



29 January 2021

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FAC ref: 596/2020

Subject: Appeal in relation to felling licence WD05-FL0186

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence WD05-FL0186.

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 WD05-FL0186 was granted by the Department of Agriculture, Food and Marine (DAFM) on 30 April 2020.

Hearing

An oral hearing of appeal 596/20 was conducted by the FAC on 14 January 2021.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Anthony Dunbar & 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 allow the appeal and set aside the decision to grant this licence (Reference WW05-FL0186).

The proposal is for the felling and replanting of a stated site area of 15.22ha at Curraun, Cutteen South, Co. Waterford. The existing plantation dates to 1979/1980 and consists of Japanese Larch, Lodgepole Pine and Sitka Spruce. Proposed restocking is for 100% Sitka Spruce (14.46ha) with 0.76ha of Open Space provided for. Following field inspection, the applicants determined that stated

underlying soils are 99% mineral/rocky and 1% scree, with no peaty soil evident. The slope is predominantly 15-30 degrees.

The project lands are located in the Brickey-Colligan-Dalligan-Mahon-Tay-Coastal Catchment (100%), the Tay_SC_010 (100%) Sub-catchment, the Tay_010 (6%) and Tay_020 (94%) waterbodies.

The DAFM carried out a screening for Appropriate Assessment (AA) for sites within a 15km radius. The following sites were screened out for Stage 2 assessment - Glendine Wood SAC, Dungarvan Harbour SPA, Mid-Waterford Coast SPA, Nier Valley Woodlands SAC, Blackwater River (Cork/Waterford) SAC, Lower River Suir SAC, Helvick Head to Ballyquinn SPA, and Helvick Head SAC. The reasons for screening out relate to absence of direct upstream hydrological connection, lack of pathway, separation distances, and location in a separate water body catchment. The Comeragh Mountains SAC was screened in for Appropriate Assessment due to the location of the project lands within the Natura 2000 site.

The DAFM produced an Appropriate Assessment Report (AAR) and Appropriate Assessment Determination AAD (AAD). Both were stated to have been completed on 6 July 2020, ecologically reviewed on 8 July 2020 and taken into consideration before the decision made to grant the licence. The AAR upholds the screening conclusions and includes a Stage 2 Appropriate Assessment in respect of the Comeragh Mountains SAC. The Natura 2000 site's qualifying interests are listed along with the conservation objectives and an examination is made of the potential for adverse impacts. In-combination effects considered for non-forestry projects include dwellings, milking parlour, agricultural sheds, sporting development and service building. Forestry related projects include Afforestation (2) (none since 2016), Forest Roads (2), Private felling (6) and Coillte felling (4).

The AAR determines that no mitigation is required as there is no pathway of impact for the qualifying interests. Notwithstanding, site specific mitigation is proposed as follows:

Adhere to all water protection measures relating to exclusion zones, silt and sediment control, cultivation, fertilisation, herbicide application, the location of outside storage depots and the disposal of waste, set out in Section 13 of the Standards for Felling and Reforestation. Proposed works shall adhere to the Interim Standards for Felling and Reforestation (Oct 2019) and Environmental requirements for Afforestation, December 2016 (DAFM 2016).

The Determination is that, based on best scientific knowledge in the field, the activity proposed, individually or in combination with other plans or projects will not adversely affect the integrity of any European site, in particular Comeragh Mountains SAC, having regard to their conservation objectives, and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with specific mitigations attached as conditions to the licence. No reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

The basis for the Determination is that the project is located adjacent to a European site but at a lower elevation and is sheltered with a larger belt of forest that transitions to lower elevation farmland, with no pathways of impact to the qualifying interests.

