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26th February 2021

Subject: Appeal FAC 187/2020 regarding licence TY11-FL0034

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 TY11-FL0034 concerning the felling and replanting of 3.95ha of forest in Gortarush Lower, Co Tipperary was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 25th of March 2020.

An oral hearing of appeal FAC 187/2020 was held by the FAC on the 12th of February 2021.

The following were in attendance at Oral Hearing:

DAFM Representatives:	Ms Eilish Kehoe, Mr Anthony Dunbar
Appellant:	[REDACTED]
Applicant Representatives:	[REDACTED]
FAC Members:	Mr. Donal Maguire (Chairperson), Mr. Derek Daly, Mr John Evans and Mr. Vincent Upton.
Secretary to the FAC:	Ms. Marie Dobbyn

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 TY11-FL0034.

The licence pertains to 3.95ha hectares of felling and replanting at Gortarush Lower, Co Tipperary. The Underlying soil type is described as being composed of Acid Brown Earths, Brown Podzolics (28%) &

Surface water Gleys, Ground water Gleys (72%). The slope is predominantly moderate at 0-15%. The habitat is described as predominantly conifer plantation (WD4). The project area is in the Multeen (East)_030 (100%) catchment area.

The licence was approved on the 25th of March 2020 with no special conditions.

There is one appeal against the decision to licence the project. The grounds of appeal contend: that there were breaches of Article 4 (3), (4) & (5) of the EIA Directive 2014/52/EU; that the licence conditions do not provide a system of protection consistent with the requirements of Article 5 of the Birds Directive; that the project threatens the achievement of the objectives set for certain river basins under the RBM Plan of the WFD; that the stage 1 AA assessment was not legally valid; that there was a failure to fully assess the potential (cumulative) impact of the project on a protected species; that there was a failure to comply with Article 21 (1) of the Forestry Regulations and that there was a breach of Article 10 (3) of the Forestry Regulations.

In a detailed written statement to the FAC, the DAFM submitted that the grounds of appeal were contested and they addressed each ground in turn. They submitted that they had carried out desk-based assessments of the application; that there was no hydrological connection to any Natura 2000 site or other designated areas; that they had carried out an AA screening of all European sites within 15kms of the project and had screened out the Lower River Suir SAC, the Philipston Marsh SAC, and the Anglesey Road SAC due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. They stated that they had likewise screened out the Slievefelim to Silvermines Mountains SPA, due to the separation distance between the Natura site and the project; and also screened out the Lower River Shannon SAC, due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.

An oral hearing of the appeal was held. The DAFM provided an overview of its processing of the application and submitted that the decision was made following the required procedures. The appellant drew attention to the estate nature of the lands, and the presence of 20% oak on the site and contrasted this with the 100% planned replanting of Norway Spruce. The appellant contended the feasibility of enforcing licence condition j) which references the retention of broadleaf trees where safe to do so, and noted that the appeal is based on the licence issued and not the application submitted or the practices of the applicant. The appellant further drew attention to the proximity of the Lower River Suir SAC and contended that the possibility of a hydrological connection whether direct or not could not be excluded. Several drains could be observed on mapping including historic mapping dating to the original planting of oak on the site. The appellant noted that these drains would have been dug by hand, and that this would have been done for a reason.

In their statement to the FAC at the hearing the applicant stated that the application had been prepared using a desk-based system, and confirmed the position taken by the DAFM. The applicant submitted

that an Environmental Officer had visited the site on the 5th of November 2020 and observed that there was a large dry, drain running through the property and drains into the Lower River Suir SAC. Under these circumstances the applicant stated that as a result they could no longer be fully certain that there would be no hydrological connection from the project to the Lower River Suir SAC. This contradicts the screening decision regarding this SAC.

The FAC considered the process documented by the DAFM and noted the responses to the grounds concerning potential breaches of the EIA Directive. In regard to Article 4 (3) of the EIA Directive, the DAFM contended that the standard operational activity of clear-felling and replanting already established forest areas below a certain threshold are not categorised and therefore a screening assessment for sub-threshold EIA did not need to be carried out by the Department for this activity in this case. The DAFM contended that because a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case, thus Article 4(4) of the Directive was not applicable either. With regard to Article 4(5) of the EIA Directive, the DAFM contended that because the standard operational activities clear-felling and replanting of an already established forest area are not categorised either in Annex II of the Directive or in the national transposing legislation that Article 4(5) of the Directive was not applicable.

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 EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered 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 3.26 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 concluded that screening for EIA was not required in this case.

In regard to general protections of bird and other species, the FAC considers that the granting of an afforestation licence does not exempt the holder from meeting any legal requirements set out in any other statute.

Regulation 10(3) of the Forestry Regulations 2017 (SI 191 of 2017) 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 provides powers to the Minister to make application information available to the public. At the oral hearing, the DAFM submitted that it has no record of a submission being made within the 30 days provided for in Regulations. 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 and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that a serious error was made in making the decision due to the fact that the desk-based assessment failed to detect the presence of a relevant watercourse within the area of the project and that this failure rendered the subsequent stage 1 AA screening deficient. The FAC is therefore setting aside and remitting the decision of the Minister to approve licence TY11-FL0034 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to undertake and document a new appropriate assessment screening of the proposal before a new decision is made.

Yours Sincerely

A large black rectangular redaction box covering the signature of John Evans.

John Evans On Behalf of the Forestry Appeals Committee