



1st December 2020

Our Ref: 579/2020

Subject: Appeal regarding licence WD06-FL0229

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 (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 all parties to the appeal.

Background

Felling Licence WD06-FL0229 was approved by the DAFM on 17th July 2020.

Hearing

An oral hearing of appeal FAC579/2020 was conducted by the FAC on 17th November 2020.

Attendees:

FAC: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Luke Sweetman

Secretary to FAC: Mr. Michael Ryan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM Representatives: Mr. Frank Barrett, Mr. Joe O'Donnell

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to grant this licence (Reference WD06-FL0229).

The proposed project is for the clearfell and replanting of 6.16ha in a rural landscape in Ballymacart Upper and Ballytrisnane, Co. Waterford. The area to be felled is comprised of four sub-compartments; 14 (2ha) and 11 (1.34ha) which are 100% Sitka spruce, and 2 (0.53ha) and 21 (2.11ha) which are both composed of 95% Sitka spruce and 5% Japanese larch. The area applied for also lists a plot of 0.18ha of "bare plantable" area. The proposed clearfell site adjoins another forest to the west, is bound by a County Road to the east and north and is adjacent to agricultural land to the south. According to the DAFM's information the underlying soil type is approximately Basin Peats, Blanket Peats (some) (34%) & Surface-Water Gleys, Groundwater Gleys (66%). The slope is predominantly moderate 0-15% and the project is within the Brickey-Colligan-Dalligan-Mahon-Tay-Coastal 17_01 catchment area and waterbody Maoil_an_Choirnigh_SC_010 (100%).

The application was referred to Waterford County Council on 8th January 2020 but no response was received. There were no other referrals in this instance.

The application was accompanied by a Harvest Plan and an Appropriate Assessment Screening Form. The DAFM carried out a Stage 1 Screening for Appropriate Assessment on 5th May 2020, identifying 7 Natura 2000 sites (4 SACs & 3 SPAs) within 15km. The likely zone of impact was not extended to include any other European sites in this instance.

The following sites were screened out for Stage 2 Appropriate Assessment for the following reasons: the Blackwater River (Cork/Waterford) SAC (002170) 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. Helvick Head SAC (000665), Ardmore Head SAC (002123), and Glendine Wood SAC (002324) due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. Dungarvan Harbour SPA (004032) and Blackwater Estuary SPA (004028) due to the separation distance between the Natura site and the project.

Helvick Head to Ballyquin SPA (004192) was screened in for Stage 2 Appropriate Assessment because the DAFM concluded that there was a possibility that the proposed project would have a significant effect on this European site due to the proximity of potential habitat for the species listed as the Special Conservation Interest of this Natura site. The Special Conservation Interests for this site are: Cormorant (*Phalacrocorax carbo*); Peregrine (*Falco peregrinus*); Herring Gull (*Larus argentatus*); Kittiwake (*Rissa tridactyla*), and Chough (*Pyrrhocorax pyrrhocorax*).

The DAFM subsequently produced an Appropriate Assessment Report, leading to an Appropriate Assessment Determination, both dated 25th June 2020, prior to the making of the decision to grant the licence. Both the Appropriate Assessment Report and subsequent Appropriate Assessment Determination, which were subject to independent ecological review, listed the Natura 2000 sites within a 15km radius. The report identifies the Helvick Head to Ballyquin SPA as being subject to possible significant effect due to the location of the project and its proximity to the Natura site. The Appropriate Assessment Report assessed the project's potential impact on the Special Conservation Interests of the European site and concluded that no mitigation was required in relation to the Cormorant, Herring Gull, Kittiwake, or the Chough because the site is not suitable or in the vicinity of suitable habitat for these species.

In relation to the Peregrine, the Appropriate Assessment Report had regard to the species' Conservation Objectives to "maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interests for this SPA". The report identifies the potential direct and indirect, short and long-term, and operational impacts as being the disturbance / displacement of the Peregrine resulting from excessive noise, vibration, mechanical movement or artificial lights associated with harvesting, timber extraction and mechanical ground preparation for reforestation. Site-specific measures designed to mitigate impacts on the SPA were recommended to be inserted as conditions of the licence. Subject to the conditions recommended, the report concludes that the proposed project, individually, will not have an adverse effect on the Natura 2000 site. In terms of potential in-combination effects, the Appropriate Assessment Report states that the potential for the proposed project to contribute to an in-combination impact on European sites was considered by the DAFM prior to the conclusion of the Appropriate Assessment Report and Appropriate Assessment Determination, and prior to the decision to grant the licence (WD06-FL0229). The report goes on to list the websites which were consulted while assessing the proposed project's potential for in-combination effects, along with other projects and developments in the vicinity, on the Natura site. These included the Department of Housing, Planning and local Government website, An Bord Pleanála website, the EPA website, the Waterford County Council website (specifically the objectives relating to Natura 2000 sites set out within the Waterford County Development Plan 2011-2017), and other forest plans & projects listed on DAFM's internal records.

The report's in-combination statement concluded that the proposed clearfell and reforestation project (with prescribed mitigation measures) will itself, i.e. individually, not result in any residual adverse effect on the Helvick Head to Ballyquin SPA and associated Special Conservation Interests and Conservation Objectives. The Appropriate Assessment Report concluded that, with the mitigation measures recommended, there is no potential for the proposed project to contribute to any in-combination effects on the Helvick Head to Ballyquin SPA and will not give rise to any adverse effect on the integrity of any European site, when considered in combination with other plans and projects.

