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11 March 2021

Subject: Appeal FAC 718/2020 and FAC 764/2020 regarding licence CE07-FL0206

Dear [REDACTED]

I refer to the 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 14A (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 CE07-FL0206 for felling of 10.40 ha, in Tullaher, Co Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 28 August 2020.

Hearing

An oral hearing of appeals FAC 718/2020 and FAC 764/2020 of which all parties were notified, was held by a division of the FAC on 2 March 2021.

In attendance

FAC Members: Mr Des Johnson (Chairperson), Mr Pat Coman, Mr Dan Molloy, and Mr Luke Sweetman
Secretary to the FAC: Mr Michael Ryan
Appellants: [REDACTED]
Applicant: [REDACTED]
DAFM Representatives: Ms Eilish Kehoe and Mr Anthony Dunbar

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference CE07-FL0206).

The proposal is for felling and restocking on a stated site area of 10.40ha at Tullagher, Co. Clare. The existing stock to be felled is 100% Sitka spruce, planted in 1977. Proposed restocking would be with 95% Sitka spruce (9.39ha), 5% Alder (0.49ha) and with 0.52ha open space provided. Soils are stated to be Blanket peat (cut/harvested) with high organic content down to at least 30cm. The slope is gentle. No fertiliser or herbicide is proposed. The application documents include a 'Harvest Plan' and Pre-screening Report (6 SACs & 3 SPAs). A second Pre-screening report was submitted at a later date. The site is stated to be within the Shannon Estuary North Catchment (100%), the Doonbeg_Sc_010 (82%) and the Wood_Sc_010 (18%) Sub-Catchments, the Moyasta_010 (18%) and Doonbeg_050 (82%) Waterbodies.

The DAFM carried out screening for Appropriate Assessment in respect of Natura 2000 sites within a 15km radius. Four SACs were screened out for reason of the absence of an upstream hydrological connection and lack of pathway – Lower River Shannon SAC, Kilkee Reefs SAC, Carrowmore Dunes SAC and Carrowmore Point to Spanish Point SAC. Three SPAs were screened out for reason of separation distance – River Shannon and River Fergus Estuaries SPA, Mid Clare Coast SPA, and Illaunonearaun SPA. The Tullagher Lough and Bog SAC was screened in for Stage 2 Appropriate Assessment for reason of possible effect due to location of the project within the Natura 2000 site. In coming to its screening conclusion, the DAFM considered an in-combination report, dated 19 August 2020. This lists non-forestry projects, including dwellings, slatted sheds, and development at 110kV station, and forestry related projects – afforestation (33), roads (1), private felling (8), Coillte felling (3).

The applicants submitted a Natura Impact Statement (NIS) dated 26 June 2020. This describes the project area as mostly dominated by conifer plantation. There is a small area in the north-east corner (0.5ha) with low yield due to high water table. No Annex I species occur in the project area. The site is within the peatland complex and surrounded by peatland habitats. A Stage 2 Appropriate Assessment in respect of Tullagher Lough and Bog SAC lists the site's qualifying interests and conservation objectives, and examines the potential for adverse effects arising from the proposed development. Mitigation measures are proposed in respect of Degraded Raised Bogs and Transition Mires and Quaking Bogs. Specifically, these measures relate to clearfelling and restocking, the extraction and removal of timber, chemical use, and monitoring and contingency planning. The NIS concludes that, based on best scientific knowledge and objective information, the proposed development itself will not adversely affect the qualifying interests of the European site. In-combination effects are considered. The site is in two river Sub Basins, with the Moyasta_010 having approximately 15% forest cover, and the Doonbeg_050 having approximately 10% forest cover. Forestry related projects include Coillte harvesting (2) and other afforestation (2). Non-Forestry related projects include dwellings, silage storage area, and extension to milking parlour. The overall conclusion of the NIS is that there would be no residual effects on European sites. There is no potential for cumulative adverse impacts. The proposed development, when considered with other plans and projects, will not give rise to the possibility of a significant effect on any European site.

The DAFM made an Appropriate Assessment Determination (AAD) on 25 August 2020. This refers to the screening conclusions reached and the assessment undertaken. The Determination is that the proposed development CE07-FL0206, individually or in combination with other plans and projects, will not

adversely affect the integrity of any European site, having regard to the conservation objectives, providing specified mitigation measures are implemented. The recommended mitigation measures referred relate to site preparation, the protection of adjoining/downstream aquatic based species and habitats, the section of project area that extends into the SAC, and adherence to specified Guidelines and Standards.

