



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

03 December 2020

[REDACTED]

Our ref: 533/2020

Subject: Appeal in relation to felling licence GY11 FL0372

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 GY11 FL0372.

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 GY11 FL0372 was granted by the DAFM on 02 July 2020.

Hearing

An oral hearing of appeal 533/2020 was conducted by the FAC on 10 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman & 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 affirm the decision to grant this licence (Reference GY11 FL0372).

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The proposal comprises the clear-felling of 16.85 ha of Sitka Spruce and Lodgepole pine and replanting with 70% Lodgepole pine and 30% Sitka Spruce at Ballinlawless, Co Galway.

The underlying soil type is approximately Blanket Peats (60%) and Peaty Gleys (40%) The slope is given as predominantly moderate (0-15%) and the habitat is predominantly WD4 (conifer). The project is located in the Shannon Catchment, the Cappagh[Galway]_Sc_010 Sub-Catchment, and the Duniry_020 Waterbody.

The application included a harvest plan document and a pre-screening report listing European Sites (10 SACs and 2 SPAs) and in-combination projects of 24.92 ha clear-felling licensed to the applicant, as well as planning permissions within 1.5 km of the proposal. The application included for 0.84 ha of open space. The application was subject of a desk assessment by the DAFM.

The DAFM undertook a screening for Appropriate Assessment and the Slieve Aughty Mountains SPA was screened in for Stage 2 Appropriate Assessment. The following were screened out at the screening stage and the reasons recorded; Lough Rea SAC, Lough Rea SPA, Sonnagh Bog SAC, Pollnaknockaun Wood Nature Reserve SAC, Pollagoona Bog SAC, Derrycrag Wood Nature Reserve SAC, Rosturra Wood SAC, Peterswell Turlough SAC, Cloonmoylan Bog SAC, Barroughter Bog SAC, Loughatorick South Bog SAC and Lough Derg (Shannon) SPA. The Hen Harrier and the Merlin are the Special Conservation Interests of the Slieve Aughty Mountains SPA and the site-specific measures from the Appropriate Assessment Report and Determination are reflected in the licence conditions. Per the DAFM statement there was a referral to NPWS.

The licence issued on 02 July 2020 and is exercisable until 31December 2022 and contains what are standard conditions (a) to (g) and additional conditions (h) to (l) and concern the proposal being within a Hen Harrier foraging (green) zone, require the greening-up following planting of the adjacent GY11 55579W prior to commencing felling, public road setbacks, 100m exclusion area from forest edge from felling and other forestry operations from 01 March to 31 August in specified circumstances, and DAFM guidelines and requirements to be followed in respect of works.

There is a single appeal against the decision to grant the licence. The grounds contend that the decision does not comply with 4(3), 4(4) or 4(5) of the Environmental Impact Assessment Directive 2014/52/EU, the application should be referred back to an EIA screening stage, and all projects, including this one, within the applicant's Forest Management Unit (FMU) must be considered to form a part of the whole project. The appellant set out that 8 other applications were submitted for the FMU and with the one for this proposal total 147.74 ha. Also, the application has not described any aspects of the environment which are likely to be significantly affected. The licence and the operations threaten the achievement of the objectives set for the underlying waterbody under the River Basin Management Plan, and there is a significant potential In-combination effect for the catchment. The Stage 1 and Stage 2 AA determinations are not legally valid the In-combination effect of all of the forestry activity on Natura 2000 sites has not been assessed adequately and a Natura 2000 site with probable hydrological connection to the project site has not been considered as part of the AA screening. Also, the DAFM has not sought the opinion of the general public under Article 6 (3) of the Habitats Directive. The Harvest Plan is not consistent with the requirements of the Interim Standards for Felling and Reforestation, the licence conditions do not provide a system of



protection for wild birds consistent with the requirements of Article 5 of the Birds Directive, and do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive. The licence should contain a standard condition for the licensee to notify the Minister of commencement and conclusion of operations and a condition that plans and works must be inspected by the DAFM. The licence should include stringent and enforceable conditions regarding notification in the case of any spraying of chemicals as current legislation and regulations do not provide for adequate warning / protection for local residents, landowners and special interest and community groups within the zone of influence of the spraying. The potential need for spraying with toxic chemicals was not contained in the licence application as would be required by Annex II (a) of the EIA Directive.

In response, the DAFM addressed each of the written grounds of appeal, and stated regards Article 4(3), 4(4) and 4(5) of the EIA Directive that tree felling is not an activity to which the EIA Directive or associated regulations applies and that it is a legal principle that, if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions continue to apply. The DAFM stated that its statutory obligation 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 EIA are also prescribed. Any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), and 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. Regarding consultations, 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. The 16.85 ha felling and reforestation project was subject to the DAFM's Appropriate Assessment Screening procedure, the DAFM identified the possibility of the project having a significant effect on the Slieve Aughty Mountains SPA and an Appropriate Assessment was carried out. The potential impacts on the Special Conservation Interests of the SPA were identified on a precautionary basis and site-specific measures were prescribed to mitigate against such impacts. Also, the potential for the proposed project to contribute to an in-combination impact on European sites was considered by the DAFM. The DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AA Report and AA Determination Statement for GY11-FL0372, which were attached as conditions of the licence. The processing of a licence application requires the publishing of a notice of the application; and informing the public that any person may make a submission or observation in writing concerning the application to the Minister within 30 days from the date of publication of that notice, and this includes the opportunity for members of the public to make a submission or observation on

the likely effect on the environment of the proposed felling activity. Also, Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making a decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6; and Regulation 19(4) expressly requires the Minister when carrying out an Appropriate Assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. Finally, the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012.

