



**An Coiste um
Achomhairc
Foraoiseachta
Forestry
Appeals
Committee**

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August 25th 2021.
FAC Ref: FAC 224/2020

Subject: appeal in relation to Licence TFL00405119.

Dear [Redacted]

I refer to the 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

Felling Licence TFL00405119 was granted by the Department of Agriculture, Food and the Marine (DAFM) on April 16th 2020.

Hearing

An oral hearing of appeal: FAC 224/2020 regarding the decision to issue the licence TFL00405119 was conducted by FAC on May 13th, 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson) Mr John Evans
Mr Luke Sweetman, Mr Dan Molloy.

Administrative Secretary: Mr Michael Ryan.

Applicant representatives: [Redacted]

DAFM Representatives: Ms Eilish Kehoe, Mr Momme Reibisch.

Appellant: [Redacted]

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Decision.

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal and all other submissions before deciding to set aside and remit the decision of the Minister to grant licence TFL00405119.

The proposal is for the thinning and subsequent felling of 21.74ha, felling only of 15.99ha and replanting of 37.73ha at Leggatinty, Bellanagare, County Roscommon. The thinning is proposed to take place in the year 2020 and felling is proposed to take place in the years 2020, 2026, 2028 and 2029. The site is subdivided into thirteen plots planted with 100% Sitka Spruce. The proposed re stocking of the site is 80% Sitka Spruce, 10% Broadleaf and an additional 10% for Open Space is provided for. The site is located in the Upper Shannon Water Framework Directive (WFD) Catchment and within the Breedoge_SC_010 Sub Catchment. The EPA named Carricknabraher River (WFD status Poor) flows on the northern edge of the site adjacent to plots 6 and 9, there is also a stream flowing on the eastern side of the site with a separation distance of approximately 25m from the site.

The applicant submitted an application pack which includes maps and a document titled 'Harvest Plan'.

The DAFM referred the application to the National Parks & Wildlife Service (NPWS) and Roscommon County Council on October 16th 2019. Roscommon County Council replied on October 22nd stating, damage caused to public roads or public facilities by associated works and transportation of timber shall be fully reinstated by the developer at their expense. Roscommon County Council also notified the DAFM on November 1st ,2019 stating the following (summary):

- o Dumping has occurred within this site. The owner of the site should be advised to remove all rubbish to a licenced waste disposal facility.
- o Install sufficient silt traps. Material removed from the traps should not be allowed to re-enter water courses.
- o Maintain adequate brush mats on extraction routes.
- o 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.
- o All measures to protect water courses, within the site, from sediment, nutrient and organic matter loss as outlined in the Environmental Requirements for Afforestation 2016 must be strictly applied during felling and re-planting operations.
- o Re-planting: 20m setback from EPA River and 5m setback from relevant watercourses.

The NPWS replied on December 13th,2019 outlining heritage-related observations/recommendations under a number of headings. In referring to The Forest Harvesting and Environmental Guidelines 2000, NPWS stated a map should have been provided by the DAFM relating to geographic details and environmental features on the site, also providing Harvest Plan details. The reply also pointed out that details relating to reforestation objectives and setbacks from hedgerows and watercourses were not identified.

The Inspectors certification states that the predominant soil type underlining the project area is podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s).

The DAFM has provided an Inspector Certification Felling Report (ICFR) which does not provide details of Appropriate Assessment Screening carried out by the DAFM. As part of the ICFR and under the heading of 'Screening Conclusion' the report states *'The zone of influence centered on this application does not overlap with any Natura site. Therefore, due to spatial separation, this project is screened out for the purpose of Appropriate Assessment, overall conclusion, Screen out'*.

The FAC consulted publicly available information from the Environmental Protection Agency website. The following Natura 2000 sites are listed within a 15km radius of the project site, Clonshanville Bog SAC,

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Bellanagare Bog SAC, Callow Bog SAC, Tullaghanrock Bog SAC, Mullygollan Turlough SAC, Drumalough Bog SAC, Cloonchambers Bog SAC, Bellanagare Bog SPA, Lough Gara SPA.

The DAFM carried out an in-combination report on January 9th 2019. The following online planning agency websites were consulted focusing on the townland of Leggatinty.

Roscommon County Council: four domestic planning applications and two bell-mouthed forest entrances from public roads to facilitate access to forestry plantations. An Bord Pleanála: three domestic planning related applications. The DAFM iForis Map Viewer was also consulted on January 9th, 2020 outlining ten afforestation projects in the years 2014 – 2019, nine forest road projects in the years 2008 - 2019, seven private felling licences in the years 2017 - 2019 and eight Coillte Felling Licence applications in the years 2016 – 2020. The DAFM conclude 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 deems that there is no potential for the project to contribute to any such effects, when considered in-combination with other plans and projects.

