed with an ecologist and that appropriate assessment is undertaken with an ecologist and that the measures and reasons are recorded in the report. The Appropriate Assessment Determination as carried out by DAFM in this case included an ecological review as recorded. The Appellant did not provide any scientific evidence to contradict the proposed mitigation measures while querying the scientific basis for the measures themselves. The FAC is not satisfied that an error occurred in the making of the decision regarding the nature of the mitigation measures themselves and notes the scientific references provided. In relation to habitats related to the Wicklow Mountains SAC and their consideration in the appropriate assessment. The FAC examined datasets provided by the NPWS in relation to Article 17 reporting and noted in particular the fitness of use and limitations identified "*Data are provided on an 'as is', 'as available' basis. NPWS does not guarantee the accuracy, timeliness, completeness, performance or fitness for a particular purpose of the data. It is the users' responsibility to ensure that the data are fit for any intended use.*" And that the data is employed for a specific reporting purpose and that the available conservation objectives and related documentation for Wicklow Mountains SAC indicate that mapping of habitats following an identified standard has not been undertaken. The FAC is not satisfied that the dataset identified by the Appellant could be relied upon as an accurate reflection of the presence of a habitat at a specific location. However, in this specific case a small portion of the forest overlaps the western boundary of the SAC and a large area of open habitat lies to the east. In the absence of reasons for determining that a qualifying interest of the SAC is absent

with a reasonable degree of certainty through remote or field assessment or that there would be no effect for other specified reasons the FAC considers that an error has been made in the appropriate assessment regarding- habitats that are deemed to be unlikely to be in the vicinity of the forest in regard to Wicklow Mountains SAC.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC concluded that a new appropriate assessment should be undertaken to include Wicklow Mountains SAC before a new decision is made.

Yours sincerely,

A large black rectangular redaction box covering the signature of the sender.

Mary Lawlor on behalf of the Forestry Appeals Committee