



[REDACTED]

11th October 2021

Subject: Appeal FAC 100/2021 in relation to licence TFL00299319

[REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 (as amended), has now completed an examination of the facts and evidence provided by the parties to the appeal.

Background

Licence TFL00299319 for the felling of 3.54 ha at Annaghgowan, Co. Sligo was approved by the DAFM on 19th of May 2021.

Hearing

A hearing of appeal FAC 100/2021 was held by the FAC on 15th of September 2021. Members of the FAC in attendance were Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton & Mr. Iain Douglas.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions made, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant licence TFL00299319.

Summary of licence and file

The application is on file dated as received by DAFM on the 21st of Feb 2019. This notes the current stock as 100% Sitka Spruce with a felling age of 32 years. The proposed restocking is given as Sitka Spruce (80%), Additional Broadleaves (10%) and open space (10%). An NIS (discussed in more detail below) submitted by the applicant is on file, and this describes the site as follows:

The proposed afforestation of a moderately-sloped, enclosed, greenfield site is located at approximately 40-50m OD over peat and peaty gley soils with alluvial deposits along the river. There is a steeply-sloped area to the east end of the site where two fields are unsuitable to mounding and some scrub has developed (WS1), encroaching the grassland. The site is dominated by small fields of semi-improved acid, wet grassland

(GSI4) and hedgerows (WL1) with earthbanks (BL2) and associated drainage ditches (FW4). It is currently grazed by livestock. The R289 road (BL3) provides access to the north across a tributary of the Bonet River (FW2), lined with trees (WL2), into which the site drains. The Bonet River and Lough Gill SAC (001976) is located downstream ca. 2km to the east of the site. The tributary can flood its banks up to 30m inside project Sarea, up to where the slope rises sufficiently (see flood risk map in appendix, IFORIS, September 2020).

There were two submissions from members of the public. The first makes reference to the close proximity of the site to Lough Arrow and a pumping station that supplies water to a local reservoir for the Geevagh-Highwood Group Water Scheme. It also makes reference to the Lough Arrow and Annaghgowan areas being in an SAC and SPA. The second submission is from the appellant. In that submission similar issues to the first submission are raised, as well as reference to the EPA report "Water Quality in 2017" which indicates that water quality in Lough Arrow is deteriorating.

A number of referrals and responses to consultation bodies are on file as follows:

- Sligo County Council: Referral on 11th March 2019, response on 20th March 2019. The response is largely generic in nature (e.g there are references to requirements for Forest Roads project when one is in place. There is a request that if the licence is granted that the Area Engineer be contacted prior to works commencing to carry out and agree a visual survey of the existing road and bridges/culvert traversing the proposed haulage route. An increased setback of 25m from watercourses is also requested.
- NPWS: Referral on 3rd March 2019, response on 11th July. The response makes no specific observations other than the inclusion of a general guidelines Appendix for forest projects.
- IFI (to Western Region Fisheries Board): Referral on 11th March 2019, response on 14th of March. This includes comments that the stream flowing into Lough Arrow along the eastern boundary of the site provides important spawning and nursery habitat and that the status of the catchment must improve (from moderate to good) to meet with WFD obligations. It also includes recommendations of a standard nature such as a requirement for silt traps, an aquatic buffer of 15m, and a request for notification of works two weeks prior to commencement).
- Irish Water: Referral on 26th June 2019, no response.
- National Federation of Group Water Schemes (NFGWS): Referral on 2nd Sept 2019, response on 4th of September 2019. This confirms the presence of a Group Water scheme in close proximity to the project site.

Several iterations of the Inspector's Certification report on file reflecting the processing of the licence application by DAFM. These indicate a desk only assessment in the check box, however a comment box indicates that an inspector visited the site on the 5th of November 2019. The report includes a screening for Appropriate Assessment, with 5 sites identified within 15km:

1. Bricklieve Mountains and Keishcorran SAC 001656
2. Lough Arrow SAC 001673
3. Lough Arrow SPA 004050
4. Lough Gara SPA 004048
5. Unshin River SAC 001898

The original iForis screens with the result of this screening are recorded separately on file, and these show an AA being required in respect of sites 2, 3 and 5 above. Subsequent iterations of the Inspector's Certification report note that the last four of these were screened in but were "functionally screened out" to progress application in the iForis system.

The Inspector's Certification report includes a section which assesses the requirement for an Environmental Impact Assessment Report (EIAR). Following a referral to the DAFM Ecology Service this concludes that no such assessment is required, subject to adherence to Forest Service guidelines and Supplementary operational conditions.