The DAFM referred the application to Waterford County Council and Inland Fisheries Ireland (IFI). No response is recorded from the County Council. The IFI responded that the site is in the upper reaches



of the Tay River, an important salmon spawning/nursery system. There are steep, peat/peaty soils susceptible to erosion. There are drains flowing through the site. A detailed overview of the drainage should be required to be undertaken showing how heavy machinery can be moved on the site without resulting in soil erosion and nutrient loss. It is imperative that cumulative impacts of clear-felling operations do not result in any discharges/damage to downstream waters or contribute to any loss of biological water quality in these waters. There is no obvious forest road and there are concerns that the transport of quantities of timber will result in significant soil erosion on the site. This site is extremely sensitive and the water downstream, and forestry operations should be limited to the summer months and the appellant should show how the trees can be extracted from steep and waterlogged portions of the site without causing soil erosion.

The licence issued on 10.07.20 and exercisable until 31.12.2022. It is subject to standard conditions plus:

- Series of conditions for reason of the protection of water quality and soil stability
- Harvest Plan should contain a drainage overview and detail of how heavy machinery can operate without causing significant soil erosion
- Forestry operations to be limited to the summer months and the applicant to show how trees can be extracted from the steep and waterlogged portions of the site without causing soil erosion

There are two appeals against the decision to grant the licence. The first appeal contends that the Appropriate Assessment screening does not comply with the decision of Finlay J in Kelly. Under the basic principles of EU Law, the decision is invalid as the Minister is being judge in his/her own case. There has been no investigation as to whether the application site has complied with the requirements of EU Law. The Minister has assumed control of the FAC. The second appeal contends that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA. There is a breach of Article 4(4) of the EIA Directive, as details on the aspects of the environment likely to be significantly affected have not been described. On the same date as the application for this licence was submitted a further application was submitted for clearfelling licences for the same Forestry Management Unit (FMU) totalling 18.81ha. 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 2 AA determinations are not legally valid. An Assessment cannot contain lacunae and must have complete, precise and definitive findings. The DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive on the AA Determination. The Forest Service failed to supply, on request, in an appropriate timeframe, relevant records that informed its decision. The Harvest Plan is not consistent with the requirements of the Interim Standard 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. Licence conditions do not provide a system of strict protection for Annex IV species. The licence should contain a standard condition to notify the Minister at both commencement and conclusion of operations. There should be a condition requiring that plans and works must be inspected by the Forestry Service prior, during and post works to ensure compliance. The licence

should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM state that standard operational activities of clear-felling and replanting an already established forest are not categorised for the purposes of the EIA Directive or national transposing legislation. The DAFM applies a wide range of checks and balances in relation to the protection of water. Adherence is required to a wide range of operational measures to prevent direct and indirect impact on water quality arising. In relation to reforestation, standards require water setbacks adjoining aquatic zones, together with silt trapping and slow water damming of forest drains during felling. The proposed project was subject to the DAFM Appropriate Assessment screening procedure. Subject to site-specific mitigation measures were recommended, and the proposed development will not result in any adverse effects on any European sites. In-combination effects were considered. The DAFM procedure fully concords with the requirements of Article 6(3) of the Habitats Directive for public participation. The appellant exercised his right to appeal. The DAFM deemed the application and associated information to meet requirements. 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 other restrictions on the timing of activities where such is set out by statute elsewhere, those other obligations and restrictions apply. Site-specific mitigations were attached to the licence. The Minister may attach or vary conditions of a licence at any time. The use of Plant Protection Products (PPPs) in Ireland is covered by Statutory Instruments. Users must apply the principles of Good Plant.

An Oral Hearing was held on 14 January 2020, and all parties were invited to participate. The FAC sat in person and remotely and the DAFM and applicants attended and participated remotely. The appellants did not attend or participate. The DAFM outlined the procedures adopted leading up to its decision to grant the licence. In response to FAC questions, the DAFM stated that the concerns of the IFI had been addressed by way of conditions attached to the licence. The AAR and AAD had been considered before the decision was made. Mitigation measures have been attached to the licence by way of conditions. The applicant stated that a field inspection revealed that the site is underlain by 99% mineral/rocky soil and a small amount of scree and not, as the IFI had stated, peaty soils. There is no risk of landslide. In a couple of 'soft spots' on the site, trees would be removed by harvester arm. There is an access road through the site. The FAC noted that the applicants Pre-screening Report had referred to surface water gleys, and the FAC queried why this information was not checked before the application for the licence is made. The applicant stated that there are blanket peats to the north and south of the site, and that a site to the west had been the subject of a thinning licence (private) for 24.33ha. In light of the concerns raised by the IFI referral submission, the FAC queried the adequacy and method of enforcement of Condition (i) of the licence requiring a Harvest Plan to contain a drainage overview and detail of how heavy machinery can move through the site without causing significant soil erosion. The applicants stated that this condition would be complied with in a revised Harvest Plan designed to control operations on the site.

The FAC initially addressed the issue of the underlying soil type on the site. There is a direct conflict between the information submitted by the IFI and the applicants. The IFI field inspected the site prior to making a submission to the DAFM whereas the applicants carried out a field inspection following the grant of the licence. The IFI observe that the site is steep with peat/peaty soils that are susceptible to erosion. The applicants Pre-screening Report submitted with the application refers to



surface water gleys, but evidence provided at the Oral Hearing (and following a field inspection post licence) indicates that the site is covered by 99% mineral/rocky soils and 1% scree. The DAFM, in its Appropriate Assessment screening and AAR refers to "(99%) & Podzols (Peaty), Lithosols, Peats (1%)". The DAFM did not indicate that it had carried out a field inspection prior to the granting of the licence. The FAC notes the contents of the submission of the IFI referring to the extreme sensitivity of the site and the waters downstream and detailing requirements, including a detailed overview of drainage on the site, and concerns regarding transportation of timber on the site and cumulative impacts of clearfelling operations. In the particular circumstances outlined, the FAC considers that the conflicting evidence regarding underlying soils, and the concerns of the IFI should have been resolved by the DAFM prior to the granting of the licence, and that the absence of resolution was a serious error in the decision-making process. The FAC further considered that the conditions (i) and (j) attached (no reasons stated) to the licence do not adequately address the issues raised by the IFI submission due to lack of precision and pathway for compliance and that this is a serious error.

The FAC considered the matters raised in the written grounds of appeal, concluding that the issues relating to the underlying soil type should have been resolved before the screening undertaken for Appropriate Assessment, the AAR and AAD and that this constituted a serious error. The FAC concluded that the decision is not in breach of the EIA Directive as the proposed felling is for the purposes of producing timber for commercial purposes and this is not a class of development covered by the EIA Directive. Furthermore, the proposed development does not include any works, which of themselves, would constitute a class of development covered by the Directive.

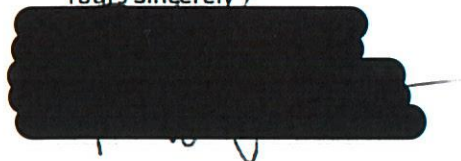
It is contended that the proposed development threatens the achievement of the objectives of the underlying waterbody. The project lands are located in the Brickey-Colligan-Dalligan-Mahon-Tay-Coastal Catchment (100%), the Tay_SC_010 (100%) and the Tay_010 (6%) and Tay_020 (94%) waterbodies. No specific evidence is submitted by the appellant in support of his contention. In these circumstances the FAC considered that there is no convincing evidence before it to indicate that the proposed development would have any impact on the underlying waterbody.

The grounds of appeal contend that the licence does not provide a system for the protection of Annex IV species, or of wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. The FAC noted that the appellant did not submit any specific details in relation to Annex IV species or bird nesting or rearing on this site. In these circumstances, the FAC concluded that there is no convincing evidence to support the contention that specific conditions should be attached to the licence.

Compliance with the licence conditions and enforcement, where appropriate, are matters for the DAFM and the FAC considers that there is no convincing reason to require additional conditions attaching to the licence in this respect. The FAC observed that the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU 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).

In deciding to allow the appeal and set aside the decision to grant the licence, the FAC concluded that there were serious errors in the making of the decision to grant the licence as detailed in this decision letter.

Yours Sincerely /

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Pat Coman, on behalf of the FAC