



10 February 2021

Our ref: 527/2020

Subject: Appeal in relation to felling licence CK12-FL0177

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence CK12 FL0177.

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

Licence CK12 FL0177 for felling and replanting of 20.38 ha at Carriganimmy, Cusloura, Co. Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on 02 July 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal 527/2020 was conducted by the FAC on 01 December 2020. Hearing originally scheduled for 24 November 2020 and adjourned.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Pat Coman and Ms Bernadette Murphy
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Alan Sheridan

Decision

The 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 affirm the decision to grant this licence (CK12 FL0177).

The proposal is for felling of 20.38 ha at Carriganimmy, Cusloura, Co. Cork. Sitka Spruce comprises the majority of the plot. A 14.48 ha plot also consists of 21% Lodgepole Pine. Restocking will be with 100% Sitka Spruce. The underlying soil type is given as approximately 82% Acid Brown Earths and Brown Podzolics, 16% Blanket Peats and the remaining 2% comprising Lithosols and Regosols. The slope is described as predominantly moderate (0- 15%). The proposal is located in the Lee, Cork Harbour and Youghal Bay Catchment_19 and the Sullane_20 Sub-Catchment (19_7). DAFM give the proposal as situated 100% within the Cusloura_10 River Sub-basin.

The proposal was referred to Inland Fisheries Ireland (IFI), Cork County Council and the National Parks and Wildlife Service (NPWS). The DAFM have confirmed that the NPWS did not submit a response in this instance. IFI requested that the Forestry and Fisheries Guidelines be adhered to. More specifically IFI sought that the details of any necessary water crossings be submitted to IFI for consideration in advance. IFI sought that all necessary precautions are taken to ensure site runoff or other contaminated discharges to waters cannot occur and that any in-stream works be limited to the period May to September inclusive. IFI wish to be notified prior to the commencement of works and in advance of any in-stream works or tracking. If the application is granted then IFI request that a condition be attached to the effect that there be no interference with, bridging, draining, or culverting of the adjoining river or any watercourse, its banks or bank-side vegetation, to facilitate this development without the prior approval of IFI. Cork County Council referred the Applicants to the Planning and Development legislation and obligations provided for therein and commented that planning permission may be required for access to the public road. The County Council specified that the proposal was in the *Mullaghanish to Musheramore Mountains SPA*. The County Council stated that the site was within the zone of archaeological potential of a pair of standing stones (SMR CO048-168)

The application included a document titled 'Harvest Plan', including maps, and general environmental and site safety rules and a pre-screening report. 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 7 Natura sites (5 SAC & 2 SPA) within 15km and found no reason to extend this radius in this case; 004162 *Mullaghanish to Musheramore Mountains SPA (within)*, 002170 *Blackwater River (Cork/Waterford) SAC c5.4km*, 001890 *Mullaghanish Bog SAC c8.4km*, 000365 *Killarney National Park, Macgillycuddy's Reeks And Caragh River Catchment SAC c8.8km*, 000106 *St. Gobnet's Wood SAC c11.5km*, 004109 *The Gearagh SPA c11.7km* and 000108 *The Gearagh SAC c11.7km*. *Mullaghanish to Musheramore Mountains SPA* was screened in for Stage 2 Appropriate Assessment due to the possibility of an effect as a result of the proposals within the Natura site. The other SPA site was screened out due to separation distance. The 5 SAC sites were screened out for Appropriate Assessment due to the absence of a pathway.

The DAFM produced an Appropriate Assessment Report (18 June 2020). This recommends conditions to mitigate potential impacts in relation to the Hen Harrier as follows:

- No potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st April to 15th August, inclusive)
- Appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out an agreed protocol regarding breeding Hen Harrier and potential disturbance operations, developed by the Forest Service of the DAFM and the National Parks & Wildlife Service (NPWS)
- The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation, December 2016 (DAFM, 2016)

Following on from the Report the DAFM made an Appropriate Assessment Determination concluding that the proposed development individually, or in-combination with other plans or projects, would not have an adverse effect on the integrity of any Natura 2000 site, subject to the implementation of the conditions recommended in



the Report. The DAFM documentation indicates that both the Report and Determination were reviewed by an independent ecologist prior to the decision.

The licence was approved with general conditions and others which are more directly concerned with the protection of water and/or soil and adherence to standards and guidelines. There are specific conditions relating to the notification of IFI at least two weeks prior to commencement of operations and any in-stream works. The licence requires that any structures crossing an aquatic zone or relevant watercourse are positioned and maintained so as not to interfere with the free flow of water and the free movement of fish, any in-stream work to be limited to the period May to September, and that no deleterious or polluting matter is discharged at or as a consequence of such crossings. As the proposal is located in a Red (Breeding) Zone for the Hen Harrier it is a condition of the licence that the Forest Service "Procedures regarding disturbance operations and Hen Harrier SPAs", specific procedures, agreed with NPWS, apply to disturbance operations within SPAs designated for Hen Harrier. Disturbance operations are detailed. No disturbance operation(s) associated with the licence are permitted to take place during the Hen Harrier breeding season (1st April to 15th August, inclusive). A new felling licence is required for such activities within the Red Zone.

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. 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. The submission argues that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody as clear-felling has the capacity to impact on water quality, especially as the site is located on peat soil in a catchment that records Fresh Water Pearl Mussel (FWPM). The Appellant argues that the Stage 2 Appropriate Assessment determination is not legally valid, stating that where there are lacunae the precautionary principle applies. It is stated that the DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. The Appellant contends that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. It is indicated by the Appellant that the site is within 120m of another site licensed or in the licensing process and licence conditions must reference other sites within 120m and the relevant restrictions. The Appellant stated that the licence conditions do not provide a system of protection for wild birds during the breeding and rearing season consistent with Article 5 of the Birds Directive. Furthermore, that the licence does not provide a system of strict protection for Annex IV (a) species in their natural range, as required by Article 12 of the Habitats Directive, and prohibiting deliberate disturbance particularly during the period of breeding, rearing, migration and hibernation. The Appellant stipulates that the licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. The submission contends that the licence should include a condition that plans that works are inspected by FS prior to, during and post works to ensure compliance with environmental conditions. Finally it is argued that the licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

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 DAFM indicate that the licence contains measures aimed at the protection of water quality and that the DAFM is actively engaged in the WFD process and is fully informed of its responsibilities regarding the achievement of the WFD objectives. The DAFM identified the possibility of significant effects on screened European sites and an Appropriate Assessment was carried out and a Determination made. Site specific measures prescribed by the DAFM were included as mitigation measures. DAFM concluded that there would be no adverse effect on any European site. DAFM outlined how members of the public can make submissions to the DAFM in respect of the likely effect on the environment of the proposed activity. The DAFM considered the information submitted at applications and deemed that it meets their requirements. The DAFM specified that they have fully complied with the requirements of Article 6(3) of the Habitats Directive. It is stated by the DAFM that the Minister may, at any time, attach or vary conditions to any licence. In relation to the lack of protection afforded wild birds by the licence, 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"*. In addition the DAFM state that the site-specific mitigations identified in the AA Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project CK12-FL0177. The DAFM contend that users of Plant Protection Products must apply the principles of Good Plant Protection Practice and that there is no legal requirement for forest owners to inform adjacent land owners of the intention to spray.

The FAC sat in person at an Oral Hearing in Portlaoise on 01 December 2020. The parties were invited to attend in person or by electronic means. The DAFM and the Applicants participated electronically as did Bernadette Murphy (FAC member) but the Appellant did not participate. The Applicant 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. The Applicant described how the site overlapped with the *Mullaghanish to Musheramore Mountains SPA* and that there was no direct uninterrupted hydrological connection with any Natura site. The slope of the site was given as moderate and westward. Road access to the site was stated to be good with an existing road bisecting the site. The Applicant explained that the site was located within a larger forest situated to the East and South, with heath situated to the West and North. The Applicant explained that a watercourse adjoins the site to the West eventually joining the River Lee after c15.5km, which flows for c45km before reaching a reservoir before entering the sea. The nearest hydrological distance to a Natura site was given as c61km (*Cork Harbour SPA*). The Applicant indicated that the stock inventory has been refreshed since the application was submitted. The Applicant has since identified c1.7ha of wind blown area to the West of the site using satellite imagery. It was further explained that the forest had reached a height at which it was at risk of wind blow (over 20m). The elevation and aspect of the site were also given as factors that would increase the risk of wind blow. The Applicant specified that if the forestry in this area was sub-divided for felling the remainder would blow over. It was clarified to the FAC that the forest was dangerous and unstable and that wind blow will continue until the majority of the site is blown over. The Appropriate Assessment Pre-Screening Report carried out by the Applicants concluded there was no likelihood of significant effects from the project while the DAFM Stage 1 Appropriate Assessment later concluded that such effects were likely. The Applicant explained that this difference arose as a result of a difference in the methodologies used in the respective reports and clarified that this issue is now resolved. The Applicant confirmed to the FAC that they consider the proposed mitigation measures standard and appropriate. The DAFM confirmed that the IFI responses were taken into account when issuing the licence. The DAFM explained that adjacent blocks in this exposed area of the forest, amounting to more than 25ha in total, were approved because they were put at risk of wind blow by the adjacent felling, and identified CK12 FL0174 in particular. The FAC noted that in such circumstances the felling, and thus green-up, may not be staggered in the area. It was clarified for



the FAC that the area adjoining the proposal to the South West corner was not included in the proposal because it is of a lower yield class (YC10 vs YC18) and lower in height (14m vs 22/23m), with a wind firm edge and thus lower a risk of wind blow. Cork County Council identified that the site was within the zone of archaeological potential of a monument (CO048-168). Both the DAFM and the Applicant concur that according to their maps the site is outside this zone.

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 20.38 ha. 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 FAC considered the procedures adopted by the DAFM in respect of Appropriate Assessment screening, the Appropriate Assessment Report and Appropriate Assessment Determination. The FAC considered that the procedures adopted were consistent with the requirements of Article 6(3) of the Habitats Directive and that the conclusions reached were sound. The FAC noted that the recommended conditions, as contained in the Determination, had been incorporated into the licence granted. The FAC concluded that the proposed development, carried out in accordance with the mitigation measures recommended in the Determination and attached to the licence, would not adversely affect the integrity of any Natura 2000 sites, having regard to their conservation objectives and would not affect the preservation of any such site at favourable conservation status.

The FAC noted that the proposal is located the Lee, Cork Harbour and Youghal Bay Catchment which does not contain a FWPM catchment. Based on the information before it, and having regard to the conditions of the licence, the FAC considered that there is no convincing reason to conclude that the proposed development would threaten the achievement of the objectives of the underlying waterbody. The FAC considered that no convincing evidence had been provided to indicate that the proposed development would have an adverse impact on the protection of wild birds or of Annex IV species (Habitats Directive) and noted that no specific details had been provided by the appellant to substantiate these grounds of 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.

There is no reference to a Harvest Plan in the licence conditions and the FAC only consider the licence before it. Irrespective, the FAC considers that all works included in any Harvest Plan carried out, must comply with the terms of the licence.

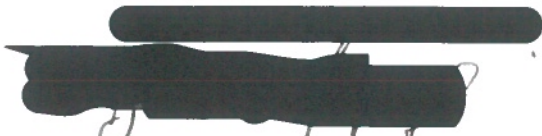
The FAC noted that Article 6(3) of the Habitats Directive provides for obtaining the opinion of the general public where the consent authority considers it appropriate, and that the DAFM did not consider it appropriate in this case. The DAFM have evidenced the public consultation process already undertaken in respect of the proposal. While considering the views set out in the grounds of appeal, the FAC concluded that no convincing reason had been submitted for public consultation in this case. The FAC is satisfied that the DAFM exercised their discretion in this instance and did not consider it appropriate in this case.

The FAC considered the Appellant's submission that the site is within 120m of another site licenced or being licenced for clearfell. The FAC notes the discretionary "greening up" licence condition that may be attached to a licence to mitigate the visual impact of clearfelling on the wider landscape, as provided for in the Interim Standards for Felling and Reforestation DAFM (2019). In this particular case, the FAC has considered the risk of wind blow to the proposal site and adjacent sites and the need for a wind firm edge. The FAC consider that the elevation, aspect and critical height of the trees on the site in question amplify such a risk in this case. In addition there is existing evidence of wind blow on the site under appeal. In these circumstances, the FAC concludes that such a "greening up" licence condition would not be warranted.

The Appellant submitted that the licence should contain conditions relating to the commencement and conclusion of operations and the inspection of works prior to, during, and post-completion. The FAC is aware that the DAFM inspect a number sample of licences issued in order to establish the Applicant's adherence to the conditions of those licences. The FAC also considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. The FAC is satisfied that the users of Plant Protection Products must apply the principles of Good Plant Protection Practice and there is no legal requirement for forest owners to inform adjacent land owners of the intention to spray. Therefore, the FAC concludes that the conditions attached to the licence issued by the DAFM are appropriate for, and proportionate to, the licenced development. As such, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours Sincerely,



Bernadette Murphy, on behalf of the FAC