



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

27 November 2020

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Our ref: 399/2020

Subject: Appeal in relation to felling licence CE03-FL0198

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 CE03-FL0198.

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 CE03-FL0198 was granted by the DAFM on 26 June 2020.

Hearing

An oral hearing of appeal 399/2020 was conducted by the FAC on 19 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Bernadette Murphy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
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 CE03-FL0198).

The proposal is for the clear-fell and restocking of a stated site area of 5.40ha at Cappaghabaunpark, Co. Clare. The existing forest was planted in 1974 in Sitka Spruce. Proposed restocking would be 100%

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Sitka Spruce (5.13ha) and open space (0.27ha). A 'Harvest Plan' and Appropriate Assessment Pre-screening Report were submitted. Underlying soils are stated to be 100% Blanket Peats and the slope is predominantly moderate. The site is within catchment 25A Lower Shannon and waterbody Graney (Shannon)_SC_020 Bow_010.

The application was referred to Clare County Council and the NPWS. Clare County Council did not respond. The NPWS state that the site lies within the Slieve Aughty Mountains SPA for Hen Harrier and Merlin. The site lies within a Higher Likelihood of Nesting Area (HLNA), previously referred to as Red Zone, for the Hen Harrier. Any proposed machinery operations could have a negative impact on nesting Hen Harriers if works carried out during the nesting season. Conditions recommended in the event of a grant of licence, include:

- All felling works within the HLNA to take place outside the Hen Harrier breeding season
- Any works planned within the HLNA (1st April – 31st August) – a Potential Breeding Habitat Assessment and possibly a Breeding Survey should be required and submitted to the NPWS before any works commence
- Contact the local Conservation Ranger at least 4 weeks prior to felling to advise of any Hen Harrier nesting in the proposed area
- No Hen Harrier nests to be disturbed or displaced by felling operations.

The DAFM carried out screening for Appropriate Assessment, identifying 9 Natura 2000 sites within 15km (7 SACs and 2 SPAs). All sites were ruled out for the likelihood of significant effects, except for the Slieve Aughty Mountains SPA. The DAFM produced an Appropriate Assessment Report (16 June 2020). This recommends conditions to mitigate potential impacts in relation to the Hen Harrier and Merlin as follows:

- No potential disturbance operations to take place during the Hen Harrier breeding season (1st April – 31st August). Potential disturbance includes – excessive noise, vibration, mechanical movement, artificial lighting etc. Operations include – felling, timber extraction and loading, aerial fertilisation, mechanical cultivation, forest road construction etc.
- No felling or other forestry operations in the period 1st March – 31st August including – within 100m of the forest edge where such edge is immediately adjacent to moors, heathland, peat bogs or natural grassland, or within 100m of a clearing in the forest > 1ha.

The report states that the reasons for the recommended conditions are that, while the habitat is not suitable for Hen Harrier foraging, nesting or roosting, it can provide potential nesting for Merlin. The conditions recommended would provide for the creation of habitat for the early stages of growth for the Hen Harrier. Following on from the Report the DAFM made an Appropriate Assessment Determination concluding that the proposed development individually, or in-combination with other plans or projects, would not have an adverse effect on the integrity of any Natura 2000 site, subject to the implementation of the conditions recommended in the Report. The DAFM indicate that both the Report and Determination were reviewed by an independent ecologist.

The licence was issued on 26 June 2020 and is exercisable until 31 December 2022. It is subject to standard conditions plus additional conditions relating to measures in respect of the Hen Harrier and the Merlin, aquatic zone setbacks, avoidance of machinery crossings and protection of water quality.



There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3) and 4(4) of the EIA Directive because of the lack of screening and as details on the aspects of the environment likely to be significantly affected have not been described and contends that this proposal does not represent the whole project. There is no evidence that the impacts on non-designated European Annex I habitat has been adequately considered. This licence and associated operations threaten the achievement of the objectives of the underlying waterbody. Clear felling has the capacity to impact on water quality. The Stage 1 screening and Stage 2 Appropriate Assessment Determination are not legally valid. 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. Licence conditions do not provide a system of strict protection for Annex IV species. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The opinion of the general public was not sought by the DAFM. The licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned.

In response, the DAFM contend that the proposed development is not of a category covered by the EIA Directive. Standard procedures were followed in processing the application. The felling licence is issued conditional on adherence to the Interim Standards for Felling & Reforestation which set out measures to prevent direct and indirect impacts on water quality. No hydrological connection or other pathway was detected during field inspection. The DAFM is fully informed of its responsibilities regarding the achievement of the objectives of the Water Framework Directive. An AA Report and AA Determination informed the DAFM decision. Mitigation measures are incorporated into the licence. Notifications of felling licence applications are published, and members of the public can make submissions or observations on the likely effects on the environment of the proposed development. The Minister may at any time attach or vary conditions of a licence. It is a legal principle of law 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 continue to apply. There is no legal requirement for forest owners to inform adjacent landowners of the intention to spray.

