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10th June 2021

Subject: Appeal FAC 026/2021 regarding licence DL31-FL0064

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 DL31-FL0064 for the clear-felling and reforestation of 7.53ha at Croaghbrack, Tievetooey Co Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 21st of January 2021 with conditions.

Hearing

A hearing of appeal FAC 026/2021 was held by the FAC on the 14th of May 2021.

In attendance:

FAC Members: Mr Donal Maguire (Chairperson), Mr. Vincent Upton, Mr. Derek Daly and Mr Iain Douglas
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, 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 DL31-FL0064.

Overview

The record describes the project area as consisting predominantly of plantation conifer high forest, with a small area of poor fen and flush. The project area is made up of five sub-compartments, planted in 1981, 1983 and 1984, primarily comprising Sitka spruce, and to a lesser extent, Japanese larch, forming closed canopy over the majority of the project area. The surrounding landscape is upland, supporting conifer plantation and pockets of recently felled woodland, with a large expanse of heath and blanket bog to the southwest, which forms the Dunragh Loughs/Pettigo Plateau SAC. The wider landscape supports blanket bog, pockets of improved agricultural grassland, wet grassland and lakes. The project

area is located on blanket peat (BktPt) soils on a gentle slope in a north-easterly direction. The project area is accessible via an existing forest road (DL31R0001).

An aquatic zone, an un-named stream (order1), UKGBNI1NW010104068 (segmentcode:01_103) flows along the northern boundary of the project area in an easterly direction. A relevant watercourse (drain) flows through the northern portion of the project area, merging with this unnamed stream. Two relevant watercourses (drains) flow through the eastern portion of the project area, merging with another unnamed stream (order1), UKGBNI1NW010104068 (segment code:01_102) just east of the project area. The unnamed stream, UKGBNI1NW010104068 (segmentcode:01_102) merges with the other unnamed stream UKGBNI1NW010104068 (segmentcode:01_103) forming UKGBNI1NW010104068 (segmentcode:01_1899) east of the project area. UKGBNI1NW010104068 (segmentcode:01_1899) continues flowing east, joining the Leaghany River (order4), which is designated, approx. 5.7 km downstream for the River Foyle and Tributaries SAC and approx. 5.8 km downstream for the River Finn SAC.

The Leaghany River flows south then merges with the Derg River (order5). The Derg River flows northeast into the Mourne River (order6), which then continues north and merges with the Foyle River (order7), constituting a hydrological connection with the Lough Foyle SPA(UK9020031) approx. .93km and the Lough Foyle SPA (004087) approx. 93.1 km downstream of the project area, before ultimately discharging into Lough Foyle.

The DAFM referred the application to Donegal Co Council on the 11/08/2020 and to Inland Fisheries Ireland (IFI) on the 27.11.20. Donegal Co Council responded on the 28.09.2020, raising no objection. There is no record of a response from IFI, although this may be because the application is within the statutory jurisdiction of the Foyle and Carlingford Loughs Agency and should have been referred to this Agency.

The applicants prepared a Natura Impact Statement (NIS) dated 30.09.2020. Following on from the Appropriate Assessment Pre-screening Report, an NIS Stage 2 Appropriate Assessment was prepared for the River Finn SAC IE0002301 which was screened in because of possible effects due to the direct hydrological connectivity that exists between the project area and this SAC and also for the River Foyle and Tributaries SAC UK0030320, which was screened in because of the possible effects due to the direct hydrological connectivity that exists between the project area and this SAC.

The qualifying interests and conservation objectives for each designated site are listed and there is an examination of potential threats. Site specific mitigation measures are recommended relating to exclusion zones for machinery, silt and sediment control during felling and reforestation, extraction and removal of felled timbers, brash management, reforestation, chemical use, and monitoring and contingency planning.

An Appropriate Assessment Determination (AAD) is dated 24.11.2020 The conditions recommended in the AAD are consistent with the recommended conditions in the NIS.

Measures have been set out for the protection of the otter including specifying an exclusion zone for machinery and timber stacking. Aquatic zone and watercourse measure protections have also been set out, including aquatic buffer zone planting, specific otter measures and good practice aquatic measures for the relevant designated features. A 20m setback is required in the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations. The AAD concludes that the proposed development individually, or in combination with other plans and projects, will not adversely affect the integrity of any of the listed European sites, having regard to their conservation objectives and subject to compliance with recommended site-specific conditions. The mitigations relate to the protection of the adjoining/downstream aquatic-based species and habitat and the Otter.

