



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

31 May 2021

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FAC ref: 391/2020

Subject: Appeal in relation to felling licence WW07-FL0157

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 felling licence WW07-FL0157.

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 WW07-FL0157 was granted by the Department on 26 June 2020.

Hearing

The FAC conducted a hearing of appeal 391/2020 on 04 February 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Pat Coman & Mr Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Appellant: [REDACTED]

DAFM representatives: Mr Luke Middleton & 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 vary the decision to grant this licence (Reference WW07-FL0157).

The proposed development is for clearfelling and replanting on a stated site area of 0.54ha. at Cloghernagh, Co. Wicklow. The current crop is 100% Sitka Spruce, planted in 1985. Proposed

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restocking is 98% Sitka Spruce and 2% Rowan. Underlying soils are stated to be Podzols (Peaty), Lithosols, Peat (100%). The slope is predominantly steep. Cultivation type is stated to be windrow and mound. The site is located in the Avonbeg_20 and Avonbeg_010 Sub Catchment. The application documents include a 'Harvest Plan' and AA Pre-screening Report.

The DAFM carried out a screening for Appropriate Assessment. Five sites within a 15km radius were identified as follows:

1. Wicklow Mountains SPA
2. Wicklow Mountains SAC (806m separation)
3. Vale of Clara (Rathdrum Wood) SAC (7734m separation)
4. Slaney River Valley SAC (10313m separation)
5. Deputy's Pass Nature Reserve SAC (13554m separation)

The Wicklow Mountains SAC, Vale of Clara (Rathdrum Wood) SAC and Deputy's Pass Nature Reserve SAC were screened out for reason of no hydrological connection and lack of pathway for the transfer of effects. The Slaney River Valley SAC was screened out as it is in a separate waterbody, with no upstream connection and no hydrological pathway for transfer of effects. The Wicklow Mountains SPA was screened in for Stage 2 Appropriate Assessment.

The DAFM completed an Appropriate Assessment Report (AAR) dated 18.06.20 and this was ecologically reviewed on 24.06.20. The Wicklow Mountains SPA qualifying interests (Merlin and Peregrine) are listed together with the conservation objectives, and the potential for impacts arising are assessed. The AAR identifies potential direct and indirect, short and long term and operational impacts as – noise, vibration, mechanical movement, artificial lights. Site specific mitigation measures are proposed. In-combination projects considered include a dwelling and forestry related projects – forest road (1) and Coillte felling (15). There is approximately 44% forest cover in the River Sub Basin.

Following on from the AAR the DAFM made an Appropriate Assessment Determination (AAD) that the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Wicklow Mountains SPA, having regard to the conservation objectives, and will not affect the preservation of the site at favourable conservation status, if carried out in accordance with site specific mitigation measures as follows:

- No felling or other associated forestry operations are permitted within 1 March to 31 August inclusive, within 100m of the forest edge
- Retain existing scrub on the site, to maximise opportunities for prey species
- Proposed works to adhere to the Interim Standards for Felling & Reforestation and Environmental Requirements for Afforestation, December 2016.

The AAD concludes that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

The DAFM referred the application to Wicklow County Council. In response, the County Council stated that the site is in the River catchment Avonbeg_20. The water status is 'Good'. The pH baseline at 4.7 is borderline. The application was also referred to Inland Fisheries Ireland (IFI). In response IFI stated that the proposal is within the catchment of the Avonbeg, a salmonid system supporting populations of Atlantic salmon, Sea trout and Brown trout. In light of the current ecological sensitivity in this catchment, Q3-4 at EPA Site 0600 Greenan Bridge (2018) and the associated comment "the paucity of



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pollution sensitive macroinvertebrates species coupled with excessive instream filamentous algae indicated unsatisfactory ecological conditions at Greenan Bridge”, IFI do not consider that reforestation with conifers as proposed at this site is sustainable. IFI added in respect of Forestry Harvesting and Environmental Guidelines, that ground stability should be kept under constant review, that IFI should be notified two weeks in advance of the operation.

