



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

27 November 2020

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

Our ref: 174/2020

Subject: Appeal in relation to felling licence WW06-FL0247

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 WW06-FL0247.

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 WW06-FL0247 was granted by the DAFM on 11 March 2020.

Hearing

An oral hearing of appeal 174/2020 was conducted by the FAC on 05 November 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 & Mr Joseph O'Donnell

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 set aside and remit the decision to grant this licence (Reference WW06-FL0247).

The proposal is for the clearfelling and restocking of a stated site area of 7.89ha at Deerpark (ED Donaghmore), Fauna, Co. Wicklow. Proposed felling is for 100% Sitka Spruce and restocking would be

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100% Sitka Spruce. A Harvest Plan is submitted with the application together with an Appropriate Assessment Pre-screening report prepared by the applicants. The project lands are within the Slaney & Wexford Harbour river catchment and the Slaney_SC_010 sub-catchment. The nearest watercourse is the Donard Upper, at a separation distance of approximately 450m.

The DAFM referred the application to Inland Fisheries Ireland. In response the IFI stated that the proposal is for felling of a large area of commercial conifers on peaty soils in the catchment of the Donard River. The River and its tributaries are an important salmon spawning/nursery habitat on the Slaney river system. The site is very steep and much of it has never been thinned. A detailed overview of the drainage of the site should be undertaken. It is important that it can be shown that the proposal would not contribute to a deterioration of downstream water quality and that heavily tunnelled watercourses noted by the IFI are treated as watercourses in the future. It is imperative that cumulative impacts of numerous clear-felling operations for the headwaters of this river catchment do not result in any discharges/damage to downstream waters or contribute to any loss of biological water quality.

The DAFM carried out a Stage 1 screening of the proposal as required by Article 6(3) of the Habitats Directive. Five Natura 2000 sites were identified (3 SACs and 2 SPAs). The DAFM concluded that there would be no likelihood of significant effects on any of the SACs (Slaney River Valley, Wicklow Mountains and Holdenstown Bog) due to the absence of an upstream hydrological connection and subsequent lack of pathway, and the likelihood of significant effects on the 2 SPAs (Poulaphouca Reservoir and Wicklow Mountains) can be discounted for reason of separation distances.

The licence was issued on 11th March 2020 and is exercisable until 31st December 2022. It is subject to standard conditions together with 23 additional conditions, many of which relate to the protection of water quality.

There is a single appeal against the decision to grant this licence. The written grounds contend that the decision is in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive. It should be sent back to screening stage. On the same date as this application was made a further 5 applications were submitted for a total area of 54.76ha. Four of those sites are within the Slaney catchment and there is potential for cumulative impact on water quality. The whole project has not been considered. The AA screening is flawed and should be referred back to the competent authority. It cannot be excluded on the basis of objective information that the proposed project will have a significant effect on the Slaney Valley SAC. The Precautionary Principle must be applied. Licence conditions contain duplications and do not take into account the IFI submission. The licence does not take account of the fact that a recreational trail runs through the site. The Forestry Service failed to supply a copy of the EIA screening report for this licence. 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. There was a breach of Article 10(3) of the Forestry Regulations as a copy of the application was not made available for inspection on request.

In response, the DAFM states that the proposed felling is not categorised as an activity covered by the EIA Directive, the DAFM Appropriate Assessment screening procedures were followed, any duplication of conditions is inconsequential, it is a condition of the licence that the applicant must complete and erect a site notice, 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



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on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions continue to apply, and the appellant requested details of 451 Coillte felling licence applications and related files and that the appellant has exercised his right to appeal the decision to grant the subject licence.

The DAFM completed an in-combination assessment on 24th March 2020. This included 31 planning decisions and other forestry projects – 4 afforestation, 6 forest roads, 3 private felling and 46 Coillte felling. The DAFM concluded that the proposed project does not represent a source, or if so, has no pathways for an effect on any Natura 2000 site, and consequently there is no potential for in-combination effects.

The FAC requested further information from the appellant, specifically asking to which class of project listed in either Annex I or Annex II of the EIA Directive the proposed felling development falls within. 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 but did not state the class of development included in the EIA Directive to which felling and reforestation belong.

At the Oral Hearing the DAFM stated that its Appropriate assessment screening carried out before the issuing of the licence was based on information submitted with the application. Responding to Committee questions, the DAFM stated that, under new procedures now adopted, the Wicklow Mountains SPA would no longer be screened out for the likelihood of significant effects. The DAFM revised in-combination assessment dated 24th March 2020 lists forestry projects not considered in the Appropriate Assessment screening carried out prior to the issuing of the licence. Conditions attached to the licence were not designed as mitigation measures in respect of any Natura 2000 site. The DAFM contended that there is no leakage from the site and there would be no impact on water quality subject to the conditions of the licence being enacted. The appellant contended that there would be a change of land use and referred to the Corine Land Cover Classification in support of this contention, and that the proposed development should be subject to the provisions of the EIA Directive. Cumulative effects had not been considered prior to the issuing of the licence. The IFI referral submission was important in highlighting the fact that the site is in the headwaters of the Slaney River SAC and clearly had concerns regarding the protection of water quality. It is difficult to see how the licence conditions could not be considered as mitigation measures in respect of a European site. The applicants stated that they had reviewed the site and did not find heavily tunnelled watercourses, as referred to by the IFI. They were not sure if this site had ever been thinned. There is no hydrological connection to any European site within a distance of 15km, there are no aquatic zones on the site and there would be no change of land use involved with this proposal.

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 7.89ha 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. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

In respect of the contention that there was a breach of Regulation 10(3) of the Forestry Regulations, Regulation 10(3) of SI 191 of 2017 is as follows; *(3) The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.* In not accepting this ground, the FAC concluded that there is evidence to show that on 20 December 2019 the appellant requested from DAFM copies of the file along with 350 other files including applications, maps and draft harvest plans, all related to the applicant in this instance. The appellant made a submission on the subject licence on 4th January 2020. Evidence shows DAFM entered into dialogue with the appellant and shows provision of the copies occurred in or about the 19 February 2020. The appellant made no further submissions to the DAFM following the production of the documents. The FAC noted that the written grounds of appeal would indicate that the appellant had knowledge of the proposed development at the time of lodging his appeal.

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 respect of the Screening for Appropriate Assessment carried out by the DAFM, the FAC noted the DAFM submission made at the Oral Hearing that, if screened again, the Wicklow Mountains SPA would not be screened out for Appropriate Assessment. Furthermore, the FAC noted that the original



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screening in regard to in-combination effects had only considered information for forestry projects submitted by the applicants, and that a subsequent screening carried out by the DAFM after the issuing of the licence and submitted to the FAC, had considered a significant number of additional forestry related projects. This in-combination assessment should have been completed prior to the making of the decision to grant the licence. Having regard to this background, the FAC concluded that serious errors had occurred in the making of the decision on the licence, the subject of this appeal, and that the decision to grant the licence should be set aside and remitted to the Minister to carry out a new Stage 1 screening assessment and, subject to the conclusions of that screening assessment, carry out a Stage 2 Appropriate Assessment, in accordance with the provisions of the Habitats Directive, before a new decision is made in respect of the licence.

Yours Sincerely

Pat Coman, on behalf of the FAC

