



19 February 2021

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FAC ref: 236/2020

Subject: Appeal in relation to felling licence LD02-FL0079

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence LD02-FL0079.

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 LD02-FL0079 was granted by the Department of Agriculture, Food and Marine (DAFM) on 30 April 2020.

#### Hearing

An oral hearing of appeals 228/20 and 236/20 was conducted by the FAC on 19 January 2021.

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 Eilish Kehoe

[REDACTED]

#### Decision

The 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 LD02-FL0079).

The proposal is for the clear-felling and replanting of 2.38 ha at Corclaragh, Co Longford. Project site comprises 95% Lodgepole Pine and 5% Birch and replanting with 100% Lodgepole Pine (LPS). Application included a harvest plan document and a pre-screening report. Application sought 0.12 ha of open space. The underlying soil type is stated to be approximately; Basin Peats, Blanket Peats

(some) (100%). The slope is predominantly moderate 0-15%. The project is located in the Upper Shannon catchment and Inny (Shannon)\_SC\_050 sub-catchment, Riffey\_010 (100%) water-body. Mapping evidence shows Corclaragh Lough, a minor lake, is located a short distance west from the proposal and divided from it by peat lands but with no downstream connection. Watercourses exist along the north and west boundaries of the proposal and flow eastwards across agricultural land to the Riffey stream.

The application was the subject of desk assessment by the DAFM and the application was referred to Longford County Council, no response is evidenced.

In processing the application the Department completed a Stage 1 screening for an Appropriate Assessment (AA) and identified Natura sites within a 15 km radius of the proposal as follows; Ardagullion Bog SAC / Garriskil Bog SAC / Glen Lough SPA / Garriskil Bog SPA / Lough Iron SPA / Lough Derravaragh SPA / Lough Kinale and Derragh Lough SPA / Derragh Bog SAC / Lough Owel SAC / Lough Owel SPA / Moneybeg and Clareisland Bogs SAC and Lough Sheelin SPA. The DAFM also completed an in-combination screening. The DAFM screened out the proposal on its own and in-combination with other plans and projects and an AA was deemed not required.

Licence issued 30 April 2020 for felling and replanting of 2.38 ha, valid to 31 December 2022, and is subject to what are relatively standard conditions (a) to (g) and additional conditions (h) and (i), these are set out in full on the licence.

There are two appeals against the decision to grant the licence. The grounds of the first appeal include that there is no in-combination assessment of the replanting. The area replanted by Coillte exceeds 50ha and therefore requires EIA as no EIA has ever been carried out. The decision of the Forest Service does not comply with the Habitats Directive and the EIA Directive and the relevant decisions of the CJEU in particular the opinion of AG Kokott in Case C254/19 which concludes; (3) The obligation of a national court to interpret national law as far as possible in accordance with EU law does not require that the parties to the proceedings before it expressly assert that specific interpretation, if those parties allege at least an infringement of the relevant provisions of EU law. An issue raised regarding the FAC in the appeal is not a valid ground of appeal against a decision to issue a felling licence. The grounds of the second appeal include that there is a breach of Article 4 (3) of the EIA Directive 2014/52/EU with a failure to carry out a screening for EIA, a breach of Article 4 (4) of the EIA Directive 2014/52/EU with a failure by developer to submit a description of the aspects of the environment likely to be significantly affected by the project. There was inadequate consideration of the objectives of the Water Framework Directive River Basin Management Plan with the proposal in the catchment of the Riffey 010, the current status of which is unassigned and listed as being for 'Review', and for which forestry is listed as a Significant Pressure on the water quality of the catchment. The AA screening conclusion is flawed as the proposal is upstream from and in the same catchment of Garriskil Bog SAC (0679) and Garriskil Bog SPA (4102). The proposed activity represents a source of potential significant impact for the SAC's long-term maintenance in favourable conservation condition and on the quality of the SPA habitat. The licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, and the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of





chemicals. Also, the licence involves the replacement of broadleaf tree cover with exotic conifers in conflict with Coillte's obligations under Forest Stewardship Council (FSC) certification.

In response to the grounds of appeal the DAFM stated AA screening was carried out for European sites within 15 km from the project. The 2.38 ha project is located c. 5.3 km from Garriskil Bog SAC and Garriskil Bog SPA and no hydrological connection was observed between the project site and these Natura 2000 sites. The DAFM deemed that the project, when considered in combination with other plans and projects as identified in the pre-screening report, will not give rise to the possibility of a significant effect on the relevant screened European sites. The AA Screening report was completed by the Inspector and contains recommendations regarding screened European Sites. A number of the Special Conservation Interests (SCI)/Qualifying Interests (QI) were truncated on the AA Screening form. However, all SCIs/QIs were considered during the screening exercise itself and the screening determination is considered sound. A revised AA screening form was provided which includes all SCIs/QIs of the screened European Sites. For consideration of in-combination effects of the proposed project, DAFM relied exclusively on Coillte's in-combination statement. DAFM subsequently carried out a separate in-combination assessment and included an associated in-combination statement. It is the position of the Department that clear-felling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed). Furthermore, an application for a licence to clear-fell and replant an established plantation forest does not constitute a change or extension of an earlier authorisation for that project. 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. The DAFM also ruled out any breach of Article 4(4). A felling licence was issued having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence. The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. DAFM has considered the applicants felling licence application information including the proposed replanting species identified by the applicant for the felling and reforestation project. The nominated replanting species was deemed consistent with DAFM policy and practice.

