



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

27th July 2020

Subject: Appeal FAC378/2019 regarding licence LS03-FL0018

Dear [REDACTED]

I refer to the 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 LS03-FL0018 for felling and replanting of 12.89 ha at Ballymaddock, Carrigeen Co. Kilkenny was issued by the Department of Agriculture, Food and the Marine (DAFM) on 15th November 2019.

Hearing

A hearing of appeal FAC378/2019 was held by the FAC on 23rd July 2020.

FAC Members: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Jim Gallagher, Mr. Vincent Upton

Decision

Having regard to the evidence before it, including the licence application, Departmental file, the notice of appeal and a consultant's report, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to confirm the decision of the Minister regarding licence LS03-FL0018.

The licence pertains to 12.89ha of felling of a forest currently composed of Lodgepole pine, Grand fir, Monterey pine, and some beech and reforestation with Douglas fir, beech, Scots pine. The underlying soil type is suggested to be Renzinas, Lithosols on a steep slope (15-30%). The project is within the waterbodies Dunrally Stream 010 (93%) and Stradbally (Laois) 040 (7%). The forest is surrounded by agricultural land and there are no marked streams in the vicinity. It lies about 4.5 kilometres east of Portlaoise, 5 kilometres north of Stradbally and a short distance south of the Heath Golf Course and the M7 motorway. The proposal was referred to Kilkenny County Council but no response was provided.

There is one appeal against the decision. The grounds suggest that on the basis of information submitted it is not possible to grant a Licence which would be in compliance with the EIA and Habitats Directives having regard to specific judgements of the CJEU. Furthermore, the grounds suggest that the test for Appropriate Assessment Screening in Irish Law is set out by Geoghegan J. in *Kelly v ABP* and goes on to quote from that judgement. The grounds also suggest that if mud was to enter the lakes it could have an effect on the SAC/SPA and that the fact that the distance is over 15 km has no relevance to the fact that there still may be an effect. The specific lakes are not identified in the grounds of appeal.

In a statement to the FAC, the DAFM stated that they are satisfied that the decision met their criteria and guidelines and that they confirm the licence. They suggest that all Natura sites within 15km have been screened out due to a lack of connectivity to any of the Natura sites. They also state that they deem that the project cannot have an impact individually or in combination with other plans or projects in the area. Finally, they suggest that there are no lakes near or adjacent to this felling licence application area, that the nearest lake (not hydrologically connected) is 1 km to the north of the proposal.

In considering the appeal and before making a decision, the FAC commissioned a report from an independent consultant that included an examination in relation to the requirements of the Habitats and EIA Directives and a copy is contained on the public file.

There are four European sites within 15km of the proposal, which are Mountmellick SAC (9km from the proposal), River Barrow and River Nore SAC (5km from the proposal), Ballyprior Grassland SAC (8km from the proposal) and Slieve Bloom Mountains SPA (15km from the proposal) which are considered in the report. It is noted that there is no hydrological connection between the proposal and any European site, that the qualifying interests have not been recorded on the site and it would not be considered as suitable habitat, and that the proposal is not situated within close proximity to any European site. There are a number of forestry licences and other permissions granted in the area but these would not work in combination with the proposal to result in a significant effect on any European site. There are no measures included on the licence that are designed to mitigate effects on European sites and none were taken into account in the screening. The FAC are satisfied that the screening included in the report was conducted appropriately and adopts the screening. The FAC concluded that the proposed felling and replanting, itself or in combination with any other plans or projects, is not likely to result in any significant effects on any European sites.

As outlined in the report, the EU Directive sets out, in Annex 1 a list of projects for which EIA is mandatory. Annex 11 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 1. Annex 11 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 11). 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 report considers that the felling of trees 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 is similarly not covered by the Irish regulations (S.I. 191 of 2017). The report goes on to consider the likelihood of effects on the environment and concludes that that the proposed development would not be likely to give rise to significant effects on the environment of itself or cumulatively with other permitted projects. The FAC noted that the proposal would occur within a commercially managed forest and in a rural and agricultural landscape and considered the information before it including that in the report. The FAC is satisfied that the considerations outlined in the report are correct and adopts those considerations. The FAC concluded that the proposal does not fall within the classes of development included in the EU EIA Directive and is not likely to result in significant effects on the environment.