A separate Appropriate Assessment Screening (AAS) document is on file dated the 9th of December 2020, this was prepared by an ecologist. This screens out sites 1 and 4 listed above for the following reason:

Due to the intervening distance, the unsuitability of the habitat and the lack of a hydrological connection, it is determined there will be no significant effects on the QI's of this Natura habitat.

Sites 2, 3 and 5 are screened in because:

A potential pathway for effect is identified in the form of sedimentation, eutrophication, and hydrocarbon pollution as a result of forestry related activities.

In the case of Site 3 it is also screened in as:

There may also be disturbance to the SCI species as a result of forestry related activities.

In relation to those sites which are screened out, the AAS includes the following statement:

Following the initial screening and subsequent expert verification (as per Table 1 above), and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), DAFM has determined that there is no possibility of the Felling and Reforestation project TFL00299319 having any significant effect, either individually or in combination with other plans or projects, on any of the European site(s) listed below. As such, the project does not advance to Appropriate Assessment stage in relation to these European Sites.

The AAS does not include an in-combination statement or make reference to when an in-combination assessment was made in support of the above statement. The AAS concludes, in relation to those sites that were screened in, that the applicant should be requested to provide a Natura Impact Statement (NIS). Separately, correspondence is on file showing the applicant requesting that they be allowed to submit and NIS. A request for an NIS issued from DAFM to the applicant on the 9th of December 2020, including guidance that this should focus on Lough Arrow SAC (1673), Lough Arrow SPA (4050), and Unshin River SAC (1898). The request letter also notes the following:

- the protected status of otter,
- the need for a Harvest Plan and Maps that confirm to the template provided in the Standard for Felling and Reforestation,
- the statements by IFI in its referral response regarding the adjacent stream and the requirements of the WFD,
- that the proposed application is immediately adjacent to the drinking water extraction point for the Geevagh Highwood Group Water Scheme and that the Castlebaldwin Group Water Scheme also derives their supply from Lough Arrow.

The NIS was prepared on the applicant's behalf by a consultant ecologist in a report dated the 1st of March 2021. In reviewing the file, the FAC noted that there are some minor errors in the NIS (e.g. the table of contents refers to a figure with photos in County Clare) but these are of a minor nature. The NIS records that a site walkover was undertaken on the 23rd of February 2021. It includes consideration of the Special Conservation Interests (SCIs)/Qualifying Interests (QIs) for each of the three screened in European sites. Where there is a possibility of impact, the NIS suggests mitigations. These largely refer to mitigations in relation to water. Details of a habitat survey are provided in an appendix, and this includes a note of the status of Lough Arrow being last assessed in 2009 by the EPA with a status of 'Good'.

A Harvest Plan with maps is on file with an indicative date of the 30th of March 2021.

An Appropriate Assessment Determination (AAD) report is on file dated the 1st of April 2021. This assesses the NIS, largely agrees with its conclusions, but identifies two shortcomings. One is in relation to aquatic setbacks for sites underlain with peat soil and stipulates that such setbacks are to be as Table 6 in the Environmental Requirements for Afforestation. The second is to include a mitigation for otter. It then goes on to list thirty-two mitigations actions and stipulate adherence to a number of standards, policies and manuals. It further states that the in-combination assessment included in the NIS has been supplemented by DAFM's internal system for in combination assessment and that DAFM deem that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the three assessed Natura sites.

An in-combination report is on file detailing searches of planning systems that were carried out on the 1st of April 2021, focusing on the general vicinity of the project area in the River Sub-basin Unshin_010. These include searches of the planning systems of Sligo County Council, Roscommon County Council, An Bord

Pleanála, the EPA, and DAFM systems in relation to afforestation, felling and forest roads. Consideration is also given to the Sligo County Development Plan.

A further information request for a Harvest plan issued from the DAFM to the applicant is on file dated the 16th of September 2021. A second harvest Plan with maps with an indicative date of the 12th of May 2020 is also on file. This includes a reference to a 250m exclusion zone to the south of the site centred round a water abstraction plant, and states that in this zone mixed broadleaves are to be planted. Both versions show a mixed broadleaf and machine exclusion zone following the course of the stream on the eastern side of the site.