A DAFM in-combination report, dated 16.11.2020, was included on the file. It states that this project lies in a rural landscape in Croaghbrack Co Donegal in the River Sub Basin Derg River (Crocknacunny). The River Sub Basin Derg River (Crocknacunny) has approximately 41% forest cover which is higher than the national average of 11%. At 7.53 hectares the project is considered small in scale. Forestry activity including afforestation, forest roading and felling, have been either submitted and still under evaluation, licenced / approval in place or completed and approved in the River Sub Basin in the last 5 years and are listed. These are subject to environmental protection measures. A number of developments in the River Sub Basin Derg River (Crocknacunny) have been granted planning permission over the last five years and these are listed and are also subject to appropriate environmental protection measures. The licence was issued on 08.01.2020 and is subject to standard conditions plus a number of site-specific conditions as per the AAD, including a 20m setback at reforestation.

There is a single appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- The FAC does not have an independent and impartial role as required by law.
- The restocking of the site has not been assessed, other than basic operational details. This is a serious error in the processing of the licence. The Appropriate Assessment does not contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on designated sites.
- Generic mitigations do not exclude the possibility of residual impacts and no alternatives to restocking have been assessed
- This project lies within the River Sub-Basin Derg River (Crocknacunny). There is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive (WFD). Based on a recent High Court judgment, the licence should not have been granted
- A proxy evaluation does not constitute compliance with the WFD. Specific steps in the architecture of the WFD must be followed. There is no evidence that the EPA has been consulted regarding the status of the waterbody.

In response, the DAFM state as follows:

- The FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process
- Sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands
- The Hyland JR decision is dated 10.01.2021. The licence decision pre-dates this. The appeal was submitted on 29.01.2021.
- DAFM applies a wide range of checks and balances during the evaluation of felling licence applications in relation to the protection of water. Adherence to specific measures in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD, and attached as conditions to the licence, ensure that the proposed development will not result in any adverse effect on any European site not on water quality or on waterbody status, regardless of hydrological connectivity.

FAC hearing

At a hearing of the appeal held on 14 May 2021, the FAC considered written grounds of appeal and response received from DAFM. The appellant contends that the FAC does not have an independent and impartial role as required by law. There are no other arguments presented to substantiate this contention. The FAC operates under the Agricultural Appeals Act 2001, as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The appellant contends that the restocking of the site was not assessed by the DAFM and that this represents a serious flaw in the processing of the licence. The FAC noted that the proposed project (clear-fell and restocking) was subject to Appropriate Assessment screening and, following the submission and assessment of a Natura Impact Statement (NIS), was the subject of an Appropriate Assessment Determination (AAD) by the DAFM. In addition, a referral submission from Donegal Co Council was sought and considered prior to the making of the decision to grant the licence. Based on the information before it, the FAC finds no reason to conclude that the proposed restocking was not properly assessed. The FAC are satisfied that the procedures followed leading to the making of the decision to grant the licence were generally consistent with the requirements of Article 6(3) of the Habitats Directive.

However, the licence application was referred to Inland Fisheries Ireland rather than the Loughs Agency in whose jurisdiction the proposal lies. In this case, the FAC considered that the decision should be set aside and remitted to the Minister to make a referral to the Loughs Agency and, where provided, to consider the response provided before a new decision is made.

Furthermore, the FAC noted the following measures were identified as necessary in the AAD and do not appear to have been transferred to the licence as issued,

In relation to the threat of the spread of invasive species in a designated site, the following mitigation is required, presented in the form of conditions to be attached to any licence issued:

A. *All machinery, equipment and boots shall be thoroughly cleaned and dried prior to entering the site for the first time. Upon completion of works, all machinery, equipment and boots shall be cleaned again before leaving site. Reason: To protect European Sites against the spread of invasive species.*

Adhere to all water protection measure guidance relating to sediment management, felling, cultivation, herbicide application, the location of onsite storage depots and the disposal of waste including : ...Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009)...

While of a clerical nature, the FAC considers that this represents a serious error which should be addressed by the DAFM in making a new decision through the inclusion of these measures on the licence.

The appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence issued contains 31 conditions in total. Conditions 1-7 are of a standard nature. The additional conditions are attached for reasons relating to the protection of water quality, the protection of European sites during harvesting and restocking, protection of soil stability, and to minimise disturbance and protect established Habitat in designated European sites. Many of these conditions contain site specific requirements. Considering the information before it, the FAC finds no basis for the appellant's contention on this issue. The appellant contends that no alternatives to restocking have been considered. In this case, the proposed development has been subject to Appropriate Assessment screening and Determination and this concluded that no significant effects would arise on any Natura 2000 site, having regard to the qualifying interests and conservation objectives of such sites and having considered the potential for in-combination effects. In such circumstances, the FAC concludes that there is no obligation to consider alternatives to the proposed restocking on the project lands.

