



18 December 2020

Subject: Appeal FAC 196/2020 regarding licence WW09-FL0164

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

Background

Licence WW09-FL0164 for felling and replanting of 3.92 ha at Greenan More, Co. Wicklow was approved by the Department of Agriculture, Food and the Marine (DAFM) on 30 March 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal FAC 196/2020 was held by the FAC on 12 November 2020.

Attendees;

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

Secretary to the FAC: Ms Ruth Kinehan

Appellant: Not in attendance

Applicant representatives: [REDACTED]

DAFM: Mr. Luke Middleton & Mr. Joseph O'Donnell

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal and submissions received, the evidence from the oral hearing and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence WW09-FL0164.

The licence pertains to the felling and replanting of 3.92 ha at Greenan More, Co. Wicklow. The forest is currently comprised of Douglas Fir (90%) and Birch (10%). Restocking comprises Douglas Fir (98%) and Oak (2%). Acid Brown Earths and Brown Podzolics are described as making up approximately 88% of the underlying soil type with Lithosols and Regosols accounting for the remaining 12%. The slope is given as predominantly moderate (0-15%). The proposal is located in the Ovoca Vartry Catchment_10 and the Avonbeg Sub-Catchment_10 (10_10). The forest is stated to be situated in the Avonbeg River Sub-Basin_040 (100%).

The proposal was referred to Wicklow County Council and no response is on file. There was also a referral to Inland Fisheries Ireland (IFI). IFI referred to the fact the lands are within the catchment of the Avonbeg, a salmonid system supporting populations of Atlantic Salmon, Sea Trout and Brown Trout. IFI considered that in light of the current ecological sensitivity in this catchment, Q3-4 at EPA Site 0600 Greenan Bridge (2018) and the associated comment "the paucity of pollution sensitive macroinvertebrates species coupled with excessive instream filamentous algae indicated unsatisfactory ecological conditions at Greenan Bridge" IFI do not consider that reforestation with conifers as proposed is sustainable. IFI specified regarding felling that all works should be completed in accordance with the Forestry Harvesting and Environmental Guidelines. IFI stated that ground stability should be kept under constant review and that the felling operation must not create unstable ground conditions or result in post harvesting ground instability. IFI sought that IFI personnel be notified by the applicant/contractor, at a minimum, two weeks in advance of the operation. The application included a Harvest Plan, including maps, and general environmental and site safety rules. In processing the application, DAFM completed a Stage 1 Appropriate Assessment screening with reference to the provisions of Article 6(3) of the Habitats Directive and identified 5 Natura sites (4 SAC & 1 SPA) within 15km and found no reason to extend this radius in this case; 733 *Vale Of Clara (Rathdrum Wood) SAC c2.6km*, 2122 *Wicklow Mountains SAC c6.4km*, 4040 *Wicklow Mountains SPA c6.4km*, 717 *Deputy's Pass Nature Reserve SAC c7.8km* and 729 *Buckronev-Brittias Dunes And Fen SAC c14.4km*. No Turlough site was identified. The SAC sites were screened out for Appropriate Assessment due the absence of a pathway. The SPA site was screened out due to separation distance.

The licence was approved with a number of conditions attached which are of a general nature and relate to environmental protection, landscaping, the maintenance of the forest and good forestry practice. Other licence conditions are more directly concerned with the protection of fish, water and/or soil. The licence requires that IFI are notified at least 2 weeks before works commence. The licence specifies as per the Code of Best Forest Practice and the Forestry and Landscape Guidelines, no conifers are to be replanted within 20m of the public road and that broadleaves and diverse conifers should be planted within the strip 10-20m from the public road, in an undulating fashion to create a sequence of varying spaces. Sharply defined edges are to be avoided to create a gradual transition from forest to open ground. A minimum planting density is provided for. The reason stated for this condition is landscaping and road safety.

There is one appeal against the decision. The grounds contend that the Habitats Directive and the Environmental Impact Assessment Directive have not been complied with. The Appellant states that the Appropriate Assessment does not comply with the requirements of the law. The Appellant indicates that they have not been provided with any evidence of an Appropriate Assessment or screening. The submission asserts regarding the test for Appropriate Assessment Screening that there is no need to establish such an effect merely that there may be such an effect and quotes judgements in support of this contention. The submission quotes a judgement stating that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the Appropriate Assessment. It is the Appellants submission that to comply with the Directive, Regulations, the Judgements of the CJEU and the High Court it is necessary at the minimum, where a waterbody is concerned, to examine the catchment map and to state which catchment the development is in and where a Turlough is concerned, to show evidence that there is no groundwater connectivity. The Appellant quotes the National Parks and Wildlife Service (NPWS) document submitted with the appeal detailing the type of in-combination assessment required in relation to other forestry management activities. The appellant referenced Commission notice "*Managing Natura 2000 Sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*" - Brussels, 21.11.2018 C(2018) 7621 final https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_6_nov_2018_en.pdf.

The Appellant states that the forest exceeds 100 ha and that roads exceed 2km. The Appellant queries whether the proposal has been subjected to Environmental Impact Assessment and whether the original planting was subjected to any assessment. The Appellant refers to the duties of a public authority in relation to the Habitats Directive, specifying that FAC must also comply fully with the duties set out in the general observations made by NPWS to the DAFM.

