



11 January, 2021

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Our ref: 569/2020 and 622/2020

Subject: Appeal in relation to felling licence LS01-FL0092

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 LS01-FL0092.

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 and replanting licence LS01-FL0092 for 5.69 ha at Glendine, Glendineoregan, Co. Laois was granted by the DAFM on 15/7/2020.

Hearing

An oral hearing of appeals 569/2020 and 622/2020 was conducted by the FAC on 10/12/2020.

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 [REDACTED] did not attend
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Alan Sheridan and Mr Luke Middleton

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 LS01-FL0092).

The proposal as per the licence is for clearfelling and restocking of a stated site area of 5.69 ha at the townlands of Glendine, Glendineoregan, Clonaslee, Co. Laois. The project lies in the River Sub Basin Gorragh_010. The River Sub Basin Gorragh_010 has approximately 55% forest cover which is higher than the national average of 11%. The Gorragh River bounds the south of the site and a tributary to same bisects the site in the NE. Proposed felling is for 100% Sitka Spruce (noted on the applicant's Supporting Information for the Felling Licence as planted in 1970 and 1971) and restock details are stated as 70% Sitka Spruce, 25% Lodgepole Pine and 5% Other Broadleaves. The restocked area would be 5.41ha with 0.28 open space. The licence application includes the applicant's Harvest Plan and Appropriate Assessment Pre-screening Report. The applicant's Appropriate Assessment Pre-screening Report identified 6 SACs and 2 SPAs within a 15km radius. It also considered the In-Combination effects of other internal projects managed by the applicant, the County Development Plan, and also planning applications (online planning system MyPlan.ie and An Bord Pleanála website) and concludes that *'the proposed project does not represent a source, or if so, no pathway for significant effect on any European site exists. Thus, there is no potential for it to contribute to any such effects when considered in-combination with any other plans/projects.'*

The licence under appeal is dated 15/7/2020 and is exercisable until 31/12/2022. It relates to the site area of 5.69ha and is subject to standard conditions (with reasons) plus conditions relating to the protection of water quality, aquatic setbacks, silt and sediment trapping and conditions regarding protection of the Hen Harrier species. The DAFM referred the application to Laois County Council and to Inland Fisheries Ireland (IFI). Laois County Council responded that the proposed development is within an NHA, SAC or National Park and an Appropriate Assessment is required. They stated that the proposed development is not within an Architectural/Archaeological site or Prime Scenic/Amenity Area and is on an unclassified road. The response from IFI indicated their concerns as follows:

- *The site is on a very steep gradient and local fishery officers have expressed concerns over the contractor's ability to mitigate against silt entering the Gorragh River. Also trees are planted right up to the bank of the Gorragh River and it is important that the removal of these trees is done so as to ensure that they do not fall into the river or that silt is allowed to fall into the river.*
- *Measures should be taken to ensure no silt enters into any watercourse near these sites and that all silt traps are maintained regularly. These must be of sufficient length and retention time for rainfall in the area. There is a steep gradient at the site and contractors must ensure that no silt enters the river which is an important Salmonid spawning river.*
- *Ground stability should be kept under constant review, and felling operations must be carried out in such manner as not to result in the creation of unstable ground conditions (leading to the excess run off of silt into water courses) or subsequently lead to post harvesting ground stability.*
- *If any water course is to be crossed during the felling operations then this should be done by either a clear span bridge or embedded culvert of diameter greater than 900mm and where at least 25% of the culvert is embedded. This includes all internal forestry drains.*



- *IFI Limerick office should be contacted at least one month prior to commencement of works*
- *... all work must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines.*

The DAFM undertook and documented an Appropriate Assessment (AA) Screening that found 8 Natura sites within the 15km radius and found that two of the sites required Appropriate Assessment. The sites were the Slieve Bloom Mountains SPA and the Slieve Bloom Mountain SAC. An Appropriate Assessment Report and Determination was undertaken and the documents were reviewed by an independent Ecologist. These documents were dated 1/7/2020 by the Department and 9/7/2020 by the independent Ecologist. The licence was approved with a number of conditions attached which took into account the responses of the referral bodies and were related to the mitigation of effects as outlined in the AA Report and Determination.

There are two appeals against the decision. The written grounds are as set out in the Notice of Appeals/appeal letters received from the two appellants. The written grounds contend that the granting of the licence is in breach of Articles 4(3) and 4(4) of the Environmental Impact Assessment (EIA) Directive and that project splitting is not permitted (the Coillte Forest Management Unit (FMU) planning process was referred to). 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. The Stage 1 and 2 AA assessments are not valid. DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. 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 nor do they provide a system of strict protection for Annex IV species. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations, and should include a condition that plans and works are inspected by Forestry Service prior to, during and post works to ensure compliance. 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. The grounds contend also that the AA screening is not in compliance with *Finlay J in Kelly*, that the decision is invalid because the Minister is a judge in own case, that there were no investigations as to whether the application site has complied with EU law and that the basic National Parks and Wildlife Service (NPWS) requirements have not been complied with.