Two copies of the licence TFL00405119 are recorded as having been issued by the DAFM on April 16th 2020. The first copy of the licence outlines what are relatively standard conditions (a) to (g) and additional conditions (h) – (j) requiring that:

(h) Adb's to consist of Birch and Rowan. OS to consist of Scots Pine.

(I) Standards for Felling and Reforestation 2019 to apply.

(J) All domestic waste to be removed from site prior to commencing with harvesting operations.

The second copy of the licence (titled Licence with amendment) outlines the same standard conditions as the first licence, (a) to (g) but what was originally outlined as condition (h) on the first licence '*Adb's to consist of Birch and Rowan, OS to consist of Scots Pine*' is removed from the second copy of the licence. The remaining additional conditions outlined on the first licence are included on the amended licence. The DAFM have also provided details of an e-mail between the Forest Service and the applicants representative relating to clarification on the licence in relation to the abbreviation 'OS', (table 2, plot 5) the applicants representative pointing out on May 6th, 2020 that '*OS referred to in the application refers to open space and not other species*' also pointing out that, the same typo is also in condition (h) on page 6 and requesting if the typo could be corrected.

There is one appeal against the decision to grant the licence. The summarised grounds of Appeal are as follows:

- o There is a breach of Article 4(3) of the EIA Directive. This is a class of development covered under Annex II. A number of criteria set out in Annex III do not form part of the screening and have not been taken into account.
- o The DAFM failed to carry out an adequate EIA screening of the proposed development. The determination is inadequately reasoned.
- o There is inadequate consideration of the objectives of the WFD River Basin Management Plan. The site is in the Carricknabraher 020 catchment. The correct status is poor and listed At Risk. There was no referral to the IFI.
- o The AA screening conclusion is flawed as at least three of the designated sites are within the zone of influence.
- o The consultation process is flawed. The NPWS stated that there was insufficient information to make an assessment of this application. There is no evidence that further information was provided to the NPWS, yet the Inspector indicates that the NPWS has no objection. The application was only desk assessed by the DAFM but Roscommon County Council visited the site.
- o Licence conditions do not limit the works to particular years. All of the trees could be felled once the licence has issued.
- o There should be a standard condition requiring notification to the Minister at the commencement and conclusion of operations.
- o Licence conditions do not provide for the strict protection of all wild birds during periods of breeding and rearing consistent with the requirements of the Birds Directive.

The DAFM has provided a written statement in response to the grounds of appeal as set out by the Appellant which states the following: Whilst a provision in the Act does impose an obligation on the Minister in the making of the decision whether to grant a Tree Felling Licence (TFL), with or without conditions, or to refuse it,

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further to the making of an application for the same under the relevant statutory provisions, to also consider whether the performance of that function also requires the carrying out of a screening for an environmental impact assessment (EIA) and if necessary the carrying out of an EIA, that statutory obligation is fully discharged once it has been clearly identified at the outset that the application in question does not involve an activity or project that falls within the specified categories of forestry activities or projects 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, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. In the case of the former, those are: Projects involving the replacement of broadleaf high forest by conifer species, where the area involved would be greater than 10 hectares; and projects involving deforestation for the purpose of conversion to another type of land use, where the area to be deforested would be greater than 10 hectares of natural woodlands or 70 hectares of conifer forest. In the case of the latter, those are: initial afforestation projects which would involve an area of 50 hectares or more; and forest road works which would involve a length of 2000 metres or more. The standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities. 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. The felling and reforestation project licenced as TFL00405119 has undergone the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The AA Screening report was completed by the Inspector and contains the recommendations regarding screened out European Sites. Screening information for each Natura 2000 site is available on file. The paperwork submitted as part of the application was reviewed by the inspector. It was deemed sufficient in providing the required information in reaching a decision to approve the licence with conditions. Thinning and clear-fell years are clearly stated on the licence application and the licence itself. The file was referred to the NPWS who did not respond. The AA screening procedure relevant at the time was applied. The proposal was screened out using the Habitat Table 18Dec19 and the Bird Foraging table 06Jan20. In combination assessment was carried out. All relevant information can be found on file.

The FAC held an oral hearing on May 13th 2021. All parties were invited to attend and participate. The FAC sat remotely and the DAFM participated remotely. The appellant and the representative for the applicant also participated remotely.

