



13 January, 2021

[REDACTED]
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Our ref: FAC 189/20

Subject: Appeal in relation to felling licence CK24-FL0085

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 CK24-FL0085.

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

The felling and replanting licence under appeal (CK24-FL0085) for the project site comprises 12.88 ha of clear-felling 100% Sitka Spruce, planted 1976, and replanting with 100% Sitka Spruce at Castletown, Barnagowlane East, Cullenagh and Goulacullin, near Drimoleague, Co. Cork. The licence was issued on 26/3/20 for felling and replanting of 12.88ha, valid to 31/12/2022.

Hearing

An oral hearing of appeal FAC 189/20 was conducted by the FAC on 5/1/2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch and Mr Pat Coman.

Secretary to the FAC: Mr Michael Ryan

Appellants: [REDACTED] did not attend

Applicant representative: [REDACTED]

DAFM representatives: [REDACTED]

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

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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 affirm the decision to grant this licence (Reference CK24-FL0085).

The proposal as per the licence is for clear-felling 100% Sitka Spruce, planted 1976, and replanting with 100% Sitka Spruce on 12.88ha at Castletown, Barnagowlane East, Cullenagh and Goulacullin, near Drimoleague, Co. Cork. The licence under appeal was issued on 26/3/20 and is valid to 31/12/22. The project is located in the Dunmanus-Bantry-Kenmare Catchment 100%, the Mealagh_SC_010 (100%) Sub-Catchment and the Mealagh_010 (100%) Waterbody. The licence application included a Harvest Plan document and Appropriate Assessment (AA) Pre-screening Report.

The licence under appeal relates to the site area of 12.88ha, subject to standard conditions as well as conditions relating to agreement with the Roads Authority about haulage routes, contact with Area Engineer prior to the construction of entrance/lay-bys, compliance with the Technical Standard for Design of Forest Road Entrances from Public Roads and adjacent unplanted area to be replanted with at least one growing season to 'Green-Up' prior to commencement of felling.

The proposal was desk assessed by the DAFM. The DAFM certification stated the underlying soil type to be approx. Podzols, Lithosols, Peats (100%), the slope to be predominantly steep 15% -30% and the habitat predominantly WD4 (Fossett code for Conifer Plantation). It also stated that the project is located in the Owvane-Meelagh-Glengarriff Coastal catchment (100%), the Mealagh_SC_010 (100%) Sub-Catchment and the Mealagh_010 (100%) Waterbody. The DAFM undertook the Stage 1 AA screening in relation to the provisions of the Habitats Directive and found two European sites coming within a 15km radius of the proposal. The sites are the 2171 Bandon River Special Area of Conservation SAC and the 1873 Derryclogher Bog SAC. The sites were considered in turn by the DAFM with their qualifying interests listed and the reasons for screening each site out provided. The Bandon River SAC was screened out because the project area was within a separate water body catchment and no upstream connection and no pathway, hydrological or otherwise to the Natura site. The Derryclogher Bog SAC was also screened out because of the absence of direct upstream hydrological connection to the site. The In-Combination Report also concludes that the project will not give rise to the possibility of an effect on the Natura sites.

There was a referral to Cork County Council who responded on 30/1/2020 with the request that two conditions be attached to the licence regarding agreeing haulage routes and



contact with Area Engineer regarding construction of entrances or lay-bys into the land. The licence approved included these conditions.

There is one appeal against the decision. The written grounds are as set out in the Notice of Appeal dated 9/4/2020. In brief, the written grounds contend that the granting of the licence is in breach of Articles 4(3), 4(4) and 4(5) of the Environmental Impact Assessment (EIA) Directive, that project splitting is not permitted (the applicant's Forest Management Unit (FMU) planning process was referred to), and that the whole project was not considered. The site is within the catchment of the Mealagh River with an extant population of Freshwater Pearl Mussel and no evidence provided that relevant prescribed bodies have been consulted. The potential impact on EU Annex 1 habitat adjacent and downstream (commonage containing blanket bog, wet and dry heath) was not shown to have been addressed nor the potential for seeding of Sitka Spruce, and relevant bodies were not consulted. Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. There was failure to comply with Regulation 21(1) of the Forestry Regulations because the appellant contended that no reply was received to their submission and therefore compromised in the capacity to make an appeal. There was also a breach of Art. 10 (3) of the Forestry Regulations because of the contended failure of the DAFM to make available a copy of the application.

