



23 December 2020

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Our ref: 580/2020

Subject: Appeal in relation to felling licence WD06 FL0233

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence WD06 FL0233.

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 the parties to the appeal.

Background

Felling licence WD06 FL0233 was granted by the Department on 15 July 2020.

Hearing

An oral hearing of appeals 580/2020 and 619/2020, both against the decision to issue licence WD06 FL0233, was conducted by the FAC on 10 December 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Appellants*:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Luke Middleton & Ms Jade McManus

Decision

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

Kilminchy Court,
Portlaoise,
Co Laois
R32 DWT5

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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 affirm the decision to grant this licence (Reference WD06 FL0233).

The proposal is for the clear-felling and replanting of 5.3 ha at Glenlicky, Co Waterford (overlooks Dungarvan). Current stocking comprises 3.67 ha of 100% Sitka Spruce and 1.63 ha of 56% Lodgepole Pine & 44% Sitka Spruce. Replanting is with 100% Douglas Fir. The application sought 0.27 ha of open space. Site is elevated with moderate slopes to south east toward the Licky River, is in the Licky FWPM catchment, the Blackwater (Munster) Catchment, the Goish_SC_10, and the Licky_20 River Sub-Basin. The River Licky flows south and east some 260m from the proposal and downhill of it and forms part of the Blackwater River (Cork/Waterford) SAC at this point. The Underlying soil type is approx. Surface water Gleys, Ground water Gleys (100%)

The application was the subject of desk assessment by the DAFM and there was referral to Waterford County Council and no response was received. Application included a generic harvest plan document and a pre-screening report by the applicant. The DAFM completed a Stage 1 screening for Appropriate Assessment and screened out the following European Sites either for separation distance or lack of pathway; 004192 *Helvick Head to Ballyquin SPA* 004032 *Dungarvan Harbour SPA* 002123 *Ardmore Head SAC* 004028 *Blackwater Estuary SPA* 000665 *Helvick Head SAC* 002324 *Glendine Wood SAC* 004023 *Ballymacoda Bay SPA*. The following European site was screened in for Stage 2 Appropriate Assessment due to proximity; 002170 *Blackwater River (Cork/Waterford)*. An Appropriate Assessment Report (AAR) and an Appropriate Assessment Determination (AAD) were completed and both reviewed by an external ecologist on 11 July 2020. The determination included that mitigation was required due to a hydrological connection and close proximity to the Blackwater River (Cork/Waterford) SAC (002170) which has a number of siltation, sediment and eutrophication sensitive features.

Licence issued 15 July 2020 for felling and replanting of 5.30 ha and is valid until 31 December 2022, and is subject to what are relatively standard conditions (a) to (g) and the additional conditions (h) to (l), these are set out in full on the licence.

There are two appeals against the decision to grant the licence. The grounds of appeal include that the AA screening does not comply with *Finlay J* in *Kelly*, the decision is invalid as the Minister is being judge in his/her case, there have been no investigations as to whether the application site has complied with the requirements of EU law, the basic requirements of the NPWS have not been complied with. An issue raised regard the FAC in the appeal is not a valid ground of appeal against a decision to issue a felling licence. The grounds of appeal contend there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. Also, there is a breach of Article 4(4) of the EIA Directive as the details of the whole project have not been submitted. That on the same date as this application, a further 13 licence applications were lodged for the same Forest Management Unit (FMU) totalling 69.98ha and all projects in this FMU should be considered in a coherent manner and project splitting is not permitted. Also, the licence and associated operations threaten the achievement of the objectives of the underlying waterbody, and clear felling has the capacity to



impact on water quality. Also, the Stage 2 Appropriate Assessment (AA) is not legally valid, and the general public were not consulted under Article 6(3) of the Habitats Directive on the AA Determination. Also, the Harvest Plan is not consistent with the requirements of the Interim Standards for Felling & Reforestation, the licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive, and the licence conditions do not provide for the strict protection of Annex IV species. Also, the licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations, the licence should include a condition that plans and works must be inspected by the Forest Service prior to, during and post works to ensure compliance, and the licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response to the grounds of appeal the DAFM stated the 5.30 ha felling and reforestation project was subject to the DAFM's AA Screening procedure, and the DAFM identified the possibility of the project having a significant effect on the Blackwater River (Cork/Waterford) SAC 002170. The project was screened in and an Appropriate Assessment carried out. The AA Screening involved a review of Special Conservation Interests and the Conservation Objectives of the above European site (as set out in the corresponding Conservation Objective documents available from the National Parks & Wildlife Service) and these were also considered in the AAR and AAD. The potential for the project to result in impacts on the Special Conservation Interest of the Blackwater River (Cork/Waterford) SAC was identified on a precautionary basis and site-specific measures to mitigate against such impacts were described and 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 concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AAR and AAD. The site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project WD06-FL0233. The DAFM stated that regards Article 4(3) of the EIA Directive, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. DAFM also ruled out any breach of Article 4(4). The DAFM also confirmed the 5.3 ha felling and reforestation project has been subject to the DAFM's AA Screening procedure and Appropriate Assessment. It was concluded that the proposed felling and reforestation project, when considered on its own, will not result in any residual adverse effect on the screened in European site and associated Special Conservation Interests and Conservation Objectives. There is therefore 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. Where the Minister for Agriculture, Food and the Marine receives a felling application he or she is required amongst things to publish a notice of the application and inform the public that any person may make a submission or observation in

writing concerning the application to the Minister within 30 days from the date of publication of that notice. Also, Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making his or her decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6. Also, Regulation 19(4) expressly requires the Minister when carrying out an Appropriate Assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. The site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project WD06 FL0233. The use of plant protection products in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, which are based on and give effect to 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). Users of plant protection products shall apply the principles of Good Plant Protection Practice, as provided for in S.I. 155 of 2012. There is no legal requirement to notify adjacent landowners.

