



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

17 December 2020

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Our ref: 402/2020

Subject: Appeal in relation to felling licence CK12 FL0174

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 CK12 FL0174.

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 CK12 FL0174 was granted by the Department on 25 June 2020.

Hearing

An oral hearing of appeal 402/2020 was conducted by the FAC on 08 December 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC: Mr Michael Ryan
Applicant representatives: [REDACTED]
DAFM representatives: Mr Frank Barrett & Ms Jade McManus

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 affirm the decision to grant this licence (Reference CK12-FL0174).

The proposal is for the clear-felling and replanting of a stated site area of 5.17ha at Cusloura, Co. Cork. Replanting would be 100% Sitka Spruce and cultivation would involve windrowing and mounding. The application sought 0.26ha of open space. Underlying soils are stated to be Lithosols

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and Regosols (98%) and Acid Brown Earths, Brown Podzols (2%). The slope is predominantly moderate. The project lands are within the Lee 19_001 catchment and Cusloura_010 waterbody.

The DAFM referred the application to Cork County Council, the National Parks and Wildlife Service (NPWS) and Inland Fisheries Ireland (IFI). The County Council responded drawing attention to various requirements of the Planning and Development Act 2000, as amended relating to forestry type developments. There is no response recorded from the NPWS. The IFI responded by email on 26th January 2020 requesting that the Forestry and Fisheries Guidelines apply, and recommending conditions that should be attached to any licence granted.

The DAFM undertook a screening for Appropriate Assessment, identifying 7 Natura 2000 sites (5 SACs and 2 SPAs), listing their qualifying interests and conservation objectives and assessing the potential likelihood of significant effects arising from the proposed development. One site – The Mullaghanish to Musheramore Mountains SPA was screened in for Stage 2 Appropriate Assessment. The DAFM produced an Appropriate Assessment Report dated 9 June 2020, reviewed by an independent ecologist on 18 June 2020. Following assessment, the following sites were screened out for Stage 2 assessment – The Geragh SPA, The Geragh SAC, St. Gobnet's Wood SAC, Killarney National Park, MacGillycuddy's Reeks and River Caragh Catchments SAC, Mullaghanish Bog SAC and Blackwater River (Cork/Waterford) SAC. Reasons for the screening conclusions in respect of these designated sites included location in a different water-body catchment, absence of upstream hydrological connection and lack of pathway, and separation distance. The Report screened in for Stage 2 Appropriate Assessment the Mullaghanish to Musheramore Mountains SPA. The conservation objectives were identified (relate to the Hen Harrier), potential adverse impacts identified, and mitigation measures recommended. Mitigation measures are set out in relation to the protection of the Hen Harrier as the site is in a High Likelihood of Nesting Area (HLNA) for that species. The report states that the site does not constitute a suitable Hen Harrier foraging habitat but, once harvested, it may provide suitable habitat over a period of 10-15 years. In-combination effects considered. include 2 planning permissions (cubicle house and domestic dwelling), 1 private felling licence (6.87ha) approved in 2018, and 1 Coillte felling licence application pending (20.38ha).

Following on from the Appropriate Assessment Report, the DAFM made an Appropriate Assessment Determination dated 9 June 2020 and independently ecologically reviewed on 18 June 2020. This concludes that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site. Individually, or in combination with other plans or projects, the proposed development will not adversely affect the integrity of the Mullaghanish to Musheramore 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 specified mitigation measures recommended as conditions to a licence.

The licence issued on 25 June 2020 and is exercisable until 31 December 2022. It is subject to standard conditions plus additional conditions relating to contact with IFI personnel, Hen Harrier protection and the protection of water quality.

There is a single appeal against the decision to grant the licence. The grounds of appeal contend the decision is in breach of the EIA Directive as there was no EIA screening carried out and details of the whole project were not submitted. On the same date as this application, a further 9 licence applications were lodged for the same Forest Management Unit (FMU) totalling 98.27ha. All