In a statement to the FAC in respect of the appeal the DAFM responses to the grounds stated are set out. In brief, they respond that the statutory obligation as regards EIA is fully discharged once it has been clearly identified at the outset that the application in question does not involve an activity or project that falls within the specified categories of forestry activities or projects 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, and wherein relevant national mandatory thresholds and criteria for an EIA are also prescribed. They stated that the standard operational activities of clearfelling and reforestation are not categories of development covered by the EIA Directive. Article 4(4) does not apply for similar reasons. The applicant's FMU planning process and any resultant strategic plan is not an obligatory statutory process and are a matter for the applicant. With regard to consultations (Freshwater Pearl Mussel and Habitat - Commonage/Bog/Heath), the referrals to statutory consultees, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. They explain that the application did not require referral to statutory bodies based on these rules. All felling licences issued by the DAFM are conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM

2019). These standards include detailed conditions relating to water setbacks, aquatic zones, silt trapping all designed to protect water quality. It is a principle of law that unless the grant of a first statutory licence expressly exempts the holder of any obligation to obtain a second licence 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 Minister may, at any time, attach or vary conditions to any licence. Correspondence with the appellant was documented and recorded and DAFM notes appellant successfully availed of appeal.

The FAC sat in person at an Oral Hearing in Portlaoise, Co. Laois on 05/01/2021. The parties were invited to attend in person or by electronic means. The DAFM and applicants participated electronically but the appellant did not participate. At the outset the DAFM explained that there were errors in their Statement because the contents included at points (9) and (10) of that Statement did not apply. The DAFM Forestry Inspector explained that the DAFM'S In-Combination Statement did not rely on the applicant's one and that they had no regard to the applicant's AA Pre-screening Report dated 29/04/2020 which had been submitted in error by the Applicant and forwarded to the FAC in error. They confirmed that the Department themselves had carried out all the required assessments. The DAFM then referred to the procedures followed in the processing of the application leading to the making of the decision to grant the licence. They confirmed that the Appropriate Assessment Screening had been completed and reviewed before the decision was made and were fully considered in the making of the decision. They advised that a referral to the Local Authority had taken place and that their concerns had been fully taken into account in the conditions attaching to the licence. The conditions of the licence, other than the standard ones (a) to (h), were also described.

The applicant then explained again that the AA Pre-screening Report dated 29/4/20 had been submitted in error. In relation to the proposal, they advised that with replanting and a small open space left, they did not regard the project as deforestation. They also explained that they found, in relation to the watercourse, no hydrological connection to the 2 Natura sites identified and no effect on the Freshwater Pearl Mussel.

In response to the FAC queries about the Freshwater Pearl Mussel, the DAFM advised that there was an undesignated Freshwater Pearl Mussel population extant approx. 14 kms downstream from the project (source referred to as National Parks and Wildlife Service) and that there would be no effect given adherence to the Forestry and Water Quality Standards (condition attaching to the licence). The applicant mentioned that they had found a population of Freshwater Pearl Mussel approx. 10kms from the project site but located in the Bandon catchment, whereas the project is in the Mealagh Sub-Catchment, therefore there is no hydrological connection.



In relation to FAC queries about the adjacent site and greening, the applicant described the site and confirmed that it had actually been cut and replanted in 2019 and the licence condition regarding greening-up had been fulfilled. With regard to FAC enquiries about providing the appellant with information, the DAFM referred to the documentation provided which recorded the correspondence between the DAFM and the Appellant in relation to their request for the information (files incl. Applications, Maps and draft Harvest Plans) as part of their request in respect of 351 cases. They explained that they were in continuous contact with the appellant, as the record of correspondence showed, and had resolved the provision and transmission issue of the bulk data by using a USB stick. There were difficulties with the first USB sent and a second stick containing all the requested data was sent on 19/02/2020. A letter was also sent to the appellant advising about the issuance of the licence, on the day of issue. They explained that although the data was forwarded to the appellant outside of the time limit this was due primarily to the amount and bulk of the information involved and the attendant administrative and security of transmission issues which they proactively worked to resolve. They also pointed out that the appellant was able to make his appeal to the FAC.

