



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

17 December 2020

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

Our ref: 210/2020

Subject: Appeal in relation to felling licence DL31 FL0058

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 DL31 FL0058.

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 DL31 FL0058 was granted by the Department on 03 April 2020.

Hearing

An oral hearing of appeal 210/2020 was conducted by the FAC on 15 December 2020.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch
& Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Appellant: [REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Anthony Dunbar & 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 to remit the decision to grant this licence (Reference DL31 FL0058).

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The proposal is for the clear-felling and replanting of 4.06 ha at Boeeshil, Corlea, Co Donegal. Trees to be felled comprise 0.52 ha of 100% Sitka Spruce, 0.03 ha of 95% Sitka Spruce and 5% Birch, and 3.51 ha of 100% Lodgepole Pine and the replanting is with 100% Sitka Spruce per the licence. Application sought 0.20 ha of open space. The Underlying soil type is approx. Blanket Peats (53%) & Podzols (Peaty), Lithosols, Peats (47%) The slope is predominantly moderate 0-15%. The proposal is in the Erne Catchment and the Billary_SC_10 sub-catchment, and the following river sub-basin districts; Sessiaghkeelta_010 (85%) & Waterfoot_010 (15%).

Application included a harvest plan document and a pre-screening report by the applicant identifying 8 SAC sites and 2 SPA sites within 15 km of the proposal site, and detailing other forestry projects of 14.82 ha clear-fell considered in combination with the proposal. The application was the subject of a desk assessment by the DAFM, who undertook an Appropriate Assessment Screening, dated 02 April 2020, and listed 14 European Sites, this is examined for below. The DAFM also carried out, an in-combination assessment on 03 April 2020, and the proposal was screened out for Appropriate Assessment. There was referral to Donegal County Council with no response evidenced and to Inland Fisheries Ireland who replied on 23 Dec 2019 seeking strict adherence to Forestry and Water Quality Guidelines, Forest Harvesting and the Environment Guidelines, Code of Best Forest Practice – Ireland and the relevant COFORD guidelines.

The licence was issued on 03 April 2020 subject to what are relatively standard conditions (a) to (g) and the additional conditions (h), (g), (h) to (z), (aa) and (bb), these are set out in full on the licence. There is a repeat of condition indexes (h) and (g) but there is no repeat of the conditions themselves, and the FAC is satisfied that all conditions apply regards the licence.

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 must be considered to form a part of the whole project, and this licence does not represent the whole of the project. The Appellant stated six other clear-felling applications were submitted with this proposal and total 103.58 ha, there is an almost contiguous area of 68.82 ha of clear-fell and the proposal is part of a much larger scheduled programme of works over a 5 years period. The licence and its associated operations are predominantly within the Sessiaghkeelta_010 water-body and threaten the achievement of the objectives set under the River Basin Management Plan for Ireland 2018-21 and there is also a significant in-combination effect for the catchment and an EIA should be required. The Appropriate Assessment stage 1 screening and the Appropriate Assessment Determination are not legally valid and the proposal is partly within the catchment of the Lough Derg (Donegal) SPA (004037) and a proportion of the surface waters from this site drain into the SPA, and should be referred back to the competent authority for re-screening. Also, the site is in a catchment, the Erne-Ominey, with an extant population of Freshwater Pearl Mussel (FWPM). The licence conditions do not provide a system of protection for wild birds consistent with the requirements of Article 5 of the Birds Directive. Finally the Forest Service failed to supply, on request, a copy of the EIA screening report for this licence, and there is an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive, refers to CJEU case Mellor C75/08 paragraphs 57-60, and providing of records that informed the decision.