The DAFM referred the application to Clare County Council and the National Parks and Wildlife Service (NPWS). No response is recorded from the County Council. The NPWS state that screening for Appropriate Assessment is required. Specific recommendations relate to the following:

- Part of the site within the SAC must not be replanted and must be retained as part of the biodiversity area in order to allow it to return to bog habitat. A buffer of a minimum of 20m from the SAC is to be retained unplanted
- If drainage is proposed, an assessment of the hydrological impacts on Tullaher Lough and Bog SAC must be carried out before a decision is made
- No felling between October and July to avoid disturbing Greenland White Fronted Geese and breeding Lapwing
- Environmental Guidelines and Standards to be adhered to.

The licence was issued on 28 August 2020 and is exercisable until 31 December 2022. It is subject to standard conditions with notable additional conditions relating to protection of water quality, specifications for mounding and collector drains, restriction on forestry operations to within the site and not extending into open degraded bog or transition mires, blocking of historic mound drains, and prohibition on restocking of the part of the project area that extends into the SAC.

There are 2 appeals against the decision to grant the licence. In summary, the grounds contend that the decision is in breach of the EIA Directive as there was no screening carried out and the whole project together with other forestry related projects was not considered, it is necessary to establish if the planting of this forestry complied with the law, no Appropriate Assessment screening was carried out in compliance with the Habitats Directive or Irish implementing law, the licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan, the AAD is not legally valid as it does not include an in-combination assessment and it is based on an error of fact, the mitigation measures contained in the AAD are not sufficiently precise and residual effects from this project cannot be excluded, the opinion of the general public was not sought under Article 6(3) of the Habitats Directive, licence conditions do not provide for the protection of all wild birds during the breeding and rearing season, licence conditions do not provide for the strict protection of Annex IV species, the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation, there should be a standard condition requiring notification to the Minister at the commencement and completion of operations, there should be a condition that all plans and works must be inspected by the Forestry Service to ensure compliance, there should be stringent and enforceable conditions regarding notification of appropriate bodies,

groups and the public of the spraying of chemicals, there is a breach of Regulation 21(1) of the Forestry Regulations, and the Forestry Service failed to provide, in an appropriate time period, relevant records that informed the decision.

In response, the DAFM state that the proposed development was subject to DAFM's Appropriate Assessment screening procedure, the potential for the proposed development to result in impacts on the Special Conservation Interests was identified on a precautionary basis and site-specific measures were proposed, the site specific measures were attached to the licence by way of conditions, the proposed development is not of a class of development to which the EIA Directive applies, the appellant has exercised his right to appeal, the DAFM apply a wide range of checks and balances in relation to the protection of water quality, and the DAFM is fully aware of its responsibilities in respect of the Water Framework Directive. The provisions of Article 6(3) of the Habitats Directive were fully complied with. It is a principle of law that, unless the grant of a first statutory consent expressly exempts the holder from any obligation to obtain a second consent or to adhere to any restrictions on the timing of activities where such are set out by statute elsewhere, those other restrictions or obligations apply, a commencement notice is not necessary in this case and a mandatory field inspection not warranted, and the use of chemicals is controlled through Statutory Instruments and there is no legal requirement to inform adjacent landowners of the intention to spray.

An Oral Hearing was convened on 2 March 2021. The FAC sat in person and remotely. The applicants and the DAFM participated remotely. The appellants did not attend. The DAFM outlined the background to the decision to grant the licence. Referrals had been made to Clare County Council and the NPWS. The NPWS responded with recommended conditions in the event of the licence being granted, and these had been incorporated into the licence by way of conditions. The DAFM screened the proposal for Appropriate Assessment and had concluded that Tullaher Lough and Bog SAC should be subject to Stage 2 Appropriate Assessment. The NIS submitted by the applicants was not solicited by the DAFM. The AAD had been independently reviewed by an Ecologist and taken into consideration in the making of the decision to grant the licence. The applicant described the site as low lying and flat. The north eastern portion of the site includes a 'dead area' and this would be left for biodiversity purposes and likely to include Birch and Willow. There is no hydrological connection to any European site. Responding to FAC questions, the DAFM acknowledged that a recommended requirement in the NPWS submission in respect of Greenland White Fronted Geese and Lapwing had not been referred to in the AAR or the AAD. The requirement had not been included as a condition of the licence. The DAFM stated that the nearest SPA is approximately 2.5km separated from the project lands. Neither the DAFM nor the applicants had ever previously come across a NPWS requirement that no felling should take place between October and July to avoid disturbing Greenland White Fronted Geese and breeding Lapwing. The applicants stated that if such a requirement was attached as a condition to the licence, although restrictive, they would comply with the requirement.

