



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

29 January 2021

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FAC ref: 568/2020 & 616/2020

Subject: Appeal in relation to felling licence LS01-FL0090

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 LS01-FL0090.

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 LS01-FL0090 was granted by the Department of Agriculture, Food and Marine (DAFM) on 15 July 2020.

Hearing

An oral hearing of appeals 568/2020 and 616/2020 was conducted by the FAC on 07 January 2021.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Appellants*:	[REDACTED]
Applicant representative:	[REDACTED]
DAFM representatives:	Mr Anthony Dunbar & 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 LS01-FL0090).

The proposal is for the clear-felling and replanting of 11.71 ha at Sheskin, Co Offaly. Current inventory per application is mostly Sitka Spruce with 9.13 ha planted in 1987 with 2% Sally, 2.15 ha in 1988, 0.32 ha in 1992 and 0.07ha in 2004 with 15% of Japanese Larch. Replanting is with 100% Sitka Spruce.

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Application included a harvest plan document and a pre-screening report. Application sought 0.59 ha of open space. The Underlying soil type is approximately Blanket Peats (22%), Peaty Gleys (72%) & Podzols (Peaty), Lithosols, Peats (6%) The slope is given as predominantly moderate 0-15%. The project is stated as located in the Lower Shannon (100%) catchment, the Silver[Kilcormac]_Sc_010 (100%) Sub-Catchment, the Silver (Kilcormac)_020 (100%) Waterbody. Proposal is crossed by a tributary to the County River.

The application was the subject of desk assessment by the DAFM and the application was referred to Offaly County Council, who responded that the proposal was within the Slieve Bloom Mountains SPA, is within an area of High Amenity and is classified as a High Sensitivity Landscape Area. Also, the western section is within a 'protected view'. The County Council sought to ensure every effort is made to protect water quality, and sought that the development is carried out in accordance with listed guidelines.

In processing the application the DAFM identified Natura sites within a 15 km radius of the proposal and completed a Stage 1 screening for an Appropriate Assessment (AA) screening out the following sites; Slieve Bloom Mountains SAC, Clonaslee Eskers And Derry Bog SAC, River Barrow and River Nore SAC, Charleville Wood SAC, Island Fen SAC and the River Shannon Callows SAC. The DAFM included an in-combination screening dated 29 April 2020. The DAFM screened in the Slieve Bloom Mountains SPA due to the location of the proposal within the European Site, and completed a Stage 2 AA, comprising an AA Report and an AA Determination, reviewed by an external ecologist, which specified required mitigations be attached to the licence.

Licence issued 15 July 2020 for felling and replanting of 11.71 ha, valid to 31 December 2022, and is subject to what are relatively standard conditions (a) to (g) and additional conditions (h) to (q), 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;

- 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 5 applications were submitted for clear-felling licences for the same FMU totalling 36.5ha.
- A licence has already been awarded for part of this site (LS01-FL0093) with a more diverse stocking specification. It is unclear which licence would apply.
- This licence and associated operations threaten the achievement of the objectives of the underlying water-body. Clear felling has the capacity to impact on water quality.
- The Stage 2 AA Determination is not legally valid
- DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive on the AA Determination
- 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 Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation
- The licence should contain a standard condition to notify the Minister at both commencement and conclusion of operations
- The licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned – regards spraying with chemicals.
- 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 Minister has assumed control of the FAC
- The basic requirements of the NPWS have not been complied with

Grounds regards the FAC are not valid appeal grounds against the decision to issue the licence LS01-FL0090 and are not deliberated upon in this decision.