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In response to the appeal, the DAFM stated that the standard operational activities of clear-felling and replanting in already established forests are not included under the specified categories of forestry activities or projects for which EIA screening 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 no breach of Articles 4(3), 4(4) or 4(5) had occurred. The DAFM stated any felling licence issued 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. Regarding consultations, referrals to statutory bodies, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. As set out in the DAFM's Forests & Water document, the DAFM has developed considerable experience in relation to the protection of water during the forestry licensing process, and is actively engaged in the WFD process, contributing proactively to both the 2nd cycle and the 3rd cycle, the latter currently under development. Therefore, while referrals are an important part of the evaluation process, the DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD. The 4.06 ha felling and reforestation project licenced as DL31-FL0058 has been subject to the DAFM's AA Screening procedure with regards European sites within 15 km which considered the project design in the absence of measures that might otherwise mitigate impact on Natura Sites. In the screening the DAFM concluded that there is no possibility that the project will have a significant effect due to the separation distance between the European site (Donegal Bay SPA 004151) and the project. A number of the Special Conservation Interests (SCIs)/Qualifying Interests (QIs) were truncated on the AA Screening form for project DL31-FL0058 when outputting the screening form. However, all SCIs/QIs were considered during the screening exercise itself. It is a condition of the licence issued for DL31-FL0058 that the applicant ensures that all felling and planting operations are carried out in accordance with Forestry and Water Quality Guidelines and the Standards for Felling and Reforestation. It's a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply. The DAFM stated that the reason for Condition (a) of the licence is to ensure protection of water quality and the environment, and adherence to Condition (b) ensures the licensee follows appropriate stump treatment procedures in the application of urea to protect water quality and the environment. Also, licence Conditions (i)-(bb) identify specific requirements in relation to harvesting and replanting operations which will ensure protection of water quality and the environment.

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 replied dated 14 May 2020 without stating the class of development included in the EIA Directive to which felling and reforestation belong.

At the oral hearing the Appellant sought that the written grounds are considered where not revisited at the hearing. The DAFM identified the processing involved and conditions of the licence and referred to the statement in response to the grounds of appeal. The Appellant confirmed that grounds regards FWPM and Lough Derg SPA are not applicable. The appellant referred to a maximum allowable clear-fell coupe size of 25 ha set out for in the Interim Standards for Felling and Reforestation, and that licences in close proximity were at issue when considered with the proposal. The Appellant listed DL31-FL0057 (8.28 ha), DL31-FL0061 (14.37 ha), DL31-FL0062 (22.88 ha) and DL31-FL0060 (19.24 ha), all applied on at the same time and not as one application. The Appellant stated that the reasons for the 25 ha extend beyond landscape and referred to content of the Code of Best Forest Practice on cumulative felling and that staggering is suggested and that coupe size is also linked to water quality and bio-diversity. The Appellant referred to the Sessiaghkeelta as a water-body under significant pressure. The Applicants set out that the proposal is in BAU1 – northwest, the site has a gentle northeast slope, is dry underfoot, has access roads and the soils are predominantly peat, also the site has 3 relevant watercourses (one at north that flows to east and two at south that flow southward. At the hearing the DAFM confirmed DL31-FL0035 (north of the proposal) is undertaken and both DL31-FL0057 and DL31-FL0061 have a condition requiring that DL31-FL0035 have greened up prior to any felling works. The Applicants described wind-blow as an issue for the current crops in these stands owing to tree height and soil type. The divides between the proposal and these other licences were examined and it was noted a distance in excess of 120m existed between the proposal and DL31-FL0060. The DAFM submitted that the provision was part of what is considered and stated none of the licences within 120m added to the proposal gave an area in excess of 25 ha.

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). While the application submitted for 0.20 ha open space, the licence issued is for the felling and reforestation of 4.06 ha and does not consent to any change of land use, a forest is defined as 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. As such, the FAC concluded that there is no change of land use and therefore there is no breach of any of the provisions of the EIA Directive. The designated Lough Fad Bog NHA was noted to be west and southwest of the proposal as approximately 1km and while in



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the same river system has no downstream connection and without any likelihood of being significantly affected.

