



23 February 2021

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FAC ref: 655/2020

Subject: Appeal in relation to felling licence GY11-FL0374

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence GY11-FL0374.

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-FL0374 was granted by the Department of Agriculture, Food and Marine (DAFM) on 07 August 2020.

Hearing

An oral hearing of appeal 655/20 was conducted by the FAC on 11 February 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy
& Mr Pat Coman
Secretary to the FAC: Mr Michael Ryan
Appellant: [REDACTED]
Applicant representatives: [REDACTED]
DAFM representatives: Mr Luke Middleton & Ms Martina Monaghan

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, submissions made at the Oral Hearing and the grounds of appeal, before deciding to set aside and remit the licence (Reference GY11-FL0374).

The proposal is for the clearfell and restocking on a stated site area of 14.15ha at Ballygunneen, Gortnagleav, Kilnagappagh, Co. Galway. The current crop is stated to be a mixture of Sitka spruce and Lodgepole pine. Proposed restocking is 60% Sitka Spruce (8.07ha) and 40% Lodgepole Pine (5.38ha) with Open Space of 0.71ha provided. The application documents include a 'Harvest Plan'

and Appropriate Assessment Pre-screening Report which identifies 19 SACs and 6 SPAs within a 15km radius of the project lands.

The DAFM carried out a Stage 1 screening for Appropriate Assessment. The context for the screening lists soils on the site as Blanket Peats (2%), Lithosols, Regosols (17%), Surface Water Gleys, Groundwater Gleys (81%). The slope is predominantly moderate 0-15%. The site is stated to be within the Kinvara-Coastal Catchment (100%), Kilchreest_Sc_010 (100%) Sub-catchment, Kilchreest_010 (100%) Waterbody. Sites screened out for Appropriate Assessment are as follows: Sonnagh Bog SAC, Lough Rea SAC, Lough Rea SPA, Rahasane Turlough SAC, Ballinduff Turlough SAC, Rahasane Turlough SPA, Castletaylor Complex SAC, Ardrahan Grassland SAC, Coole-Garryland SPA, Kiltiernan Turlough SAC, Kiltartan Cave (Coole) SAC, Drummin Wood SAC, Lough Fingall Complex SAC, Lough Cutra SAC, Lough Cutra SPA, Gortacarnaun Wood SAC and Inner Galway Bay SPA. The reasons for screening these sites out include the absence of upstream connection and no pathway for effects, separation distances, and location outside the core foraging range of qualifying interests. The following sites were screened in for Stage 2 Appropriate Assessment - Slieve Aughty Mountains SPA, Peterswell Turlough SAC, Lough Coy SAC, Carrowbaun, Newhall and Ballylee Turloughs SAC, Coole-Garryland Complex SAC, Caherglassaun Turlough SAC and Galway Bay Complex SAC. In-combination projects considered included non-forestry - dwellings, domestic extensions, materials recovery facility, telecommunications infrastructure, agricultural shed, and forestry related - Coillte Harvesting (7) (84.49ha), Private felling (3) (8.14ha), Forest Roads (2).

The applicants submitted an unsolicited Natura Impact Statement, dated 10.07.20. This included a Stage 2 Appropriate Assessment of the following sites - Peterswell Turlough SAC, Lough Coy SAC, Coole-Garryland Complex SAC and Slieve Aughty Mountains SAC. In respect of these sites the NIS lists qualifying interests, conservation objectives, supporting habitats and species and potential adverse effects. Mitigation measures are proposed for each site.

The DAFM completed an Appropriate Assessment Determination dated 05.08.20. This determined that the proposed project individually, or in combination with other plans or projects will not adversely affect the integrity of any European site, having regard to their conservation objectives, provided that the mitigation measures are implemented.

