



30 December 2020

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Subject: Appeal 341/2020 regarding licence DL09-FL0055

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. 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

Licence DL09-FL0055 for felling and replanting of 6.31ha at Mongorry, Co. Donegal was issued by the Department of Agriculture Food and the Marine (DAFM) on 19 June 2020.

Hearing

An oral hearing of appeal 341/2020 was conducted by the FAC on 15 December 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC: Mr Michael Ryan
Appellant: [REDACTED]
Applicant representatives: [REDACTED]
DAFM representatives: Mr Anthony Dunbar and Ms Eilish Kehoe

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 DL09-FL0055).

The proposed development is for the clear felling and restocking of a stated area of 6.31ha of Conifer High Forest at Mongorry, Co. Donegal. The site is in 3 plots either side of a public road. Restocking would comprise 100% Sitka Spruce (5.99ha) and 0.32ha of open space is provided for. A document titled 'Harvest

Plan' and an Appropriate Assessment Pre-screening Report are submitted. Soils are stated to be 100% Podzols (peaty), Lithosols, Peats. The slope is stated to be predominantly moderate. The site is in the Swilly-Coastal catchment and the Leslie Hill Stream_020 (100%) waterbody. The River Sub-basin Leslie Hill Stream has approximately 8% forest cover.

The DAFM undertook a Stage 1 Appropriate Assessment screening, identifying 6 Natura 2000 sites (5 SACs and 1 SPA) within a 15km radius - Lough Swilly SAC, Lough Swilly SPA, River Finn SAC, River Foyle & Tributaries SAC, Leannan River SAC and Ballyarr Wood SAC. Qualifying interests were listed together with conservation objectives and the likely significant impacts assessed for each of the listed sites. DAFM confirmed that an in-combination assessment was undertaken on 11 June 2020. This referred to an extensive list of planning permissions, and other forestry projects – 1 afforestation, 3 forestry roads and 2 private felling licences. Following the screening assessment, all of the listed sites were ruled out for Stage 2 Appropriate assessment.

The applicants submitted an unsolicited revised Appropriate Assessment Pre-screening Report dated 10 June 2020, a day before the in-combination assessment undertaken by the DAFM. The revised report screened 6 Natura 2000 sites and ruled all out for Stage 2 Appropriate Assessment for reasons relating to the absence of hydrological connection and separation distance. In respect of the Lough Swilly SAC, the Report found that there is a hydrological connection at 9.25kms, and in respect of Ballyarr Wood SAC there is a separation distance of greater than 100m but with no hydrological connection. In terms of likely significant in-combination effects, the Report refers to 7 harvesting applications (364.5ha) and 3 road applications (471.44m). At the Oral hearing, the DAFM stated that its in-combination assessment had relied on the information submitted by the applicant.

The DAFM referred the application to Donegal County Council and Inland fisheries Ireland (IFI). In response, the IFI stated that the applicant should adhere to Forestry & Water Quality Guidelines, Forest Harvesting and the Environment Guidelines, Code of Best Forest Practice – Ireland, and relevant COFORD Guidelines. The DAFM confirmed that there was no response from the County Council.

The licence issued on 19 June 2020 for clear-felling and reforestation of 6.31ha and is exercisable until 31 December 2022. It is subject to standard conditions with additional conditions relating to treatment of the aquatic buffer zone, restriction on conifers within 20m of the public road with broadleaves to be planted in a strip 10-20m from the public road, and adherence to specified documents.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. Selection criteria set out in Annex III to the Directive were not taken into account. There is a breach of Article 4(4) of the EIA Directive as the details of the whole project have not been submitted. On the same date as this licence application, there was a further licence application for clear felling in the same Forest Management Unit for an area of 8.01ha. Project splitting is not permitted. This licence and associated operations threaten the achievement of the objectives of the underlying waterbody. Clear felling has the capacity to impact on water quality. The Stage 1 Appropriate Assessment conclusion screening is legally flawed and should