In a statement to the FAC, the DAFM described the Appropriate Assessment procedure adopted in processing the licence and submits that the screening relied exclusively on information from the Applicant in relation to considering the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequent to the licence being issued.

The FAC sat in person at an Oral Hearing in Portlaoise on 12 November 2020. The parties were invited to attend in person or by electronic means. The DAFM and the Applicants participated electronically as did Bernadette Murphy (FAC member) but the Appellant did not participate. At the Oral Hearing the DAFM submitted that the standard operational activities of clearfelling and replanting already established forests are not included under the specified categories of forestry activities or projects for which screening for EIA is required. DAFM clarified that its original screening in-combination assessment had been based on the information submitted with the application and that its subsequent in-combination assessment had been undertaken after the granting of the licence. This second assessment listed a significant number of forestry projects (both Coillte and private) in the vicinity of the development. While details regarding the current status and location were provided for a number of the forestry projects listed, the FAC were unable to determine such information at the Oral Hearing for all of the projects. DAFM confirmed there was a response from IFI but were unable to provide the details. This information was found in the documentary evidence submitted to the FAC by the DAFM. The DAFM explained the reasons for all licence conditions after (h) and the majority were in the interest of the protection of water quality and/or soil. DAFM stated that the conditions were pre-cautionary as there was no Aquatic Zone on the site and were not in response to IFI submissions. DAFM explained that licence conditions requiring daily monitoring of protective measures are enforced by inspecting projects after operations and that Daily Monitoring Forms were not required from the Applicants. The Applicants clarified that Daily Water Monitoring Forms are filled and gathered for inspection throughout the operations. The DAFM acknowledged that Wicklow is an area known to have problems regarding deer foraging damage but no information regarding the rate of damage was provided. The FAC queried why the need to use tree shelters on the Oak was not therefore included as a licence condition. DAFM explained that the replanting could be checked for deer foraging damage and the Applicant confirmed that close monitoring for such damage would be carried out, particularly given the susceptibility of Douglas Fir. The Applicants confirmed that necessary measures would be taken if such problems arise. DAFM gave the distance of *Wicklow Mountain SPA* as c6.4km and the core foraging range of the Merlin as c5km and the Peregrine as c2km. DAFM confirmed that the relevant records are retained for as long as the legislation requires and for at least 12 years. DAFM confirmed that the Appropriate Assessment screening documentation was provided to the Appellant in advance of the Hearing. The Applicant described the site as relatively small with no direct hydrological connection with any Natura site and surrounded by long established forestry on 3 sides with agricultural land to the South. A forest road pre-exists. The site was described as sloping gently westward. A watercourse was stated to be located c470m to the West. This watercourse was described as flowing for c7.6km before joining the Avoca River which flowed for c15km before entering the sea. The Applicant explained that broadleaves will be retained if possible and will only be removed for Health and Safety reasons.

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 EIA 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 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 felling of trees, as part of a forestry operation with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish Regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 3.92 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other classes included in the Annexes I or II of the EIA Directive or considered for EIA in Irish Regulations.

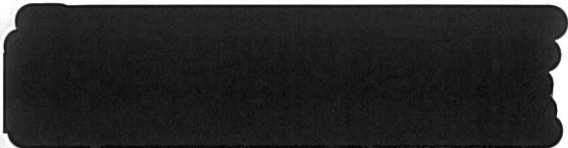
Regarding the legal requirement for public authorities to retain records, DAFM have confirmed that relevant records are retained in accordance with the legislative requirements as detailed above. DAFM have further confirmed that the Appropriate Assessment screening documentation was provided to the Appellant in advance of the Hearing. The FAC is satisfied that the Appellant has not been inhibited in the making of submissions in respect of this appeal and that all relevant information and documentation were available for scrutiny. Documentation relating to this FAC decision will also be available in accordance with the legislative requirements.

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, 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 FAC noted that *Qualifying Interests* were truncated on some of the DAFM documentation but considered that this omission was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites. The FAC also noted that the Peregrine is a *Qualifying Interest* of the *Wicklow Mountain SPA*. The Peregrine is not listed on the Bird Foraging Table (06 January 2020), the only such table available to the FAC and therefore in the absence of such evidence it is not clear to the FAC on what basis the latter SPA was screened out. Furthermore, the FAC noted, that the DAFM failed to carry out a sufficient in-combination assessment before the decision to grant the licence was made. The DAFM subsequently submitted to the FAC listings of other plans and projects, including forestry projects (Afforestation -3, Forest Roads – 5, Private Felling - 3 & Coillte Felling - 39). Having regard to the nature and scale of the proposal, the characteristics of the site and the surrounding area and to the nature and number of other forestry projects listed, the FAC is satisfied that the failure of DAFM to carry out a satisfactory in-combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

In the above circumstances, the FAC concluded that the decision of DAFM should be set aside and remitted to the Minister to carry out an Appropriate Assessment screening under Article 6 of the Habitats Directive, for any likely

significant effects of the proposed development on Natura sites alone or in-combination with other plans and projects, before making a new decision in respect of the licence.

Yours sincerely,



Bernadette Murphy On Behalf of the Forestry Appeals Committee

