



03 December 2020

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Our ref: 179/2020

Subject: Appeal in relation to felling licence CK28 FL0022

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 licence CK28 FL0022.

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 CK28 FL0022 was granted by the DAFM on 26 March 2020.

Hearing

An oral hearing of appeal 179/2020 was conducted by the FAC on 05 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Vincent Upton, Ms Bernadette Murphy & Mr Pat Coman
Secretary to the FAC:	Ms Ruth Kinehan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett & 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, including the response to a request for further information by the FAC, before deciding to set aside and remit the decision to grant this licence (Reference CK28 FL0022).

The proposal is for the clear-felling and replanting of 24.71 ha at Derreendonee, Derreenglass, Co. Cork and was approved following desk-based assessment by the DAFM. Trees to be felled are mostly Sitka Spruce with the remainder Lodgepole Pine, and some undeveloped areas (0.39 ha). Replanting is with 95% Sitka Spruce and 5% Lodgepole Pine. The application had submitted for 1.24 ha of open area. The Underlying soil type is given as approximately Blanket Peats (1%) & Podzols (Peaty), Lithosols, Peats (99%). The slope is given as predominantly moderate 0-15%. The proposal slopes to the North and contains a number of aquatic zones per application maps that converge to both the west and north of the proposal before flowing to the Lee. The proposal is a short distance west of the R684 public road. The proposal is within the Lee (Cork)_010 (100%) river-sub basin, the Lee Cork Harbour and Youghal Bay Catchment and the Lee (Cork)_010 sub-catchments.

A harvest plan document was submitted with the application for this licence along with a pre-screening report regards Appropriate Assessment that identified 5 SACs within a 15km radius of the proposal. The applicant included 38.53 ha of licensed clear-fell in other plans and projects and submitted that alone, the project does not represent a source, or if so, no pathway for significant effect on any European site exists, there is no potential for it to contribute to any such effects when considered in-combination with any other plans/projects.

The DAFM referred the application to Cork County Council, and a reply was received seeking the County Council Roads Authority be contacted regards haulage and that the area engineer be contacted regards entrances or lay-bys.

The DAFM carried out a Screening for Appropriate Assessment dated 11 February 2020 and listed 5 Natura 2000 sites within a 15 km radius of the proposal; 1873 Derryclogher (Knockboy) Bog SAC, 2315 Glanlough Woods SAC, 364 Kilgarvan Ice House SAC, 365 Killarney National Park, Macgillycuddy's Reeks And Caragh River Catchment SAC and 2171 Bandon River SAC. The screening concluded that there is no possibility of significant effects on the SACs "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" or "due to the separation distance between the Natura site and the project". With regards to in-combination screening of other plans and projects the AAS report concluded as follows for each site; *"Furthermore, as set out in the in-combination assessment attached to this AA screening, as there is no possibility of the project itself (i.e. individually) having a significant effect on this Natura site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects"*.

The licence issued on 26 March 2020 and is exercisable until 31 December 2022 and contains what are standard conditions (a) to (g), and additional conditions (h) to (k) which in brief require the completion of a harvest plan prior to commencing works, having prior agreement with the local authority for haulage from the proposal when extracting mature timber, contacting the local area engineer on constructing lay-bys or entrances, and adjacent unplanted areas, felled under licence CK28-FL0012 be replanted and have at least one growing season to 'green-up' prior to the commencement of felling.



