



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

27 November 2020

[REDACTED]
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[REDACTED]

Our ref: 102/2020

Subject: Appeal in relation to felling licence LS13 FL0057

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 LS13 FL0057.

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 LS13 FL0057 was granted by the DAFM on 11 February 2020.

Hearing

An oral hearing of appeal 102/2020 was conducted by the FAC on 15 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 LS13 FL0057).

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The proposal is for the clear-felling and replanting of 11.24 ha at Garryglass, Co Laois and was approved following desk-based assessment by the DAFM. Trees to be felled are listed as Sitka Spruce 97% and Birch 3% in plot 1 (7.64 ha) and Sitka Spruce 100% in plot 2 (3.59 ha). Replanting is with 100% Sitka Spruce. The underlying soil type is approx. Lithosols, Regosols (87%), Surface water Gleys (Shallow), Ground water Gleys, (Shallow) (10%) & Surface water Gleys, Ground water Gleys (2%) The slope is given as predominantly moderate 0-15%. The proposal is within the Stradbally (Laois)_010 (17%) & Owveg (Nore)_020 (83%) sub-catchments.

A Harvest Plan was submitted with the application for this licence along with an Appropriate Assessment Pre-screening report that identified 4 SACs and 1 SPA within a 15km radius of the proposal. The pre-screening report stated the harvest block is not located within a water basin that has hydrological connectivity to an aquatic SAC, and there is no direct connection between the harvest block and the Water Framework Directive rivers. The applicant included for 5.73 ha of licensed clear-fell in other plans and projects and submitted that alone, the project does not represent a source, or if so, no pathway for significant effect on any European site exists, 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 Laois County Council, and a reply sets out that *"on the day of inspection at the above site it was evident the site does not involve an area of more than 50 ha, there is no EIS required"*. Also, the Council reply stated the site is not within an SAC, NHA or National Park, not within an Architectural or Archaeological Site, not within a prime scenic / amenity area, and is on a local secondary road.

The DAFM carried out a Screening for Appropriate Assessment dated 11 February 2020 and listed 3 Natura 2000 sites within a 15 km radius of the proposal; the River Nore SPA, Lisbigney Bog SAC, Ballyprior Grassland SAC and the River Barrow and River Nore SAC. The screening concluded that there is no possibility of significant effects on the SACs 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 SPA due to the separation distance between the Natura site and the project. With regards to in-combination screening of other plans and projects the AAS 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 11 February 2020 and is exercisable until 31 December 2022 and contains what are standard conditions (a) to (h).

There is a single appeal against the decision to grant the licence. The grounds include that there is a breach of Article 4(3) of the EIA Directive, that criteria set out in Annex III of the Directive are missing from the Forestry Service screening assessment and have not been taken into account and the application should be referred back to screening stage. Also, there is a breach of Article 4(4) of the EIA Directive as details of the whole project have not been submitted and details of all the applicant's projects must be considered. There is a breach of Article 4(5) of the EIA Directive as the



whole project has not been considered. There is also a reduction in broadleaf cover. The appropriate assessment screening is suspect, there is a 10% to 12% gradient and the site is thus linked to an SAC where Fresh Water Pearl Mussel is a Qualifying Interest (QI). There has been a breach of Article 10(3) of the Forestry Regulations. Also, it should be a standard condition of a felling licence that if any works are carried out during the bird breeding and rearing period, there is a requirement for an ecological survey carried out by a competent person, including mitigation actions to be implemented.

In response, the DAFM stated that the standard operational activities of clear-felling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required as 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. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3), 4(4) and 4(5) had not occurred. In relation to designated sites, 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 does not involve the DAFM. The regeneration method identified by the applicant on their licence application is conifer forest for wood production. As per DAFM's Felling and Reforestation Policy document, this objective represents the standard option for reforesting with conifer species and is applied where silviculturally and environmentally appropriate. Where applicable, the reforestation plot should also include setbacks in relation to watercourses, archaeological features, and dwellings. In the case of LS13-FL0057 the application open space area amounts to 0.56 ha. DAFM deems the nominated replanting species appropriate for the licence granted. DAFM provided and referred to correspondence detailing the requests from the appellant for copies of 451 Coillte felling licence applications and related files, and supplied to the appellant as digital files.

The DAFM stated screening for appropriate assessment was carried out on the project LS13-FL0057 in line with DAFM procedure, a number of the QIs were truncated on the AA Screening form when outputting the form when in fact all QIs of the screened European Sites were considered. The 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 consistent with the licensee's in-combination statement.

On 12 May 2020 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 in a response dated 14 May 2020 did not state the class of development included in the EIA Directive to which felling and reforestation belong.

At the oral hearing the appellant signalled his appeal was based on a desk assessment, and 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 within the applicant's FMU, there is no legal protection for nesting birds in respect of the proposed activity under National law and a licence condition should be put in place to do so. Also, the Harvest Plan should have been subject to scrutiny before the award of the licence and should be available to the public. The appellant questioned if the plantation was subject to development consent in 1988, it is not an isolated project and all of the Forestry Management Unit should be considered as one project. The appellant questioned why there was no referral to the NPWS when the site is within 1.5 km of a FWPM catchment and is hydrologically connected. Also, there was no referral to the EPA and the northeast portion is in a river basin where forestry is stated to be a significant threat. The appellant contended that gradient is a pathway in this instance, as where does the water that falls on the site flow to only to the SAC and the FWPM is highly sensitive, also the extraction route crosses a mapped watercourse and has potential for effect and DAFM are not taking a sufficiently precautionary approach. The appellant stated that open spaces should be mapped out and placed on the file for public access, also the harvest plant does not require DAFM assessment or approval nor is it available to the public. Also, a forest road on the site is 13 years old and needs to be assessed as timber is being transported on this over an aquatic zone and certainty is required to ensure no nutrient enrichment occurs which is detrimental to the FWPM.

The DAFM replied 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. 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 having a 3% to 5% slope, the site has no aquatic zone, so is not a source and has no potential or pathway for significant effect, there is a gentle slope from the site across agricultural lands which provide a natural buffer between the site and the nearest aquatic zone and any sediment would be minimal to non-existent. They contended that any open space retained after replanting was for productivity or environmental reasons and would not constitute deforestation. They stated there is no EIA Directive requirement as the proposal is felling and replanting with no change of land use. The applicants stated it not their practice to remove broadleaves and only do so where safety issues arise.

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 contended 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 11.24 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.

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 noted the site is located on a northwest facing slope with gradient falling from c 250m to c 200m, the nearest mapped stream/river is c.700m to the northwest, the Clarbarracum per EPA, with agricultural land in between, the stream flows c. 2km to the River Barrow and River Nore SAC.

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 on 12 February 2020, post licence decision, 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, and 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 decision to grant 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 appropriate assessment screening of the proposed development on Natura 2000 sites 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 read 'Pat Coman', written over a horizontal line.

Pat Coman, on behalf of the FAC