Following referral of the application, the National Parks and Wildlife Service (NPWS) responded as follows:

1. There is potential for flooding that may affect downstream European sites. The removal of canopy, exposure of underlying drains, cleaning of any drains, could lead to accelerated run-off and increased silt loading on the following:
 - Carrowbaun, Newhall & Ballylee Turloughs SAC
 - Ballinduff Turlough SAC
 - Cahermore Turlough SAC
 - Caherglassaun Turlough SAC
 - Coole-Garryland Complex SAC
 - Lough Coy SAC
 - Peterswell Turlough SAC
2. Forestry Best Practice should be followed in all phases



3. Invasive species, if present, should be managed to avoid spreading.

The licence issued on 07.08.20 and is exercisable until 31.12.22. The licence is subject to standard conditions (a) to (g). Additional conditions relate to the protection of the Hen Harrier, protection of the Merlin, provision of a corridor and haven for prey species, protection of water quality, inspection requirement and adherence to specified Guidelines and Standards.

There is a single appeal against the decision to grant the licence. In summary, the grounds of appeal contend that the decision is in breach of Articles 4(3) and 4(4) of the EIA Directive, the licence and associated operations threaten the achievement of the objectives set for the underlying waterbody as set under the River Basin Management Plan, there is no evidence that the impact on a non-designated European Annex I habitat has been adequately considered, the Stage 1 screening did not consider potential impact on SAC 001913, the AA in-combination assessment is flawed, the opinion of the general public was not sought under Article 6(3) of the Habitats Directive, the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation, licence conditions do not provide for the protection of all wild birds during breeding and rearing season, licence conditions do not provide for the strict protection of Annex IV species, there should be a standard condition requiring the licensee to notify the Minister at the commencement and conclusion of operations, there should be a condition requiring the Forest Service to inspect plans and works prior to, during and post works to ensure compliance, and there should be stringent and enforceable conditions regarding notification of appropriate bodies, groups and the public of the spraying of chemicals.

In response, the DAFM state that the proposed development is not of a class of development to which the EIA Directives applies, the application was referred to the Local Authority and (NPWS) in line with current procedures, the DAFM applies a wide range of checks and balances in relation to the protection of water quality, The Slieve Aughty NHA is 650m to the east. The site synopsis notes that the site is threatened by afforestation but felling and reforestation are not mentioned as a threat, the application was subject to Appropriate Assessment screening procedures and sites within a 15km radius were assessed, the DAFM procedures concord with the requirements of Article 6(3) of the Habitats Directive, it is a principle of law that unless the grant of a first consent exempts the holder from any obligation to obtain a second consent or adhere to any other restriction on the timing of activities or similar, where such is set out by statute elsewhere, these other obligations and restrictions apply, the Minister may, at any time, attach or vary conditions to any licence granted, and the use of PPPs is governed by Statutory Instruments. These provide the basis for the proper and appropriate use of chemicals.

An Oral Hearing was held on 11.02.21 in Portlaoise. All parties were invited to attend. The FAC sat in-situ and remotely and all parties attended and participated remotely. The DAFM briefly detailed the background to the decision and details of the licence. Under questioning by the FAC, the DAFM confirmed that it had completed an Appropriate Assessment screening concluding that 7 Natura 2000 sites (6 SACs and 1 SPA) should be subject to Stage 2 Appropriate Assessment. They stated that the submission of the NIS by the applicants had been unsolicited and confirmed the NIS had

assessed 4 sites for Appropriate Assessment. The Appropriate Assessment Determination by DAFM had relied substantially on the information contained in the NIS. The Determination (Section 4) had concluded that the proposed project individually, or in combination with other plans or projects will not adversely affect the integrity of any European site, having regard to their conservation objectives, provided that the mitigation measures are implemented. The FAC queried if a Stage 2 assessment had been carried out on all of the sites the DAFM had screened in for Stage 2 Appropriate Assessment, and DAFM stated that, other than the conclusion reached in the Determination no other assessment document existed. The Appellant stated that the proposed development could potentially affect the waterbody Kilchreest_010, and that this had not been assigned a status. In these circumstances, in accordance with judgement by Justice Niamh Hyland in *Sweetman v An Bord Pleanála*, Ireland and the Attorney General, the licence had to be refused. The appellant queried the terms of the condition attached to the licence in respect of the Merlin and stated that there was no scientific basis for the 100m buffer. The mitigation measures recommended were too generic. The possibility of colonisation of an Annex I habitat had not been assessed. The Applicants stated that a field assessment had been carried out on 07.12.20, following the granting of the licence. The site was dry underfoot and there was evidence of some wind-blow. There is an aquatic zone on the site, approximately 0.4km separation from the Kilchreest Stream, which in turn flows 0.75km to the Ballygunneen River, which in turn flows 1.4km to the Kilchreest River, and then 2.9km to Peterswell Turlough SAC (total hydrological distance 5.4kms). There was no formal request to submit the NIS, and the Applicant was unaware as to the reason for not including all of the DAFM screened in sites in the NIS. There is no history of flooding on the site. The Applicants were not aware of any karst features on the site. A non-designated Annex I habitat extended from the project lands to a designated habitat.