There is a single appeal against the decision to grant the licence. The grounds are that there is a breach of Article 4(3) of the EIA Directive, that criteria set out in Annex III of the Directive is missing from the Forestry Service screening assessment and have not been taken into account and the application should be referred back to screening stage. There is a breach of Article 4(4) of the EIA Directive as details of the whole project have not been submitted, on the same date as this application was made a further application was submitted for 4.62 ha of clear-felling within Forestry Management Unit CK28 and this was in the same sub-catchment (Lee (Cork) 010) and less than 2.75kms away. Also, the proposal is part of a much larger schedule of works over a 5 years period and project splitting is not permitted. There is a breach of Article 4(5) of the EIA Directive as the whole project has not been considered. The grounds also included that there would be a potential cumulative impact on a protected species as there is an extant population of Freshwater Pearl Mussel in the Lee Upper catchment. There is no evidence of prescribed bodies being consulted. The appellant also contended that there would be potential impact on an Annex I habitat, as the site adjoins commonage that contains Blanket Bog and Wet Heath, and research shows colonisation by Sitka Spruce can occur up to at least 996m, so a negative impact on these designated habitats cannot be excluded. The appellant also contends the licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive. Also, there was a breach of Article 10(3) of the Forestry Regulations as a copy of the application was not made available for inspection on request.

In response, the DAFM stated the standard operational activities of clear-felling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required as 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. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3), 4(4) and 4(5) had not occurred. Referrals were issued to statutory authorities as per standard procedure in relation to this application i.e. referral to local authority in this instance. The felling and reforestation project is not located within a catchment designated for the Fresh Water Pearl Mussel. The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018). Any felling licence granted is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works. In relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The felling and reforestation project licenced as CK28-FL0022 has been subject to the DAFM's Appropriate Assessment Screening procedure. A number of the Qualifying

Interests/Special Conservation Interests were truncated when outputting the screening form. However, all Qualifying Interests/Special Conservation Interests were considered during the screening exercise itself and the screening determination is considered sound. For consideration of in-combination effects of the proposed felling and reforestation project, the DAFM relied exclusively on Coillte's in-combination statement and the DAFM subsequently carried out a separate in-combination assessment and included an associated in-combination statement based on this information which is consistent with the licensee's in-combination statement. The DAFM provided and referred to correspondence detailing the requests from the appellant for copies of 451 Coillte felling licence applications and related files, supplied to the appellant as digital files.

On 12 May 2020 the FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant in a response dated 14 May 2020 did not state the class of development included in the EIA Directive to which felling, and reforestation belong.

At the oral hearing the DAFM outlined the processing of the application and the reasons for the conditions of the licence. The appellant set out for each of the grounds of appeal. The appellant contended the proposal was a deforestation on the basis that one cannot reforest without deforesting, and referred to the Corine Land Cover Classification that there is no forest (3.1) until canopy cover reaches 30% and height achieves 5m and is otherwise shrub or other herbaceous (3.2). This proposal constitutes temporary deforestation and is a different land class and once more than 0.1 ha is deforested an EIA screening is required, also this needs to be looked at in a cumulative manner with the other projects in the vicinity. The appellant stated the Hen Harrier will use such an area for 10 to 15 years until canopy closure occurs. Regards the whole of project the forest area is clearly defined in the general region. The appellant stated this proposal was not referred to either the Inland Fisheries Ireland or the Environmental Protection Association yet is within a High-Status Waterbody and within an area of high landslide susceptibility. There is also the cumulative impact on the Freshwater Pearl Mussel Catchment and there are populations that need protection. Also, there is EU Annex 1 Blanket Bog within 70m across the public road and Wet Heath within 200m. The appellant stated regards birds that Article 6 of the Birds Directive has not been given effect to and the exemptions in the Wildlife Act do not reflect a direct transposition of EU law. The appellant stated copies of the application documents were not provided until after the submissions deadline and as a result was denied proper opportunity to submit concerns. Also, the harvest plan should be available for viewing and must contain a record of the site. The appellant replied to the FAC that the purpose of the felling was timber production but was also a deliberate act to remove a forest. The applicant stated the licence included restocking, and outlined what was submitted in the application, including 1.24 ha of open space but that the site already includes such in small pockets, and owing to being small and dispersed were not mapped for and there is no change of land use in the proposal. The new planting would comply with buffers and setbacks. There are no water crossings on site and there is no uninterrupted hydrological connection from the site to any European Site, and there is an existing forest road network serving this site. The applicant also stated the proposal is not within a Freshwater Pearl Mussel Catchment. The DAFM stated that a harvest plan was submitted with the application and that DAFM had sufficient information to assess the application and to issue the licence. The DAFM stated that there was no deforestation on the licence and that open areas within a forest after felling and replanting would not be considered as deforestation, for example setbacks



are considered part of the forest area. The DAFM identified the locations of designated and proposed NHAs at c. 1.5km and c. 1.7 km from the proposal.

