



10 February 2021

Our ref: 421/2020

Subject: Appeal in relation to felling licence LS01 FL0091

Dear Sir/Madam,

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 LS01 FL0091.

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

Licence LS01 FL0091 for felling and replanting of 9.39 ha at Garryhedder, Co. Laois was approved by the Department of Agriculture, Food and the Marine (DAFM) on 26 June 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal 421/2020 was conducted by the FAC on 26 November 2020.

Attendees:

FAC Members: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Pat Coman and Ms Bernadette Murphy
Secretary to the FAC: Mr Michael Ryan
Appellant: [REDACTED]
Applicant representatives: [REDACTED]
DAFM representatives: Ms Eilish Kehoe and Mr Luke Middleton
[REDACTED] attended with the Appellant as an observer

Decision

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

Kilminchy Court,
Portlaoise,
Co Laois
R32 DWT5

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057 863 1900

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 (LS01 FL0091).

The proposal is for felling of 9.39 ha at Garryhedder, Co. Laois. Sitka Spruce comprises the majority of the plot. There is a 0.26 ha felled area. Restocking will be with 100% Sitka Spruce. The underlying soil type is given as approximately 26% Blanket Peats, 71% Peaty Gleys and the remaining 3% comprising Podzols (Peaty), Lithosols, and Peats. The slope is described as predominantly moderate (0-15%). The proposal is located in the Lower Shannon Catchment_25A and the Silver (Kilcormac)_10 Sub-Catchment (25A_12). The DAFM give the proposal as situated 100% within the Silver (Kilcormac)_20 River Sub-basin. The Lahoole Stream (25L12_Order_1) rises in the proposal site and flows by the western boundary of 000859 *Clonaslee Eskers and Derry Bog SAC*. The stream flows for c3.5km before joining the Silver (Kilcormac) (25502_Order_4).

The proposal was referred to Laois County Council only. The County Council did not consider that an Environmental Impact Statement was necessary as the application area did not comprise more than 50 ha. The County Council stated that an Appropriate Assessment was required but did not refer to the proposal's location within an SPA. In the response the County Council noted that the proposal is not located within an Architectural or Archaeological site, is not within a Prime Scenic/ Amenity Area and is located on an unclassified road.

The application included a document entitled a "Harvest Plan", including maps, a pre-screening report, and general environmental and site safety rules. In processing the application, the DAFM completed a Stage 1 Appropriate Assessment screening with reference to the provisions of Article 6(3) of the Habitats Directive and identified 5 Natura sites (4 SAC & 1 SPA) within 15km. An additional SAC site beyond the 15km radius was also included in this instance. The sites examined were; 004160 *Slieve Bloom Mountains SPA (within)*, 000859 *Clonaslee Eskers And Derry Bog SAC c2.1km*, 000412 *Slieve Bloom Mountains SAC c2.6km*, 002162 *River Barrow And River Nore SAC c7.8km*, 000571 *Charleville Wood SAC c12.6km* and 6410 *River Shannon Callows SAC c41km*. The *Slieve Bloom Mountains SPA* was screened in for Stage 2 Appropriate Assessment due to the possibility of an effect as a result of the proposal's location within the Natura site. The 4 SAC sites within 15km of the project were screened out for Appropriate Assessment due the absence of a pathway while *The Shannon Callows SAC* was screened out due to the hydrological distance from the proposal (c41km) and the scale of the proposal.

The DAFM produced an Appropriate Assessment Report (AAR) (12 June 2020). This recommends conditions to mitigate potential impacts in relation to the Hen Harrier as follows:

- Project lies wholly within Green Area and disturbance operation(s) associated with this project are permitted during the Hen Harrier breeding season (1st April to 15th August, inclusive). If the DAFM are notified of a new Hen Harrier nesting site by the National Parks & Wildlife Service (NPWS) and the project is located partially or wholly within 1.2km of this site, then the Applicant will be informed by the DAFM and the licence amended with immediate effect to exclude potential disturbance operations during the breeding season (Potential disturbance operations are listed)
- An irregular belt (minimum 3 rows) of broadleaves will enhance connectivity provided by the water body acting as a corridor and haven for Hen Harrier prey species
- The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019)

Following on from the AAR the DAFM made an Appropriate Assessment Determination (AAD) concluding that the proposed development individually, or in-combination with other plans or projects, would not have an adverse effect on the integrity of any Natura 2000 site, subject to the implementation of the conditions recommended in the Report and that some positive impacts can be expected from the creation of habitat for prey species and from



pre-thicket habitat for the early stages of growth. The DAFM documentation indicates that both the Report and Determination were reviewed by an independent ecologist prior to the decision.

The licence was approved with general conditions and others which are more directly concerned with the protection of water and/ or soil and adherence to standards and guidelines. As the proposal is located in a Green (Foraging) Zone for the Hen Harrier it is a condition of the licence that *“as set out in the Forest Service document “Procedures regarding disturbance operations and Hen Harrier SPAs”, specific procedures, agreed with National Parks & Wildlife Service, apply to disturbance operations (listed) within SPAs designated for Hen Harrier. Regarding sites wholly within Green Areas, a disturbance operation(s) associated with the licence can proceed during the Hen Harrier breeding season (1st April to 15th August, inclusive). However, the Forest Service will notify the licensee in the future if any new Red Area (generated by a newly recorded nesting site) overlaps the site. From the date of receipt of this notification, no disturbance operation(s) associated with the licence is to take place within the breeding season. To do so will lead to the immediate cancellation of the licence (where trees remain standing) and may represent an offence under the Birds & Habitats Regulations 2011. If notification of a new Red Area is given within the breeding season itself, any ongoing disturbance operation(s) associated with the licence is to cease immediately on receipt of the notification, unless otherwise agreed with the Forest Service, and can only recommence after the breeding season has closed”*. A further condition of the licence provides for a stream setback of 10m for broadleaves. Broadleaves are to be planted (minimum 3 rows) in an irregular belt adjacent to the edge of the aquatic zone setback along Silver Kilcormac_20 waterbody. The purpose of this condition is stated to enhance connectivity provided by the waterbody acting as a corridor and haven for Hen Harrier prey species.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU. It is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. The submission argues that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody as clear-felling has the capacity to impact on water quality. It is outlined that in the absence of an adequate assessment of the cumulative impact of this project with the other forestry activities approved or planned in the same Catchment, the achievement of the aforementioned objectives cannot be assured. The Appellant argues that the Stage 2 Appropriate Assessment Determination is not legally valid, stating that an Assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions, capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected areas concerned. It is submitted that the DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. The Appellant stated that the licence conditions do not provide a system of protection for wild birds during the breeding and rearing season consistent with Article 5 of the Birds Directive. Furthermore, that the licence does not provide a system of strict protection for Annex IV (a) species in their natural range, as required by Article 12 of the Habitats Directive, and prohibiting deliberate disturbance particularly during the period of breeding, rearing, migration and hibernation. The Appellant contends that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The Appellant stipulates that the licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. Finally, it is argued that 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 a statement to the FAC, the DAFM submitted that the standard operational activities of clearfelling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3), 4(4) and 4(5) had not occurred. The DAFM indicated that the licence contains measures aimed at the protection of water quality and that the DAFM is actively engaged in the WFD process and is fully informed of its responsibilities regarding the achievement of the WFD objectives. The DAFM identified the possibility of significant effects on screened European sites and an Appropriate Assessment was carried out and a Determination made. Site specific measures prescribed by the DAFM were included as mitigation measures. DAFM concluded that there would be no adverse effect on any European site. The DAFM specified that they have fully complied with the requirements of Article 6(3) of the Habitats Directive. It is stated by the DAFM that the Minister may, at any time, attach or vary conditions to any licence. The DAFM outlined how members of the public can make submissions to the DAFM in respect of the likely effect on the environment of the proposed activity. In relation to the lack of protection afforded wild birds by the licence, 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"*. In addition, the DAFM state that the site-specific mitigations identified in the AAR and AAD Statement were attached as conditions of the licence issued for felling and reforestation project LS-FL0091. The DAFM considered the information submitted at applications and deemed that it meets their requirements. The DAFM contend that users of Plant Protection Products must apply the principles of Good Plant Protection Practice and that there is no legal requirement for forest owners to inform adjacent landowners of the intention to spray.

