An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

29 October 2020

[redacted]

Our ref: 101/2020

Subject: Appeal in relation to felling licence OY01 FL0060

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 FL0060.

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 FL0060 was granted by the Department on 11 February 2020.

Hearing
An oral hearing of appeal 101/2020 was conducted by the FAC on 21 October 2020.
Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Vincent Upton, Ms Bernadette Murphy and Mr Pat Coman
Secretary to the FAC:	Ms Ruth Kinehan
Appellant:	[redacted]
Applicant representatives:	[redacted]
DAFM representatives:	Mr Frank Barrett and 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 set aside and remit the decision to grant this licence (Reference OY01-FL0060).

The proposal is for the clearfelling and restocking on a stated site area of 5.62ha at Clooneen, Co. Offaly. The trees to be felled were planted in 1989 and are predominantly Sitka Spruce. Restocking

would be 80% Sitka Spruce (4.27ha) and 20% Lodgepole Pine (1.07ha). A Coillte Harvest Plan and AA Pre-screening Form are submitted with the application documents. The project lands are underlain by Basin Peats, Blanket Peats (70%), Surface water Gleys, Ground water Gleys (28%) and Grey Brown Podzolics, Brown Earths (2%). The slope is predominantly moderate.

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 17 Natura 2000 sites (12 SACs and 5 SPAs) 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. A number of the qualifying interests were truncated in the DAFM documentation. 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.

The application was referred to Offaly County Council who responded stating that the project lands are not within an SAC or an SPA, access to the site will be off the N62 and measures should be implemented to protect water quality in the area.

The licence was issued on 11th February 2020 and is exercisable until 31st December 2022. It is subject to standard conditions. It relates to a site area of 5.62ha and requires restocking with 80% Sitka Spruce and 20% Lodgepole Pine.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive and that the application should be referred back to screening stage, there was a breach of Article 10(3) of the Forestry Regulations through the failure to make the application available for inspection, 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 state that tree felling is not an activity to which the EIA Directive or associated Regulations apply 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 DAFM state 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 submitted a statement of In-combination effects to the FAC on 12th February 2020 (1 day after the licence was issued). This contains details of planning permissions (none of which would give rise to in-combination effects), extracts from the County Development Plan, and details of other forestry projects in the townland of Clooneen. The projects listed include Forest Road and Afforestation (4), and Felling licences (10).

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 referred to the written grounds of appeal. He noted that the subject forestry had been planted in 1989 and claimed that it should have been subject to EIA. The proposal leaves 5% of the site unplanted as open space and this represents a change of land use. The proposal falls within Class 13 of Annex II of the EIA Directive as it is for a change to an already authorised project which may have significant adverse effects on the environment. The appellant referred to CJEU 392/96. The project lands are within 500m of a pNHA and the NPWS should have been consulted. The applicants stated that there is no hydrological connection to any European site and there is no water within or adjacent to the project area. No change of land use is proposed or would occur. There are some trees on the site which never established but were included in the application. The DAFM stated that the pNHA (Lough Coura) was approximately 500m separated and the other side of a public road. There was no requirement to refer the application to the NPWS.

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 (5%) 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 5.62ha and 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 information before the FAC to show that the planting of the forestry in 1989 was subject to consent. There is no evidence to indicate that the current proposal is for a change or extension of a project listed in the annexes to the Directive which may have adverse effects on the environment. 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 9th March 2020 (Appeal form dated 7th March 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.

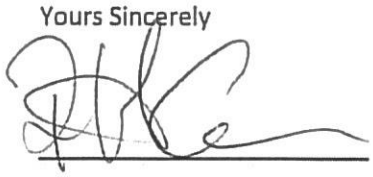
In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to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

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 17 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 arising from the proposed development itself 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 satisfactory. 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 including forest roads, afforestation and felling projects. The assessment of potential in-combination impacts arising cannot be determined by the FAC due to the absence of details relating to these listed 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 the Natura 2000

sites listed in the DAFM screening, specifically in-combination with other plans and projects, before making a new decision in respect of the licence

Yours Sincerely



Pat Coman, on behalf of the FAC