The licence issued on 17th July 2020 for the clearfell and reforestation of 6.16ha and is exercisable until 31st December 2022. It is subject to standard conditions plus additional conditions specifying requirements in relation to the Peregrine, traffic safety, and adherence to specified standards and guidelines.

A single appeal was submitted against the decision to grant the licence. The grounds of appeal state that the Appropriate Assessment screening did not comply with "the decision of Finlay J in Kelly", the (DAFM's) decision is invalid under the principles of EU law as the Minister is being a Judge in their own case, there has been no investigation as to whether the application site has complied with the requirements of EU law, According to the heads of the new bill the Minister has assumed control of the FAC, and the basic requirements of the National Parks & Wildlife Service (NPWS) have not been complied with.

The DAFM responded to the Appellant's grounds of appeal in a written statement to the FAC. The DAFM stated that the proposed area for felling and reforestation was subject to the DAFM's Appropriate Assessment screening procedure in compliance with the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). This Stage 1 Screening for Appropriate Assessment included Natura 2000 sites within 15km of the project area. The screening identified the possibility of the project having a significant effect on one screened European site (Helvick Head to Ballyquin SPA) therefore the proposed project was screened in and a Stage 2 Appropriate Assessment was carried out. This resulted in the production of an Appropriate Assessment Report and Appropriate Assessment Determination. The outcome of this process was that the potential impacts of the proposed project on the Special Conservation Interests of the Helvick Head to Ballyquin SPA were identified "on a precautionary basis" and so site-specific measures to mitigate these impacts were included by the DAFM in the conditions of the licence. The DAFM intimated that adherence to the prescribed conditions of the licence, in tandem with compliance with relevant environmental guidelines/requirements/standards and the measures laid out in the application documentation, would "ensure that the proposed project itself (i.e. individually) will not prevent or obstruct the Special Conservation Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive." The DAFM also stated that the proposed project will not result in any adverse effect on any European Site. Furthermore, the DAFM concluded that there is "no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects." The DAFM's statement to the FAC stated that a number of the Special Conservation Interests / Qualifying Interests were truncated on the Appropriate Assessment Screening Form for project WD06-FL0229 when outputting the form related to the screening exercise but that all Special Conservation Interests / Qualifying Interests were considered during the screening exercise itself.

The FAC carried out an Oral Hearing on 17th November 2020. The parties were invited to attend in person or to join electronically. The FAC sat in person at this hearing, the Appellant did not participate

but the DAFM and the Applicant both participated electronically. At the Oral Hearing the DAFM restated much of their previously submitted written response to the Appellant's grounds of appeal. The DAFM also confirmed that the Appropriate Assessment Report and Appropriate Assessment Determination had been concluded, and their conclusions considered, prior to the decision to grant felling licence WD06-FL0229. The DAFM outlined how referrals to statutory consultees, including the NPWS and local authorities, are automatically triggered according to interactions with certain spatial rules, and that this licence was not referred to the NPWS in this instance and that Waterford County Council had been consulted and they did not respond. The DAFM indicated that the conditions attached to the licence in relation to the Peregrine had been recommended by an Ecologist.

In addressing the grounds of appeal, the FAC considered, in the first instance, the Appellant's contention that the Appropriate Assessment screening was not carried out in compliance with the decision of "Finlay J in Kelly". The Appellant did not participate in the Oral Hearing and so there was no opportunity for them to expand on the details of their contention. The FAC interpreted the Appellant's reference to "Finlay J in Kelly" as referring to the findings of Finlay Geoghegan J. in *Kelly— v An Bord Pleanála*. 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 or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to 7 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on 6 of the Natura 2000 sites. The Helvick Head to Ballyquin SPA was screened in for Stage 2 Appropriate Assessment. The FAC considered that the DAFM had carried out a Stage 2 Appropriate Assessment in alignment with the requirements of the Habitats Directive, which led to the making of an Appropriate Assessment Determination which was considered prior to the decision to grant the licence being made. The assessment and the Determination had both been subject to review by an independent Ecologist and the recommendation of the Determination in respect of specific conditions to be attached to the licence relating to the protection of the Peregrine was incorporated into the licence issued by the DAFM. The FAC noted that Qualifying Interests were truncated on some of the DAFM documentation but considered that this omission was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites. The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone, or in combination with other plans or projects, would not be likely to give rise to significant effects on any Natura site, were correct. Furthermore, the FAC concludes that, if executed in accordance with the specific mitigation measures recommended in the Appropriate Assessment Determination, the proposed clearfell and reforestation would not, individually, or in combination with other plans or projects, have an adverse effect on the integrity of any European site, with regard to their conservation objectives. Based on the evidence before it, the FAC is satisfied that the DAFM complied with the provisions of the Habitats Directive in carrying out its Appropriate Assessment screening.

Having regard to the Appellant's other contentions in their grounds of appeal, the FAC concluded, based on the information before it, that the DAFM's decision is valid and that the project site has been assessed in compliance with the requirements of the Habitats Directive. The FAC considered the Appellant's contention that "the basic requirements of the NPWS have not been complied with". The FAC also took into account the DAFM's statement regarding the referral of licence applications to the NPWS (and other statutory consultees) and that this proposed project was not referred for consultation because the criteria for doing so were not met. Based on the information before it, the FAC considers the processes completed prior to issuing the decision, including the Stage 2 Appropriate Assessment,

have complied with the requirements of Article 6(3) and the absence of referral to the NPWS does not provide sufficient grounds on which to deem the licence decision should not be affirmed.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee