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projects in this FMU should be considered in a coherent manner. 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 site is in a catchment with records of the Freshwater Pearl Mussel (FWPM). There was inadequate consideration given to potential (cumulative) impact on a protected species (FWPM). The Stage 2 Appropriate Assessment Determination is not legally valid. DAFM did not seek 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 Standard for Felling & Reforestation. 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. Licence conditions do not provide for the strict protection of Annex IV species. The licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations. The licence should contain a condition that plans and works must be inspected by Forest Service prior to, during and post works, and the licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response, the DAFM state that clear-felling and replanting are not a class of development to which the EIA Directive relates. The DAFM has a wide range of checks and balances in respect of the protection of water quality – including water setbacks adjoining aquatic zones, silt trapping and damming of forest drains. DAFM has developed considerable experience in relation to the protection of water quality during the forestry licensing process and is actively engaged in the Water Framework Directive process. A Stage 2 Appropriate Assessment was carried out for Mullaghanish to Musheramore Mountains SPA. Site specific measures were prescribed by the DAFM to mitigate effects on this European site. Members of the public had the opportunity to make submissions/observations on the likely effects on the environment from the proposed felling. Regarding the protection of wild birds, 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 apply. Site specific mitigation measures were attached as conditions to the licence. The Minister may, at any time, attach or vary conditions attaching to a licence. There is no legal requirement for forest owners to inform adjacent landowners of the intention to spray.

The FAC sat in person at an Oral Hearing in Portlaoise on 8th December 2020. The parties were invited to attend in person or by electronic means. The DAFM and the applicants participated electronically; the appellant did not participate. At the Oral Hearing, the DAFM confirmed that the Appropriate Assessment Report and Determination were completed and independently ecologically reviewed before the decision was taken and they were considerations in the making of the decision to grant the licence. The application was referred to the NPWS but no response was received. Issues raised in the IFI response were addressed in the conditions attached to the licence. The applicants stated that the proposed development was adjacent to another clearfelling development for a site area of 20.38ha, and windblow was an issue on both sites and that the two sites would need to be felled together. Both sites were planted just over 40 years ago. The project lands are on a south west facing slope and on a mineral soil. There is a FWPM catchment to the north but there is no

hydrological connection to it. The nearest water body, the Cusloura River, is at a separation of approximately 450m and is c.65km to Cork Harbour.

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 that there is no convincing evidence before it that the purpose of the proposed felling is for the conversion to another type of land use. As such, the FAC concluded that there is no breach of any of the provisions of the EIA Directive.

The FAC considered the appellant's contention that the proposed development would threaten the achievement of the underlying water body but noted that no specific information had been submitted in support of this contention. The FAC further noted that additional conditions were attached to the licence in relation to the protection of water quality and the separation distance from the project lands to the nearest water body. Based on the information before it, the FAC concluded that there is no convincing reason to conclude that the proposed development, if carried out in accordance with the conditions of the licence, would have an adverse impact on water quality. In respect of the contention that inadequate consideration was given by DAFM to the existence of a FWPM catchment, the FAC noted that there is no hydrological connection to the catchment concerned (the Munster Blackwater) and, in such circumstances, the proposed development would not have any impact of the protected species.

The FAC considered the procedures followed by the DAFM in regard to the requirements of the Habitats Directive. It noted that the Appropriate Assessment Report had addressed Natura sites within a 15km radius, listing qualifying interests and conservation objectives and detailing potential effects, before concluding that a Stage 2 Assessment was required in respect of the Mullaghanish to Musheramore Mountains SPA, but that there was no likelihood of significant effects arising from the proposed development on the other sites screened. The FAC considered the Stage 2 assessment carried out leading to the recommendation for mitigation measures in respect of the protection of the Hen Harrier and noted that the recommended conditions had been incorporated into conditions of the licence. The FAC is satisfied that the procedures followed by the DAFM in the Stage 1 screening and Stage 2 assessment are consistent with the requirements of the Habitats Directive and adopts the conclusions reached. The FAC concludes that the proposed development individually, or in combination with other plans or projects, would not adversely affect the integrity of the Mullaghanish to Musheramore Mountains SPA, and will not affect the preservation of the site at



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favourable conservation status, if carried out in accordance with specified mitigation measures recommended as conditions to a licence. The FAC is satisfied that the DAFM complied with the requirements of Article 6(3) of the Habitats Directive.

Under 3.2 of the Interim Standards for Felling and Reforestation a maximum coupe size of 25 ha applies generally unless an overriding consideration such as crop stability applies. The evidence before the FAC is that wind-blow is an issue with the proposal and the neighbouring CK12 FLO177 (20.39 ha) and the FAC accepts crop stability must be an over-riding regard in this instance

The appellant contends that the licence should provide a system of protection for wild birds during the period of breeding and rearing and of Annex IV species but provided no specific information in respect of the presence of wild birds or Annex IV species on the project lands. In these circumstances, the FAC concluded that conditions, of the nature requested by the appellant, should not be attached to the licence. Furthermore, the FAC considered that the conditions attached to the licence would provide for satisfactory protection of the environment, including water quality.

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

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