The licence issued on 26.06.20 and is exercisable until 31.12.2022. It is subject to standard conditions a) to g). Additional conditions are h) notification of IFI personnel, i) retain existing scrub, j) Restriction on felling operations associated with the licence 1 March to 31 August inclusive, within 100m of the forest edge, where such edge is immediately adjacent to moors, heathland, peat bogs, or natural grassland; or within 100m of a clearing in the forest larger than 1ha. Such operations can commence in sections of the project area furthest away from the 100m exclusion zone. Such operations can progress towards the exclusion zone but can only enter it during the period 1 September to 29 February inclusive, k) – p) protection of water quality and q) adherence to specified Guidelines etc.

There is a single appeal against the decision to grant the licence. In summary, the grounds of appeal contend that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA and there is also a breach of Article 4(4) of the EIA Directive. On the same date as this application was made a further 7 applications were made for the same FMU totalling 47.83ha. The application does not cover the whole project. Project splitting is not permitted. This licence and associated operations threaten the achievement of the objectives of the underlying waterbody. Clear felling has the capacity to impact on water quality. The Stage 2 Appropriate Assessment (AA) is not legally valid. Mitigations in the licence are not consistent with those in the AAR. The Minister did not consult with the public before making the AAD. There was inadequate consideration given to feedback from a Consultation Body. The Harvest Plan is not consistent with the Interim Standard for Felling and Reforestation. The Minister should be notified at the commencement and conclusions of operations. There should be a condition that all works be inspected by the Forest Service prior, during and post works. The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM state that the proposed development is not of a class of development covered by the EIA Directive. DAFM provides a wide range of checks and balances in respect of the protection of water – including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extractions, monitoring, storage of hazardous materials, and post operation works. The Minister may attach or vary conditions at any time. Members of the public may make a submission or observation on likely effects on the environment of the proposed felling activity. All correspondence was considered. The use of PPPs in Ireland is covered by Statutory Instruments. There is no legal requirement to notify of the intention to spray.

An Oral Hearing was convened on 4 February 2021 and all parties were notified. The FAC sat remotely. The appellant and the DAFM participated remotely. The applicant was not in attendance. At the outset a referral submission from Inland Fisheries Ireland (IFI) (e mail dated 27 January 2019) was read into the record of the Hearing.

The DAFM outlined the procedures followed leading to the decision to grant the licence. An Appropriate Assessment screening (AAS) was carried out, followed by an AAR and an AAD, before the licence was issued on 26 June 2020. The project lands are in the Ovoca Vartry catchment and Avonbeg_Sc_010 sub-catchment. The application was desk assessed. The site is in a fisheries sensitive area. Scrub would be retained on the site as a measure to protect the qualifying interest of the Wicklow Mountains SPA. There would be no felling between 1 March and 31 August within 100m of the forest edge. Other conditions are designed to protect water quality. The project lands are approximately 400m from the Drumgoff River with intervening forestry. The appellant stated that the project lands were within 800m of the SPA. Condition (j) of the licence, in effect, watered down the AAD requirement. The Inspector should not overrule the Ecologist. The appellant questioned the scientific basis for the mitigation measure relating to the Merlin. The appellant referenced publications in respect of the protection of the Merlin and stated that there is expert opinion that there should be no felling operations between 1 March and 31 August within 300 – 500m of the forest edge. There is no scientific basis for the 100m required and the National Parks and Wildlife Service (NPWS) were not consulted and should have been. The appellant expressed concern for potential colonisation, noting that there is mapped Blanket Bog 420m to the south-west. Both the County Council and IFI had raised concerns regarding water quality. In response to FAC questions, the DAFM stated that Greenan Bridge (referred to in the IFI submission) is approximately 6km separated from the project lands. Other licences (WW07-FL0029 and WW07-FL0067) were replanted in 2019 and 2020 respectively, the first with 100% Sitka spruce and the second with 98% Sitka spruce and 2% Broadleaves.

