



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

06 November 2020

[REDACTED]
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[REDACTED]
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[REDACTED]

Our ref: 170/2020

Subject: Appeal in relation to felling licence SO10 FL0098

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence SO10 FL0099.

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

Licence SO10-FL0098 for felling and replanting of 2.84 ha at Glackaundarragh, Glen Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 09 March 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal 170/2020 was conducted by the FAC on 21 October 2020.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Vincent Upton, Mr Pat Coman and Ms Bernadette Murphy
Secretary to the FAC:	Ms Ruth Kinehan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett and Ms Eilish Kehoe

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the oral hearing and

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all other submissions, including the response to a request for further information by the FAC, before deciding to set aside and remit the decision to grant this licence (Reference SO10 FL0098).

The proposal is for felling on a stated site of 2.84 ha at Glackaundarragh, Glen Co. Leitrim. A 2.27 ha plot comprises 91% Sitka Spruce, 6% Norway Spruce and 3% Hazel. A 0.04 ha plot consists of 95% Sitka Spruce and 5% Birch. The 4 remaining small plots comprise 100% Sitka Spruce and an unplanted area. Restocking will be with 2.84 ha of 100% Sitka Spruce. The underlying soil type is given as approximately 92% Peaty Gleys, 5% Peaty Gleys Shallow and 2% Surface and Ground Water Gleys. The slope is described as predominantly moderate (0- 15%). The proposal is located in the Upper Shannon Catchment_26A. DAFM give the location of the proposal as 100% within the Arigna (Roscommon)_10 River Sub-basin (Sub- Catchment 26A_4).

The proposal was referred to Leitrim County Council who sought prior notification of commencement of works and the submission of a proposed *Transport Scheme* in addition to adherence with DAFM and NPWS best practice harvesting guidelines with particular reference to water quality. The proposal was also referred to Inland Fisheries Ireland (IFI). In their response IFI requested that ground stability be kept under constant review, and felling operations be carried out in such manner as not to result in the creation of unstable ground conditions (leading to the excess run off of silt into water courses) or subsequently lead to post harvesting ground stability issues. If any water course is to be crossed during the felling operations then IFI sought this to be done by either be a clear span bridge or embedded culvert of diameter greater than 900mm and where at least 25% of the culvert is embedded, to include all internal forestry drains. IFI Limerick office are to be contacted at least one month prior to commencement of works. IFI require that all work must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines.

The application included a Harvest Plan, including maps, and general environmental and site safety rules related to the operations. 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 7 Natura sites (6 SAC & 1 SPA) within 15km and found no reason to extend this radius in this case; 4050 Lough Arrow SPA c9.9km, 1673 Lough Arrow SAC c9.9km, 584 Cuilcagh - Anierin Uplands SAC c10.2km, 2032 Boleybrack Mountain SAC c11.1km, 1898 Unshin River SAC 12.4km, 1976 Lough Gill SAC c13.5km and 1656 Bricklieve Mountains and Keishcorran SAC c13.5km. The 6 SAC sites were screened out for Appropriate Assessment due to the absence of a pathway and the SPA site due to separation distance.

The licence was approved with a number of general conditions and others which are more directly concerned with the protection of water. There is a specific condition relating to communication with Leitrim County Council prior to works commencing regarding timber haulage from the site. The licence includes a condition that specifies the method by which water is to be crossed during operations. Conditions on the licence require that Leitrim County Council District Engineer and IFI are notified within specified time periods before works commence. The licence conditions also require, as per Forestry and Water Quality Guidelines, that 20% of the aquatic buffer zone is to be pit planted with broadleaves in an undulating fashion to create a sequence of varying spaces with sharply defined edges to be avoided to create a gradual transition from forest into the riparian zone. Furthermore no trees are permitted to be closer than 5m of an Aquatic Zone but buffer zone widths may vary depending on soil type, slope and land forms. A minimum initial planting density within the buffer is required by licence.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU. It is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. The appellant contends that, due to the location of the site, Sligo and Roscommon County Councils should have also been consulted as there may be an impact on the road network in these counties arising from the transportation



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of the felled material. The grounds specify that there was a failure to consult with the NPWS, IFI or the EPA on the suite of applications (SO10). The Appellant argues that there is inconsistency regarding the protection of watercourses evident on the licence because the increased watercourse buffer (25m) provided for at restock on other licences bounded / intersected by the Arigna River is not included on this licence although the site also bounds/intersects the latter river. It is further submitted by the Appellant that that licence references contain duplication and that the licence conditions are not worded in a manner that permits meaningful enforcement. The appellant stated that the licence conditions do not provide a system of protection for wild birds during the breeding and rearing season consistent with Article 5 of the Birds Directive. The grounds also contend there has been a breach of Article 10(3) of the Forestry Regulations as relevant application information was not made available on request.

The FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant responded that his appeal should be considered on its own merits and that the applicability of EU Law and National Law are matters for the FAC and "cannot be circumvented by any process of interrogation of me", but did not state the class of development included in the EIA Directive to which felling and reforestation belong.

In a statement to the FAC, 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 as 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. The DAFM contended that screening for EIA was not required in this case and that breaches of Article 4(3), 4(4) and 4(5) had not occurred. DAFM stated that the proposal was located within the boundary of County Leitrim and was referred to Leitrim County Council as per standard procedure. DAFM indicated that standard procedures were followed in respect of referrals to statutory bodies in relation to this felling licence application. DAFM consider the watercourse buffer appropriate to this site based on the relatively small size of the clearfell at 2.84 ha and the nature of the peaty gley soil present. DAFM contend that duplicate conditions on a licence as the result of a clerical error are materially inconsequential. DAFM hold that conditions attached to the licence allow for meaningful enforcement and refer to Section 17.4 of the 2014 Forestry Act which states that the Minister may at any time attach or vary conditions to any licence granted. In relation to the lack of protection afforded wild birds by the licence, DAFM submitted that it is *"a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply"*. Regarding Article 10(3) of the Forestry Regulations, the DAFM stated that the Appellant had requested information on 451 applications and contend that the Appellant has exercised their right to appeal this licence. The statement goes on to describe the Appropriate Assessment procedure adopted by the DAFM 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 subsequently to the licence being issued.

An oral hearing was held at which the Appellant submitted that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EU EIA Directive. The appellant argued that, based on the

application submitted, the reforestation would leave a portion of the site as open space and, as such, would constitute deforestation and a change of land use. It was submitted that the area should be mapped and maintained. The appellant argued that the proposal should have been screened for EIA. It was indicated by him that part of the site was planted in 1993 and may have been subject to development consent. The appellant suggested an assessment was required of the impact of replanting peat soil such as that found on this site in the context of EIA and carbon emissions. The Appellant described the proposal site as being in a peat area susceptible to landslide based on Geological Survey of Ireland data and close to an area where previous landslides have occurred. The Appellant specified that NPWS, EPA and IFI should have been consulted in this case but were not and emphasised the purpose of the consultation process. The Appellant explained that landslides impact water quality and therefore the matter is relevant to Local Authorities. It was argued by the Appellant that NPWS should have been consulted due to the proximity and potential for effects on nearby NHA's. It was further explained by the Appellant that the site is steep and bounds a mapped watercourse that flows through at least 3 NHA sites. The Appellant stated that the Glen part of the project is located in County Sligo. The point that haulage routes for timber extraction would impact Roscommon and Sligo roads and that therefore these County Councils should have been consulted was re-iterated. Sligo County Council have required a 25m setback from a watercourse but Leitrim County Council have not and the Appellant seeks this condition for this licence. It was asserted by the Appellant that the examination of *In Combination* effects was insufficient. It is the opinion of the Appellant that FLO097, FLO098, FLO099 and FLO100 should be examined as 1 due their hydrological connection to the same waterbodies and the potential for cumulative effects and furthermore that SO10 is the forest which should be examined as a whole in this context. The Appellant queries how duplications on a licence stand in law. Broadleaves are not provided for in the *Replanting Schedule* as stated by the Appellant. It is specified by the Appellant that no maps are submitted with an application which detail setbacks from aquatic zones (mapped) or relevant watercourses (unmapped) specific to the site. The Appellant contended that the Harvest Plan should have been subject to DAFM scrutiny and be available to the public and Local Authorities before the appeal deadline. The Appellant further submitted that there was insufficient protection as required by EU legislation for all birds during the breeding and rearing season and sought a legally enforceable condition to ensure same. The Appellant did not submit any evidence regarding species that related to the specific decision under appeal. Regarding the public consultation process the appellant submitted that the public notice issued after the licence had issued.

The Applicant contended that the proposal does not include any deforestation or land use change while noting that the application did include small unplanted areas. The Applicant did not accept that the Forestry Management Unit defines the project area. Further to an examination of the proposal site, which included a site inspection, the Applicant explained that the hydrological connection distance from the proposal to the nearest Natura site was c74km having flowed through 5 lakes. The Applicant stated that they are obliged to protect all watercourses and to observe setback distances and exclusions including for unmapped watercourses. The licence conditions are clear to the Applicant. DAFM asserted their contention that the proposal does not include a class of project covered by the EIA Directive. DAFM explained that currently the more meaningful river sub-basins (c2500 ha) are used for the examination of *In Combination* effects regarding licences that are granted within the last 5 years approximately. DAFM did not accept that the slope was steep based on the weighted area slope nor did the Applicant. DAFM indicated that the licence conditions reflect the sensitivity of the site due to the proximity to the Argina River. DAFM accept that a small part of the site is in County Sligo. DAFM accept broadleaves are not addressed in the *Replanting Schedule*. Regarding public consultation DAFM referred to the communication timeline detailed on file and stated that the public notice did issue. DAFM specified that it would be a breach of International Organisation Standardisation 27001 for DAFM, as a certified *Paying Agency*, to provide access to application information at a DAFM terminal. DAFM clarified that the setbacks at m (1st) and b