At the hearing the DAFM set out the processing procedure undergone in issuing the licence, that there were referrals to Roscommon Co Council and the NPWS, that the application was desk assessed and that an AAS was carried out. The DAFM clarified that an in-combination report was carried out on January 9th 2020 and that the report was taken into consideration as part of the licensing process. The appellant stated that there was uncertainty in relation to the licence issued, pointing out that two licences exist for the same application, TFL00405119. The DAFM stated that the first licence issued incorrectly referred to additional broadleaves in plot five instead of open space for 10% of the plot area and that the error was corrected on table two of the amended licence where additional broadleaves was amended to open space. The FAC requested the DAFM to clarify which licence was advertised. The DAFM stated that details relating to the application for Clear-fell and thinning were advertised on October 9th 2019 and the decision relating to TFL00405119 was advertised on April 17th 2020 and that only one licence was advertised. The FAC pointed out to the DAFM that no AAS report was forwarded to the FAC and the Inspector Certification report provided no details of screening carried out by the DAFM. The DAFM stated that the incorrect Inspector Certification Report was forwarded to the FAC. It was established at the hearing that the appellant received the AAS as part of an AIE request. The DAFM was asked by the FAC if they considered referring the application to Inland Fisheries Ireland (IFI). The DAFM stated the location of the site does not require referral of the application to IFI. The appellant raised concerns relating to the protection of wildlife at harvesting referring to the time of year outlined in the harvest plan, Spring, Summer and Autumn months and that there is nothing in the licence requiring the applicant to space out harvesting

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operations. The representative, on behalf of the applicant, stated that under current conditions, they are allowed to fell trees in the periods referred to in the harvest plan if there are no species in the area during the breeding stage, that clear-felling as outlined in the application will commence over a number of years, that the planned development will take place in stages to facilitate 'greening up' on the site and that the site is largely a flat site with a slight slope to the north. The applicant's representative was asked by the FAC to clarify if existing field drains on the site carry water. He pointed out that the field drains carry water in periods of very wet weather and that drains are blocked and heavily vegetated over. The appellant also stated that the in-combination report lacks detail, is limited in content and the fact the licence runs to 2029, he finds it difficult to see how the in-combination report can take this into account.

The FAC pointed out to the DAFM that the NPWS expressed dissatisfaction in relation to insufficient information provided as part of the referral process in this case. The DAFM stated the response from the NPWS is a generic document and that the DAFM are satisfied that issues concerned have been addressed in the Harvest Plan.

In addressing the grounds of appeal, the FAC considered, in the first instance, the appellant's contention that that there is a breach of Article 4(3) of the EIA Directive. This is a class of development covered under Annex II. A number of criteria set out in Annex III do not form part of the screening and have not been taken into account, the proposed development should have been referred back in the context of the EIA Directive. The 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 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 I (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require assessment under 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 considers that the felling of trees, as part of a clear-felling and replanting 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 FAC considers the licence issued is for the felling and reforestation of 37.73 ha and 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.

The FAC considered the appellant's contention that there is inadequate consideration of the objectives of the WFD River Basin Management Plan. The site is in the Carricknabraher 020 catchment. The correct status is poor and listed At Risk. There was no referral to the IFI. The applicant, when questioned by the FAC, stated that field drains that exist within the site carry water in periods of very wet weather, that the drains are heavily vegetated over and blocked in some cases. The FAC noted, the Harvest Plan also outlines 10m setbacks from water courses, harvester restriction zones from sensitive areas and, where appropriate, silt traps will be installed along the entire length of the forest drains to intercept sediment and needles. Harvest operations will be stopped if weather and or ground conditions become unsuitable during periods of heavy rain. 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. The FAC considered the appellants contention that the AA screening conclusion is flawed as at least three of the designated sites are within the zone of influence. The AAS report carried out by the DAFM was not provided to the FAC. Based on the information before it, the FAC is not satisfied that DAFM carried out Appropriate Assessment screening in accordance with the provisions of Article 6(3) of the Habitats Directive, and considered this to be a significant error in the making of the decision.

The FAC considered the referral of the application to the NPWS and the appellant's contention that the consultation process is flawed, that there was insufficient information for the NPWS to make an assessment of this application and that the application was only desk assessed by the DAFM but Roscommon County Council visited the site. The FAC notes the application was referred to the NPWS, providing details of the proposal relating to thinning, clear-felling and replanting. Details relating to the species on site and the area in hectares of each category for thinning and clear-fell were also provided by the DAFM. The FAC also notes that the NPWS in their reply to the DAFM on December 13th 2021 state, *the application provides insufficient information to be assessed properly with regard to its potential impacts on protected habits and species*. The NPWS also state: *The application does not provide the information required and outlined in the Forest Harvesting and Environmental Guidelines (2000) and does not provide the information required and outlined in the Felling and Reforestation Policy (2017)*. The DAFM informed the hearing, the document received from the NPWS on

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December 13th 2019 is a generic document and the issues raised by the NPWS were not ‘site-specific’, however the FAC is not satisfied that the DAFM provided the NPWS with sufficient information to assess potential impacts on protected habitats and species in line with the requirements outlined in the Forest Harvesting and Environmental Guidelines (2000). The FAC regards this to be an error on the part of the DAFM.