The FAC considered, in the first instance, the referral submission from the IFI and decided to request further information. The request sought clarification from the IFI on the following issues:

- Is it the IFI view that reforestation with Sitka spruce should not be permitted for reasons of likely adverse impacts on fisheries?
- Documentary evidence that the water quality recorded at Greenan Bridge is significantly impacted by coniferous plantations upstream, or could other intervening land uses be having an impact?
- Do the conditions on the licence issued allay IFI concerns?

The IFI response, dated 16 March 2021, stated that cumulative impacts must be considered. Research carried out by the Central Fisheries Board demonstrated significantly lower juvenile salmon abundance at Q3 and Q3-Q4 sites compared to Q4 sites. The research found that the Q values of Q3-Q4 will impede salmon parr production, while Q values of Q3 or less will limit Brown Trout production. IFI monitoring at Greenan Bridge in 2010 and 2013 confirmed the ecological status as Moderate, and in 2017 it was Poor. The submission refers to 3 peer reviewed studies highlighting the fact that afforestation in upland peats poses a significant environmental threat to water quality and that the principal threat is from forest harvesting. Forestry has been identified as a significant pressure in the Avonbeg catchment. The conditions of the licence issued are in line with the 2016 Afforestation Guidelines and, therefore if strictly implemented, should provide better protection for the aquatic environment than practices did pre-2016.

The FAC decided to seek clarification of the further information submitted as follows:



- Is it the IFI's view that Sitka spruce should not be permitted for reasons of adverse impacts on fisheries in the Avonbeg River?
- Clarification if the conditions of the licence allay the concerns of the IFI.

The IFI responded on 5 April 2021. The response attaches a draft report titled *Avonbeg-Avonmore (AFA 0012) Priority Area for Action*, dated March 2020. The draft report notes that acidification and peat siltation are significant issues. Natural sensitivity to acidification of this area is enhanced by the pressures of forestry. Forestry is identified as the main pressure on Avonbeg_010 and Avonbeg_020 waterbodies. With respect to the Upper Avonbeg, the report concludes that, "while ecological conditions improved to Good in 2013-2018, the waterbody is still At Risk due to the possible failure of acidification conditions in the future cycle". The report identified forestry as the single significant pressure for this waterbody.

The requests for further information and the IFI responses were circulated to the other parties. One response was received – from the DAFM dated 18 May 2021. This states that the licence was issued in line with DAFM practices and procedures and included 7 standard conditions. In addition, a further 6 conditions were added specifically aimed at protecting water quality. All conditions require setbacks in place at reforestation to protect water quality. The increased setbacks now required will avoid any deterioration in water quality. There is also a condition requiring consultation with the IFI prior to commencement of works. There is no direct connectivity between the harvest block and WFD rivers. The site is unsuitable to restock with broadleaves and, in addition, the high population of deer in this area would make establishing broadleaves difficult without protection measures. The licence does allow for the planting of broadleaves in buffer zones. The DAFM carried out an in-combination assessment of all projects carried out over the previous 5 years in the same river sub-basin and concluded that the proposed development, when considered in combination with other plans or projects, would not give rise to any adverse effect on the integrity of any European site. Once all of the conditions on the licence are adhered to, there will be no negative effect on water quality.

Addressing the written grounds of appeal, the FAC considered the contention that the licence issued was in breach of the provisions of the EIA Directive. The proposal is for the clearfelling and restocking of a stated site area of 0.54ha. Clearfelling and restocking, as part of a forestry management scheme, with no change in land use, is not a class of development contained in Annex I or Annex II of the Directive, and is not a class of development included in the transposing Regulations. Furthermore, the proposed operations do not include works which, by themselves, constitute a class of development covered by the EIA Directive or the transposing Regulations. In these circumstances, the FAC concluded that the licence issued is not in breach of the EIA Directive.

