



An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

06 November 2020

Subject: Appeal FAC 107/2020 regarding licence WD06-FL0234

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

Background

Licence WD06-FL0234 for felling and replanting of 12.68 ha at Knockatoor, Co. Waterford was approved by the Department of Agriculture, Food and the Marine (DAFM) on 06 March 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal FAC 107/2020 was held by the FAC on 14 October 2020.

Attendees;

FAC: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Vincent Upton and Ms. Bernadette Murphy

Secretary to the FAC: Ms Ruth Kinehan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM: Mr. Frank Barrett & Ms. Eilish Kehoe

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal and submissions received, the evidence from the oral hearing and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence WD06-FL0234.

The licence pertains to the felling and replanting of 12.68 ha at Knockatoor, Co. Waterford. The forest is currently comprised of Sitka Spruce and the same species would be replanted. Podzols (Peaty), Lithosols and Peats are described as making up approximately 92% of the underlying soil type while Acid Brown Earths and Brown Podzolics account for the remaining 8%. The slope is given as predominantly moderate. The proposal is located in the River Blackwater (Munster) Catchment _ 18 and the Goish Sub-Catchment_10 (18_27). The forest lies in the Licky River Sub-Basin_020 (100%).

The proposal was referred to Waterford County Council and no response is on file. The application included a Harvest Plan, including maps, and general environmental and site safety rules related to the operations. In processing the application, DAFM completed a Stage 1 Appropriate Assessment screening with reference to the provisions of Article 6(3) of the Habitats Directive and identified 8 Natura sites (4 SAC & 4 SPA) within 15km and found no reason to extend this radius in this case; 2170 Blackwater River (Cork/Waterford) SAC c1.7km, 2123 Ardmore Head SAC c8.9km, 665 Helvick Head SAC c11.5km, 2324 Glendine Wood SAC c14.5km, 4028 Blackwater Estuary SPA c6.5km, 4192 Helvick Head to Ballyquin SPA c6.7km, 4032 Dungarvan Harbour SPA c7.2km and 4023 Ballymacoda Bay SPA c14.1km. The first 4 sites were screened out for Appropriate Assessment due the absence of a pathway and the latter 4 sites due to separation distance. The licence was approved with a number of conditions attached which are of a general nature and relate to environmental protection, the maintenance of the forest and good forestry practice

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU. In particular, it is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. It is further contended that a prior ecological survey by a competent authority, should be a standard condition of a felling licence and mitigation actions recommended and implemented, if any works are to be carried out during the breeding and rearing period, to ensure compliance with the European Nature Directives.

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 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 and "cannot be circumvented by any process of interrogation of me", but did not state the class of development included in the EIA Directive to which the proposal belongs.

In a statement to the FAC, the DAFM submitted that the standard operational activities of clearfelling 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 the contention that a condition should be attached to the licence in relation to birds, the DAFM submitted that it is *"a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply"*. The statement goes on to describe the appropriate assessment procedure adopted by the DAFM in processing the licence and submits that the screening relied exclusively on information from the Applicant in relation to considering the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequently to the licence being issued.

An oral hearing was held at which the Appellant submitted that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EU EIA Directive. 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 deforestation and a change of land use. He noted that the subject forestry had been planted in 1988 and claimed

that it should have been subject to EIA. The appellant argued that no screening was carried out to determine the requirement for EIA. The Appellant indicated that a Forestry Management Unit defines the project area and should be considered in terms of assessment under the EIA Directive. The Appellant stated that the proposal needs to be assessed in combination with other plans and projects proposed in the same vicinity and questioned why DAFM relied on Coillte's in-combination assessment when private projects were not included. The Appellant contended that the Harvest Plan should have been subject to DAFM scrutiny and be available to the public before the appeal deadline and that it should highlight and map all key environmental details. The Appellant specified that the proposal was a source and that both direct and indirect hydrological pathways exist to a Natura site which lists the highly sensitive Fresh Water Pearl Mussel as a *Qualifying Interest*. Evidence of the direct hydrological connection was referred to but not put before the FAC. The indirect hydrological connection referred to surface water amplified by clear felling, especially in periods of high rainfall. The Appellant argued that the NPWS and EPA should have been consulted based on the precautionary principle given the proximity to such a Natura site. The Appellant further submitted that the licence did not provide sufficient protection for birds in line with EU legislation. The Appellant did not submit any evidence regarding species that related to the specific decision under appeal. The Applicant contended that the proposal does not include any deforestation or land use change while noting that the application did include small unplanted areas. The Applicant did not accept that the Forestry Management Unit defines the project area. Further to an examination of the proposal site, which included a site inspection, the Applicant found no evidence of a direct hydrological connection and explained that rich agricultural land and forestry are situated between the proposal and any watercourse. DAFM asserted their contention that the proposal does not include a class of project covered by the EIA Directive and that based on the available information there is no hydrological connection.

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 EIA 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 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 felling of trees, as part of a forestry operation with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 12.68 ha. Unplanted 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 information before the FAC to show that the planting of the forestry in 1988 was subject to consent. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other classes included in the Annexes I or II of the EIA Directive or considered for EIA in Irish Regulations.

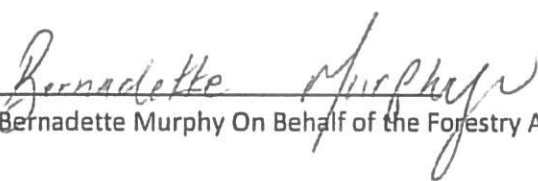
In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing on

this site. Based on the evidence before it, 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 or projects, having regard to the conservation objectives of that designated site. In this case, DAFM undertook a Stage 1 screening in relation to 8 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 that *Qualifying Interests* were truncated on some of the DAFM documentation but considered that this omission was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites. The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone would not be likely to give rise to significant effects, were correct and the FAC concurs with the conclusion. The FAC noted however, that the DAFM failed to carry out an in-combination assessment before the decision to grant the licence was made. The DAFM subsequently submitted to the FAC listings of other plans and projects, including forestry projects (Forest Roads – 3, Private Felling - 4 & Coilte Felling - 26). Having regard to the nature of the site and the surrounding area, and to the nature and number of other forestry projects listed, the FAC is satisfied that the failure of DAFM to carry out a satisfactory in combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of DAFM should be set aside and remitted to the Minister to carry out an Appropriate Assessment screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites, specifically in combination with other plans and projects, before making a new decision in respect of the licence.

Yours sincerely,



Bernadette Murphy On Behalf of the Forestry Appeals Committee