In addressing the appeal, the FAC considered, in the first instance, the procedures followed by the DAFM in terms of the requirements of the Habitats Directive. The FAC noted the conclusion of the screening exercise undertaken that 7 Natura 2000 sites should proceed to Stage 2 Appropriate Assessment - Slieve Aughty Mountains SPA, Peterswell Turlough SAC, Lough Coy SAC, Carrowbaun, Newhill and Ballylee Turloughs SAC, Coole-Garryland Complex SAC, Caherglassaun Turlough SAC and Galway Bay Complex SAC. The FAC noted that a reasoned screening led to this conclusion. The NIS submitted on 10.07.20 was unsolicited and considered 4 Natura 2000 sites for Stage 2 assessment – Peterswell Turlough SAC, Lough Coy SAC, Coole-Garryland Complex SAC and Slieve Aughty Mountains SAC. The FAC noted the methodology applied in the NIS and considered that this was consistent with the requirements of Article 6(3) of the Habitats Directive. However, the FAC noted that the NIS did not address all of the sites previously screened in by the DAFM. The DAFM produced an Appropriate Assessment Determination dated 05.08.20. In section 4 of this document, it is stated that the Minister has carried out an Appropriate Assessment of potential impacts on the likely significant effects of the project on those European sites 'screened in'. The 'screened in' sites are listed in section 2 of the Determination and these are the same 7 sites as were originally screened in for Stage 2 assessment. In response to questions put at the Oral Hearing by the FAC, the DAFM confirmed that no Appropriate Assessment Report had been produced in this case and that there was no other documentation purporting to be a Stage 2 Appropriate Assessment. In these circumstances, the FAC concluded that the DAFM, as consent authority, had failed to meet the requirements of Article 6(3) of the Habitats Directive and that this constituted a serious error in the making of the decision to grant the licence.



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

Addressing the other grounds of appeal, the FAC considered that there is no convincing evidence that the licence and associated operations would threaten the achievement of the objectives for the underlying waterbody as set under the River Basin Management Plan. In this case the FAC concluded, having regard to the nature and scale of the proposed development, and to the conditions of the licence designed to protect water quality, there would be no likelihood of any impact on the underlying waterbody. In coming to this conclusion, the FAC referred to the Hyland judgment, noting that the circumstances to which the judgment referred, where there was a direct and accepted impact on an unassigned waterbody, were entirely different to the circumstances applying in the case the subject of this forestry appeal. The FAC concludes that the proposed development, comprising clearfell and restocking, does not fall within a class of development to which the EIA Directive applies and, furthermore, does not include any works which, by themselves, would fall within a class of development covered by the Directive. There is no specific information before the FAC in regard to Annex IV species or wild birds which would give rise to the necessity for attaching conditions to the licence requiring their protection. The use of PPPs is covered by way of Statutory Instruments in Ireland and there is no legal requirement to inform the public, bodies and groups of the intention to spray in individual cases. Compliance and enforcement of conditions is a matter for the DAFM at any stage of the development and the FAC considers that the additional conditions requested by the appellant are not required. The Sonnagh Bog SAC is 1.67 km to the south east. There is Blanket bog in between the proposal and the SAC, but there is no convincing evidence submitted to indicate that the proposed development would give rise to the likelihood of any significant effects on this habitat.

In conclusion, the FAC decided that DAFM had failed to carry out a complete Appropriate Assessment in accordance with the provisions of the Habitats Directive and that this constituted a serious error in the making of the decision to grant the licence. In these circumstances, the FAC decided to set aside and remit the decision to grant the licence and to require the DAFM to carry out an Appropriate Assessment in accordance with the provisions of the Habitats Directive, before making a new decision.

Yours Sincerely

Pat Coman, on behalf of the FAC