The FAC held an Oral Hearing on 10 December 2020. The parties were invited to attend in person or to join electronically. One of the Appellants participated electronically while the other did not participate. The DAFM and the Applicant both participated electronically. The FAC sat in person at this hearing. At the hearing, the DAFM detailed their approach to processing and issuing the licence application. The DAFM outlined that the application had been referred to Waterford County Council and they did not respond. The DAFM referred to the statement in response to the grounds of appeal. The DAFM confirmed the AAR and AAD were completed and reviewed by an external ecologist prior to any decision on the licence and the conditions of the licence include the mitigations from the Appropriate Assessment. The appellant sought that the written grounds are considered where not revisited at the hearing. The appellant stated there was a land use change in this instance with 0.27 ha of open space and 5.03 ha for restocking, and clear-felling is a temporary change of land use and condition (h) supports this contention, also the AAR and AAD refer to land use change and these are signed off by DAFM Inspectors and an Ecologist. The Appellant also stated that the stage 2 assessment does not meet the level of certainty required by 6(3) of the Habitats Directive, the Water Framework Directive (WFD) is not met especially regards condition (h), the application site is within a Freshwater Pearl Mussel catchment and there is reference to damaged and collapsed control measures implying there is potential for residual effects from silt build up. Also, the Wicklow Mountains SAC and the Wicklow Mountains SPA are in Co Wicklow well away from the proposal in Co Waterford but are contained for in the in-combination statement. The DAFM stated this was not a change of land use and the words were out of context in condition (h). The Applicants described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan which is for operational reasons. The Applicants set out that the proposal is on a gentle south facing slope with good access, is on a gley soil and is c. 270m from the Licky River, with the Blackwater SAC c. 110m south of the proposal. The Applicants stated a site manager visited the site on 22 October 2020 and reported the southern tip of the proposal has a wet area, and there is a relevant watercourse at the south-east with a downstream distance of 270 m to the Licky River. The Applicants stated there is no change of land use involved and that the restocking with Douglas Fir would



have been a locally made decision. The Applicants stated they were aware of their responsibilities regards the mitigations in the licence to protect the qualifying interests of the SAC.

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 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). Condition (h) states 'land use change'. The FAC considers this is a clear-felling of existing forestry and replanting of forestry for commercial wood production and the licence issued is for the felling and reforestation of 5.3 ha and does not consent to any change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

The FAC considered the Appropriate Assessment screening, the AAR and AAD in this instance. The FAC considered that the procedures adopted in these were consistent with the requirements of Article 6(3) of the Habitats Directive and that the conclusions reached were sound. The FAC noted that the recommended conditions, as contained in the Determination, had been incorporated into the licence granted. The FAC concluded that the proposed development, carried out in accordance with the mitigation measures recommended in the Determination and attached to the licence as conditions, would not adversely affect the integrity of any Natura 2000 sites, having regard to their conservation objectives and would not affect the preservation of any such site at favourable conservation status. In addition, condition (h) requires silt fences should be checked at least once per month in wet weather, and repaired/upgraded if water is bypassing it, if torn, collapsed or not functioning. Condition (h) also states that if full of silt, this should be removed to a dry, vegetated area upslope of the silt fence, and that a series of smaller sediment traps are recommended over several larger sediment traps. The FAC considers these are important maintenance requirements regards the mitigations required by the licence to protect the SAC QI's from any silt from the proposed works, and that there is sufficient certainty in requiring this be undertaken once per month.

The FAC is satisfied there is an error in the in-combination section (11.6) of the AAR in referring to the Wicklow Mountains SPA 004040 and the Wicklow Mountains SAC 002122. However, the FAC concludes that this is not a significant or serious error as it has not impinged on the AAR and AAD regards the European Sites otherwise assessed and leads to no likelihood of any significant effects not otherwise considered in the assessment.

The proposal is within the Licky_20 River Sub-Basin, and based on the information before it, including the conditions of the licence, the FAC considered that there is no convincing reason to conclude that the proposed development would threaten the achievement of the objectives of protecting the underlying waterbody.

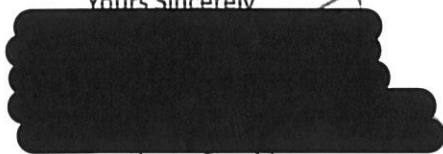
In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to the felling licence. The 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, and stating at the oral hearing that these grounds related to a shortcoming in law which is inconsistent with Article 5 of the Birds Directive. In these circumstances, the FAC concluded that conditions of the nature requested by the appellant, should not be attached to the licence.

With regard any notification of certain parties in the case of any spraying of chemicals, the FAC notes that the use of pesticides is governed by the European Communities (Sustainable Use of Pesticides) Regulations 2012 (S.I.155/2012) and European Communities (Plant Protection Products) Regulations 2012 (S.I. 159/2012) that all users of pesticide products registered for professional use must follow the principles of good plant protection practice. The FAC concludes there is insufficient basis on which to apply an additional condition as contended by the Appellant.

Furthermore, the FAC considered that the conditions attached to the licence would provide for satisfactory protection of the environment, including water quality. The FAC also noted that all works included in a Harvest Plan and carried out must comply with the terms of the licence.

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



Pat Coman, on behalf of the FAC

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