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(2nd) were for different purposes and that that no machinery traffic is permitted within 10m of water but that tree planting can take place from beyond 5m from an aquatic zone and so between 5 and 10m.

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 2.84 ha. Unplanted area left during restocking is ancillary to the forestry land use. It does not have a use as open space, does not have public access and is not to be maintained. 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.

The colouration data referred to by the Appellant refers to landslide susceptibility and not to risk per GSi. The site in this instance comprises 92% Peaty Gleys, 5% Peaty Gleys Shallow and 2% Surface and Ground Water Gleys. The site falls within 2 'landslide susceptibility classifications' (Low and Moderately Low) with the greater part in the Moderately Low classification. While the FAC notes the proximity to the Arigna River based on the sites susceptibility to landslide, the nature of works involved in felling and replanting and the size of the site, the FAC considers the proposal would not lead to a likelihood of landslide that would threaten a European site and that there is no real likelihood of a significant effect on the environment on which to affect the licence.

The FAC considers in respect of County Council referrals, that referral to Leitrim County Council only, did not impinge Sligo or Roscommon County Council's ability to make recommendations regards public roads. The licence conditions contain a number of measures related to water quality and require Leitrim County Council be contacted prior to the commencement of operations to discuss the haulage of timber from the site and their District Engineer to be notified one week prior to the commencement of operations. The FAC considers these conditions to be acceptable and reflect the submission received by the County Council.

The grounds specify that there was a failure to consult with the NPWS, IFI or the EPA on the suite of applications (SO10). In this regard the FAC can only consider the licence before it. FAC notes that both IFI and Leitrim County Council were consulted in this case. The FAC considered the proposals location relative to designated sites and notes that there was no statutory requirement to consult. The FAC has taken the nature of works involved in felling and replanting and the relatively small size of the site into account. DAFM followed standard consultation procedures. The FAC considers the consultation process to be acceptable in this case.

The Appellant argues that there is inconsistency regarding the protection of watercourses evident on the licence because increased watercourse buffers included on other licences are not included on this licence. In this regard the FAC can only consider the licence and information before it, regarding licence SO10 FL0098, including the mineral and organo-mineral nature of the soils. Having examined the licence conditions the FAC considers that there are conditions attached that protect watercourses and that these conditions are sufficient for the protection of watercourses specific to this proposal and its characteristics. The FAC notes duplication of alphabetical labels used to enumerate conditions but is satisfied there is no repetition of actual licence conditions and considers that each condition applies.

The FAC noted that the harvest plan set out for in the licence conditions is essentially an operator's manual for the carrying out of the development permitted by the licence. Condition (h) of the licence requires a harvest plan to be completed prior to the commencement of felling. The FAC noted that all works included in a harvest plan must comply with the terms of the licence. In these circumstances, the FAC considers that the implementation of the harvest plan would not create the likelihood of significant effects occurring on any Natura 2000 site or on the environment. The licence was approved with a number of general conditions and others which are more directly concerned with the protection of water in addition to some specific conditions as outlined above. The FAC consider that the licence conditions are acceptable particularly given the proximity of the proposal to the Arigna River.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing on this site. Based on the evidence before it, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

In respect of the contention that there was a breach of Regulation 10(3) of the Forestry Regulations, Regulation 10(3) of SI 191 of 2017 is as follows; (3) *The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.* In not accepting this ground, the FAC concluded that there is evidence to show that on 20 December 2019 the appellant requested from DAFM copies of the file along with 350 other files including applications, maps and draft harvest plans, all related to the applicant in this instance. The appellant made a submission on the subject licence on 03 January 2020. Evidence shows DAFM entered into dialogue with the appellant and shows provision of the copies occurred in or about the 19 February 2020. Furthermore, the FAC is satisfied that the appellant has not been inhibited in the making of submissions in respect of this appeal.

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 7 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 is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone would not be likely to give rise to significant effects, were correct and the FAC concurs with the conclusion. The FAC noted however, that the DAFM failed to carry out an in-combination assessment before



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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 – 20 & Coilte Felling - 52). Having regard to the nature 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, specifically 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 FAC

