



04 December 2020

Subject: Appeal FAC 265/2020 regarding licence CE07-FL0201

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

Background

Licence CE07-FL0201 for felling and replanting of 9.2 ha at Glenmore Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 22 May 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal FAC 265/2020 was held by the FAC on 05 November 2020.

Attendees;

FAC: Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. Vincent Upton and Ms. Bernadette Murphy

Secretary to the FAC: Ms Ruth Kinehan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM: Mr. Frank Barrett & Ms. Eilish Kehoe

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal and submissions received, the evidence from the oral hearing and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CE07-FL0201.

The licence pertains to the felling and replanting of 9.2 ha at Glenmore Co. Clare. The forest is currently comprised of Sitka Spruce with the exception of 0.27 ha of Birch and 0.05 ha of heather. Restocking comprises 95% Sitka Spruce and 5% Other Broadleaves. Blanket peats are described as making up approximately 94% of the underlying soil type and Regosols 2%. Podzols (Peaty), Lithosols and Peats account for the remaining 4%. The slope is given as predominantly moderate. The proposal is located in the Mal Bay Catchment _ 28 and the Kiltumper Stream Sub-Catchment_10 (28_4). The forest lies in the Creegh River Sub-Basin_020 (100%). The proposal site adjoins the Glenmore stream to the East and the Kiltumper Stream to the West. Both flow for c. 2.5km and merge to flow on as the Kiltumper Stream for c3.3km, which drains into Cahermurphy Lough. A stream flows from the Lough for

c0.7km and drains into the Creegh River. The Creegh River flows for some c14km and drains into the Carrowmore Dunes SAC at the coast, which overlaps with Mid-Clare Coast SPA. The hydrological distance between the project site and these European Sites is c20km.

The proposal was referred to Clare County Council and no response was provided. There was also a referral to Inland Fisheries Ireland (IFI). IFI had no objection but sought that ground stability be kept under constant review, and felling operations be carried out so 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 issues. IFI specified that if any water course is to be crossed during the felling operations then this should be done by either be a clear span bridge or embedded culvert of diameter greater than 900mm and where at least 25% of the culvert is embedded to include all internal forestry drains. IFI Limerick office to be contacted at least one month prior to commencement of works which are to be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines. The application included a Harvest Plan, including maps, and general environmental and site safety rules. 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 6 Natura sites (4 SAC & 2 SPA) within 15km and found no reason to extend this radius in this case; *2165 Lower River Shannon SAC*, *1021 Carrowmore Point To Spanish Point And Islands SAC*, *2318 Knockanira House SAC*, *2250 Carrowmore Dunes SAC*, *4182 Mid-Clare Coast SPA* and *4077 River Shannon and River Fergus Estuaries SPA*. The first 2 SAC sites were screened out for Appropriate Assessment due the absence of a pathway. Both SPA sites were screened out due to separation distance as was *Knockanira House SAC*. *Carrowmore Dunes SAC* was screened out based on expert opinion regarding hydrological distance, project area, soil type and depth, site slope and project separation distance.

The licence was approved with a number of conditions attached which are of a general nature and relate to environmental protection, the maintenance of the forest and good forestry practice. Other licence conditions are more directly concerned with the protection of water and/or soil. The licence includes a condition that specifies the method by which water is to be crossed during operations as per IFI directions. The licence requires that IFI are notified at least one month before works commence. The licence conditions also require, as per Forestry and Water Quality Guidelines, that 20% of the aquatic buffer zone is to be pit planted with broadleaves in an undulating fashion to create a sequence of varying spaces with sharply defined edges to be avoided to create a gradual transition from forest into the riparian zone. Furthermore no trees are permitted to be closer than 5m of an Aquatic Zone but buffer zone widths may vary depending on soil type, slope and land forms. A minimum initial planting density within the buffer is required by licence.

There is one appeal against the decision. The grounds contend that the decision does not comply with the Habitats Directive, the Birds Directive or the Environmental Impact Assessment Directive. The submission asserts regarding the test for Appropriate Assessment Screening that there is no need to establish such an effect merely that there may be such an effect. The Appellant argues that If the development is within 15km of a Natura 2000 site it should be screened in. The submission quotes judgements stating 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 Appropriate Assessment. Further quotes say that the Assessment 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 indicates that if the application is in a different catchment then the screening must state the catchment and that it is necessary to realise that birds can fly and do not all rely on watercourses to move. It is argued that a map

showing the SACs and SPAs and the site of the proposed development should be attached. The Appellant outlined details regarding Environmental Impact Assessment. It is claimed that it is the duty of the FAC to carry out both a full Appropriate Assessment screening and a full Environmental Impact Assessment screening in accordance with the law. Case law is quoted to support the Appellants contention that the obligation is binding on all the authorities of Member States.

In a statement to the FAC, the DAFM described the Appropriate Assessment procedure adopted in processing the licence and submits that the screening relied exclusively on information from the Applicant in relation to considering the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequently to the licence being issued.

The FAC sat in person at an Oral Hearing in Portlaoise on 05 November 2020. The parties were invited to attend in person or by electronic means. The DAFM and the Applicants participated electronically but the Appellant did not participate. At the Oral Hearing 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. DAFM clarified that its original screening in-combination assessment had been based on the information submitted with the application and could not definitively confirm that its subsequent in-combination assessment had been undertaken before the granting of the licence. This second assessment listed a number of forestry projects (both Coillte and private). DAFM clarified that proposals are not referred to NPWS concerning pNHA or NHA sites. DAFM confirmed that there was no response form the County Council. The FAC were unable to determine at the Oral Hearing precisely the current status or location of a number of the projects. The applicants stated that their Pre-screening Report in-combination assessment had been based on sites within 1.5km initially but in later instances included information provided by DAFM. DAFM explained that licence conditions h and i are in the interest of the protection of water quality and in response to IFI requests. The Applicant confirmed to FAC that there was a pre-existing forest road present which connected to the public road. The Applicant described how the Creegh River flows for c14km and drains into the Carrowmore Dunes SAC at the coast, which overlaps with Mid-Clare Coast SPA. The Applicant's representatives gave the hydrological distance between the project site and these European Sites as c20.5km.

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 9.20 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 granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the Appellant did not submit any specific details in relation to the endangerment of birds on this site. Based on the evidence before it, the FAC cannot conclude that the Birds Directive has been breached in relation to this proposal.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in-combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case, DAFM undertook a Stage 1 screening in relation to 6 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The FAC noted that *Qualifying Interests* were truncated on some of the DAFM documentation but considered that this omission was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites. The FAC also noted however, that the DAFM failed to carry out a sufficient in-combination assessment before the decision to grant the licence was made. The DAFM subsequently submitted to the FAC listings of other plans and projects, including forestry projects (Afforestation -13, Forest Roads – 5, Private Felling - 8 & Coillte Felling - 9). Having regard to the nature of the site and the surrounding area, and to the nature and number of other forestry projects listed, the FAC is satisfied that the failure of DAFM to carry out a satisfactory in-combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of DAFM should be set aside and remitted to the Minister to carry out an Appropriate Assessment screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites, specifically in-combination with other plans and projects, before making a new decision in respect of the licence.

Yours sincerely,



Bernadette Murphy / On Behalf of the Forestry Appeals Committee