At the Oral Hearing, the appellant referred to the written grounds of appeal. He stated that proposed deforestation would provide for a change of land use on part of the site as open space. There are European Annex I habitats (dry heath and wet heath) in the vicinity of the project lands and that there was evidence of colonisation of these with conifers. Water quality in the area has moderate status and is under threat from forestry and this site is 100% Blanket Peat. The Appropriate Assessment carried out had not considered restocking. Condition j of the licence provides for compensatory measures and cannot be considered as mitigation. No drainage channels or haulage route were shown on application documents. The DAFM clarified condition (b) of the licence stating that urea is nitrogen based and the requirements would prevent damage to water quality. If the depth of peat on the site was found to exceed 25cms no urea would be applied. The applicants stated that the project lands are on the fringes of a larger block of forestry. They are in a Hen Harrier Red Zone. The response of the NPWS in this case had been incorporated into the licence.

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 does not consent to any change of land use. Open area left during restocking is ancillary to the forestry land use. It does not have a use as open space, does not have public access and is not to be maintained. There is no evidence before the FAC to indicate that the proposed felling 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.

The appellant stated that Annex I habitat exists 300m to the north and between 220-230m to the south of the project lands. Based on the information before it, the FAC considers that there is no convincing evidence to indicate that the proposed development would have a significant adverse impact on this habitat. The appellant claimed that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody but offered no specific evidence in this regard. While accepting that clear-felling can, in certain circumstances, have an impact on water quality, the FAC concluded that there is no convincing evidence to indicate that the proposed development, carried out in compliance with the conditions of the licence, would have a detrimental impact 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. In these circumstances, the FAC concluded that a condition of the nature requested by the appellant should not be attached to the licence.

The FAC addressed the requirements of Article 6(3) of the Habitats Directive. It noted that the DAFM had carried out a Stage 1 screening and Stage 2 assessment leading to the making an Appropriate Assessment Determination before the decision to grant the licence was made. The Stage 1 screening



concluded no likelihood of significant effects on the following Natura 2000 sites, having considered the qualifying interests and conservation objectives:

- Loughatorick South Bog SAC
- Lough Derg (Shannon) SAC
- Pollagoona Bog SAC
- Slieve Bernagh Bog SAC
- Derrycrag Wood nature Reserve SAC
- Glendree Bog SAC
- Lough Derg North-east Shore SAC
- Pollnaknockaun Wood Nature Reserve SAC

The screening assessment conclusions were based on reasons relating to the absence of direct upstream hydrological connections and lack of pathways, and separation distances.

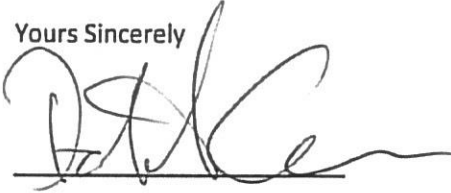
The Stage 2 Appropriate Assessment Report assessed the potential for adverse effects on the Slieve Aughty Mountains SPA. The conclusion of this report led to an Appropriate Assessment Determination that the proposed activity, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, and will not affect the preservation of such sites at favourable conservation status, if carried out in accordance with specific mitigation measures to be attached as conditions to the licence. There are 5 specific conditions recommended, with two restricting felling and other disturbance operations associated with the licence during the Hen Harrier breeding season (1 April to 15 August inclusive) and also during the period 1 March to 31 August inclusive within 100m of the forest edge, where such edge is immediately adjacent to moors, heathland, peat bogs or natural grassland, or within 100m of any clearing in the forest greater than 1 ha (it was clarified at the oral hearing that the latter requirement related to the Merlin and was recommended by an independent ornithologist). The Appropriate Assessment Report and the Determination had both been subject to independent ecological review and the recommendation of the Determination in respect of conditions to be attached to the licence relating to the protection of the Hen Harrier and Merlin were 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 assessment and Determination were carried out prior to the decision to grant the licence and informed that decision. The FAC concluded that, subject to the implementation of the specific mitigation recommended in the Determination and included in the licence, 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 noted that Article 6(3) of the Habitats Directive provides for obtaining the opinion of the general public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. While considering the views set out in the grounds of appeal, the FAC concluded that there is no convincing reason for public consultation at this stage. The FAC further concluded that, subject to adherence to the conditions set out in the licence, the proposed

development would not be likely to give rise to significant effects on any designated site or on the environment.

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