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26th February, 2021

Subject: Appeal FAC293/2020 regarding licence WW08-FL0194

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 WW08-FL0194 is for the felling of 3.68 ha at Ballymanus Upper, Co Wicklow which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 28th May 2020.

Hearing

An oral hearing of appeal FAC293/2020 was held by the FAC on 22nd January 2021.

In attendance:

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

Secretary to the FAC: Ms. Marie Dobbyn

Appellant: Not present

Applicant's Representatives: [REDACTED]

DAFM Representatives: Mr. Anthony Dunbar, Ms. Eilish Kehoe.

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 vary the decision of the Minister regarding licence WW08-FL0194 to include the following additional condition,

At restocking stage, at least 20% of the canopy of the application area to be comprised of birch, oak, or an acceptable native tree species in the Forestry Standards Manual through the retention of existing trees or through replanting with these species. Provide tree guards or other suitable protection from browsing for planted broadleaves. Reason: In the interest of Good Forest Practice and Visual Amenity.

The licence pertains to the felling of 3.68 hectares of woodland at Ballymanus Upper, Co. Wicklow. The site is described as having a slope which is predominantly steep 15-30%. The underlying soil type is

described as surface water gleys and ground water gleys, lithsols and 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 provided with the application and recorded on the file. The forest is currently comprised of Douglas fir, Japanese larch and birch planted in 1975, with an area of 0.09 ha planted in 1995 and a proportion of the canopy is comprised of oak described as planted in 1878. Replanting is proposed of Douglas fir with 0.18 ha of open space.

The application was referred to Wicklow County Council, Inland Fisheries Ireland (IFI) and the NPWS. The IFI responded submitting that the operation must adhere to guidelines, that ground stability should be kept under review and that its personnel should be contacted prior to operations commencing. The NPWS responded that it had no comment to make on the application and submitted general points regarding the obligations on public authorities.

The DAFM undertook screening considered eleven sites within 15km; that there was no need to expand this radius in this case and other plans and projects considered are recorded. The European sites considered were Carrigower Bog SAC 000716, Deputy's Pass Nature Reserve SAC 000717, Buckronev – Brittas Dunes & Fen SAC 000729, Vale of Clara (Rathdrum Wood) SAC 000773, Magherabeg Dunes SAC 001766, Wicklow Mountains SAC 002122, Wicklow Head SPA 004127, Wicklow Mountains SPA 004040, Wicklow Reef SAC 002274, The Murrough Wetlands SAC 002249, and The Murrough - SPA 004186. Each site is considered in turn with its qualifying interests and conservation objectives and reasons are provided for the screening decisions. All of the sites were screened out based on a hydrological review of site characteristics including a hydrological distance, the absence of hydrological connection and separation distance. An in-combination assessment of possible In-Combination Effects was also carried out and recorded. The licence was issued on the 28th May 2020 with conditions.

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, as the competent authority, has failed to carry out screening to determine the requirement for EIA and the application has not described all aspects of the environment which are likely to be significantly affected and does not represent the whole project. 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. The Stage 1 conclusion is not considered legally valid. The grounds also contend that there is inadequate conditions for the protection of listed birds consistent with the requirements of the Birds Directive, inadequate conditions in relation to notification of commencement operations and in relation to the spraying of chemicals.

In a statement to the FAC, that in regard to the granted licence for the proposed felling under WW08-FL0194 the DAFM indicated that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act and the Department is satisfied that all criteria as outlined in the following standards and procedures have been adhered to in making a decision on the application. They submit that they followed the current DAFM AA Screening guidance document and considered Natura 2000

sites within 15km. in this regard, the qualifying interests of the Natura 2000 sites in question by using the latest information available and subsequently all Natura 2000 sites were assessed and screened out. It was also indicated that the site was the subject of a desk assessment and having considered the information gathered and assessed including in-combination it was recommended that this licence proceed. It is submitted that the standard operational activities of clear-felling and replanting of an already established forest area are not included in the Annexes of the EU EIA Directive nor considered for EIA in Irish Regulations. In relation to water quality, the statement submits 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 and that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation, which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. It is submitted that the felling and reforestation project licenced as WW08-FL0194 has been subject to the DAFM's AA Screening procedure, the Department deemed that the project, when considered in combination with other plans and projects as identified in the pre-screening report, will not give rise to the possibility of a significant effect on the relevant screened European sites. The clearfell and reforestation project was screened out and an Appropriate Assessment deemed not required in relation to the European sites considered during the screening exercise. It is submitted that a number of qualifying interests and special conservation interests were truncated in the record but that all QIs and SCIs were considered in the screening and an updated version of the screening was submitted.

Regarding licence conditions 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." It is submitted that the Minister may attach or vary licence conditions and that in this instance a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM. 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. Both of these S.I.s are based on, and 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) and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. It is submitted that there is no legal requirement for forest owners to inform adjacent land owners and that the PPE is used in a targeted way.