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 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 which is inconsistent with Article 5 of the Birds Directive. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

The provisions of 3.2 of the Interim Standards for Felling and Reforestation are as follows; *The maximum allowable size for any single clear-fell coupe is 25 ha. No other coupe within 120 m can be clear-felled until the original coupe has greened up, and no less than 12 months after the completion of felling.* The evidence shows DL31-FL0062 (22.88 ha) and DL31-FL0061 (14.37 ha) are within the 120m distance from the proposal, the others are in excess of 120m, and that DL31-FL0061 when added to the proposal does not come to 25ha or more. Regards DL31-FL0062, the proposal is divided by a stand of trees, these were described at the hearing as having a high probability of blowing over. With regards to the proposal when considered along with DL31-FL0062 there is in excess of the stated 25 ha. The FAC while recognising the Applicant's grounds regards wind-blow, also has regard to the interim strip of retained forest between DL31-FL0062 and the proposal, and to the fact that the felling applications of both coupes and others in close proximity were simultaneous and made no case seeking the exception within the provisions of 3.2. The FAC considers there is no impediment between the proposal and DL31-FL0061 or between the proposal and DL31-FL0057. However, the FAC considers the greening up required should apply regards the proposal and DL31-FL0062 in this instance and considers the licence was erroneous in this regard.

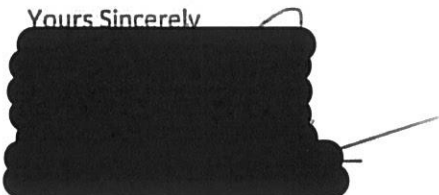
Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 Appropriate Assessment screening in relation to Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The European Sites screened for were as follows; 002301 River Finn SAC, 004057 Lough Derg (Donegal) SPA, 001125 Durragh Loughs/Pettigo Plateau SAC, 004099 Pettigo Plateau Nature Reserve SPA, 001992 Tamur Bog SAC, UK0030320 River Foyle and Tributaries SAC, UK0016607 Pettigoe Plateau SAC (input twice), 002135 Lough Nageage SAC, 002164 Lough Golagh And Breesy Hill SAC, 000163 Lough Eske and Ardnamona Wood SAC, 000133 Donegal Bay (Murvagh) SAC, 000115 Ballintra SAC and 004151 Donegal Bay SPA.

There are minor lake water-bodies in the surrounds and none border the proposal. Lough Derg is c. 1.2km north of the proposal. The FAC having regard to the grounds of appeal, notes that Lough Derg SPA is within the Foyle Catchment and the LeaghanyRiver_SC_10 and not within the same catchment as the proposal. The evidence at the hearing is that the site contains three relevant watercourses and two flow southward, EPA mapping tool shows the direct downstream connection is c. 40 km to Donegal Bay SPA, this is via a river and lake network that includes Lower Lough Erne. The FAC finds no convincing basis on which to suspect any likelihood of significant effects on the SPA. Also, there is no evidence before the FAC that populations of FWPM arise downstream of the proposal, and the proposal is not evidenced as within a FWPM catchment, and no significant effects are therefore likely.

The FAC noted that the qualifying interests listed in this Appropriate Assessment Screening were truncated on the DAFM documentation. In respect of its screening assessment the DAFM provided an amended version purporting to address the truncation. However, in neither version are the qualifying interest species of the River Foyle and Tributaries SAC set out for. Also, in respect of the Pettigo Plateau SAC the screening specifies the Eurasian Golden Plover as the sole qualifying interest whereas instead Natural Dystrophic Lakes and Ponds, and Blanket Bogs arise for the SAC. The Eurasian Golden Plover is the sole qualifying interest for the Pettigo Plateau SPA UK9020051, a site within 15 km of the proposal but not identified on the screening undertaken. The FAC considers that the Appropriate Assessment screening therefore contains a series of errors.

In the above circumstances the FAC considers a series of errors arise in this instance and the FAC conclude that the decision of the DAFM should be set aside and remitted to the Minister to carry out an assessment of the proposed development on Natura 2000 sites on its own and in combination with other plans and projects, before making a new decision in respect of the licence, while also having regard to 3.2 of the Interim Standards for Felling and Reforestation.

Yours Sincerely



Pat Coman, on behalf of the FAC

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