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). At the Oral Hearing, the appellant contended that, based on the application submitted, the reforestation would leave portion of the site as open space and, as such, would constitute a change of land use, also that deforestation and reforestation is a change of land use having regard to the CORINE classifications. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation of 24.71 ha and does not consent to any change of land use. Also, the Forestry Act 2014 defines a forest as meaning land under trees with (a) a minimum area of 0.1 hectare, and (b) tree crown cover of more than 20 per cent of the total area, or the potential to achieve this cover at maturity, and includes all species of trees. On the basis of the foregoing there is no change of land use and the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

Regards the provisions of 10(3) that the Minister may make specified records available to the public free of charge, the FAC noted the DAFM's confirmation that on 20 December 2019 the Appellant sought records concerning 451 licences and shows the DAFM entered into dialogue with the appellant and provided the documents on 19 February 2020. 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.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species. Also, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.


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, the DAFM undertook a Stage 1 screening in relation to 5 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The sites included in the screening were Derryclogher Bog SAC, Glanlough Woods SAC, Kilgarvan Ice Hose SAC, Killarney National Park, Magillcuddy Reeks and Caragh River Catchment SAC and the Bandon River SAC. The FAC notes there is a downstream connection to the Geragh SAC and the Geragh SPA from the proposal at c. 26.3 km but that the Lee flows through some minor lakes on the route as well as through the c. 4.7 km of Allua Lough, the Lee flows from there through the Carrigdrohid and the Inniscarra reservoirs prior to meeting the Cork Harbour SPA at c. 81 km from the proposal.

The Bandon/Caha Fresh Water Pearl Mussel Catchment is south of the proposal within a different river basin and catchment (the Bandon Ilen) and the proposal is not within a Fresh Water Pearl Mussel Catchment and there are no populations of Fresh Water Pearl Mussel identified to the FAC for consideration regards the proposal. The Conigar bog NHA is c. 1.7 km to the west of the proposal within the Dunmanus/Bantry/Kenmare catchment and the Ballagh Bog pNHA and Gouganebarra Lake pNHA are c. 1.8 km to the north with no downstream connection from the proposal. There are wetlands to the east across the public road and to the northwest and uphill, there is no evidence before the FAC that significant effects are likely on these habitats.

The DAFM statement sets out that DAFM relied exclusively on the applicant's in-combination statement before making its decision. The DAFM subsequently submitted to the FAC an in-combination document undertaken on 27 March 2020, post the licence issue date, with listings of other plans and projects (which were significantly different from the details submitted by the applicant), including afforestation and additional felling projects concerning the applicant. The in-combination statement conclusion included that individually, the project does not represent a source, or if so, no pathway for an adverse effect on any European site exists, and the DAFM deems that there is no potential for the project to contribute to any such effects, when considered in-combination with other plans and projects. Having regard to the number and nature of forestry projects listed and the fact the DAFM relied exclusively on the applicant's in-combination statement, the FAC is satisfied that the failure of the DAFM to carry out its own satisfactory in combination assessment prior to the decision to grant the licence constituted a serious error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of the DAFM should be set aside and remitted to the Minister to carry out an appropriate assessment screening of the proposed development on Natura 2000 sites in combination with other plans and projects, before making a new decision in respect of the licence.

Yours Sincerely



Pat Coman, on behalf of the FAC