An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

22 October 2020

[redacted]

Our ref: 100/2020

Subject: Appeal in relation to felling licence OY01-FL0063

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 OY01-FL0063.

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 OY01-FL0063 was granted by the Department on 25 February 2020.

Hearing
An oral hearing of appeal 100/2020 was conducted by the FAC on 15 October 2020.

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

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 OY01-FL0063).

The proposal is for felling and replanting on a stated site of 24.60ha at Stonestown, Co. Offaly. Restocking of the 24.60ha. is to be 70% Sitka Spruce (16.36ha) and 30% Lodgepole Pine (7.01ha). The project lands are underlain by Basin Peats and Blanket Peats. In processing the application the DAFM completed a Stage 1 screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying 15 Natura 2000 sites within 15km of the project lands and listing their qualifying interests and conservation objectives, and assessing the possibility of effects on any of the

Natura 2000 sites listed. The DAFM concluded that the proposed development alone or in-combination with other plans and projects would not be likely to have a significant effect on any Natura 2000 site.

In response to a referral by the DAFM, Offaly County Council stated that the site is not within a SAC or SPA but is in a High Amenity Area and High Sensitivity Landscape (Lough Boora). There is a need to protect water quality.

The licence was issued on 11th February 2020 and is exercisable until 31st December 2022. It is subject to standard conditions.

There is a single appeal against the decision to grant the licence. The grounds argue that the DAFM breached Article 10(3) of the Forestry Regulations in respect of a request seeking documents including maps and Harvest Plans, breached Articles 4(3), 4(4) and 4(5) of the Environmental Impact Assessment Directive (EIA) and that 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 Appellant had requested information on 451 applications and contend that the Appellant has exercised their right to appeal the specific licence. The DAFM further state that tree felling is not an activity to which the EIA Directive or associated regulations applies and that 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 on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions continue to apply.

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 felling and reforestation belong.

At the Oral Hearing the appellant 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, there is no legal protection for nesting birds in respect of the proposed activity under National law, it is questionable why the DAFM rely on Coillte's in-combination assessment as it is inadequate, and the Harvest Plan should have been subject to scrutiny before the award of the licence. The Appellant detailed correspondence with the DAFM regarding the requests to access licence application files, including the one under appeal, and submitted that the documentation requested was not provided with the files before the appeal was submitted. The DAFM contended 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. 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 contended that any open space retained after replanting was for productivity or environmental reasons and would not constitute deforestation. They suggested that the proposal would not be covered by the EU 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 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 he 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 24.60ha 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 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 5th 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.

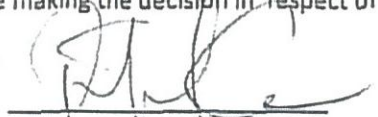
In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to 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.

The Harvest Plan set out in the licence condition is essentially an operator's manual for the carrying out of the development permitted by the licence. Condition (h) of the licence requires a Harvest Plan to be completed prior to the commencement of felling. The FAC noted that all works included in a Harvest Plan carried out must comply with the terms of the licence. In these circumstances, the FAC considers that the implementation of the Harvest Plan would not create the likelihood of significant effects occurring on any Natura 2000 site or on the environment.

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 15 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 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. The FAC noted that the qualifying interests listed in this assessment were truncated on the DAFM documentation, but considered that this was not a serious or significant error as there was no possibility of any significant effects on the designated sites for the reasons given in the DAFM assessment. However, in respect of its assessment of in combination effects, the DAFM relied solely on information submitted by the applicant before making its decision. The DAFM subsequently submitted to the FAC listings of other plans and projects (which were significantly different from the details submitted by the applicant), including forest roads, afforestation and felling projects. Having regard to the number and nature of forestry projects listed, the FAC is satisfied that the failure of the DAFM to carry out a satisfactory in combination assessment prior to the granting of 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 assessment of the proposed development on Natura 2000 sites within a 15km radius of the project lands specifically in combination with other plans and projects, before making the decision in respect of the licence.

Yours Sincerely



Pat Coman, on behalf of the FAC