



03 December 2020

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Our ref: 126/2020

Subject: Appeal in relation to felling licence RN09 FL0085

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 RN09 FL0085.

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 RN09 FL0085 was granted by the DAFM on 13 February 2020.

#### Hearing

An oral hearing of appeal 126/2020 was conducted by the FAC on 19 November 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Bernadette Murphy & Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

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 RN09 FL0085).

Project site comprises 2.18 ha of clear-felling of 85% Japanese Larch and 15% Western Red Cedar and replanting with 100% Sitka Spruce at Carrownskeheen, Co Roscommon. The application sought 0.11 ha of open space.

The Underlying soil type is given as approximately Surface water Gleys (Shallow), Groundwater Gleys, (Shallow) (32%) and Surface water Gleys, Groundwater Gleys (68%) The slope is given as predominantly moderate (0-15%). Site is c.470m east of Kilglass Lough across a public road R371. The proposal is located in the Upper Shannon Catchment and the Shannon (Upper) sub-catchment\_40, and within the Owenur\_030 (100%) river sub-basin.

A pre-screening report provided with the application identified European sites within 15km; Lough Ree SAC, Annaghmore Lough (Roscommon) SAC, Lough Forbes Complex SAC, Brown Bog SAC, Clooneen Bog SAC and Lough Ree SPA. The report also identified zero other forestry projects within 1.5km as well as a number of planning permissions.

The DAFM carried out a desk assessment of the proposal. There was referral of the application by the DAFM to Roscommon Co Co. On 31 January the Council replied regards any public road damage, and on 05 February replied also that under the provisions of the Water Framework Directive all waters must achieve at least good status and where good or high status exists. The reply identified the water quality as follows;

**G\_156 Lough Acrick, Good/at Risk/E – X**

**G\_120 Kilglass Dromod Good/Not at Risk/E – X**

The County Council sought the following;

- *'Water quality' must be protected and maintained Install sufficient silt traps*
- *Monitor silt traps and install additional traps as necessary.*
- *Material removed from silt traps should not be allowed to re-enter water courses.*

*Extraction routes; (1) Maintain adequate brush mats on extraction routes to avoid silt runoff. General (2) The owner of the site must ensure that all measures necessary are put in place such that the objectives of the WFD River Basin Management Plan 2018-2021 are not compromised. These measures must be managed, monitored and maintained such that they are continually effective in the protection of water quality in order to comply with environmental legislative quality objectives. (3) All measures to protect the water courses within the site from sediment, nutrient and organic matter losses as outlined in the Environmental Requirements for Afforestation 2016 and in Felling and Reforestation Policy documents, must be strictly applied during tree felling and replanting at the site. The Council also inserted for planting; 5M setback from any relevant watercourse. 10m setback from road*

The DAFM carried out a Stage 1 screening for Appropriate Assessment on 13 February 2020 regards Annaghmore Lough (Roscommon) SAC, Clooneen Bog SAC, Lough Forbes Complex SAC, Ballykenny-Fisherstown Bog SPA, Brown Bog SAC, Lough Ree SAC and Lough Ree SPA and all were screened out for Appropriate Assessment. An in-combination assessment provided by the DAFM is dated 14 February 2020, a date after the licence issue date, and included a significant and extensive list of licences for other forestry related projects for which no further details were provided.

The licence issued 13 February 2020 for felling and replanting of 2.18ha, Standard conditions (a) to (g) were applied with reasons. Additional conditions (h) and (i) were attached and relate to the completion of a harvest plan prior to commencing felling, public road setbacks and buffer zones with use of broadleaves and diverse conifers.



There is a single appeal against the decision to grant RN09 FLO085 and the grounds are summarised as follows;

- Two other clear-felling applications were submitted in the same general location and same catchment of the pNHA (Kilglass and Grange Loughs) totalling 14.26 ha.
- The decision is in breach of Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014), in that a number of criteria set out in Annex III do not form part of the screening assessment and have not been taken into account.
- The decision is in breach of Article 4 (4) of the EIA Directive), as all projects within the applicants FMU must be considered to form a part of the whole project.
- The decision is in breach of Article 4 (5) of the EIA Directive, since the application for this licence does not represent the whole project any determination reached in terms of EIA screening is invalid.
- It should be a standard condition where works are to be carried out during the period of bird breeding and rearing a prior ecological survey, by a competent party, be carried out and any mitigating actions be implemented to ensure compliance with European Nature Directives.
- No evidence that the NPWS were consulted, site is within the catchment of a pNHA and at less than 500m distance.

The DAFM provided a response to the grounds of appeal that in regard to Article 4(3) of the EIA Directive, this Article requires that when a Competent Authority is considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation (and where the legislature had the discretion to include such activities had it wished to do so), a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. DAFM also ruled out any breach of Article 4(4) or Article 4(5). The felling and reforestation project licenced as RN09-FL0085 is c. 430 m to the east of the Kilglass and Grange Loughs pNHA, and the application was not referred to the NPWS as the site was not within the bounds of the pNHA, also the relative size and scale of the proposed project at 2.18 ha is small. The adherence to the DAFM Interim Standards for Felling and Reforestation (Licence condition (a)) will ensure protection of water quality during felling and reforestation operations. The felling and reforestation project licenced as RN09-FL0085 has been subject to the DAFM's Appropriate Assessment Screening procedure, a number of the Qualifying Interests and Special Conservation Interests (QIs & SCIs) were truncated when outputting the screening form. However, the Appropriate Assessment Screening exercise is considered sound. For consideration of in-combination effects of the proposed project, DAFM relied exclusively on Coillte's in-combination statement. 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. With the response DAFM provided a revised screening form and an in-combination assessment.

The FAC requested further information from the appellant, specifically asking to which class of project listed in either Annex I or Annex II of the EIA Directive the proposed felling development falls within. The appellant responded but did not state the class of development included in the EIA Directive to which felling, and reforestation belong.

The FAC sat in person at an oral hearing in Portlaoise on 19<sup>th</sup> 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 the DAFM outlined the processing of the application and clarified that its original screening in-combination assessment had been based entirely on the information submitted with the application and the DAFM undertook a subsequent in-combination assessment after the granting of the licence. This second assessment listed numerous forestry projects (both Coillte and private) without locations or areas. The applicants stated that their Pre-screening Report in-combination assessment had been based on sites within 1.5km and that no sites had been identified likely to give rise to in-combination effects. The applicants stated the application was for a relatively small project and included 0.11 ha of open space, there is existing public road and forest road access to the site, and there is no change of land use. The applicant stated that prior to commencement of operations, a Forest Manager would walk the site with the contractor and have regard to any nesting or rearing of birds. The DAFM confirmed archaeology sites were outside of the proposal. The DAFM stated that the referral response of the County Council is addressed by the licence conditions and the requirements therein on the applicant.

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). The FAC considers the licence issued is for the felling and reforestation of 2.18 ha, 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.

Regards referral to the NPWS on the basis of Kilglass and Grange Loughs pNHA, the FAC is satisfied having regard to location of the pNHA, the interim distance to the proposal and to the scale of the proposal that such referral was not necessary in this instance.

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 projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to seven 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 is satisfied with the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone would not be likely to give rise to significant effects. The FAC noted that the QIs and SCIs listed in this assessment were truncated on the DAFM documentation, but considered that this was not a serious or significant error as there was no possibility of any significant effects on the designated sites for the reasons given in the DAFM assessment. However, in respect of its assessment of in combination effects, the DAFM in the first instance concluded that because the project itself has no likelihood of significant effects on any of the European Sites it could not in combination with other plans and projects give rise to any likelihood of significant effects on a European site. Also, 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 post licence decision with listings of other plans and projects (which were significantly different from the details submitted by the applicant), including a number of EPA licensed projects, planning permissions including a forest road entrance, forest road projects, afforestation and private felling projects, as well as additional felling projects concerning the applicant. No details of scale, completion or proximity were provided in the assessment. 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. Consequently, the DAFM deemed 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 related 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 granting of 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 a screening of the proposed development regards Natura 2000 sites specifically in combination with other plans and projects, before making a new decision in respect of the licence.

Pat Coman, on behalf of the FAC