The issued licence is on file, dated the 19th of May 2021. Attached to this is a revised AAD report, dated the 17th of May 2021. This appears to be substantially the same as the original AAD, save for a condition relating to silt traps being updated to include a specific reference to the *Interim Standards for Felling & Reforestation*, and a mitigation relating to extraction routes being updated to refer to the updated Harvest Plan map. The licence itself includes standard conditions, together with Inspector's conditions that include: adherence to measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual; that all existing trees and hedgerows with the site shall be retained; that the mitigation measures in the AAD dated the 17th of May 2021 be adhered to; that IFI and the County Council Area Engineer be contacted before operations commence; and that the Standard for Felling and Reforestation (2019) be strictly adhered to.

Grounds of Appeal and Statement of Fact.

There is one appeal against the decision to grant the licence and this is available on the FAC file. In summary the grounds are:

1. That the site is approx. 2m below the road level, the north-western section of the site is almost completely windblown, and that this brings into question whether a second rotation would reach maturity given the extent of windblow.
2. That the NIS and AAD assessment of water quality (on the basis that the AAD agrees with the NIS) are incorrect. The appellant submits that the status of Lough Arrow is given as good and refers to the 2013-2018 EPA report and submits that this shows the lake as not good and At Risk. The appellant submits that WFD requires that Water Quality be improved not deteriorated.
3. That the Inspector's Certification report is in error when it records a 'No' in relation to Q12 for determination of EIA requirement, in relation to whether project site is greater than 10ha and located in catchment of a local authority designated water scheme. The appellant submits that given the proximity to a Group Water Scheme the risk cannot be discounted on the basis of the project site size.
4. That there is an inconsistency between whether the site was site visited or not, and notes that proposed replanting scheme is not reflected in the licence.
5. That it is questionable whether the use of silt traps would be effective in peat land and submits the land is prone to flooding.

6. That that the replanting map states a distance of 250m, but that the maps actually marks a distance of 200m from the extraction point, and reasserts that this replanting scheme is not reflected in the licence.
7. That there are issues in relation to Sitka Spruce on this site in relation to urea, insecticides, bog planting and windblow. Submits that none of these factors have been considered in the decision to approve the licence.
8. That the appellant was disadvantaged as documents were provided with less than a week to deadline for appeal, on the basis of an (acknowledged) administrative error by the Forest Service.

DAFM supplied a Statement of Fact (SoF) dated the 5th of July. It confirms the administrative details of the file. The SoF includes observations as follows:

- *The WFD lake waterbody status 2013-2018 for Lough Arrow is moderate, rather than at risk, as claimed by the appellant. The AAD can be updated to correct for the outdated status reported in the NIS. In relation to the issue of sediment traps and their potential inadequacy during flood conditions, it is stated in the AAD that traps should be maintained and monitored as per the guidelines. It is expected that this mitigation will be adhered to by the ground operator and that sediment traps will be strategically managed during adverse weather conditions to prevent excessive movement of silt/sediment toward the aquatic zones.*
- *Forest Service district inspector and a forester representing the applicant met on site with Geevagh-Highwood Group Water Scheme prior to certification if this file.*
- *The area to be replanted was amended following an on-site meeting with a Geevagh-Highwood Group Water Scheme representative.*
- *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.*

Consideration by the FAC

In addressing the grounds of appeal the FAC had regard for the Grounds of Appeal, the Statement of Fact, the DAFM file relating to the processing of the licence application, and publicly available sources of information such as mapping provided by the EPA, OSI and DAFM.

The FAC, in the first instance, reviewed the making of the decision by DAFM as recorded above. In doing so, the FAC observed that an AAS produced by DAFM makes reference to consideration of in-combination effects, but that the AAS contains no in-combination assessment and makes no reference to an in-combination report. The earliest in-combination assessment on file is that recorded in the NIS dated the 1st of March 2021, which is post the screening decision. The FAC finds that this represents an error in the screening for Appropriate Assessment and are therefore remitting the decision of the Minister for Stage 1 Appropriate Assessment.

The FAC also considered the appellant's contention that they had been disadvantaged in submitting an appeal by reason of being provided documents by DAFM with less than a week to the deadline for an appeal. The FAC note that in the appeal provided by the appellant, correspondence indicates that this delay is acknowledged by DAFM. The FAC further notes that in the notice of decision that issued to the appellant on the 8th of June, DAFM have incorrectly stated that the licence was issued on that date and that the applicant had been advised that felling cannot commence for 28 days from the date of the letter (the 8th of June) to the appellant. The FAC accepts that this represents poor practice on the part of DAFM. However, the FAC further notes that it has received an appeal from the appellant, and that on receipt of that appeal the appellant was provided with a copy of the record of the decision by the FAC, and that the Agriculture Appeals Act 2001 (as amended) under Section 14B(4), (5), (6) and (7) provides for the appellant to submit additional information where permitted by the FAC under particular circumstances, and that in this instance no request to do so was received. The FAC is not satisfied that in this instance the appellant was disadvantaged in bringing their appeal to the Committee.

