



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

12 November 2020

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[REDACTED]

Our ref: 343/2020

Subject: Appeal in relation to felling licence CK11 FL0089

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 FL0089.

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 CK11 FL0089 was granted by the DAFM on 19 June 2020.

Hearing

An oral hearing of appeal 343/2020 was conducted by the FAC on 10 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, 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, before deciding to affirm the decision to grant this licence (Reference CK11-FL0089).

The proposal is for the clear-fell and restocking on a stated site area of 9.20ha at Glendav, Labbadermody, Co. Cork. The proposed felling in the application is 100% Sitka Spruce and proposed

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restocking would be 100% Sitka Spruce (8.72ha) and 0.46ha. open space. A Harvest Plan and Appropriate Assessment Pre-screening Report are submitted with the application.

DAFM referred the application to Cork County Council and, in response, the Council advises the applicant to have regard to Planning requirements set out in the Planning and Development Act 2000, as amended and the Planning and Development Regulations 2001, as amended. The site is within the Mullaghanish to Musheramore SPA.

The DAFM carried out a Stage 1 screening for Appropriate Assessment, identifying 8 Natura 2000 sites (5 SACs and 3 SPAs) within 15km of the project lands. The Mullaghanish Bog SAC, St Gobnet's Wood SAC, Killarney National Park SAC, Blackwater River SAC and The Gearagh SAC are all ruled out for Appropriate Assessment for reasons of no upstream connection and lack of pathway, with the last two listed SACs being in a different water body catchment to the project lands. The Gearagh SPA and Cork Harbour SPA are ruled out on the basis of separation distances. The screening determination concludes that there is the possibility that the project will have a significant effect on the Mullaghanish to Musheramore Mountains SPA as the project lands lie within the Natura 2000 site. The qualifying interest for this designated site is the Hen Harrier.

The DAFM subsequently produced an Appropriate Assessment Report, leading to an Appropriate Assessment Determination, both dated 9th June 2020 prior to the making of the decision to grant the licence. The report, which was the subject of ecological review, listed the Natura 2000 sites within 15km radius but added sites beyond 15km based on the identification of pathways for significant effect. It identifies the Mullaghanish to Musheramore Mountains SPA as being subject to possible effect due to the location of the project within the Natura site. It is concluded that there is no possibility of significant effects alone or in-combination with other plans and projects on the following SACs – Mullaghanish Bog, St Gobnet's Wood, Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment, Blackwater River (Cork/Waterford), and The Geragh. It is concluded that the project would not adversely affect the integrity of these listed sites. The report also concludes that there is no possibility of significant effects arising for The Geragh and Cork Harbour SPAs or that the project would adversely affect the integrity of these sites. Assessing the Mullaghanish to Musheramore Mountains SPA, the report identifies the qualifying interest as the Hen Harrier and the conservation objective 'to maintain or restore the favourable conservation condition of the bird species listed' for this SPA. The report identifies potential impacts and notes that the project lands lie wholly within a Green Area relating to the Hen Harrier and that potential disturbance can take place during the Hen Harrier breeding season (1st to 15th August inclusive). Site-specific measures designed to mitigate impacts on the Natura 2000 site are to be inserted as conditions of the licence. If notification is given by the NPWS of a new Hen Harrier nesting site within a distance of 1.2km of the proposed felling, the terms of the licence will be amended with immediate effect to exclude potential disturbance operations from taking place during the Hen Harrier breeding season. Subject to the conditions recommended, the report concludes that the proposed project, individually, will not have an adverse effect on the Natura 2000 site. In terms of in-combination effects, the report notes that the project lands lie within the River Sub Basin Foherish _010, and that this has approximately 64% forest cover compared with the national average of 11%. It is concluded that, with the mitigation measures recommended, there is no potential for the proposed works to contribute to any cumulative effects on this Natura 2000 site and will not give rise to any adverse effect on the integrity of any European site.



The DAFM made an Appropriate Assessment Determination on 9th June 2020. This confirmed the findings of the above mentioned report, concluding that, subject to the carrying out of specific mitigation measures, the proposed development individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular the Mullaghanish to Musheramore Mountains SPA, having regard to their conservation objectives, and will not affect the preservation of the sites at favourable conservation status. Both the Report and the Determination were subject to independent ecological review.