No specific lakes were identified in the grounds of appeal but given the lack of hydrological connection, the nature and scale of the proposal and the conditions attached to the licence the FAC concluded that the proposal does not pose a significant threat to any lakes or water quality generally.

In deciding to confirm the decision of the Minister to grant the Licence, the FAC concluded that the proposed development would be consistent with Government policy and Good Forestry Practice. Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Pat Coman', is written over a horizontal line.

Pat Coman on behalf of the Forestry Appeals Committee

FAC Case Ref:378/2019

DAFM Case Ref. LS03-FL0018

Details of application:

The application is for the clear-felling of trees and re-planting of an area of 12.89 hectares in the townland of Killenny in Co. Laois. The application indicates that the existing trees are a variety of species including fir, larch, beech and pine species. The restocking is indicated to be with 50% Douglas Fir (DF) 35% Beech (BE) and 15% Scots Pine (SP) trees.

The applicant [REDACTED] Copies of [REDACTED] Harvesting and Establishment Environmental Rules and of its Harvesting Site Safety Rules were submitted with the application. The application also includes [REDACTED] screening of the application for Appropriate Assessment. The conclusion of the screening was that a second stage Appropriate Assessment is not required.

The submission from [REDACTED] indicated that it had licences for 8.23 Hectares of clear-felling and the construction of 254.1 metres of forest road within 1.5 kilometres of the lands. The screening submission indicated planning permission for a number of houses and alterations to older permissions within a 1.5 metre radius. The submission also indicated that planning permission has been granted for one agricultural development and for an access from a forest road to the public road. 13 planning permissions are listed in the submission. The submission referenced 17 planning permissions in total.

Location and details of project lands:

The lands are located in a rural area of County Laois about 4,5 kilometres east of Portlaoise, 5 kilometres north of Stradbally and a short distance south of the Heath Golf Course and the M7 motorway. The lands are located in a rural area where the main land use is agriculture although there are some forested lands in general area. There are also several houses located alongside the public roads in the area, including alongside the local road to the east of the hill on which the lands are located.

The lands occupy the summit of a hill which extends above the 500-foot contour above Ordnance Datum. The hill is one of 3 such hills in the immediate area with those to the southwest and to the east being slightly higher. (The hill to the southwest rises to over 600 feet and that to the east to over 700 feet). There is a local road close by, to the east of the project lands, and the trees on the hilltop are clearly visible from that road. The OS maps indicate a laneway on the west side of the hill also but this does not appear to be a public road. The OS maps indicate that there was a rifle range on the southwest side of the hill at some time in the past.

The lands in the vicinity of the project lands are, well drained, agricultural lands with no evidence of any drains or streams in the immediate area. The nearest stream to the project lands is located about 990 metres away to the north. It appears from the

contours and spot levels that the bulk of the lands drain towards the north. The stream to the north flows north-eastwards and then eastwards to the Barrow. It joins the River Barrow about halfway between Monasterevin and Athy. A smaller part of the lands may drain towards the south and towards Stradbally. There is no river or stream in this direction until near Stradbally which is about 5 kilometres away.

Decision of DAFM:

The Department determined that a licence should be granted. The licence was subject to 9 conditions. The conditions are numbered (a) to (i). Condition (i) or 9 is a requirement that all veteran and broadleaf trees are to be retained. The conditions are of a standard variety requiring compliance with standard requirements of the Forest Service for such works. None of the conditions are specifically designed to mitigate or reduce impact at any Natura 2000 site.

Grounds of appeal:

It is submitted that, based on the information submitted, it is not possible to make a decision which would be in compliance with the requirements of the Habitats and EIA Directives.

The appellant refers to a High Court decision given by Ms Finlay Geoghegan on 25 July 2014. He submits that the test for Appropriate Assessment in Irish law is set out in this judgement. The judgement quotes from a European Union Advocate General's Opinion which states that for Appropriate Assessment to be a mandatory requirement there is no need to *establish* that there would be a significant effect on a Natura 2000 site. It is merely necessary to determine that there *may* be such an effect. A further quotation, from the EU Advocate General's Opinion referred to in the judgement, states "It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3)".

