An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

**19 November 2020**

[redacted]

**Our ref:** 105/2020

**Subject:** Appeal in relation to felling licence KK02 FL0169

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 KK02 FL0169.

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 KK02 FL0169 was granted by the DAFM on 18 February 2020.

**Hearing**
An oral hearing of appeal 105/2020 was conducted by the FAC on 17 November 2020.
Attendees:

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| FAC: | Mr Des Johnson (Chairperson), Mr Luke Sweetman, & Mr Pat Coman |
| Secretary to the FAC: | Mr Michael Ryan (sec) |
| Appellant: | [redacted] |
| Applicant representatives: | [redacted] |
| DAFM representatives: | Mr Frank Barrett & Ms Jade McManus |

**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 the decision to grant this licence (Reference KK02 FL0169) and remit for a new decision.

Per the licence the project site comprises 2.41 ha for clear-felling of 100% Sitka Spruce and replanting with 100% Sitka Spruce at Boleybawn / Crutt, Co Kilkenny, the application sought 0.12 ha of open

space. The application made on 02 December 2019 had been subject to a desk assessment by the DAFM and licence issued 18 February 2020 for felling and replanting of 2.41 ha, and what are relatively standard conditions (a)to (h) were attached to the licence.

The Underlying soil type is approximately Lithosols, Regosols (100%), slope is predominantly moderate 0-15%, and the project is stated to be located in the Owveg (Nore)_040 River Waterbody, is in the Nore_060_Sub-Catchment, and is within the Nore Freshwater Pearl Mussell Catchment. There was a referral to Kilkenny County Council and no reply was received.

Application included a harvest plan document and a pre-screening report with 5 SACs and 1 SPA and an in-combination assessment of other licensed clear-fell projects within 1.5 km of 20.13 ha and 244.56m of licensed forest roads.

On 17 February 2020 the DAFM completed an Appropriate Assessment Screening and examined for European NATURA sites within 15km of the proposal, these were 2162 River Barrow and River Nore SAC, 4233 River Nore SPA, 869 Lisbigney Bog SAC and 2256 Ballyprior Grassland SAC. The DAFM conclusion was to screen out the proposal for Appropriate Assessment. With regards possible in-combination effects the DAFM relied exclusively on the applicant's in-combination statement. On 21 February 2020, post licence issue date, the DAFM completed its own in-combination assessment and included significantly more plans and projects than the applicant's pre-screening which was relied upon in the decision to grant the licence. For the extensive list of forestry projects provided, no details concerning the location / degree of proximity, area covered, or forest road length were included.

There is a single appeal and the grounds submitted included that a further five felling licences were submitted on the same date within the same FMU of the applicant totalling 55.47 ha, and at appeal date none of the other licence applications had been decided upon. The grounds are summarised as follows;

1. Breach of Article 4 (3) of the EIA Directive 2014/52/EU – a number of the criteria set out at Annex III of the EIA Directive have not been taken into account by the DAFM in screening the application.
2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU – the application does not represent the whole of the project and is therefore in breach of the EIA Directive.
3. Breach of Article 4 (5) of the EIA Directive 2014/52/EU – the decision is invalid as all projects within the applicant's FMU must be considered as part of the determination as to whether an EIA is required for the whole project.
4. The AA screening determination is suspect, the proposal is within a FWPM Catchment, the FWPM is a qualifying interest of the SAC (River Barrow and River Nore SAC), and in the absence of certainty the precautionary principle should apply as the lack of a direct mapped hydrological connection does not exclude the possibility of a relevant watercourse providing a hydrological connection to the mapped aquatic zones and refers to Circular 12/2017.