The FAC made enquiries of the DAFM about the catchment area. The DAFM advised that the data sets regarding catchments are updated regularly and consulted the data sets again and agreed that the more up-to-date Catchment data showed the area as the Dunmanus-Bantry-Kenmare Catchment 100% (the sub-catchment and waterbody remained the same). They confirmed that according to the National Parks and Wildlife Service, an undesignated Freshwater Pearl Mussel extant population lay approx. 14kms downstream. The FAC made enquiries about the site's proximity to a watershed at southern end, and streams to north and south. The Applicant explained that there were a series of waterbodies to the west, south west and to the east, converging downstream and into Bantry Bay eventually. The waterbodies to the south are separated from the project by a hill with no risk of water leaving the site and reaching them. , The FAC queried further regarding the waterbody to the east, and DAFM confirmed that it rose in the south some 150m from site and ran north along the eastern boundary .

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) and concludes that there is no breach of the provisions of the EIA Directive.

In respect of the Appellant's contention that the project has a potential cumulative impact on a protected species, referring to an extant population of the Freshwater Pearl Mussel, the DAFM confirmed at the oral hearing that they were aware of an undesignated extant population approx. 14kms downstream from the project site and that the licence contains a condition requiring adherence to the Forestry and Water Quality Guidelines which will prevent a deleterious effect on water quality. Referrals are only required for designated populations. With regard to the Appellant's reference to another clear felling application in the same sub-basin, no specific information was provided nor was the issue expanded as a ground in relation to the project site. Based on the evidence before it, the FAC concludes that the licenced development, carried out in accordance with the licence conditions, is not likely to have an adverse effect on water quality or on the Freshwater Pearl Mussel.

With regard to the Appellant's ground on the potential impact on habitats that appear in Annex 1 of the Habitats Directive, the FAC considered the procedures followed by the DAFM with regard to the requirements of the Habitats Directive. It noted that the Appropriate Assessment Report had addressed Natura sites (2 European sites) within a 15km radius, listing qualifying interests and conservation objectives and detailing potential effects, before concluding that they could be screened out because there was no likelihood of significant effects arising from the proposed development on the sites screened. The FAC is satisfied that the procedures followed by the DAFM in the Stage 1 screening are consistent with the requirements of the Habitats Directive and accepts the conclusions reached. The FAC is satisfied that the DAFM complied with the requirements of Article 6(3) of the Habitats Directive. With regard to consultations, the referrals regarding designated sites are triggered by the spatial analysis rules employed by the DAFM and no referrals were required in this instance (other than to the Co. Co. re. engineering requirements). No specific evidence was provided regarding the contention of seeding by Sitka Spruce into an adjacent undesignated commonage.

In regard to the ground of appeal concerning a system of protection for wild birds during breeding and rearing, 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 this licence. The FAC noted that the appellant did not submit



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any specific details in relation to bird nesting or rearing on this site. In these circumstances, the FAC concluded that a condition should not be attached to the licence.

With regard to the ground relating to breach of Article 10(3) of the Forestry Regulations, the FAC noted that the electronic copy of information requested in respect of the application was provided by the DAFM. The appellant made no further submission to the DAFM following the production of the documents. The FAC noted that the written grounds of appeal would indicate that the appellant had knowledge of the proposed development at the time of lodging his appeal.

Based on the evidence before it, the FAC concluded that the DAFM did not make a serious or significant error, or series of errors, and complied with fair procedures in the process of making their decision to grant this licence (CK24-FL0085). 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,

Paula Lynch on behalf of the FAC