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 responded but did not state the class of development included in the EIA Directive to which felling, and reforestation belong.

Following provision of the DAFM statement the applicant submitted that their Environment Manager visited the site on 22 October 2020 and observations indicate ground conditions were mainly dry underfoot, a relevant watercourse originating west of the project site, merges with a tributary of the Duniry River, within the project area and exits to the south and flows for 0.75km before it confluences with the Duniry River. A second tributary of the Duniry exits the project site to the east and merges with the main river channel c. 2km distant. The Duniry River flows eastwards for 6.3 km and drains into the Cappagh River and continues for 10.3km before draining into the Barroughter Bog SAC. From the project area, the closest hydrological distance to a European Site (Barroughter Bog SAC) is c. 18.6 km.

At the oral hearing the DAFM outlined the procedures adopted in considering the application and the reasons for the conditions of the licence, the NPWS email response of 22 January 2020 to the referral was read to the record. The appellant argued that the approvals process was not conducted in accordance with the law, no screening was carried out to determine the requirement for EIA, a Forestry Management Unit defines the project area and should be considered in terms of assessment under the EIA Directive. The appellant raised concerns regards the Water Framework Directive and water quality with the proposal being 60% Blanket Peat and the potential cumulative effects with other projects. Regards the Appropriate Assessment there was no assessment of Lough Derg (North East Coast) SAC which has fen qualifying interests that are sensitive to acidification. The appellant contended that condition (j) of the licence was insufficient regards the Merlin as there is no complete data regards nest locations, and regards what the DAFM refer to as the Hen Harrier protocol states that this has not be re-assessed in quite some time, also the opinion of the general public is not sought regards the outcome of the approval process per requirements of 6(3) of the Habitats Directive. Also, the harvest plan submitted with the application is not consistent with the Interim Standards for Felling and Reforestation. There is no legal protection for wild birds, and the Birds and Habitats Directive refers to deliberate disturbance and felling is such a disturbance. There is no monitoring set out for in the licence regards even the mitigation measures in the Appropriate Assessment. The DAFM confirmed that the Appropriate Assessment Report and Determination had been independently reviewed by an ecologist and fully taken into account in the making of the decision to grant the licence. The Applicants' described the information submitted with the



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application including maps and details of environmental and safety measures in a Harvest Plan. They submitted that an operational Harvest Plan is prepared before felling commences to inform their staff and contractors. They described the site as having a moderate slope and peaty gley soils and through the nearest stream the closest Natura site downstream is Barroughter Bog SAC at c 18.5 km. The applicants contended that any open space retained after replanting was for productivity or environmental reasons and would not constitute deforestation. There is no change of land use and the EIA screening does not apply. DAFM confirmed the mitigations regards the Merlin were developed with an ornithologist.

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 argued 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. The FAC considers that there is no basis for this contention as the licence issued is for felling and reforestation of 16.85 ha and does not consent to any change of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, 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 felling licence. The applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. 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, and stating at the oral hearing that these grounds related to a shortcoming in law. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

The FAC considered the procedures adopted by the DAFM in respect of Appropriate Assessment screening, the Appropriate Assessment Report and Appropriate Assessment Determination. The FAC considered that the procedures adopted were consistent with the requirements of Article 6(3) of the

Habitats Directive and that the conclusions reached were sound. The FAC noted that the recommended conditions, as contained in the Determination, had been incorporated into the licence granted. The FAC concluded that the proposed development, carried out in accordance with the mitigation measures recommended in the Appropriate Assessment Report and Determination and attached to the licence, would not adversely affect the integrity of the Slieve Aughty Mountains SPA, having regard to its conservation objectives or the preservation of the site at favourable conservation status. The FAC notes Barroughter Bog SAC was screened out for Appropriate Assessment for reasons of separation distance and a lack of pathway to the qualifying interest. At the hearing the appellant raised issue regards Lough Derg North East Shore SAC which based on relevant watercourses originating west and east from the project has an apparent downstream connection distance of c. 18.5 km, the qualifying interests of the SAC are common Juniper formations, calcareous fens, alkaline fens, limestone pavements, alluvial forests and Yew woods. The screening used a 15 km radius identifying Natura sites and, in this instance having regard to the nature and scale of the proposal, the connection identified and the hydrological separation distances, the FAC is satisfied that there is no likelihood of significant effects arising from the proposed development on this designated site, having regard to its qualifying interests and conservation objectives. 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. Based on the information before it, and having regard to the conditions of the licence, the FAC considered that there is no convincing reason to conclude that the proposed development would threaten the achievement of the objectives of protecting the underlying waterbody. Having regard to the nature and scale of the development, and the characteristics of the surrounding environment, the FAC concluded that the proposed development alone, or cumulatively with other plans and projects, would not be likely to have a significant effect on the environment.

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,

Pat Coman, on behalf of the FAC