The FAC held an Oral Hearing on 19 January 2021. 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 and remotely at this hearing. At the hearing, the DAFM detailed their approach to processing the licence application, the referral responses received and the reasons for the additional licence conditions. The Appellant sought that the written grounds of appeal are considered where not revisited at the hearing. 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 and included for 0.12 ha of open space. The Applicants stated the proposal comprised deep peat, has a gentle slope



and a cul-de-sac access, and described aquatic zones along the north and west of the proposal and a hydrological connection from the north east that flows across 150m of agricultural land before entering the Riffey stream to the east and flowing to Garryskil Bog, a distance of c. 5.7 km. The Applicants stated there is no change of land use in the proposal. The DAFM stated the QIs of the Garryskil Bog are not at the Natura 2000 site's boundaries and are of an elevated nature sloping toward the stream and not from it, so the watercourse flows around and not through the Natura 2000 site. The Applicant's stated their pre-screen was on the basis that Garryskill Bog SAC is not an aquatic SAC and does not contain QIs of an aquatic nature. The Appellant stated the SAC bog has hydrological features that could be considered aquatic. The Applicants stated Local Authorities are informed annually of pesticide applications and of top-up operations. The Appellant referred to a recent court judgement and that the Riffey Water-body has not been assigned a Water Framework Directive status by the EPA, and a failure to have done so makes it impossible for the DAFM to award a valid licence. Court judgement was identified as JR 740/18 released 15 January 2021. The DAFM confirmed the in-combination screening was referred to erroneously in the DAFM statement to the FAC, the DAFM had in fact completed an in-combination assessment as part of the AA screening and had not relied upon the Applicant's pre-screening report as set out therein. Regards licence condition (i) requiring 20% of the aquatic buffer zone is to be pit planted with broadleaves, the Appellant stated the licence schedule has no listing for replanting with broadleaves and only lists for replanting with 100% LPS.

In addressing the grounds of appeal, the FAC considered the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU Directive sets out a list of projects in Annex I 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 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). The FAC considers the licence issued is for the felling and reforestation of 2.38 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.

Regards the grounds of appeal relating to the AA screening and Article 6(3) of the Habitats Directive, the FAC considered the AA screening. While the FAC considered that the procedures adopted therein were consistent with the requirements of Article 6(3) of the Habitats Directive, the screening out of Garryskill Bog SAC was due to the separation distance between the project and Natura site and the subsequent lack of a pathway to the QI based on the criteria outlined in the Habitat Table, and for Garryskill Bog SPA was due to the separation distance between the Natura 2000 site and the project. The QI of Garryskill Bog SPA is the Greenland White-fronted Goose, and the QIs of the Garryskill Bog SAC are the active raised bogs, degraded raised bogs still capable of natural regeneration and



depressions on peat substrates of the Rhynchosporion, and each of these are water-dependent habitats. At the hearing the DAFM explained that the reference to lack of pathway was not that there was not a connection to the Riffey stream but that the nature of the onsite habitats was such that there was no pathway from the proposal to them. The FAC is satisfied with the conclusion of the AA screening that there is no likelihood of a significant effect on the Natura 2000 sites from the proposal on its own. The DAFM in-combination assessment completed 28 April 2020, prior to the decision at appeal, sets out a number of other plans and projects, amongst which there are a number of forestry related projects. The reasoning includes that individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in the AA screening conclusions for individual Natura sites table. Consequently, the DAFM deems that there is no potential for the project to contribute to any effects, when considered in-combination with other plans and projects. The FAC concludes that there was no significant or serious error or series of errors in the AA screening in this instance.

Regards the written grounds concerning the WFD and the submission at the hearing concerning a recent court judgement, the EPA website evidences the status is 'unassigned' for the Riffey\_10 River Waterbody. The FAC noted that in respect of the proposal at appeal in addition to the standard licence conditions, condition (i) was attached to the licence for reason of protecting water quality. Having regard to the licence conditions, the specific mitigation measures for water protection and the nature and scale of the proposed development, the FAC has concluded that there would be no likelihood of any impact on the waterbody. In coming to this conclusion, the FAC also considered the Hyland judgment, noting that the circumstances to which the judgment referred, where there was a direct and accepted impact on an unassigned waterbody, and where mitigation measures were proposed in respect of these accepted impacts, were entirely different to the circumstances applying regards the proposal that is the subject of this appeal where no such impacts would occur.

The FAC also noted that all works included in a Harvest Plan required by condition (h) and carried out must comply with the terms of the licence.

The current inventory includes 5% Birch and the replanting comprises 100% LPS, the licensee must also have regard to licence condition (i) planting broadleaves on 20% of the aquatic buffer zone.

In regard to a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season, referring to Article 5 of the Birds Directive, the FAC observe that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the information before it, the FAC concluded that additional conditions of the nature described 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.

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

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Pat Coman, on behalf of the FAC