The appellant submits that if mud was to enter the lake it could have an effect on the SAC/SPA. He submits that the fact that the distance is over 15 kilometres has no relevance to the fact that there may still be an effect. (The appellant does not state which lake or Natura site he is referring to).

DAFM response to appeal:

It is submitted that Appropriate Assessment screening was carried out by DAFM for European sites within 15 km from the clear-fell and reforestation project submitted for licencing. Felling licence application information submitted by [REDACTED] in the form of maps, harvesting and establishment operational procedures was considered. Having reviewed the details of relevant European sites, their qualifying interests and conservation objectives, 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. As such, the clear-fell and reforestation project was screened out and an Appropriate Assessment deemed not required in relation to the European sites considered during the screening exercise.

It is submitted that for the purposes of 42(16) of S.I.477 / 2011, DAFM has determined that the project will not adversely affect the integrity of any European sites. A felling licence was issued for the clear-fell and reforestation project having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence. There are no stream/ivers at or adjacent to the felling site. The nearest EPA waterbody or river segment (not hydrologically connected) is c. 1 km to the north of the harvest block.

The Department carried out a revised screening and submitted this with the response to the grounds of appeal. This screening is based on the 2020 version of its screening procedure but it is not dated. The Department also submitted a revised list of planning permissions considered and it also submitted details of various provisions in the County Laois development plan which it considers relevant to considering in-combination effects. The list of planning permissions considered totals over 80 cases. The submission also contains a list of various licenced forestry developments in the general area.

Screening for Appropriate Assessment:

There are 4 Natura 2000 sites located, at least in part, within 15 kilometres of the project lands. The sites in question are

Slieve Bloom Mountains SPA located, at the closest point, about 14.9 kilometres from the project lands.

Mountmellick SAC located, at the closest point, about 9.06 kilometres from the project lands.

Ballyprior Grassland SAC located, at the closest point, about 8.07 kilometres to the south of the project lands.

River Barrow and River Nore SAC located, at the closest point, about 5.1 kilometres from the project lands. (the closest point to the SAC is at Stradbally to the south).

The Slieve Bloom Mountains SPA has as its special interest the Hen Harrier. A mature forest such as exists in the project lands is not a suitable breeding or foraging habitat for the Hen Harrier. A pre-thicket forest area is however a habitat used for breeding by Hen Harriers. After replanting the lands will become more suitable, as a breeding habitat for Hen Harriers, at least for some years. At a distance of almost 15 kilometres from the SAC the project lands are also outside the foraging distances for Hen Harriers breeding in the SAC. Having regard to the unsuitability of a mature forest as a habitat for Hen Harriers and to the distance from the SPA to the project lands the development is not likely to have any significant effect on the Slieve Bloom SPA.

Mountmellick SAC is a site comprising of a disused stretch of the Grand Canal between Dangan's Bridge and Skeagh Bridge, approximately 3 km east of Mountmellick in Co. Laois. The qualifying interest for the SAC is Desmoulin's Whorl Snail (*Vertigo moulinsiana*). The SAC is over 9 kilometres from the project lands and it is located further upstream in the Barrow catchment than the project lands. There is no hydrological connectivity from the project lands to the SAC. In the absence of

any pathway to give rise to any effect and having regard to the separation distance the proposed tree felling and replanting is not likely to have any significant effect on Mountmellick SAC.

The Ballyprior Grassland SAC is located to the south of Stradbally and on the opposite side of the Stradbally River from the project lands. The lands are also over 8 kilometres from the SAC. There is no hydrological connection from the lands to the SAC. The SAC has as its qualifying interest "Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometalia*) (* important orchid sites) [6210]". Having regard to the distance and the lack of any hydrological connection the proposed tree felling and re-planting is not likely to have any significant effect on this SAC.

