



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

12 November 2020

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

Our ref: 108/2020

Subject: Appeal in relation to felling licence CK12 FL0176

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence CK12 FL0176.

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 CK12 FL0176 was granted by the Department on 27 February 2020.

Hearing

An oral hearing of appeal 108/2020 was conducted by the FAC on 20 October 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Vincent Upton, Ms Bernadette Murphy & Mr Pat Coman
Secretary to the FAC:	Ms Ruth Kinehan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett & 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, including the response to a request for further information by the FAC, before deciding to set aside and remit the decision to grant this licence (Reference CK12 FL0176).

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Forestry Appeals Committee

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The proposal is for the clear-felling and replanting of 9.56 ha at Coolacullig, Co. Cork. Trees to be felled are listed as Norway Spruce 100% in plots 1 (2.17 ha) and 6 (0.92 ha), Norway Spruce 79% and Alder 21% in plot 3 (5.52 ha), and Norway Spruce 91% and Alder 9% in plot 5 (0.95 ha), no other plots arise. Restocking of 9.56 ha is with 100% Sitka Spruce per the licence. The Underlying soil type is given as approximately Acid Brown Earths, Brown Podzolics (100%), slope is predominantly moderate 0-15%, and the project lands are in the Dripsey_020 (9%) & Lee (Cork)_080 (91%) sub-catchments.

A Harvest Plan was submitted with the application for this licence along with an Appropriate Assessment Pre-screening report that identified the Geragh SAC (000108) and the Mullahanish to Musheramore Mountains SPA (004162) within a 15km radius of the project lands, and listed a significant number of planning permissions along with a statement there was also 7.35 ha of licensed clear-fell blocks. The pre-screening report stated the harvest block is not located within a water basin that has hydrological connectivity to an aquatic SAC, and concluded that alone, the project does not represent a source, or if so, no pathway for significant effect on any European site exists. Thus, there is no potential for it to contribute to any such effects when considered in-combination with any other plans/projects.

The DAFM referred the application to Cork County Council, to which no response is evidenced.

The DAFM carried out a Screening for Appropriate Assessment dated 26 February 2020. This listed 3 Natura 2000 sites; the Geragh SAC, the Geragh SPA and the Mullahanish to Musheramore Mountains SPA. This concluded that there is no possibility of significant effects on the Geragh SAC due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. It concluded that there is no possibility of a significant effect on the Geragh SPA and the Mullahanish to Musheramore Mountains SPA due to the separation distance between the Natura site and the project. In regards to in-combination the report concluded as follows for each site; *"Furthermore, as set out in the in-combination assessment attached to this AA screening, as there is no possibility of the project itself (i.e. individually) having a significant effect on this Natura site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects"*.

The licence issued on 27 February 2020 and is exercisable until 31 December 2022 and contains what are standard conditions (a) to (h) and condition (i) requiring the retention of all broadleaves, where safe to do so.

There is a single appeal against the decision to grant the licence. The grounds contend that the decision does not comply with 4(3), 4(4) or 4(5) of the Environmental Impact Assessment Directive 2014/52/EU, the application should be referred back to an EIA screening stage, and all projects, including this one, within the applicant's Forest Management Unit must be considered to form a part of the whole project. The appellant set out that 9 other applications were submitted with the one for this proposal and total 98.27 ha. The appellant stated that the licence conditions should require a prior ecological survey by a competent party and implementation of any mitigating actions required to ensure compliance with the European nature directives. Also, the appellant stated they had requested records in connection with the application.



In response, the DAFM stated the statutory obligation regards EIA is fully discharged once it has been clearly identified at the outset that application in question does not involve an activity or project that falls within the specified categories of forestry activities or projects set out 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. The standard operational activity of clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the DAFM in the case of applications for these particular activities. Also, in regard to Article 4(3) of the EIA Directive, this Article requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so 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 DAFM in this case and thus Article 4(3) of the Directive is not applicable. Likewise regards Article 4(4) of the EIA Directive requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation are required to be subject to a determination as whether a sub-threshold EIA needs to be carried out or not, the applicant is required to provide information on the characteristics of the project and its likely significant effects on the environment. A detailed list of information to be provided is specified in Annex IIA of the Directive (as transposed by Schedule 1 of the Forestry Regulations 2017) and includes, amongst other things, a description of the physical characteristics of the whole project. However, because the standard operational activities of clear-felling and replanting an already established forest area are not so 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 in this case and thus Article 4(4) of the Directive is not applicable. DAFM added that the FMU planning process and any resultant BAU strategic plan is an entirely separate and diversely focussed process undertaken by the applicant with regards its business and standards and do not involve the DAFM. Also, as the standard operational activities clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(5) of the Directive is not applicable. Finally, the DAFM stated the felling and reforestation has been subject to the DAFM's AA Screening procedure, and an AA Screening report was completed by the Inspector and contains his recommendations regarding screened European Sites. A number of the SCIs/QIs were truncated on the AA Screening form for the project when outputting the form related to the screening exercise. A revised AA screening form was provided which includes all SCIs/QIs of the screened European Sites. DAFM also stated that 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 based on this information which is DAFM state is consistent with the licensee's in-combination statement.

The FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant responded that his appeal should be considered on its own merits and that the applicability of EU Law and National Law are matters for the FAC and "cannot be circumvented by any process of interrogation of me", but did not state the class of development included in the EIA Directive to which felling and reforestation belong.

At the oral hearing the appellant argued that the approvals process was not conducted in accordance with the law, no screening was carried out to determine the requirement for EIA, a Forestry Management Unit defines the project area and should be considered in terms of assessment under the EIA Directive, the application details do not include details of other projects proposed in the same vicinity, there is no legal protection for nesting birds in respect of the proposed activity under National law and site should be assessed by an ornithologist as these type of woodlands generally contain 9 to 12 breeding pairs per ha, as well the red squirrel use these habitats. Also, it is questionable why the DAFM rely on Coillte's in-combination assessment as it is inadequate, and the Harvest Plan should have been subject to scrutiny before the award of the licence. The appellant submitted that screening as done for all TFL applications does not imply an EIA is required. That in this case there is a group water scheme just below the project site and should have been considered for reasons of water quality and referred to the Planning Authority / Irish Water in regard to the zone of contribution and source protection areas. The appellant questioned if the County Council were getting the whole of the project in referrals, there were 98.72 ha submitted in the same day in this instance. Also, emissions are not quantified in any way and should be, for the likes of works and transport. Open spaces should be mapped out and placed on the file for public access. Also, the harvest plan required by the conditions is not subject to DAFM assessment or approval, and is not available to the public for consideration, and should be.

The DAFM contended that a Harvest Plan was submitted with the application and that DAFM had sufficient information to assess the application and to issue the licence. The DAFM stated that there was no deforestation on the licence and that open areas within a forest after felling and replanting would not be considered as deforestation, for example setbacks are considered part of the forest area. DAFM stated that water extraction points when they arise are referred to Irish Water and none arose in this instance. Also, the licence covers broadleaves and allows felling as following the removal of surrounding tree canopy such trees may not support themselves.

The Applicants' described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan. They submitted that an operational Harvest Plan is prepared before felling commences to inform their staff and contractors. They described the site as a flat site adjacent to a public road, the nearest Natura site is c. 12 km distance, and the site has no aquatic zone, so is not a source and has no potential or pathway for significant effect. They contended that any open space retained (0.48 ha) after replanting was for productivity or environmental reasons and would not constitute deforestation. They suggested that the proposal would not be covered by the EU EIA directive. The applicants stated it not their practice to remove



broadleaves and only do so where safety issues arise, that the alder in this site was planted as an intimate mix.

In addressing the grounds of appeal, the FAC considered, in the first instance, the 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 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 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). At the Oral Hearing, the appellant argued that, based on the application submitted, the reforestation would leave portion of the site as open space and, as such, would constitute a change of land use. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation of 9.56 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.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to the felling licence. The applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species, and stating at the oral hearing that these grounds related to a shortcoming in law. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

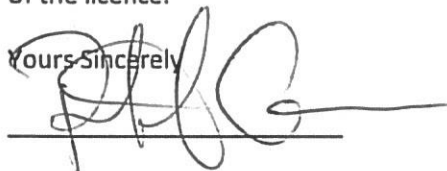
The FAC noted that even though a harvest plan was submitted with the application, the harvest plan set out for in the licence conditions is essentially an operator's manual for the carrying out of the development permitted by the licence. Condition (h) of the licence requires a harvest plan to be completed prior to the commencement of felling. The FAC noted that all works included in a harvest plan must comply with the terms of the licence.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination

with other plans projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to 3 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone would not be likely to give rise to significant effects, were correct. The FAC noted that the qualifying interests listed in this assessment were truncated on the DAFM documentation, but considered that this was not a serious or significant error as there was no possibility of any significant effects on the designated sites for the reasons given in the DAFM assessment. However, in respect of its assessment of in combination effects, the DAFM in the first instance concluded that because the project itself has no likelihood of significant effects on any of the European Sites it could not in combination with other plans and projects give rise to any likelihood of significant effects on a European site. Also, the DAFM statement sets out that DAFM relied exclusively on the applicant's in-combination statement before making its decision. The DAFM subsequently submitted to the FAC an in-combination document undertaken post licence decision on 10 March 2020 with listings of other plans and projects (which were significantly different from the details submitted by the applicant), including EPA licensed projects, afforestation and private felling projects, as well as additional felling projects concerning the applicant. The in-combination statement conclusion included that individually, the project does not represent a source, or if so, no pathway for an adverse effect on any European site exists. Consequently, the DAFM deems that there is no potential for the project to contribute to any such effects, when considered in-combination with other plans and projects. Having regard to the number and nature of forestry projects listed, and the fact the DAFM relied exclusively on the applicant's in-combination statement the FAC is satisfied that the failure of the DAFM to carry out its own satisfactory in-combination assessment prior to the granting of the licence constituted a serious error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of the DAFM should be set aside and remitted to the Minister to carry out an assessment of the proposed development on Natura 2000 sites specifically in combination with other plans and projects, before making a new decision in respect of the licence.

Yours Sincerely

A handwritten signature in black ink, appearing to be 'Pat Coman', written over a horizontal line.

Pat Coman, on behalf of the FAC