In a statement to the FAC in respect of each appeal the DAFM responses to the grounds stated are set out. They state that the standard operational activities of clearfelling and reforestation are not categories of development covered by the EIA Directive. The Coillte planning processes are a matter for Coillte. The DAFM applies a wide range of checks in relation to the protection of water. It is actively engaged in the Water Framework Directive (WFD) process and objectives and is fully informed of its responsibilities thereunder. The application was the subject of DAFM's Appropriate Assessment (AA) screening procedure and all sites within a 15 km radius were examined. The DAFM identified the possibility of the

project having a significant effect on the Slieve Bloom Mountains SPA 004160 and the Slieve Bloom Mountains SAC 000412. A Stage 2 AA was carried out and a Determination made. Site specific measures prescribed by the DAFM were included in the Determination as mitigation measures. There would be no adverse effect on any European site. Members of the public could make submissions to the DAFM in respect of the likely effect on the environment of the proposed felling activity. The DAFM fully complied with the requirements of Article 6(3) of the Habitats Directive. 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. Users of Plant Protection Products must apply the principles of Good Plant Protection Practice. There is no legal requirement to inform forest owners or adjacent land owners of the intention to spray. As regards the grounds relating to Finlay J and Kelly and the NPWS requirements, the Department set out in detail the procedures adopted by them under EU law relating to screening, appropriate assessments and EIA.

The FAC sat in person at an Oral Hearing in Portlaoise, Co. Laois on 10/12/2020. The parties were invited to attend in person or by electronic means. The DAFM and applicants participated electronically but the appellants did not participate. At the Oral Hearing the DAFM confirmed that the AA screening was carried out and that the AA Report and Determination were completed before the issuing of the licence and was based on information submitted with the application. They confirmed that the Appropriate Assessment Report and Determination had been independently reviewed by an Ecologist and had been fully taken into account in the making of the decision to grant the licence. They confirmed that although Table 1 at Section 5 of the AA Report does not contain entries for the results of the subsequent expert verification, the Ecologist reviewer signed-off on all the measures at the Report sign-off section at page 31 of the document and in the AA Determination. They confirmed no referral to the NPWS because the project is located in a 'Green Area' for Hen Harrier which does not trigger a mandatory referral under the agreed procedure. When queried about the specific concerns of the IFI, the DAFM confirmed that all of the IFI concerns were addressed through the licence conditions, referring to conditions (h), (i), (l), and (m) of the licence. The FAC queried what level of consideration was given in the In-Combination assessment to the fire line at the Cut. The DAFM responded that a fire line is not a licenced activity, that the fire line in question was in a separate catchment, that it was over 1km away from the site, had no in-combination effect and a referral was therefore not needed. FAC queried why this issue did not prompt a referral to the NPWS and the DAFM responded that the referral did not take place in this case because of the distance (over 1 km) between the fire line and the site and because of the separate water catchment area. The FAC queried other licence applications in the area. The applicant advised that due to the fires in the Slieve Bloom area in 2018 a number of forests suffered substantial damage and they were working through the fire damaged sites to clear them and replace the trees.

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 contention that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody the FAC considered this but noted that no specific information had been submitted in support of this contention. The FAC further noted that additional site-specific conditions were attached to the licence in relation to the protection of water quality. Based on the information before it, the FAC concluded that there is no convincing reason to conclude that the proposed development carried out in accordance with the conditions of the licence, would have an adverse impact on water quality.

The FAC considered the procedures followed by the DAFM with regard to the requirements of the Habitats Directive. It noted that the AA Report had addressed Natura sites within a 15km radius, listing qualifying interests and conservation objectives and detailing potential effects, before concluding that a Stage 2 assessment was required in respect of the Slieve Bloom Mountains SPA and SAC, but that there was no likelihood of significant effects arising from the proposed development on the other sites screened. The FAC considered the Stage 2 assessment carried out leading to the recommendation for mitigation measures in respect of the protection of the Hen Harrier and water quality protection and noted that the recommended conditions had been incorporated into conditions of the licence. The FAC is satisfied that the procedures followed by the DAFM in the Stage 1 screening and Stage 2 assessment are consistent with the requirements of the Habitats Directive and agrees with the conclusions reached at each stage. The FAC concludes that the proposed development individually, or in combination with other plans or projects, carried out in accordance with specified mitigation measures recommended as conditions to a licence would not adversely affect the integrity of the Slieve Bloom Mountains SPA and SAC, and will not affect the preservation of these sites at favourable conservation status. The FAC is satisfied that the DAFM complied with the requirements of Article 6(3) of the Habitats Directive.

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. 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. 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 further

concluded that, subject to adherence to the conditions set out in the licence, the proposed development would not be likely to give rise to significant effects on any designated site or on the environment.

The FAC noted that all works included in any Harvest Plan and carried out must comply with the conditions of the licence. In these circumstances, the FAC considers that the implementation of a Harvest Plan would not create the likelihood of significant effects occurring on any Natura 2000 site or on the environment.

The FAC considered the Appellant's grounds that the licence should contain conditions relating to the commencement, carrying-out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the Licensee's adherence to the conditions of those licences and that the enforcement of conditions is a matter for the DAFM.

The FAC also considered the Appellant's submission that the licence should include a condition regarding the notification of certain parties in the case of any spraying of chemicals. In this regard, the FAC noted there is no statutory basis to enforce the Licensee to inform individual landowners. The FAC observed the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No. 1107/2009 (concerning the placing of plant protection products on the market). Users of plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. In these circumstances, the FAC finds that there is insufficient basis on which to apply additional conditions as contended by the Appellant.

In relation to the ground referring to the case regarding Finlay J and Kelly, the FAC noted that no specific details had been provided by the appellant to substantiate these grounds of appeal. However, the FAC concluded that the DAFM had fulfilled the requirements of EU law with regard to the screening and appropriate assessment in this case and that they had carried out investigations as appropriate regarding this project. Grounds of appeal relating to the Minister are outside the remit of the FAC.

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 (LS01-FL0092). 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