be referred back to the competent authority. 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. The licence should have a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. There should be a condition that plans and works must be inspected by the DAFM prior to, during and post works to ensure compliance. The licence should include stringent and enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM state that this is not a project class covered by the EIA Directive. The DAFM applies a wide range of checks and balances in its assessment of an application in respect of the protection of water. Measures include setbacks adjoining aquatic zones, silt-trapping, damming of forest drains, creation of buffers. The DAFM determined that, based on objective information, the project either individually, or in combination with other plans or projects will not adversely affect the integrity of any European site. The DAFM considered the expert opinion and rationale submitted by the applicants, and the characteristics of the project site. It is a principle of law that unless the grant of a first statutory consent expressly exempts the holder of any obligation to obtain a second consent or adhere to any restrictions where set out by statute elsewhere, those obligations or restrictions apply. The Minister may, at any time, attach or vary conditions on a licence. There is no legal requirement to inform adjacent landowners of the intention to spray.

At the Oral Hearing the DAFM confirmed that its Appropriate Assessment screening had relied on information submitted by the applicants with the application. The screening, including the in-combination assessment had been completed and taken into account in the making of the decision to grant the licence. The applicants stated that the reason for their revised Appropriate Assessment Pre-screening Report was to give the DAFM as much information as possible before the decision was made. Both parties accepted that there was a significant difference in the information used for the in-combination assessments contained in the applicants' revised Pre-screening Report and the DAFM in-combination report dated 11 June 2020. Under questioning, the applicants stated that one of the harvesting applications referred to in their report relates to thinning over a large area. The appellant queried why the application lands were in the form of 3 blocks. He had not been provided with a copy of the revised Pre-application Screening Report dated 10 June 2020. This report recognised that there is a hydrological connection to Lough Swilly SAC and this should trigger a Stage 2 Appropriate Assessment. There was potential for chemical contamination, silt and sediment, and any of the aquatic interests for the Lough Swilly SAC could potentially be detrimentally impacted. The project lands are in the only sub-basin that drains into Lough Swilly.

In addressing the grounds of appeal, the FAC considered the appellant's 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 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 that the proposed felling is for the purposes of producing timber for commercial purposes and that there is no convincing evidence that the purpose of the proposed felling is a change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

Based on the information before it, and having regard to 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. The appellant contends that 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 that a condition should be attached to the licence in this respect. The FAC notes that no specific information has been provided by the appellant regarding the existence of wild birds on the project lands, while contending that coniferous forests would generally support some bird species and that there is a shortcoming in the law. In these circumstances, the FAC concluded that it is not necessary to require a specific condition on the licence providing for the protection of wild birds. The FAC further considers that the conditions attached to the licence provide satisfactory control in regard to the protection of water and the environment in general.

The FAC addressed the requirements of Article 6(3) of the Habitats Directive. It noted that the DAFM had carried out a Stage 1 screening, listing the Natura 2000 sites within a 15km radius and their qualifying interests and conservation objectives, and assessing the listed sites for likely significant effects arising from the proposed development. In respect of one of the sites – Lough Swilly SAC, the DAFM ruled the site out for Stage 2 Appropriate Assessment "having considered the expert opinion and rationale presented" by the applicants regarding hydrological distance (9.25kms), project area (6.31ha), soil type and depth, site slope and project separation distance. The FAC considered the qualifying interests for the Lough Swilly SAC – estuaries (marine), Atlantic salt meadows (coastal), Old Sessile Oak Woods, Spartina swards (coastal), coastal lagoons (marine) and the Otter, and noted that the applicants revised Pre-screening Report was prepared with ecological, hydrological and silvicultural input. The FAC concluded that it was reasonable for the DAFM to have particular regard to this scientific opinion in reaching its conclusion of no likely significant effect arising from the proposed development individually. In addressing in-combination effects, the DAFM listed the following forestry related projects – 1 afforestation, 3 forestry roads and 2 private felling licences. However, based on information submitted by the applicants in the revised Appropriate Assessment Pre-screening Report, the number of forestry related projects which should be considered is significantly greater.

Based on the information before it, the FAC considers that there is a serious error in the Appropriate Assessment screening carried out by the DAFM before the making of its decision to grant the licence and that the decision should be set aside and remitted to the DAFM to carry out an Appropriate Assessment screening, specifically with reference to in-combination effects with other plans or projects before making a new decision.

Yours sincerely,

A large black rectangular redaction box covering the signature of Pat Coman.

Pat Coman, on behalf of the Forestry Appeals Committee