The River Barrow and River Nore SAC has as its qualifying interests

Estuaries [1130]

Mudflats and sandflats not covered by seawater at low tide [1140]

Reefs [1170]

Salicornia and other annuals colonising mud and sand [1310]

Atlantic salt meadows (*Glauco-Puccinellietalia maritima*) [1330]

Mediterranean salt meadows (*Juncetalia maritimi*) [1410]

Water courses of plain to montane levels with the *Ranunculus fluitantis* and *Callitriche-Batrachion* vegetation [3260]

European dry heaths [4030]

Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels [6430]

Petrifying springs with tufa formation (*Cratoneurion*) [7220]

Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles [91A0]

Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*) [91E0]

Vertigo moulinsiana (Desmoulin's Whorl Snail) [1016]

Margaritifera margaritifera (Freshwater Pearl Mussel) [1029]

Austropotamobius pallipes (White-clawed Crayfish) [1092]

Petromyzon marinus (Sea Lamprey) [1095]

Lampetra planeri (Brook Lamprey) [1096]

Lampetra fluviatilis (River Lamprey) [1099]

Alosa fallax fallax (Twait Shad) [1103]

Salmo salar (Salmon) [1106]

Lutra lutra (Otter) [1355]

Trichomanes speciosum (Killarney Fern) [1421]

Margaritifera durrovensis (Nore Pearl Mussel) [1990]

The project lands are over 5 kilometres from the nearest point of the designated SAC. The nearest point of the SAC is to the south in Stradbally. There is however no stream or river flowing in this direction from the project lands. The bulk of the lands also appear to drain towards the north and the stream serving the lands to the north drains generally eastwards and the distance to the SAC along the stream (which itself is about 990 metres from the project lands) is about 11.4 kilometres. Having regard to the drainage pattern and the distance to the SAC I consider that the proposed tree felling and re-planting is not likely to have any significant effect on the SAC.

It will be noted that one of the qualifying interests of the River Barrow and River Nore SAC is the Freshwater Pearl Mussel. This species is extremely vulnerable to water pollution in the form of suspended solids or nutrient enrichment. The detailed information on the conservation objectives for this species in the SAC indicates that the status of the Freshwater Pearl Mussel (*Margaritifera margaritifera*) is currently under review and there is no conservation objective set out for this species. The Nore freshwater Pearl Mussel (*Margaritifera durrovensis*), however, still remains a qualifying species and there are conservation objectives for this species. The Nore Freshwater Pearl Mussel is however found only in an upstream section of the Nore and the project in question here would have no impact on this section of the SAC or on the conservation objectives for this species.

The appellant refers to the possibility of mud entering some lake. I am not aware of any lake in the vicinity and the appellant has not indicated which lake he is referring to or which Natura site might be affected. The O.S. maps and Google aerial photography indicate a small pond in the lands to the east of where the tree-felling is proposed. This is very small in extent and does not appear to have any drain or stream entering or exiting it. This small feature could not reasonably be described as a lake.

I noted in checking the history of planning permissions, in recent years, that there have been several applications and planning permissions in the general area. I note that the Department lists over 80 planning permissions in its response to the grounds of appeal. Most of these, however are a considerable distance from the lands. I noted only 6 permissions in the immediate area. These include permission for the retention of a, thirty metres high, telecommunications mast within the project lands. (Permission granted by the planning authority on 10 March 2015 and appeal relating to a section 48 contribution condition determined on 29 July 2015) Planning permission has been granted for 2 new houses alongside the road to the east. (Permissions dated 5/11/2015 and 5/12/2018. The house permitted on 5/11/2015 has been constructed). Planning permission was also granted for a house in the lands to the south of the project lands on 5/3/2012. This house has been constructed. 2 further permissions, relatively close to the project lands, are permission for modifications to a house on the opposite side of the road to the east a short distance to the northeast and permission for a house on a nearby local road to the northwest granted on 25/9/ 2018. Having regard to the location and nature of these permissions I do not consider that the tree felling proposed would have any in-combination or cumulative effects with the developments permitted. I also consider that the development would not have any significant effect on Natura 2000 sites in-combination with developments envisaged by the County Laois development plan.