In relation to the consultation with Roscommon County Council, the FAC notes that in their reply to the DAFM, the local authority has not stated the date they visited the site and if the dumping was observed previous to the application date of the licence TFL00405119 or after the date of referral by the DAFM. It is not clear that Roscommon County Council visited the site directly as a result of the referral. The FAC are satisfied that the DAFM have not erred in their communication with Roscommon County Council.

The FAC considered the contention that licence conditions do not limit the works to particular years and that all of the trees could be felled once the licence has issued. It was noted by the FAC that the conditions of the licence require adherence to standards in relation to water quality, biodiversity, forest harvesting and the environment, archaeology, aerial fertilisation guidelines and the Code of Best Forest Practice and that the licence provides for a requirement to erect notices when felling is to occur. The FAC also notes that, the applicant when applying for a licence to fell trees on September 16th 2019 stated the requested years of felling as 2020, 2026, 2028 and 2029. The FAC also notes the proposed fell dates, as outlined in the application is also attached as part of the licence issued on April 16th 2020. The FAC is satisfied that the conditions attached to the licence provide for the provision of best forest practice.

In relation to the appellants contention that licence conditions do not provide for the strict protection of all wild birds during periods of breeding and rearing consistent with the requirements of the Birds Directive, the FAC noted that there is no specific information before the FAC in regard to species or wild birds which would give rise to the necessity for attaching additional conditions to the licence.

The FAC considered the appellant’s grounds that the licence should contain conditions relating to the commencement, carrying out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the licensee’s adherence to the conditions of the licence and that enforcement of licence conditions is a matter for the DAFM.

Following the conclusion of the hearing, the FAC requested the DAFM to provide details relating to the following queries within fourteen days of the request:

- *Clarification and details of all Public Notifications/Public notices, (scanned copies of all notices) in relation to TFL00405119.*
- *Clarification of the date the licence was issued, clarification of the date the licence was amended and an explanation as to why the licence was apparently amended.*

The DAFM provided the following reply on June 15th, 2021:

- 1) Application was advertised on the Department’s website on 9/10/2019. No submissions were received from members of the public on foot of this advertising.
Decision was advertised on the Department’s website on 17/04/2020.

Copies of advertising attached.

2. Licence issued 16/04/2020. Subsequent to issue of licence it was brought to the Department’s attention that condition ‘h’ which read ‘*Adb’s to consist of Birch and Rowan. OS to consist of Scots Pine*’ and OS (Additional Broadleaves) referenced on plot 5 of the Replanting Table were incorrectly referenced as Other Species while they should have been referenced as Open Space. On 08/05/2020 an amendment was made to Plot 5 on the Replanting Schedule to read as Open Space. Condition ‘h’ as above was completely removed in error but only the part ‘OS to consist of Scots Pine’ was incorrect. Therefore *Adb’s to consist of Birch and Rowan* still stands and should not be excluded from the licence.

Based on the information before it, the FAC considered that the DAFM made a series of errors by not readvertising as a public notice, the amended licence (TFL00405119), by not providing the FAC with a copy of

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the Appropriate Assessment Screening Report and by also not providing the NPWS with sufficient information outlined in the Forest Harvesting and Environmental Guidelines (2000) and Felling and Reforestation Policy(2017).

In conclusion, the FAC considered that there were significant errors in the making of the decision to grant the licence as the public were not informed by notice of the amendments made to the licence dated 16 April 2020, and there is no convincing evidence before the FAC to indicate that Appropriate Assessment screening was carried out consistent with the provisions of Article 6(3) of the Habitats Directive before the making of the decision to grant the licence. In deciding to set aside and remit the decision of the Minister to grant the licence, the FAC considered that Appropriate Assessment screening should be carried out in accordance with the provisions of Article 6(3) of the Habitats Directive and that a new referral be made to the NPWS providing information in line with the Interim Standards for Felling and Reforestation (2019) before making a new decision, and that the terms of any new decision should be advertised in line with statutory requirements.

Yours sincerely

A black rectangular redaction box covering the signature of Dan Molloy.

Dan Molloy on behalf of FAC

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