An oral hearing of the appeal was held of which all parties were informed and attended by representatives of the DAFM and the Applicant. The DAFM outlined their processing of the application including the data sets and analysis undertaken and referrals made. They submitted that the application was referred to the County Council, Inland Fisheries Ireland and the NPWS and that the responses received were considered and reflected in the licence conditions. The Applicant described the site and the information provided during the application. They submitted that an Environmental Officer had visited the site and found it to be dry and on shallow, mineral soil. No watercourses were identified and

the forest does not have hydrological connectivity with Ballinacooly stream 420 metres to the south which is the closest marked watercourse. It was submitted that the operation does not comprise deforestation or a change in land use and that it is not included in the Annexes of the EU EIA Directive. It was submitted that plants would be treated in the nursery and that spraying would be undertaken following the Applicants Integrated Pest Management system and signs would be erected to inform the public. It was submitted that the operation would involve the removal of the coniferous species and that the broadleaves would be retained where it was possible and safe to do so.

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 3.68 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 and that breaches of Article 4(3) and 4(4) had not occurred.

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. The FAC consulted publicly available information from the NPWS and the EPA and identified the same ten sites. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered nature, scale and location of the proposal, the European sites identified and their conservation objectives and the reasons provided by the DAFM. The closest site is Deputy's Pass Nature Reserve SAC which lies some 1.8km in direct distance to the southeast. The qualifying interest of the SAC is a terrestrial habitat and there is no hydrological connection or other pathway of effect to the SAC. The closest SPA is the The Murrough SPA which lies some 7.5km to the northeast and its special conservation interests are a number of bird species associated with coastal and wetland habitats and wetlands. The proposal is for the felling of a

mature forest 7.5km from the site and would not be considered suitable habitat and the SPA is situated in a different sub-catchment and there is no hydrological connection from the proposed felling to the SPA. There is no evidence of any hydrological connection with any of the remaining sites which are all situated at a considerable distance from the proposed felling. The proposal would involve the felling of a managed forest and there is no evidence of any protected habitats or species on the site. The DAFM recorded forestry and non-forestry projects considered in combination with the proposal. The FAC considered that the truncation of some habitats and species in the record was an obvious clerical error and that there was no reason to consider that it had any effect on the outcome of the decision or that all interests and conservation objectives were not considered. Having regard to the record of the decision, the submitted appeal and available information, the FAC is satisfied that the proposal would not result in any significant effects on any European site, itself or in combination with other plans or projects and that the DAFM did not err in its screening for Appropriate Assessment.

Regarding water quality and the objectives of the River Basin Management Plan and Water Framework Directive (WFD), the FAC noted that the Ballinacoooley stream forms part of the Potter's 10 waterbody which has been assigned a moderate status for 2013-2018 and considered At Risk for the WFD as documented by the EPA. The pressures on this waterbody were recorded as Hydromorphology and Channelisation for the second cycle of the WFD. This is the closest marked watercourse to the proposed felling but is situated some 420 metres at its closest point, the forest is on a well-drained mineral soil and there is no evidence of a hydrological connection to the stream. The FAC is satisfied that no waterbody would be affected by the proposal and that no issues arise in relation to the River Basin Management Plan and WFD.

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 or animals listed under Annex IV (a) of the Habitats 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 or animals on the proposed site. In relation to the use of chemicals, the Applicant submitted that they inform the local authority of their intentions to employ spraying, that signs are erected to notify the public and that spraying is undertaken in a controlled and targeted way. The FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying would be required to follow best practice as outlined by the DAFM. Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence as stated in the licence conditions. Based on the evidence before it, the FAC concluded that there was no reason to attach additional conditions of the nature described by the appellant.

The forest is currently comprised of Douglas fir, Japanese larch, birch and mature oak. At the oral hearing it was submitted that the operation would involve the retention of broadleaves and attention was drawn to the Environmental rules submitted with the application which includes the retention of

veteran trees. The forest would currently be classified as a mixed high forest and oak would represent an important environmental feature in the forest and within the wider landscape but would not have the same regenerative success as birch. Having regard to the application and the submissions made at the oral hearing, the FAC concluded that the licence as issued does not provide sufficient clarity regarding the broadleaf component of the forest and that this represents a serious error in the making of the decision. The FAC is, therefore, varying the licence to include the identified condition for clarity and in keeping with Good Forest Practice. The FAC considers the licence condition can be met through the retention of most of the current broadleaf component but that where felling occurs that the replacement of felled trees may be required to meet the stated canopy proportion.

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 varying the decision of the Minister regarding licence WW08-FL0194 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to include the stated additional condition. The FAC 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 Vincent Upton.

Vincent Upton/On Behalf of the Forestry Appeals Committee