This plan contains provisions to prevent developments which would adversely impact on Natura 2000 sites

I do not have details indicating the locations of other forestry related developments but as I consider that the development of itself would have no effect on any of the Natura sites, I do not envisage any significant in-combination effects. (I note that the Department states in the screening form, that there are licences for clear-felling of 8.23 hectares and 254.1 metres of forest road within 1.5 kilometres. The revised screening however gives further details of other licenced or proposed forestry projects. I note that one of these projects refers to clear-felling of 152.1 This seems to be a recent application (TFL00491520). I have no information of the location of this clear-felling but there is no mature forest of this size in close proximity to the project lands). Planning reference 18214, which relates to an access to a public road from a forest road, relates to an application to serve a forest plantation some distance away to the north and it has no relevance to the current licence application.

In the above assessment I have not considered the normal good felling practices referred to in the documentation and in the licence in forming my conclusions. I consider, however, that compliance with the various guidelines etc referred to would re-enforce my conclusions. I also consider that the practices referred to are designed to protect the local environment, as they are general standards for all felling, and are not designed to prevent any significant effect on the Natura 2000 sites.

The proposal is clearly not necessary to or connected with the management of any Natura 2000 site. I conclude that the proposed felling and replanting, of itself or in-combination with any other plans or projects, is not likely to have any significant effect on any Natura 2000 site. In these circumstances the carrying out of an Appropriate Assessment as referred to in Article 6(3) of the EU Habitats Directive is not required.

Screening for Environmental Impact Assessment (EIA):

In my screening for EIA I have regard to the requirements contained in the EU Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU), in Irish regulations transposing the Directive into Irish law and to the Guidance for Consent Authorities regarding Sub-threshold Development published by the Department of the Environment in August 2003. I have had regard to the characteristics of the project, the location of the project (including the environmental sensitivity of the area) and the types and characteristics of potential impacts of the development as referred to in Annex 11 of the Directive. I have also taken account of my conclusions, set out above, in relation to the likely impact of the development on any Natura 2000 site.

The EU Directive sets out, in Annex 1 a list of projects for which EIA is mandatory. Annex 11 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 1. Annex 11 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 11). 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. It appears to me that felling of trees 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 is similarly not covered by the Irish regulations (S.I. 191 of 2017). I will, however, consider the likely effects of the proposal on the environment.

The site is located in an area where the predominant land use locally is agriculture with some pockets of forestry. Forestry by its nature involves afforestation, thinning, clear-felling and re-planting. Such activities are normal and not out of character visually or otherwise in an area such as that in question. The area is not designated as being of exceptional or special visual amenity value in the current Co. Laois development plan. The trees to be felled are located on top of a hill and so they are prominent in views from local roads and particularly the local road to the east. There are other hills to the east and to the west and so the trees in the project lands are not prominent in the wider landscape. I consider that they are not of such exceptional visual significance or value as to be considered essential or vital components of the landscape. I consider that the felling and replanting proposed would not have a significant impact on the wider landscape.

The felling will give rise to the transport of timber on the local roads. This will cause some inconvenience in the short term but this is an inevitable consequence of the afforestation and would not of itself result in such likely significant effects on the environment as to require compliance with the full Environmental Impact Assessment process. I also consider that the tree felling and re-planting proposed, in compliance with the standard conditions referred to, would not be likely to give rise to significant effects on the environment due to any localised water or air pollution.

There are no National Monuments located within the project lands. The nearest such monument, a moated site, is located about 150 metres to the south in a forested area. The next nearest monument is an enclosure near the top of the hill to the southwest. This site is about 600 metres from the project lands. There are 2 monuments, the sites of a church and graveyard, to the northwest about 700 metres from the project lands. The proposed tree felling and re-planting would have no effect on the monuments in question.

I consider that the felling proposed does not come within the classes of project covered by the EU EIA Directive. I also consider that the proposed development would not be likely to give rise to significant effects on the environment of itself or cumulatively with other permitted projects. I consider that the possibility of significant effects on the environment can be ruled out on the basis of this preliminary screening.

Overall conclusion:

I conclude that the proposed project would not be likely to have significant effects on the environment and the carrying out of EIA is not required. I also conclude that the project individually, or in combination with other plans or projects, is not likely to have any significant effect on any Natura 2000 site, having regard to the reasons for designating the sites and their conservation objectives.

Padraic Thornton

8 July 2020