



05 March 2021

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FAC ref: 021/2020

Subject: Appeal in relation to felling licence TFL00416919

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of felling licence TFL00416919.

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 TFL00416919 was granted by the Department on 07 January 2020.

Hearing

An oral hearing of appeal 021/2020 was conducted by the FAC on 11 February 2021.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Applicant representative:	[REDACTED]
DAFM representatives:	Mr Seppi Hona & Ms Eilish Kehoe

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, submissions made at the oral hearing and all other submissions before deciding to affirm the decision to grant this licence (Reference TFL00416919).

The proposal comprises 9.56 ha of clear-felling of 100% Sitka Spruce and replanting with 80% Sitka Spruce, 10% Additional Broadleaves and 10% bio-diversity open area such as buffer areas etc at Drumcroman and Clover Hill, Co Leitrim. Proposal is in 8 plots, with plots 1-6 identified for clearfelling in 2022 and plots 7 & 8 for clearfelling in 2029.

The DAFM referred the application to Leitrim Co Council and received a reply on 19 January 2019. Leitrim Co Council stated that the lands as outlined are not located within any designated area identified in the County Development Plan 2015-2021, and there are no tree preservation orders. The lands are within an area designated high capacity for forestry and does not appear to impact on any archaeological site. The County Council seeks that the DAFM should satisfy itself regards Appropriate Assessment (AA) and Environmental Impact Reports (EIAR) and sought conditions be included should the development go ahead, these related to the following; Discussion with the District Engineer on point of access to the site. Transport scheme required regarding location, vehicle type used & timing of operations. Bonding against damage to roads. Works carried out in accordance with best practice especially with regard to water quality.

The Inspector's certification states the soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise conifer plantation.

The Drumahira River flows to south west c.20m from the boundaries of the southernmost plots, while the Prabagh River flows to east c.20m from the boundaries of the northernmost plots. The general surrounds are a mix of farmlands and forestry lands with some dispersed settlement. There are dwellings and small farmyards in from the public road between the plots. Per National Soils layer on the EPA website the proposal comprises mainly Surface Water Gleys and Ground Water Gleys. The proposal is within the Erne Catchment, and is divided north and south between the Blackwater (Newtowngore)_SC_010 and the Blackwater (Newtowngore)_SC_020, and is within the Yellow (Ballinamore)_030 Waterbody (at risk) to the south and the Derradda Stream_010 Waterbody (not at risk) at the north.

In processing the application, the DAFM completed a Stage 1 AA Screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying Natura 2000 sites within 15km of the project lands: *The Cuilcagh-Aneirin Uplands SAC*. The screening conclusion was to screen out the site and the reason given was the position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection. An in-combination assessment was also completed. The overall screening conclusion was to screen out and no stage 2 AA required.

The licence was issued subject to standard conditions plus additional conditions that include to liaise with the County Council prior to commencing operations and to strictly adhere to the Standards for Felling and Reforestation (October 2019).

There is one appeal against the decision to grant the licence, the grounds include that the Forest Service in its Screening for AA found that there were Natura sites within the 15km zone of impact. That is a trigger for the requirement for Appropriate Assessment as it may have an effect. Also, the inspector answered 'yes' to the following questions, but the inspector fails to show any evidence on which this answer is based. Q3. As District Inspector, have you reviewed all referral responses and submissions received in relation to this project and this AA screening process? Q4. Is there sufficient information within the application and available from elsewhere to form a sound judgement as to whether or not the project is likely to have a significant effect on a Natura site?



The appellant contends that in most cases the inspector states that the Natura site(s) is in a different catchment but fails to state which catchment that it is in. In these circumstances the only legal answer is that the application has been screened in for Appropriate Assessment. The judgement in Case C-323/17 states; Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an AA of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site. It is the appellant's submission that safeguards published in the Forest Service guidelines, requirements & procedures are in fact measures intended to avoid or reduce the harmful effects of the plan or project on that site.

Any decision must comply with this "Commission notice" which interprets the relevant judgements of the CJEU "Managing Natura 2000 sites the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" The Irish Courts have interpreted the requirements for AA Screening in the judgement Kelly -v- An Bord Pleanála & others which states:

26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.1777U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C-258/11 Sweetman at paras 47-49:

"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.

The FAC held an Oral Hearing on 11 February 2021. The parties were invited to attend in person or to join remotely. The DAFM participated remotely. Neither the appellant nor the applicant participated. The FAC sat in person and remotely at this hearing. At the hearing the DAFM set out the processing undergone in issuing the licence, the application was subject of a desk based inspection, there was referral to the Local Authority and the response was considered and the conditions of the licence reflect the relevant points to this proposal. An AA Screening and in-combination assessment was finalised prior to any decision to issue the licence. An area at the north of the site was indicated to be liable to flood but this area is not within the planted area of the site and was identified on the OPW flood layers when examined on IFORIS. The applicant described the information submitted with the application including maps. The applicant stated there was currently a wind-blow issue with the proposal and the effects are spreading through the crop. The applicant described the existing forest roads and transport routes, and how there is agreement with the County Council. A forest adjoining at the west is felled and replanted.

The FAC considered 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). As such, the FAC concluded that there is no breach of the provisions of the EIA Directive.

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 projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening in relation to Natura 2000 sites within 15 km and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The FAC considers the 15km radius to have been in order having regard to the size and nature of the proposal. The FAC notes the closest point of the Cuilcagh Aneirin Uplands SAC to the proposal is c. 3.6km. In addition, the Cuilcagh Mountain N.I. SAC is within 15km and within the Erne Catchment but in a separate sub-catchment, the MacneanTribCuilcaghMountains_SC_010, and upland of the proposal and is on the north-northeast facing slopes of the Cuilcagh Mountains beyond the Cuilcagh Aneirin Uplands SAC that was considered in the AA screening. The Northern Ireland site's exclusion from the DAFM screening of European Sites within 15km of the proposal is considered an error. However, in the circumstances of this case the FAC does not consider it to be a significant error having regard to the location, the elevation, the distances, the absence of pathway and the subsequent absence of any likelihood of significant effect arising for the SAC from the proposal. The in-combination assessment completed by the DAFM was compiled on 12 December 2019 and included consideration of adjacent 2018 felling licence TFL00132318 (15.84ha) along with planning and other forestry related projects. The FAC considers the screening conclusion sound in this instance and the proposal poses no likelihood of significant effects on its own or in combination with other plans or projects on any European Site.

The licence does not directly address a transport scheme proposed by the Local Authority but the licence does require the applicant to make contact with the Area Engineer prior to the commencement of operations to discuss haulage of timber from the site. The operations are at all times subject to the remaining conditions on the licence, especially condition (e), and are subject to 'strict' adherence to the Guidelines for Felling and Reforestation (Oct 2019). The FAC considers the referral response was addressed by the DAFM and that the concerns of the County Council are addressed sufficiently in the licence in this instance.



**An Coiste um Achomhairc
Foraoiseachta**

Forestry Appeals Committee

Based on the information before it, the FAC concluded that the DAFM did not make a serious or significant error or series of errors in their decision to issue the licence and did so in compliance with fair procedures. 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