



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

29 October 2020

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Our ref: 143/2020

Subject: Appeal in relation to felling licence KK06 FL0148

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 KK06 FL0148.

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 KK06 FL0148 was granted by the Department on 20 February 2020.

Hearing

An oral hearing of appeal 143/2020 was conducted by the FAC on 20 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 KK06-FL0148).

The proposal is for the clear-felling of a stated site area of 7.24ha (6.64ha Sitka Spruce and .60ha Japanese Larch) at Brandonhill, Co. Kilkenny. Restocking would comprise 100% Sitka Spruce over a

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stated area of 6.88ha. A Harvest Plan was submitted with the application. The application documentation identified Natura 2000 sites within a radius of 15km of the project lands, and in combination details refer to 2 other licenced clear-fell blocks with total site area of 20.11 ha.

In processing the application, the DAFM noted that the soil types were 97% Podzols, Lithosols, Peats and 2% Peaty Gleys. The slope is predominantly steep. Screening for Appropriate Assessment identified 4 SACs and 1 SPA as follows:

- River Barrow & River Nore SAC
- River Nore SPA
- Blackstairs Mountains SAC
- Slaney River Valley SAC
- Thomastown Quarry SAC

The River Barrow and River Nore SAC and Blackstairs Mountains SAC were ruled out for likely significant effects due to the absence of a direct upstream hydrological connection and lack of pathway, the Slaney River Valley SAC and Thomastown Quarry SAC were ruled out for reason that the project lands are located within a separate water body catchment, there is no upstream connection and no pathway, and the River Nore SPA was ruled out for reason of separation distance. The screening form does not include an assessment of in-combination effects.

The licence was issued on 20th February 2020 and is exercisable until 31st December 2023. It relates to a site area of 7.24ha and restocking with 100% Sitka Spruce. The licence is subject to standard conditions.

Subsequent to the issuing of the licence, the DAFM submitted an in-combination assessment to the FAC on 21st February 2020. In terms of forestry projects this submission lists the following – 7 afforestation, 6 forest roads, 22 felling licences and 88 Coillte felling licences. The submission concludes that individually the project does not represent a source or, if so, no pathway for adverse effect on any European site exists. There is no potential for the project to contribute to any adverse effects when considered in-combination with other plans and projects.

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 Environmental Impact Assessment (EIA) Directive, and breaches of Article 10(3) of the Forestry Regulations and Regulation 21(1) of the Forestry Regulations. The licence does not include conditions providing a system of protection for wild birds during breeding and rearing consistent with the requirements of the Birds Directive.

In response, the DAFM contend that tree felling is not an activity or project that falls within the specified classes of forestry activities or projects covered by the Directive or in relevant Planning or Forestry Regulations, documentation is submitted in respect of the appellants request for information from the DAFM, and it is stated 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 adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions would 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



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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, in addition to referring and expanding on the issues raised in the written grounds of appeal, the appellant contended that the site is in a basin and that it does have hydrological connectivity to designated sites because of its steepness and proximity to an EPA watercourse. There is a possibility of impacts on the watercourse through siltation, sedimentation and transport of toxic substances. There are small fields and hedgerows adjacent to the project site and these often indicate poor drainage. The application should have been referred to the NPWS but was not. The appellant contended that there is a significant area of dry heath to the south and that this is an Annex I habitat requiring protection. Due to its proximity to the project site there is the possibility of colonisation with conifers. The applicants stated that they had desk and field assessed the project lands and that there is no evidence of watercourses. The adjacent habitat referred to by the appellant is commonage and is not designated. There would be no change of land use arising from the proposal. Any surface run-off from the site would be buffered by adjoining fields and hedgerows. The nearest receiving waters are at a distance of approximately 400m. There was no observable water leaving the site on the day of inspection. The DAFM accepted that there was a procedural error in that the licence had not been sent to the appellant as it should have been.

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 be 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 convincing basis for this contention. The application details indicated that a small portion of the site (0.36ha) would be left unplanted but not for the purposes of a change in land use. The oral evidence from the applicants was that this open area would be ancillary to the forestry land use. The FAC noted that the open area would not be maintained as open space, would not have public access as a dedicated open space and that the licence granted does not consent to any change in land use. As such, the FAC concluded that there is no breach of any of the provisions of

the EIA Directive as the proposed development is not of a class of development covered by the Directive.

The FAC considers that, based on the evidence submitted at the Oral Hearing, the DAFM were in error in not supplying a copy of the licence to the appellant. The appellant also contends that the DAFM failed to provide an electronic copy of all relevant information in respect of this application, as requested and that he has been denied his legal right to make a submission on the application based on the actual details of the application. In this regard the FAC notes that the appellant has been provided with opportunities to present his case to the FAC, including at the Oral Hearing. In respect of this issue, the FAC considers that there is no convincing evidence before it to indicate that the appellant has been compromised in participating fully in the appeal process. In these circumstances, the FAC concluded that the error in supplying a copy of the licence to the appellant did not constitute a significant or serious error.

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.

The appellant contends that lands adjacent to the south of the project site comprise dry heath and that this is an Annex I habitat that must be protected. In support of this contention the appellant referred to the NPWS database (2011). The applicants denied that these lands are designated as an Annex I habitat, stating that they comprise commonage. Based on the information before it the FAC concluded that there is no convincing evidence that the lands referred to comprise an Annex I designated habitat or that the proposed development is likely to have any significant adverse impact on the lands in question.

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 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 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. However, the FAC 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, including an extensive number of forestry related 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 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



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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 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 of the proposed development on the Natura 2000 sites 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