In response to the grounds of appeal the DAFM stated with regard to 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 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 and thus Article 4(3) of the Directive is not applicable. DAFM also ruled out any breach of Article 4(4). The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. As indicated in the felling licence issued for LS01-FL0090, where an unexpired felling licence exists for any part of lands delineated in this Tree Felling Licence it is the newly issued tree felling Licence that will take precedence over the same areas delineated in the earlier licence. Regarding consultations, referrals to statutory consultees, including Inland Fisheries Ireland, NPWS and local authorities, are automatically triggered according to interactions with certain spatial rules. The 11.71 ha felling and reforestation project licenced as LS01 FL0090 has been subject to the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019), as such, the clear-fell and reforestation project was screened in (for the Slieve Bloom Mountains SPA 004160) and an Appropriate Assessment carried out. The DAFM identified the possibility of the project having a significant effect on the SPA on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described. 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. 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 LS01 FL0090. 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. 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 AA Report and AA Determination Statement for LS01-FL0090. Where the Minister for Agriculture, Food and the Marine receives an application he or she is required amongst other 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. Finally, the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively 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 PPPs shall apply the principles of Good Plant Protection Practice (GPPP), 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 07 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 response received and the reasons for the additional licence conditions. The Appellant sought that their 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 0.59 ha of open space. The Applicants stated the proposal comprises peaty gleys / blanket peats, has a gentle slope and is bounded by existing forestry and a small amount of agricultural land. The nearest Hen Harrier 'red zone' is c. 800m away. The proposal has no direct hydrological connection to a Natura Site, the closest watercourse is the County River, across a forestry road from the proposal, it flows to the Silver River, in turn to the Brosna River and on to the River Shannon Callows SAC and the Middle Shannon Callows SPA at c. 45.5km. Landscape plans are linked with work plans and with established forests in the surrounds this proposal would fit into the landscape. There is no change of land use. The Appellant stated the ecological review was days after the completion of the AA Report and AA Determination. Previous evidence from the DAFM was that the ecologist would not have access to the Hen Harrier 'red zone' data where assigned that status in March and May 2020, and the 'green zone' protocol does not exclude disturbance. This proposal should have been referred to the NPWS due to being within the SPA. The requisite degree of certainty cannot be established. There is dry heath mapped at 220m south of the proposal, there can be colonisation and deterioration of foraging for the Hen Harrier. There is also mountain Blanket Bog and Heath at the south east within 1km, there should be a condition to fell encroaching trees. Restocking has not been addressed in respect of the Natura site and needs to be addressed as Part of the AA, instead there seems to be only a National policy to restock.

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 11.71 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 Article 6(3) of the Habitats Directive, the FAC considered the AA screening, the AA Report and AA Determination 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 reasoned and sound. The proposal was not required to progress to a Stage 3 AA as the effects from the proposal were resolved by mitigation. The FAC noted that the recommended conditions, as contained in the AAD, had been incorporated into the licence granted as conditions. 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 the Natura 2000 site, having regard to the conservation objectives and would not affect the preservation of the site at favourable conservation status. The FAC is satisfied the fire-line is considered in the AA Report; this fire line measures c. 920m in length and is 5091m from the proposal. The licence conditions (h), (i) and (q)(3) applied regards the Hen Harrier have been reviewed by an external ecologist and there is no convincing evidence before the FAC that the good conservation status of the Hen Harrier will be disaffected by the proposal with the mitigations afforded in the licence conditions. While there was no referral of the proposal to the NPWS, datasets outlined at the hearing against which the proposal is assessed includes a layer provided by the NPWS regards the Hen Harrier 'green zones' and 'red zones'. The FAC concludes that there was no significant or serious error or series of errors in the AA screening in this instance.

In the matter of water quality, the licence includes a number of standard and additional conditions for reason of protecting water quality during harvesting and restocking. In addition there are no watercourses evidenced on site, and there is no specific evidence to indicate that the proposed development as licensed would have a negative impact on 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.

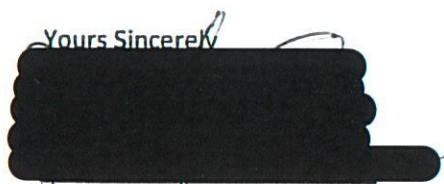
The FAC considered the grounds that the licence should contain a condition regards the commencement and the conclusion of works. The FAC noted that the licence as issued is valid until 31 December 2022, and works may only proceed as permitted by the licence and the conditions therein.

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, and to Annex IV species, 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

A large black rectangular redaction box covers the signature of Pat Coman. The box is positioned below the 'Yours Sincerely' text and above the printed name.

Pat Coman, on behalf of the FAC