The DAFM response to the appeal is summarised as follows;

1. Article 4(3) of the EIA Directive 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, a screening assessment for sub-threshold EIA did not need to be carried out by the DAFM in this case.
2. With regards to Article 4(4) of the EIA Directive, the standard operational activities of clear-felling and replanting of an already established forest area are not categorised in Annex II of the Directive or in the national transposing legislation, and a screening assessment for sub-threshold EIA did not need to be carried out by the DAFM. Also, the FMU and the BAU of the applicant is not an obligatory statutory process and do not arise from the provisions of forest management plans set out at Section 10 of the Forestry Act 2014. Also, they do not constitute a plan or programme subject to the requirements of the SEA Directive as transposed by the 2004 Regulations. The plans do not involve DAFM participation or approval, are subject to change and in DAFM's opinion do not provide the level of detail required regards assessing any likely significant effects on the environment or otherwise.
3. With regard to Article 4(5) of the EIA Directive a screening assessment for sub-threshold EIA did not need to be carried out by the DAFM in this case and thus Article 4(5) is not applicable.
4. The site was desk inspected only and the nearest EPA marked stream is c. 440m to the southwest of the proposal, no streams or waterbodies are visible from maps (ortho and 6" OS). An AAS was undertaken, some of the qualifying interests were truncated on the report but all qualifying interests were considered (revised version was provided). Also, the DAFM relied exclusively on the applicant's in-combination statement and the DAFM subsequently undertook its own in-combination assessment which was consistent with the applicant's.

The FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive does felling belong to. The appellant responded 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 stated clear-felling is an act of deforestation, in that one cannot reforest what is not deforested, the application stated for 100% Sitka Spruce canopy planted in 1981 and based on the application 0.12 ha of non-reforested land will result. Also, the applicant's FMU was not considered as the whole project, a Forest Management Unit defines the project area and should be considered in terms of assessment under the EIA Directive. The appellant placed emphasis on the Appropriate Assessment Screening having regard to the distance to the river sub-basin and the proximity of the River Barrow and River Nore SAC with the Freshwater Pearl Mussel as a qualifying interest and there exists at least the mere possibility of a significant effect. Adding that surface water from the site is a concern and a site visit in June 2020 would not reflect the potential for run-off. The appellant submitted that the harvest plan did not contain what is set out in the Interim Standards for Felling and Reforestation with an absence of mapped haulage routes, environmental receptors, water hot spots, relevant watercourses, bio-diversity, utility lines or rights of way.

The DAFM contended the application was desk assessed; they 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. DAFM stated that a screening for Appropriate Assessment was undertaken and the proposal was screened out. The DAFM confirmed they relied upon the applicant's in-combination statement when screening for any likely significant effects when considered in-combination with other plans and projects.

The Applicants described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan. They described the site as a dry and flat site with no aquatic zone and with no potential or pathway for significant effect. The applicants submitted that the nearest mapped watercourse was c. 350m distance and had no connections from the proposal site. They contended that any open space retained after replanting was for productivity or environmental reasons and would not constitute deforestation and there was no change of land use in this instance. They suggested that the proposal would not be covered by the EU EIA directive.

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 he 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 conversion to another type of 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) and there is no convincing evidence before the FAC to indicate that the proposed felling and reforestation is for the purposes of a change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive set out for in the appeal.

The FAC noted a harvest plan was submitted with the application and that, where submitted, forms part of the application per the Interim Standards for Felling and Reforestation. In this instance the FAC considers the document submitted is more a generic document and does not include many of the required contents set out for in the standards. Also, the harvest plan set out for at condition (h) of the licence conditions is essentially an operator's manual for the carrying out of the development permitted by the licence. The FAC noted that all works included in a harvest plan must comply with the terms of the licence. Based on the evidence before it, the FAC is satisfied that the DAFM had sufficient information to process 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.

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 or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening for Appropriate Assessment in relation to Natura

2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site.

Regards Appropriate Assessment screening, 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 screening for likely 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 or projects, give rise to any likelihood of significant effects on a European site. This conclusion does not allow for the possibility of combined effects with other plans and projects giving rise to significant effects. 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 21 February 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. 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 a new Appropriate Assessment screening of the proposed development in combination with other plans and projects, before making a new decision in respect of the licence.

Yours Sincerely

Pat Coman, on behalf of the FAC