An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

[redacted]

29th October 2020

Subject: Appeal FAC104/2020 regarding licence CE03-FL0202

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 CE03-FL0202 for felling and replanting of 14.92 ha at Corlea, Corlea More, Knockbeha Mountain, Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 11th February 2020.

Hearing

A hearing of appeal FAC104/2019 was held by the FAC on 15th October 2020. In attendance:
FAC Members: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Ms. Bernadette Murphy, Mr. Vincent Upton
Secretary to FAC: Ms. Ruth Kinehan
Appellant: [redacted]
Applicant: [redacted]
DAFM Representatives: Mr. Frank Barrett (Forestry Inspector), Ms. Eilish Kehoe (Executive Officer)

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing and submissions received, 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 CE03-FL0202.

The licence pertains to the felling and replanting of 14.92 ha at Corlea, Corlea More, Knockbeha Mountain, Co. Clare. The forest is currently comprised of Sitka spruce and lodgepole pine and the site would be replanted with the same species. The site is described as being on a moderate slope and on mineral and peat soils, comprised of blanket peats, lithosols and peaty podzols. The forest lies in the Bleach_020 (73%) and Graney (Shannon)_020 river basins. The proposal was referred to Clare County

Council which did not respond. The proposal was also referred to the National Parks and Wildlife Service which replied that the proposal lies within Slieve Aughty Mountains Special Protection Area for Hen Harrier and Merlin (SPA) and noted the protections provided under EU and Irish law. The NPWS stated that the proposal does not fall within a Higher Likelihood of Nesting Area (HLNA) for the Hen Harrier and that as a result, any proposed felling works should follow the protocol agreed between the National Parks & Wildlife Service and the Forest Service for operational works in Hen Harrier Special Protection Areas. They further request that the local Wildlife Ranger be contacted if felling is to take place between 1st April - 15th August and make observations on the legal obligations of the DAFM. The application included a harvest plan, including maps, and general environmental and site safety rules related to the operations. An appropriate assessment pre-screening report was also provided with the application. The DAFM undertook and documented an appropriate assessment screening that found twelve European sites within 15km and found that there was no reason to extend this radius in this case and that appropriate assessment was required regarding Slieve Aughty Mountains SPA. An appropriate assessment report and determination was undertaken and dated 17th February 2020. The licence was approved with a number of conditions attached which related to the mitigation of effects as outlined in the appropriate assessment report.

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 EU EIA Directive. 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. Furthermore, it is submitted that it should be a standard condition of a felling licence that a survey be conducted 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 and that this relates to all breeding birds.

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 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 the date at which the appropriate assessment determination was signed off. It is further submitted 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 subsequent 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. They further submitted that National legislation 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. They contended that the licence conditions were not sufficient to protect the qualifying interests of the SPA and that the protocol agreed with the NPWS was out of date. The Applicant submitted that the proposal does not include any deforestation or land use change while noting that the application did include small unplanted areas. They suggested that their environmental officers undertake routine assessment of felling and other proposals, including considerations of habitats, and had considered the site and did not identify any risk to European sites. They also suggested that they are in regular contact with local regulators including the NPWS. The DAFM reasserted their contention that the proposal does not include a class of project covered by the EIA Directive or National legislation. They submitted that their protocols were developed with ecologists and the NPWS and that they are satisfied that they were acceptable in this case. They suggested that an error had occurred in documenting the appropriate assessment report and determination and that a draft report had been prepared prior to the licence being issued and that the report was "signed off" and finalised on the 17th February 2020. They stated that a copy of the draft was not available but that it contained the same content as the final report.

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 14.92 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change

and neither that it falls within the classes included in the Annexes 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 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 there is potential for the presence of birds on the 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, a 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, the DAFM undertook a Stage 1 screening in relation to twelve Natura 2000 sites and concluded that an appropriate assessment should be undertaken in relation to Slieve Aughty SPA with other sites screened out. An appropriate assessment report and determination were prepared, and mitigation measures were derived and incorporated into the licence conditions. However, the documentation provided to the FAC was dated after the licence was issued and the FAC cannot assess the determination undertaken at the time of licensing. In addition, the Appendix provided in the report is not complete while reference is made to its contents in the document. The FAC also noted the request from the NPWS that the local Wildlife Ranger be contacted prior to felling being undertaken during a specified period and considers that this should be included as a condition of the licence if an approval is issued.

The FAC also noted 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. 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 the 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 addition, the FAC considers that it was provided with an appropriate assessment determination that post dated the licence and that such a determination, where required, must be made prior to a licence being issued. The FAC is satisfied that this issue also represents a significant error.

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 a screening for appropriate assessment under Article 6 of the Habitats Directive of the likely significant effects on European sites of the proposal, itself and in combination with other plans and projects, and an appropriate assessment where required to include Slieve Aughty SPA, having regard to the best available scientific information before the making of a new decision.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee