



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

12 February 2021

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FAC ref: 608/2020

Subject: Appeal in relation to felling licence CK25-FL0059

[REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence CK25-FL0059.

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 CK25-FL0059 was granted by the Department of Agriculture, Food and Marine (DAFM) on 04 August 2020.

Hearing

An oral hearing of appeal 608/20 was conducted by the FAC on 02 February 2021.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Applicant representatives:	Mr [REDACTED]
DAFM representatives:	Mr Frank Barrett & Ms Eilish Kehoe

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the 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 (Reference CK25-FL0059).

The proposed development is for clear-felling and replanting on a stated site area of 17.60 ha at Ballygrissane, Kilpatrick, Minane, Springhill and Willowhill, Co Cork. Application 02 October 2019. Current inventory comprises of mixed species plots; Noble Fir, Grand Fir, Japanese Larch, Ash, Elm,

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Oak, Norway Spruce, Sitka Spruce, Sycamore and Beech planted between 1943 and 1981, predominantly in 1968, proposed replanting is with 70% Norway Spruce, 20% Birch and 10% Rowan. Site is alongside a minor public road toward the local road L3210. Application seeks 0.88 ha of open space. Proposal is surrounded by good agricultural land, including tillage, there are a number of dwellings and public roads in the surrounds. The underlying soil type is approximately 5.89% Acid Brown Earths, Brown Podzolics 3.47% Podzols (Peaty), Lithosols, Peats & 90.71% Lithosols, Regosols. The slope is predominantly steep 15-30%. The project is located in the Ballinspittle-Coastal catchment (100%), the Stick_Sc_010 (100%) Sub-Catchment & the Minane (Cork)_010 (100%) waterbody. The application included a harvest plan document and a pre-screening report by the Applicants.

The application was desk assessed, and the DAFM referred the application to Cork County Council and no response is evidenced. The DAFM carried out a Stage 1 screening for Appropriate Assessment (AA) dated 31 July 2020. Natura sites within a 15km radius were assessed and three such European sites were identified and screened out for AA as follows; *Cork Harbour SPA & Sovereign Islands SPA - Due to the separation distance between the Natura site and the project. Great Island Channel SAC - Due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.* The DAFM included an in-combination screening assessment dated 31 July 2020 and found no likelihood of significant effects from the proposal when considered in combination with other plans and projects outlined therein.

The licence issued on 04 August 2020 and is exercisable until 31 December 2022. It is subject to standard conditions, along with additional conditions (h) to (q) which are set out in full on the licence CK25-FL0059 with reasons such as traffic safety, water quality and the environment

There is one appeal against the decision to grant the licence. The Appellant submits points regarding the FAC which are not valid grounds of appeal against the decision to issue CK25-FL0059. The grounds of appeal contend that before granting a felling licence, it was necessary for the Minister to establish the legitimacy of the actual forest. The appeal refers to a submission document from the National Parks & Wildlife Service (NPWS) and that some of which has been superseded by decisions of the CJEU, but no such submission was lodged with the FAC. The Appellant states that where Department of Housing, Local Government and Heritage is not in a position to make specific comments on a particular referral at the time, no inference should be drawn that the Department is satisfied or otherwise with the proposed activity and the below points will still be of relevance. Please do not rely on the fact that the NPWS did not make an individual objection. The Appellant contends that access to IFORIS is refused and as a result it is not possible to make an informed appeal on the details of the decision. The Appellant submits the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment (EIA) Directive or the basic guidelines of the NPWS. The Appellant states to have made detailed legal submissions to similar appeals in the past and it appears that there is a problem in understanding the legal requirements therein and sets out what the Appellant refers to as a 'ladybird version': That the test for Appropriate Assessment Screening in Irish and EU law is that it is merely necessary to determine that there may be such an effect, rather than to state that it will not have a significant effect. If the development is within 15km of a Natura 2000 site it has been screened in. The Appellant refers to case C-323/17 regards Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and



flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an AA of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site. The Appellant referred also to section 36 that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the AA. Also, section 38 that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned. The Appellant contends a map showing the SACs and SPAs and the site of the proposed development should be attached. The Appellant submits that regards screening for EIA it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha, and to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development, that includes thinning and clearfell. The Appellant refers to an opinion of advocate general Kokott in Case C-254/19 regards a Member States' obligation arising from a directive to achieve the result envisaged by the directive is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts.

In response the DAFM stated that the proposal has been subject to the DAFM's AA Screening procedure for European sites within 15 km from the clear-fell and reforestation project, and the DAFM deemed the project, when considered in combination with other plans and projects as identified in the pre-screening report, will not give rise to the possibility of a significant effect on the relevant screened European sites. The DAFM stated the project was screened out and an AA not required. DAFM stated that a number of the Special Conservation Interests (SCIs) / Qualifying Interests (Qis) were truncated on the AA Screening form when outputting the form. However, all SCIs/Qis were considered during the screening exercise and the screening determination is considered sound. DAFM stated a revised AA screening form is provided. For consideration of in-combination effects of the proposed project, DAFM carried out an in-combination assessment and included an associated in-combination statement based on this. That regarding consultations, referrals to statutory consultees, including Inland Fisheries Ireland, NPWS and local authorities, are automatically triggered according to interactions with certain spatial rules. In regard to Article 4(3) of the EIA Directive, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. Article 4(5) of the EIA Directive requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation are required to be subject to a determination as whether a sub-threshold EIA needs to be carried out or not, and the Competent Authority decides that an EIA is not required, it must –

a) State the main reasons for not requiring the EIA with reference to the relevant criteria listed in Annex III of the Directive (as transposed by Schedule 3 of the Forestry Regulations 2017) and, where

proposed by the applicant, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment;
b) Make the determination available to the public.

However, because the standard operational activities clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(5) of the Directive is not applicable.

An Oral Hearing was held on 02 February 2020, and all parties were invited to participate. The FAC sat in person and remotely and the DAFM and Applicants attended and participated remotely. The Appellant did not attend or participate. At the Oral hearing the DAFM detailed the procedures followed leading up to the making of the decision to grant the licence. The application had been the subject of a desk-based assessment and there was referral to the Local Authority, but no response was received. The proposal was subject to an AA screening of European Sites within a 15 km radius and to an in-combination assessment with other plans and projects prior to any decision to issue the licence and was screened out and a Stage 2 AA was not required. The DAFM stated that spatial layers used in assessing the site included for Curlew nesting and there were no sites in the vicinity. The DAFM stated there had been no request from the Appellant to access IFORIS in this case. The Applicants described the proposal site, the location of broadleaves across the site and that these would be retained where safe to do so, and that a watercourse runs along the western boundary for some of the site, rises approximately 1/3rd way up, and estimated a distance of 5.25km downstream to the coastline SPA. The Applicants described how some Japanese larch, infected with *Phytophthora ramorum*, had been removed from the site under a 'disposal notice' in the past. The Applicants stated the proposal does not constitute deforestation and is not a class of project within the EIA requirement.

The matter before the FAC is the appeal against the decision of the DAFM to grant a licence for clear-felling and replanting on a stated site area of 17.60 ha at Ballygrissane, Kilpatrick, Minane, Springhill and Willowhill, Co Cork. This is mature forestry and there is no convincing evidence presented by the Appellant, and before the FAC, to indicate that there are issues relating to its 'legitimacy'. Accordingly, the FAC's consideration of the appeal is focused on the licence granted under reference CK25-FL0059 and issued on 04 August 2020. The FAC considered the process followed by the DAFM in carrying out its screening for AA. Sites within a 15km radius were considered by the DAFM and, having regard to the nature and scale of the proposed development, the FAC considered that this was reasonable. The FAC notes that three Natura 2000 sites were identified, their QIs listed, and SCIs identified. Aspects of the project design and the potential for pathways for the transport of significant effects were also considered. An in-combination assessment examined non-forestry and forestry related projects, and the overall conclusion reached was of no likelihood of significant effects arising from the proposed development individually, or in combination with other plans or projects on any Natura 2000 site. The FAC had especial regard to Cork Harbour SPA which is at a direct distance of c. 2.8km and c. 4.7 km downstream per the EPA mapping facility and to the QIs associated with the SPA, and the FAC is satisfied with the conclusion of no likelihood of significant effects from the proposal on its own or in combination with other plans or projects. Having reviewed the AA screening the FAC concluded that mitigation measures had not been considered in the DAFM screening. The FAC concluded that the



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procedures adopted by the DAFM were consistent with the requirements of Article 6(3) of the Habitats Directive and that the conclusion reached was sound.

In respect of the contention that the proposal does not comply with the requirements of the EIA Directive, the FAC concluded that the proposal for clear-felling and restocking does not constitute a class of development to which the EIA Directive applies. Notwithstanding this conclusion, the FAC concluded that, having regard to the nature and scale of the proposed development, the characteristics of the receiving environment which is predominantly rural and agricultural, may give rise to localised, short term and intermittent noise and disturbance, there is no likelihood of significant effects on the environment arising.

The FAC considered that there is no convincing evidence before it to indicate that the DAFM decision was the subject of significant or serious error or a series of errors, or that the decision was made without complying with fair procedure. In deciding to affirm the decision to grant the licence, the FAC concluded that the proposed development would be consistent with Government Policy and Good Forestry Practice.

Yours Sincerely,

Pat Coman, on behalf of the FAC



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