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5th February 2021

Subject: Appeal FAC 182/2020 in relation to licence CE07-FL0205

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence CE07-FL0205 for felling and replanting of 9.72 hectares at Booltiagh and Boolynaknockaun, Co. Clare was granted by the DAFM on 25th March 2020.

Hearing

An oral hearing of appeal FAC 182/2020, of which all parties were notified, was held by the FAC on 16th December 2020. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Frank Barrett & Ms. Eilish Keogh
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister to grant this licence CE07-FL0205.

The licence pertains to the felling and replanting of an area of 9.72 hectares at Booltiagh and Boolynaknockaun, Co. Clare. The forest is currently composed of almost entirely Sitka Spruce and replanting is to be of Sitka Spruce with 5% open space. As per the DAFM documentation, the site's underlying soil type is Blanket Peats (100%), the slope is moderate 0-15%, the habitat is predominantly coniferous forest (WD4) and the project is located in the Doonbeg_010 (100%) River Sub Basin.

The applicant's application pack included maps, inventory data, a harvest plan and an Appropriate Assessment pre-screening report. The DAFM referred the proposal to Clare County Council, however no response is on file. The DAFM undertook and documented an Appropriate Assessment screening dated 24th March 2020, that identified five European sites within 15km and that there was no reason to extend this radius in this case. The screening determined that an Appropriate Assessment was not required, giving reasons for screening out each of the sites. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The licence issued on 25th March 2020 with relatively standard conditions attached.

The decision to grant the Licence is subject to one appeal. Briefly the grounds of the appeal are;

- Breach of Article 4(3) of the EIA Directive 2014/52/EU through failure to take into account the relevant selection criteria set out in Annex III of the Directive.
- Breach of Article 4(4) of the EIA Directive 2014/52/EU through failure to consider all projects in a Coillte Forestry Management Unit (FMU) as a project.
- Breach of Article 4(5) of the EIA Directive 2014/52/EU through similar grounds to above regarding failure to consider all projects in a Coillte FMU as a project.
- Failure to consider a nationally designated site as part of the approval process, that the site immediately adjoins part of Lough Acrow Bogs NHA, listing species recorded on that site, and claiming no evidence it has been considered or NPWS consulted.
- Licence conditions that do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 8 of the Birds Directive.
- Breach of Article 10(3) of the Forestry Regulations, that the application was not provided on request in response to public consultation.

In a statement to the FAC, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, and provided responses to the grounds of appeal. At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence, clarifying that the in-combination statement was completed before the licence issued, that mandatory referral to the NPWS was not required in this case, that they considered the Lough Acrow Bogs NHA and referred to the NPWS site synopsis for the site and that felling and reforestation is not mentioned in it. The DAFM confirmed that no response was received from Clare County Council. The appellant contextualised his grounds of appeal and outlined his rationale for some of the grounds, claiming there was possible evidence of colonisation of the Lough Acrow Bogs NHA with conifers based on aerial imagery, asserting that the trees are at a stage that they can be reproductive and restocking the project area with Sitka spruce is subjecting the site to more of this in the future, and to do so without a buffer would be negligence, that referral to NPWS should have taken place, referring to Article 5 of the Birds Directive, the presence of Curlew in the vicinity and that there was need to increase the buffer between nesting sites and project areas. The applicant provided information on the site, and its environs, that the Lough Acrow Bogs NHA comes into their property but that it does not overlap with this proposal area, that the designation of this NHA was around 2005 and that the planting of the site occurred prior to this, that a site inspection found a watercourse on site that flows in a south westerly direction and drains

into the Doonbeg river and that the site is 38km hydrologically distant from the nearest hydrologically connected European site, the mid Clare SPA.

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. In its statement to the FAC, the DAFM submitted that the standard operational activities of clear-felling and replanting already established forests areas 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), 4(4) and 4(5) had not occurred. At the oral hearing the DAFM reasserted its contention that the proposal does not include a class of project covered by the EIA Directive or by National legislation.

In considering this aspect, the FAC notes that 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 is 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 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 twenty 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 9.72 hectares. 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. Therefore, the FAC agrees that screening for EIA was not required in this case and that breaches of Article 4(3), 4(4) and 4(5) had not occurred.

In relation to the ground of appeal that there was a failure to consider a nationally designated site as part of the approval process, specifically Lough Acrow Bogs NHA, and that there was no evidence it has been considered or NPWS consulted, the DAFM in their statement to FAC stated;

"Regarding consultations, referrals to statutory consultees, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. As the site adjoins but is not within the Lough Acrow Bogs NHA the licence application was not referred to the NPWS. DAFM notes that tree felling or reforestation are not mentioned as threatening the integrity of the designated site in the site synopsis for the NHA

(<https://www.npws.ie/sites/default/files/protected-sites/synopsis/SY002421.pdf>). Any felling licence issued by DAFM 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 impact on water quality arising from the operation. These 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 reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The DAFM considered this project in combination with other plans and projects and decided that will not give rise to the possibility of a significant effect on any European site (see in-combination document on file)."

The parties to the appeal elaborated further on this issue at the oral hearing as outlined above.

The FAC considered Lough Acrow Bogs NHA and reviewed the NPWS site synopsis for it, dated 21st January 2004, the synopsis describes the site and species that occur on the site, and the activities that threaten the integrity of the site. Its qualifying interest is identified as Peatlands. While afforestation is identified as one of the activities that is a threat to its integrity, felling and reforestation is not mentioned. The decision before the FAC relates to the felling licence issued under the Forestry Act 2014, which involves the harvesting and removal of mature trees from the identified forest stand. The forest stand under licence is situated outside of the NHA and it was confirmed at the oral hearing that the timber would be extracted to a forest road to the north of the site and away from the NHA. At the oral hearing, the DAFM submitted that it employs spatial data of mapped curlew nests from the NPWS in its assessments and that there are no mapped curlew nests in the vicinity of the felling. An EPA mapped watercourse c.130 metres to the south of the proposal area bisects the north west extremity of the NHA and flows south westerly to become part of the Doonbeg river (Doonbeg 010 waterbody which has been assigned a Good status and not at risk). The applicant at the oral hearing referred to a watercourse on the site also draining south westerly to join the Doonbeg river and that the hydrological distance from this watercourse on site to the nearest hydrologically connected European site was 38km. Evidence before the FAC indicates that 89% of the proposal area was planted in 1973 with the remainder being planted across a number of years, the last being in 1989. The site was designated as an NHA under S.I. No 435/2004 (Natural Heritage Area [Lough Acrow Bogs NHA 002421]).

In considering this ground of appeal, the FAC considered, 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 undertook a Stage 1 screening, and found five European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Lower River Shannon SAC, Knockanira House SAC, River

Shannon and River Fergus Estuaries SPA, Pouladatig Cave SAC and Newhall and Edenvale Complex SAC. The FAC consulted publicly available information from the NPWS and EPA and identified the same five sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. DAFM's reasons for screening out the different sites were site dependant, including reasons such as due to the separation distance between the Natura site and the project, location of the project outside the core foraging range or absence of a direct upstream hydrological connection. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. The FAC having considered all of this and the European sites' qualifying interests, is satisfied that no likelihood of significant effects arise from the proposal itself or in combination with other plans and projects, due to the distance involved, the size and nature of the proposal and having regard to other plans and projects. The procedures adopted by the DAFM in their assessment are considered to be acceptable. In addition, while the proposal area adjoins the Lough Acrow Bogs NHA, it does not overlap the NHA and considering all the evidence before it the FAC is not satisfied that a serious error was made by DAFM in not referring the proposal to the NPWS, nor is it satisfied that a serious or significant error or series of errors was made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

In relation to the appellant's stated ground of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. The FAC had regard to the DAFM statement and note that the granting of a 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 bird nesting or rearing on the proposed site but referred to the existence of curlew, hen harrier and other species in Lough Acrow Bogs NHA. The DAFM at the oral hearing advised of the distance from the proposed site to the nearest Curlew nesting sites and that all distances to identified nesting sites were outside the standard buffer. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In relation to the appellant's stated ground of appeal contending breach of Article 10(3) of the Forestry Regulations, the Forestry Regulations 2017 (SI 191 of 2017) Article 10 (3) states that:

(3) The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.

The FAC considers that this particular Regulation does not provide a right to the appellant to access information but instead provides powers to the Minister to make such information available. The DAFM contended that the appellant had requested files for 451 licence applications and that this information was provided to them, although a number of months after the request was made. The FAC is satisfied that

the appellant was provided with an opportunity to appeal the licence and provided with further opportunities to make submissions on the licence decision, including at an oral hearing.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision, considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

A large black rectangular redaction box covering the signature of James Conway.

James Conway, On Behalf of the Forestry Appeals Committee