In addressing the written grounds of appeal, the FAC considered, in the first instance, the contention that the decision to grant the licence was in breach of the EIA Directive. The EU 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 (nor clear-felling) 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 concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly are not covered in the Irish Regulations (S.I. No. 191 of 2017). Furthermore, the FAC concludes that the proposed development does not include works, which of themselves, would constitute a class of development to which the Directive applies. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive. There is no information before the FAC to indicate that the existing plantation is unlawful and, as such, the FAC assessment is focused on the proposed development (CE07-FLO206) and the DAFM decision to grant the licence.

The FAC considered the contention that the proposed development and associated operations would threaten the achievement of the underlying water body but noted that no specific information had been submitted in support of this contention. The proposed development is in two waterbodies – the Moyasta_010 (18%) and Doonbeg_050 (82%). The Moyasta_010 waterbody is unassigned. Based on the information before it, the FAC concluded that the proposed development carried out in accordance with the conditions of the licence would have no impact on any waterbody.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to the felling licence. The applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species. In these circumstances, the FAC concluded that a general condition of the nature requested by the appellant should not be attached to the licence. The FAC noted the NPWS submission relating to the Lapwing and this is addressed later in this decision letter.

There is no information before the FAC to indicate that there are Annex IV species likely to be affected by the proposed development and, in such circumstances, the FAC considers that a specific condition as requested by the appellant is not necessary. Compliance and enforcement of the conditions of the licence are the responsibility of the DAFM and the FAC considers that there is no convincing evidence that additional conditions are required relating to compliance or enforcement. The spraying of chemicals is controlled by way of Statutory Instruments and there is no legal requirement to notify adjacent landowners of the intention to spray. The FAC considers that the Harvest Plan is an operational

document to be followed in the carrying out of the development, which must comply with the conditions of the licence granted. The FAC notes that the appellants have exercised their rights to appeal the decision to grant the licence.

The FAC considered the procedures followed in respect of meeting the requirements of the Habitats Directive. The FAC considers that there is no convincing evidence to indicate that the DAFM screening for Appropriate Assessment was in error or that the conclusion to screen in Tullaher Lough and Bog SAC for Stage 2 Appropriate Assessment was not correct. The FAC considered the referral submission by the NPWS and, in particular, the recommendation that there should be no felling between October and July to avoid disturbing Greenland White Fronted Geese and breeding Lapwing. The FAC noted that the Site Synopsis (NPWS) for the Tullaher Lough and Bog SAC makes specific reference to the importance of the SAC for over-wintering of the Greenland white-fronted goose – an Annex I species under the EU Birds Directive - and that the value of the SAC as a wintering ground for the species is noteworthy. The conservation objective relating to Active Raised Bogs also notes that the SAC, including bog, supports a small flock of wintering Greenland White-Fronted Geese. The FAC noted that the AAR and AAD do not refer to the Greenland White-Fronted Goose which, while not a qualifying interest for the Tullaher Lough and Bog SAC, is an Annex I species within the Natura site, and that this constituted a significant error.

In respect of the lapwing (Annex II species), the FAC notes that this is a qualifying interest of the River Shannon and River Fergus Estuaries SPA, but that the separation distance is approximately 2.5km. The FAC noted that the NPWS submission stated that breeding Lapwing is a Red Listed Bird of conservation concern, and relies on the transition mire beside the project site. Having regard to the nature and scale of the proposed development, and to the separation distance to the Natura 2000 site, the FAC considers that it would be appropriate to clarify with the NPWS its specific recommendation in respect of the Lapwing.

The FAC concluded that a significant error was made in the Stage 2 Appropriate Assessment by not addressing the presence of the Greenland White-Fronted Goose (Annex I species) in the Tullaher Lough and Bog SAC, within which the project lands are located. In these circumstances, the FAC decided to set aside and remit the decision to grant the licence and to require a new Stage 2 Appropriate Assessment of the Natura 2000 site before making a new decision in respect of the proposed development.

Yours sincerely



On behalf of the Forestry Appeals Committee