The FAC considered the procedures followed by the DAFM in respect of the requirements of the Habitats Directive. The DAFM carried out a screening for Appropriate Assessment identifying 5 Natura 2000 sites within a 15km radius. The FAC found no reason to conclude that sites in a wider radius should have been considered. Four of the sites were screened out for Stage 2 Appropriate Assessment with reasons given for this conclusion - Wicklow Mountains SAC, Vale of Clara (Rathdrum Wood) SAC, Slaney River Valley SAC and Deputy's Pass Nature Reserve SAC. The Wicklow Mountains SPA was screened in for Stage 2 Appropriate Assessment. The DAFM completed an AAR dated 18.06.20 and

this was ecologically reviewed on 24.06.20. The Wicklow Mountains SPA qualifying interests (Merlin and Peregrine) are listed together with the conservation objectives, and the potential for impacts arising are assessed. The AAR identifies potential direct and indirect, short and long term and operational impacts as – noise, vibration, mechanical movement, artificial lights. Site-specific mitigation measures are proposed. In-combination projects are considered. Following on from the AAR, the DAFM made an AAD concluding that the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular Wicklow Mountains SPA, having regard to the conservation objectives, and will not affect the preservation of the site at favourable conservation status, if carried out in accordance with site specific mitigation measures. Based on the information before it, the FAC finds no reason to conclude that the procedures followed by the DAFM are inconsistent with the provisions of the Habitats Directive or that the overall conclusion expressed in the AAD is not sound. The FAC noted, however, that condition (j) attached to the licence does not reflect the wording of the recommended mitigation contained in the AAR and the AAD following ecological review. There is no convincing evidence before the FAC as to why the wording of the recommended mitigation was not attached as a condition to the licence. In these circumstances, the FAC concluded that a significant error had occurred in the making of the decision.

The FAC considers that the 'Harvest Plan' submitted is an operational plan for contractors carrying out the proposed development and that, in any event, the terms and conditions of the licence must be complied with in full in the carrying out of the proposed development. Compliance with, and enforcement of conditions of the licence are matters for the DAFM, who are given separate legislative powers for this purpose. As such, the FAC finds no need to add additional conditions to the licence in respect of compliance. The spraying of chemicals is controlled through Statutory Instruments and no additional conditions are required to be attached to the licence in this regard.

The appellant contends that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody as clearfelling has the capacity to impact on water quality. While the appellant did not provide any convincing evidence to substantiate this contention, the FAC decided to seek clarification from the IFI on its referral submission regarding the potential for impact on water quality in this fishery sensitive area. The requests for further information and IFI responses are summarised above and are contained in full on the case file. While noting that the original referral submission dated January 2019 expressed the IFI view that reforestation with conifers, as proposed, is unsustainable, the IFI response to further information dated March 2021 states that the conditions of the licence issued are in line with the 2016 Afforestation Guidelines and, therefore, if strictly implemented, should provide better protection for the aquatic environment than practices did pre-2016. Having regard to the nature and scale of the proposed development, the separation of the project lands from any WFD river, the separation distance to Greenan Bridge, and to the responses of the IFI to the FAC requests for further information, the FAC finds no convincing reason why the proposed restocking with conifers, as proposed, would adversely impact on water quality or on fisheries in the Avonbeg River.

The FAC concluded that a significant error had occurred in the making of the decision by not including the recommended mitigation as worded in the Appropriate Assessment Report and Determination in respect of the Merlin. The FAC decided that the licence should be varied by the omission of condition (j) and the inclusion of the following condition as a new condition (j):



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No felling or other associated forestry operations are permitted within the period 1 March to 31 August inclusive within 100m of the forest edge.

Reason: In the interest of the protection of the Merlin during the felling and forestry operations on this site.

Yours Sincerely

Pat Coman, on behalf of the FAC