The FAC then considered the grounds of appeal relating to windblown trees, the elevation of the site relative to the road and the use of silt traps, and issues relating to urea, insecticides and the nature of the underlying ground. The FAC notes that the conditions of the licence include adherence to various standards, policies and manuals that relate to good forestry practice, and note the details of the SoF provided by DAFM, and the harvest plans which include proposals to plant native woodland species in proximity to the watercourse to the east of the site. Windblow of trees may occur where there is inadequate thinning of trees, and the presence of windblow in one rotation does not imply that properly managed further rotations will result in windblow. The FAC further note that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). The FAC is not satisfied that the DAFM has erred in the processing of the licence in this regard.

The appellant submits in the grounds of appeal that the decision to record a 'No' in relation to Q12 in the Inspector's Certification Report ("Has the proposed thinning and or clearfell proposal been identified in the application as being as being greater than 10 ha. and located in catchment of a local authority designated water scheme") is in error on the basis that in relation to the proximity to a Group Water scheme, the risk cannot be discounted on the basis of the project site size. The FAC notes that this question relates to the application submitted and not to a judgement on the part of DAFM. The FAC is not satisfied that an error has been made in the processing of the licence in this regard.

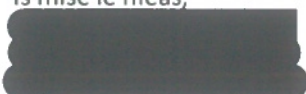
Two of the grounds of appeal refer to the replanting scheme. Based on the SoF provided by DAFM, the FAC is satisfied that the site was visited by DAFM prior to approval. The FAC notes that a revised AAD, dated the 17th of May 2021, is attached to the licence and that the licence requires adherence to the mitigation actions contained in the AAD. The FAC further notes that the AAD contains a reference to the

revised harvest maps dated the 12th of May 2021 in the 9th mitigation action relating to extraction routes. While these harvest maps contain an illustration of a 250m zone and a comment that *"As agreed with FS inspector groups of 20-30 mixed broadleaves will be planted withing the 250m zone of the water abstraction point as marked"*, there is no explicit reference to this requirement in the AAD or the licence itself, nor is there any detail of the density of broadleaf planting required. The appellant states in the grounds of appeal that this zone is marked on the map at a distance of ca. 203m and not the 250m stated in the map annotation and submits a screenshot of a mapping tool showing the distance from the lake edge. The FAC considers that the absence of clear and precise details of the mitigation in the licence represents an error in the licence, and is remitting the decision of the Minister for the inclusion of mitigations designed to protect the water quality status of Lough Arrow in the licence.

In relation to the ground of appeal that the NIS and AAD assessment of water quality (on the basis that the AAD agrees with the NIS) are incorrect, the FAC viewed publicly available information from the EPA in relation to the WFD 2013-2018 monitoring cycle (catchments.ie). This confirms that on its eastern side the site it is bounded by/close to the Unshin_010 river which has a status of 'Good' and is reported to be 'At Risk' river, and that this flows into Lough Arrow after a short distance and that this is reported to be 'Moderate' and to be 'Not at risk'. Having regard for the conditions of the licence as discussed above, the FAC is not satisfied that the conditions as written would ensure the contribution of the project toward the advancement of the WFD status of Lough Arrow from 'moderate' to 'good'. The FAC is satisfied that the NIS, and consequently the AAD, were in error in recording the status of Lough Arrow, and that a revision to the AAD post consent as proposed in the SoF is not a suitable remedy for the error. As the error relates to the water quality in a body of water that lies within two European sites, which both include aquatic qualifying interests and interests that might be affected by water quality, the FAC is satisfied that this constitutes a serious error in the making of the decision. On this basis, the FAC is remitting the decision of the Minister for a Stage 2 Appropriate Assessment.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. As outlined in this letter, the FAC is satisfied that a serious error was made in making the decision in relation to the requirements of Article 6(3) of the EU Habitats Directive and the WFD Directive. The FAC is, therefore, setting aside the decision of the Minister and remitting it for a new screening and, as appropriate, Appropriate Assessment and consideration and specification of licence conditions such that the project will not impede the attainment of "good" status for a waterbody currently assessed as "moderate" under the WFD, in line with Article 14B of the Agricultural Appeals Act 2001, as amended.

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John Evans, On Behalf of the Forestry Appeals Committee