The licence issued on 19th June 2020 for the clear-felling and replanting on a site of 9.20ha. and is exercisable until 31st December 2022. It is subject to standard conditions plus additional conditions relating to requirements in relation to the hen Harrier, protection of water quality and adherence to specified standards and guidelines.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive. On the same date as this application was made a further application was submitted for a 17.02ha site in the same Forestry Management The proposed is part of a much larger scheduled programme of works over a 5-year period. Project splitting is not permitted. There is a requirement to consider the whole project. The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan. The Stage 2 AA Determination is not legally valid. It must not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all scientific doubt. The general public were not given the opportunity to give opinions on the AA Determination under Article 6(3) of the Habitats Directive. 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 include enforceable conditions regarding notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM contends that clear-felling and replanting are not included as a class of development covered by the EIA Directive. Licence are issued conditional on adherence to Interim Standards for Felling and Reforestation (DAFM 2019). The DAFM is fully informed of its responsibilities regarding the achievement of the objectives of the Water Framework Directive. The DAFM carried out Stage 1 screening and Stage 2 Appropriate Assessment which recommended conditions regarding the protection of the Hen Harrier. Subject to adherence to the requirement set out in licence conditions, the DAFM concluded that the proposed development alone, or in-combination would not adversely affect the integrity of the Mullaghanish to Musheramore Mountains SPA. Notification of applications and details for public participation are published on the Department's website. Regarding the consideration, if appropriate, of the opinion of the general public in the making of a determination under Article 6(3) of the Habitats Directive, the Department's procedures fully concord with requirements. It is a legal principle that if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions apply.

There is no legal requirement for forest owners to inform adjacent landowners of their intention to spray.

At the Oral Hearing, the DAFM detailed the background to the processing of the application and the decision to grant the licence. It confirmed that an Appropriate Assessment Determination had been made prior to the decision to grant the licence. There had been no specific communication with the NPWS in this case. The condition attached to the licence requiring protection of the Hen Harrier had been agreed with an eminent and qualified ornithologist. The appellant queried if the current proposal overlaps with another current proposal under Reference CK11-FL0091 (the applicants agreed to check this to see if CK11-FL0091 should be withdrawn at this stage). 5% open space is applied on, but the licence does not make provision for open space. The appellant stated that referral should have been made to the EPA seeking its views on possible implications for the Water Framework Directive. A condition should be attached giving protection to wild birds during the nesting and rearing seasons. There was no public consultation in the DAFM Stage 2 assessment exercise, and such consultations would have been appropriate in this case. There were lacunae in this assessment as it relied on a Hen Harrier protocol that had not been updated, and no assessment had been made of the restocking of the site. The appellant accepted that there is no legal requirement for notification in respect of the spraying of chemicals but argued that such notifications should be given in accordance with good practice. The appellant queried the age of the subject forest and stated that if it had been planted prior to 1989 it should have been subject to EIA screening. The applicants stated that it is practice to inform local authorities on an annual basis of proposed spraying within their areas.

Addressing the grounds of appeal, the FAC noted that the DAFM had carried out a Stage 1 screening and Stage 2 assessment in accordance with the provisions of the Habitats Directive leading to the making an Appropriate Assessment Determination before the decision to grant the licence was made. The assessment and the Determination had both been subject to independent ecological review and the recommendation of the Determination in respect of a condition to be attached to the licence relating to the protection of the Hen Harrier was incorporated into the DAFM decision. Based on the information before it, the FAC is satisfied that the procedures adopted by the DAFM in reaching its Appropriate Assessment Determination are correct and in accordance with the provisions of the Habitats Directive. The FAC concludes that, subject to the implementation of the specific mitigation recommended in the Determination, the proposed development individually, or in combination with other plans or projects will not have an adverse effect on the integrity of any European site, having regard to their conservation objectives.

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 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 (5%) 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 9.20ha and does not consent to any change of land use. The FAC further 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. Small unplanted areas within the site would be ancillary to the forestry land use on the site. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

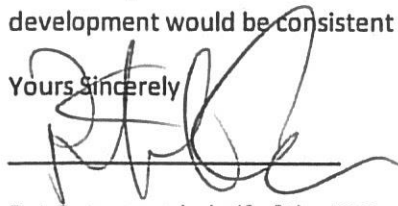
In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to 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 appellant argued that the licence and associated operations could threaten the achievement of the objectives of the underlying water body and questioned why no referral had been made to the EPA. No specific evidence was submitted relating to this contention. The FAC noted that, in addition to standard conditions attaching to the licence for reason of protecting the environment during harvesting and restocking, a specific condition (i) is inserted for reason to protect water quality and the environment. The FAC noted that mandatory referral is not a requirement in this case. Based on the information before it, the FAC concludes that there is no reason to conclude that the licensed development would give rise to adverse impacts on water quality.

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.

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

Pat Coman, on behalf of the FAC