The FAC sat in person at an Oral Hearing in Portlaoise on 26 November 2020. The parties were invited to attend in person or by electronic means. The DAFM, the Applicants and the Appellant participated electronically. The Appellant wished to focus on particular grounds in his oral submission and to place particular emphasis on the Appropriate Assessment (AA) screening and process. The Appellant queried why the NPWS were not consulted even though the proposal was located within an SPA. The Appellant anticipated DAFM answer that such a referral is not mandatory for Green Zones (Foraging) under the Hen Harrier protocol and that it was only mandatory for Red Zones (Breeding). The Appellant considers that Green Zones need the referral the most as there is not information regarding nest sites in these areas. It was contended by the Appellant that no joint agreed Red Zone Hen Harrier (Breeding) protocol exists between DAFM and NPWS as referred to in the AAR (Forestry Standards Manual – Appendix 21) and that the protocol referred to is a DAFM protocol with NPWS having only been consulted. It was further indicated that NPWS provide updated spatial information regarding nest sites which the Appellant considered to be separate to a protocol. No NPWS representatives were in attendance. The Appellant argued that the Green Zone procedure is not consistent with the precautionary principle as the objective is only to reduce but not remove risk to the Hen Harrier. It was highlighted by the Appellant that the 2021 Hen Harrier nest sites cannot be yet known. It was further indicated that any activity during the pre-nesting period is a disturbance and will impact nest site selection in the area. The slow nature of the process to surveying and identify nest sites was mentioned as were nest site notification time lags. It was submitted that the priority is to protect the Hen Harrier and not the forestry. The Appellant stated that another licenced forestry project is located at c1km from the proposal and therefore there was the potential for cumulative impact. The impact of restocking was not taken into account in the AA according to the Appellant, who also highlighted that restocking was optional. In response the DAFM argued that the protocol was robust and precautionary and that the Hen Harrier was very unlikely to use closed canopy sites to nest. It was explained that a 1.2km radius buffer is applied to a Red Zone Area i.e. an area where nesting was highly likely. The Appellant did not comment directly in response to whether short term disturbance could occur without impacting the conservation objectives of the Hen Harrier.



Referring to licence condition (i) which was also mentioned in the AA Report, the Appellant queried what was being mitigated against. It was specified by the Appellant that compensatory measures should not be included in the AA noting that the condition refers to enhanced connectivity for the Hen Harrier. It was stated by the Appellant that there were no mitigation measures on the licence for the Hen Harrier. In response to the FAC regarding why the Stage 2 AA was not lawful the Appellant indicated that if the determination is incorrect or inaccurate, then the law is broken. He referred to the need to remove all reasonable scientific doubt and if such doubt remained then the Stage 2 AA was not legally valid. In this regard the Appellant argued that the nesting sites were unknown in the Green Zones.

The Appellant stated that Inland Fisheries Ireland (IFI) were not consulted, that the site was not free draining and that the watercourse on the proposal site was therefore at risk. The *Shannon Callows SAC* was screened out due to insignificant effects and the Appellant argued that once there was an effect the in-combination effects need to be examined as such insignificant effects could amount to a significant effect in-combination with other proposals. The DAFM explained that the in-combination effects had been examined and none were found. The Appellant described that the Silver (Kilcormac) adjoins the *Clonaslee Eskers and Derry Bog SAC* and implied a direct hydrological connection with the site.

The Applicant submitted that the standard operational activities of clearfelling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required. The Applicant described how the site overlapped with the *Slieve Bloom Mountains SPA* and that there was no direct uninterrupted hydrological connection with any Natura site. It was explained that the stream which rises in the proposal site and flows near 000859 *Clonaslee Eskers and Derry Bog SAC* (by the Western site boundary) did not intersect with the site. The slope of the site was given as gentle. Road access to the site was stated to be good and the proposal was described as being surrounded by forestry. It was specified that an adjacent forest to the North of the proposal was clear felled in 2019 and will be replanted in 2021. The Applicant explained that prior to any operations the site is inspected to determine any environmental features and any actions needed regarding protection including the protection of bird nesting and rearing. It was clarified by the Applicant that the forest will only be sprayed if pine weevil is identified, in which case the Local Authority will be informed, and signage erected.

The DAFM clarified that both the AAR and AAD were independently reviewed by an ecologist and that both were taken into account when issuing the licence. The DAFM confirmed that there were procedures in place to enforce condition (h) of the licence as the NPWS inform the DAFM of new nest sites, who inform the Applicant and that the licence is then updated to reflect the new circumstances and issued. In response to the FAC the DAFM explained that the disturbance restrictions apply for the 2 years during which re-forestation can occur. The DAFM indicated that the separation distance between the nearby stream and *Clonaslee Eskers And Derry Bog SAC* was estimated to be c6m and that there would be no effects to the site. The FAC enquired if there was any information regarding the *Vertigo geyeri (Snail)* species which is listed as *Qualifying Interest* for *Clonaslee Eskers And Derry Bog SAC* but no evidence was presented. The DAFM included the *Shannon Callows SAC* which are located beyond the 15km radius due to the hydrological connection. The DAFM verified that there were no other licenced projects within 120m of the proposal site, the 2 nearest sites being located at c500m and c800m respectively. The FAC noted that the Applicant is licenced to clear fell c61ha within 1.5km of the proposal. In response to the FAC the

DAFM indicated that this site likely drained out into the watercourse and that the watercourse did not enter the site. The Appellant noted the potential for the watercourses and the bog SAC to flood.

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 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 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 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 decision under appeal relates to a licence for the felling and replanting of an area of 9.39 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other classes included in the Annexes I or II of the EIA Directive or considered for EIA in Irish Regulations.