The appellant contends that the site is in the River Sub-Basin Derg River (Crocknacunny), and that there is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive. Based on a recent High Court (Hyland) judgment, the licence should not have been granted. The 'Hyland' judgment, delivered on 15 January 2021, concluded that, in circumstances where there would be a direct impact on an unassigned lake waterbody, the efficacy or appropriateness of mitigation measures could not be evaluated by reference to the requirements of the WFD. The adoption of 'some type of proxy evaluation' which did not follow steps identified in the WFD for the assignment of status to all waterbodies, 'does not constitute compliance with the WFD.

The FAC considered the implications of the 'Hyland' judgment for the current case under appeal. The FAC noted that, in the 'Hyland' case, it is accepted by all parties that there would be a direct physical impact on the unassigned lake, and that the mitigations proposed were designed to reduce the impacts on the ecological and chemical status of the waterbody. The appellant's contention in the current appeal appears to be based on an assumption that the licensed development would give rise to an impact or impacts on the unassigned waterbody, Derg River, but does not submit any evidence to demonstrate how or why this would be the case.

The FAC examined the conditions attached to the licence granted and, in particular, those requiring site specific measures designed to protect water quality and European sites during harvesting and restocking operations. These measures include the following:

- Water setback to be applied and maintained during reforestation is 20m
- 20% of buffer zone to be pit planted with broadleaves. No trees permitted within 10m of an aquatic zone
- Establishment of a clearly marked exclusion zone of 10m around identified water hot spots
- Location of timber landing bays at least 50m from nearest aquatic zone
- No brash mats within environmental setbacks along aquatic zones
- Historic drains with direct connectivity to relevant watercourses or aquatic zones to be identified and blocked before commencement of operations
- Avoidance of machinery crossing internal drains
- Geotextile silt traps to be installed in new and existing drains
- No discharge of roadside drains into aquatic zones
- Restriction on fertiliser application to elemental phosphate at no more than 42kg/ha
- Storage of chemicals, fuel and machinery oils etc. at a dry, elevated location onsite at least 50m from nearest aquatic zones
- During felling, extraction and reforestation, application of a 10m exclusion zone from an aquatic zone on or adjoining site.

The decision before the FAC relates to a felling licence granted by the Minister for Agriculture, Food and the Marine under the Forestry Act 2014. The evidence before the FAC would suggest that the operations would not involve any exploitation of a waterbody while the FAC understands that poorly sited and managed forestry operations, including felling, have been identified as a potential source of water pollution by the EPA and DAFM, including through sedimentation, eutrophication and acidification. Regarding the specific decision, the felling operations would occur over a limited period of time while provision is made for long term setback from any waterbodies at the replanting stage. In addition to the specific measures set out above, the licence conditions include adherence with the DAFM's Felling & Reforestation Standards (v. Oct. 2019) and Felling & Reforestation Policy (DAFM, 2017) which require other good practice measures.

In summary, the FAC considers that there is no evidence before it that the DAFM have attempted to assign a proxy status to a waterbody or put in place mitigation measures to reduce impacts on such a status. It appears to the FAC that the operations would be required to adhere to a range of conditions designed to prevent impacts on waterbodies and water quality generally. It is contended by the DAFM that the conditions include operational measures to prevent direct and indirect impact on water quality

arising from the operation. The grounds do not articulate how a waterbody or water quality might be impacted in this case or contest the effectiveness of the proposed measures. The FAC considers that there is no evidence before it that a waterbody may be affected by the authorisation, for the purposes of the Water Framework Directive. Taking all of the above into consideration, the FAC is not satisfied that the Minister has erred in making the decision to authorise this application.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is satisfied that a serious or significant error was made in making the decision by referring the application to IFI when it should have been referred to the Loughs Agency. The FAC is thus setting aside and remitting the decision of the Minister back to the DAFM, to correct the referral and licence condition errors, regarding licence DL31-FL0064 in line with Article 14B of the Agricultural Appeals Act 2001.

Yours sincerely,

A black rectangular redaction box covering the signature of Donal Maguire.

Donal Maguire on behalf of the forestry Appeals Committee

