



An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

06 Nov 2020

Subject: Appeal FAC 144/2020 regarding licence KK06-FL0145

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 KK06-FL0145 for felling and replanting of 11.56 ha at Curraghmore, Co. Kilkenny was approved by the Department of Agriculture, Food and the Marine (DAFM) on 20 February 2020 and is exercisable until 31 December 2023.

Hearing

An oral hearing of appeal FAC 144/2020 was held by the FAC on 20 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 KK06-FL0145.

The licence pertains to the felling and replanting of 11.56 ha at Curraghmore, Co. Kilkenny. The forest currently consists of a 11.56 ha comprising 77% Sitka Spruce, 18% Lodgepole Pine plot and 5% Beech. The forest will be replanted with 70% Sitka Spruce and 30% Norway Spruce. The underlying soil types are described approximately as Lithosols and Regosols (100%). The slope is given as predominantly moderate (0-15%). The proposal is located in the Nore Catchment _ 15. The eastern portion of the site is in the Nore Sub-Catchment_140 (15_18) and the

western portion is in the Nore Sub-Catchment_130 (15_20). The forest lies in the Arrigle_020 (62%) and Tullagher_010 (38%) River Sub-Basins.

The proposal was referred to Kilkenny 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 5 Natura sites (4 SAC & 1 SPA) within 15km and found no reason to extend this radius in this case; 2162 River Barrow And River Nore SAC c1.3km, 4233 River Nore SPA c3.4km, 404 Hugginstown Fen SA c9.7kmC, 2252 Thomastown Quarry SAC c10.3km and 770 Blackstairs Mountains SAC c14.4km. The 4 SAC sites were screened out for Appropriate Assessment due to the absence of a pathway and the SPA site 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 stated that the Appropriate Assessment determination is suspect in this case and should be referred back to the national competent authority (DAFM) for re-screening. It is also submitted that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive. 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 Birds Directives. Finally, the grounds argue that there has been a breach of Article 10(3) of the Forestry Regulations as relevant application information was not made available for inspection on request.

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. The statement goes on to describe the Appropriate Assessment procedure adopted by the DAFM in processing the licence and submits that the screening relied 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. In relation to the contention that a condition should be attached to the licence in relation to protection of 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. Regarding Article 10(3) of the Forestry Regulations, the DAFM stated that the Appellant had requested information on 451 applications and contend that the Appellant has exercised their right to appeal this licence.

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. It was specified that this area of open space should be mapped and maintained. The appellant argued that the proposal should have been screened for EIA. The Appellant highlighted that 5% Beech would be lost to the local environment. The Appellant described the proposal site as being in area of moderate to high risk of landslide based on Geological Survey of Ireland data. He also stated that there is no indication whether toxic chemicals, e.g. for the treatment of pine weevil, of which very small amounts can cause harm will be used and stated that if used on this site such chemicals will almost certainly enter the SAC owing to the pathways that exist. He considered that there is a high likelihood the site will be sprayed. The Appellant indicated that both toxic chemicals and landslides fall under the criteria referred to in Annex III of the EIA Directive. The Appellant specified that Appropriate Assessment was required in this case based on the precautionary principle. It was further explained by him that the proposal was located between 2 branches of a river SAC, to the East and West, that lists the highly sensitive Fresh Water Pearl Mussel as a *Qualifying Interest*. The Appellant indicated that both direct and indirect hydrological pathways exist to this Natura site. Evidence of a direct hydrological connection was referred to and stated to be shown on Land Direct maps to the North East of the proposal. The indirect hydrological connection referred to surface water amplified by clear felling, especially in periods of high rainfall on an elevated site such as this. The Appellant queries why the proposal was screened out when hydrological connections exist. The Appellant stated that forestry was a source even when completed in accordance with requirements as pollutants can still enter the water and soil. The Appellant specified that it was very concerning that NPWS and EPA were not consulted in this case. The proposal was described by him as lying between 2 river sub-basins to the West and East. The western sub-basin has high status water quality, while forestry is listed as a significant pressure for the eastern sub-basin but the EPA was not consulted. The Appellant contended that the Harvest Plan should have been subject to DAFM scrutiny and be available to the public. The Appellant noted that there no requirement to notify DAFM of commencement of works. The Appellant further submitted that there was insufficient protection for birds as required by 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. The Applicant described the site as dry with no aquatic zones and as having a pre-existing road network. The Applicant stated that chemicals are only used on a risk assessed basis and when used they are spot sprayed being applied in accordance with best practice by trained operators. Setback distances would be observed. Pine weevil treatment would only be applied if there was evidence that treatment

was required. DAFM asserted their contention that the proposal does not include a class of project covered by the 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 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 11.56 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. 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.

The colouration data referred to by the Appellant refers to landslide susceptibility and not to risk per GSI. The site in this instance comprises Lithosols and Regosols (100%). The site falls within 3 'landslide susceptibility classifications' (Low Inferred, Moderately Low and Moderately High) with the greater part in the Moderately High classification. The FAC noted the steep nature of the site. The FAC also considered however, the nature and scale of the proposal along with its location. The proposal is surrounded by forests of varying ages and agricultural land. The degree of separation and absence of convincing evidence of a direct hydrological connection was taken in account. The FAC concluded the proposal would not lead to a likelihood of landslide that would threaten a European site and that there is no real likelihood of a significant effect on the environment on which to affect the licence.

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.

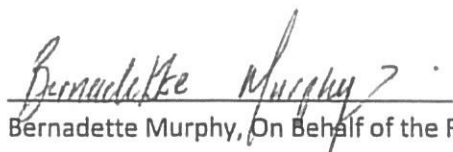
In respect of the contention that there was a breach of Regulation 10(3) of the Forestry Regulations, Regulation 10(3) of SI 191 of 2017 is as follows; (3) *The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing 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 03 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. Furthermore, the FAC is satisfied that the appellant has not been inhibited in the making of submissions in respect of this appeal.

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 5 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 notes that the proposal site is not suitable habitat for the Kingfisher (*Alcedo atthis*) listed as the *Qualifying Interests* for the SPA site mentioned. 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 (Afforestation - 7 Forest Roads - 6, Private Felling - 25 & Coille Felling - 88). 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