Regarding the achievement of the objectives of the underlying waterbody, the FAC acknowledges the conditions of the licence regarding the protection of water. The FAC particularly noted a condition of the licence providing for a stream setback of 10m for broadleaves, which are to be planted (minimum 3 rows) in an irregular belt adjacent to the edge of the aquatic zone setback along Silver Kilcormac_20 waterbody. The licence should however refer to the Lahoole Stream which rises in the proposal site and not to the Silver (Kilcormac) River which it later joins. The FAC considers therefore that licence condition (i) requires correction in this regard in order to protect the achievement of the objectives of the underlying waterbody.

The FAC considered that no convincing evidence had been provided to indicate that the proposed development would have an adverse impact on the protection of wild birds or of Annex IV species (Habitats Directive) and noted that no specific details had been provided by the appellant to substantiate these grounds of appeal. 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. Furthermore, the FAC notes that the Applicants inspect sites prior to any operations to determine any actions needed regarding protection of bird nesting and rearing and that buffers are applied to known likely nesting sites.

There is no reference to a Harvest Plan in the licence conditions and the FAC only consider the licence before it. Irrespective, the FAC considers that all works included in any Harvest Plan carried out, must comply with the terms of the licence.

The FAC noted that Article 6(3) of the Habitats Directive provides for obtaining the opinion of the general public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. While considering the views set out in the grounds of appeal, the FAC concluded that no convincing reason had been submitted for public consultation in this case. The FAC is satisfied that the DAFM exercised their discretion in this instance and did not consider it appropriate in this case.

The Appellant submitted that the licence should contain conditions relating to the commencement and conclusion of operations. The FAC is aware that the DAFM inspect a sample of licences issued in order to establish the Applicant's adherence to the conditions of those licences. The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties



in the case of any spraying of chemicals. The FAC is satisfied that the users of Plant Protection Products must apply the principles of Good Plant Protection Practice and there is no legal requirement for forest owners to inform adjacent landowners of the intention to spray. The FAC further notes that the Applicant informs the Local Authority and erects signage where spraying is required. Therefore, the FAC concludes that the conditions attached to the licence issued by the DAFM are appropriate for, and proportionate to, the licenced development. As such, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

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, DAFM undertook a Stage 1 screening in relation to 6 Natura 2000 sites. The FAC considered the procedures adopted by the DAFM in respect of Appropriate Assessment screening, the Appropriate Assessment Report and Appropriate Assessment Determination. The FAC noted that the recommended conditions, as contained in the Determination, had been incorporated into the licence granted. The FAC noted however, that the Lahoole Stream (25L12_Order_1) rises in the proposal site and flows in close proximity to the western boundary of 000859 Clonaslee Eskers and Derry Bog SAC. Examination of EPA maps indicate that the stream adjoins this boundary of the SAC for a length (c30m). The stream flows for c3.5km from the site before joining the Silver (Kilcormac) (25502_Order_4). The FAC further notes that the Environmental Protection Agency (EPA) have given the waters of the Silver (Kilcormac) as at risk and of moderate quality. The FAC acknowledges that setbacks and broadleaf buffers are provided for in the licence however these erroneously refer to the Silver (Kilcormac) River. The FAC is not therefore satisfied to conclude, in the absence of a DAFM field inspection (desk check only), that there is no direct hydrological connection with 000859 Clonaslee Eskers And Derry Bog SAC, especially since the estimated separation distance was given to be just c6m at the hearing. Irrespective, the possible effects of flooding and drainage on the SAC site cannot be ignored at this close proximity by reason of the peat, and therefore acid nature of the underlying proposal soil type and the fact *Alkaline fens (Peatland)* are listed as a *Qualifying Interest* for this SAC. The location of the SAC at the opposite side of the R421 road and as referred to in the AAR is of no consequence in this regard. Having regard to the nature and scale of the proposal, the characteristics of the site and the surrounding area and to the nature and number of other forestry projects listed (Afforestation-4, Forest Roads – 11, Private Felling - 7 & Coillte Felling – 10), the FAC is satisfied that the failure of DAFM to carry out a satisfactory assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal. The FAC cannot therefore conclude with certainty that the proposed development would not adversely affect the integrity of this Natura 2000 site, having regard to the conservation objectives and would not affect the preservation of any such site at favourable conservation status.

In the above circumstances, the FAC concluded that the decision of DAFM should be set aside and remitted to the Minister to carry out an Appropriate Assessment screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites alone or in-combination with other plans and projects, and if necessary a revised Stage 2 Appropriate Assessment, before making a new decision in respect of the licence.

Yours Sincerely,



Bernadette Murphy, on behalf of the FAC