An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

05 November 2020

[redacted]

[redacted]

Our ref: 171/2020
Subject: Appeal in relation to felling licence SO10 FL0099

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
Felling licence SO10 FL0099 was granted by the Department on 09 March 2020.

Hearing
An oral hearing of appeal 171/2020 was conducted by the FAC on 21 October 2020.

FAC Members:	Mr Des Johnson (Chairperson), Mr Vincent Upton, Ms Bernadette Murphy and Mr Pat Coman
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 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 FL0099).

The proposal is for felling of Sitka Spruce and replanting on a stated site of 4.77 ha at Glackaunadarragh, Co. Leitrim. Restocking of 4.77 ha is to be with 100% Sitka Spruce. The application was accompanied by a harvest plan and a pre-screening report compiled by the applicant. The Underlying soil type is approximately Blanket Peats (11%) & Peaty Gleys (89%), the

slope is predominantly steep 15-30%. The habitat is predominantly conifer and the proposal is located within the Arigna (Roscommon) sub-catchment.

In processing the application the DAFM completed a Stage 1 screening on 08 March 2020 with reference to the provisions of Article 6(3) of the Habitats Directive, identifying 8 Natura 2000 sites within 15km of the project lands and listing their qualifying interests and conservation objectives, and assessing the possibility of effects on any of the Natura 2000 sites listed. The DAFM concluded that the proposed development alone or in-combination with other plans and projects would not be likely to have a significant effect on any Natura 2000 site.

In response to a referral by the DAFM, Leitrim County Council responded seeking that the District Engineer be contacted and that a transport scheme be provided prior to works. The licence was issued subject to standard conditions (a) to (h) and further conditions (i) to (k) and (a) to (v).

There is a single appeal against the decision to grant the licence. The grounds include that there is a breach of Article 4(3) of the EIA Directive and the application should be referred back to screening stage. The appellant contends this licence is for an area of 4.77 ha in Coillte's Forest Management Unit (FMU) SO10 which is between two NHA's, 90m from one, and that a further three applications for clear felling licences were submitted for the same FMU at the same time, totalling 36.03 ha. The appellant stated that one of those sites is outside the 5km range of Q5 of the EIA screening form but is within the same sub-basin catchment and there are 'mapped connected watercourses' running through three sites and there is potential for cumulative impacts on water quality, the site is on peat based soils and if it is deep based peat an EIA should be conducted to determine the long-term impact on carbon emissions. The appellant contends there is a breach of Article 4(4) and 4(5) of the EIA Directive, as details of the whole project have not been submitted and not been considered. The appellant contends Sligo and Roscommon County Councils (Roscommon county bounds 200m away) should have also been consulted as there may be an impact on the road network. The grounds include that there was no consultation with the NPWS, IFI or the EPA on the suite of applications. In addition, the appellant stated the licence conditions require broadleaves, but these are not included in the restock species, also, the licence conditions are not worded to permit meaningful enforcement, and there are duplications in the licence conditions. The appellant stated that the licence conditions do not provide a system of protection for wild birds during the breeding and rearing season. Also, the grounds contend there has been a breach of Article 10(3) of the Forestry Regulations as relevant information was not made available on request. The appellant also contends there was insufficient consideration given regards the NHA.

In response, the DAFM addressed each of the written grounds of appeal, and stated regards Article 4(3), 4(4) and 4(5) of the EIA Directive that tree felling is not an activity to which the EIA Directive or associated regulations applies and that it is a legal principle that, if the grant of a consent does not expressly exempt the holder from an obligation to obtain a second consent or to adhere to any other restrictions on the timing of activities or similar where set out in statute elsewhere, those other obligations and restrictions continue to apply. DAFM stated that its 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. With regards 10(3) of the Forestry regulations DAFM stated the appellant had requested information on 451 applications and contend that the Appellant has exercised their right to appeal the specific licence. DAFM stated the referral to Leitrim County Council was sufficient in this instance as the proposal is within Co Leitrim. DAFM confirm a screening for appropriate assessment was undertaken and that DAFM relied exclusively on Coillte's in-combination statement. DAFM provided a further in-combination screening apparently compiled 23 March 2020 (a date after the proposal licence was issued).

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.

At the oral hearing the appellant argued that the approvals process was not conducted in accordance with the law, no screening was carried out to determine the requirement for EIA, a Forestry Management Unit defines the project area and should be considered in terms of assessment under the EIA Directive, the application details do not include details of other projects proposed in the same vicinity, there is no legal protection for nesting birds in respect of the proposed activity under National law, it is questionable why the DAFM rely on Coillte's in-combination assessment as it is inadequate, and the Harvest Plan should be available to the public and subject to scrutiny by DAFM. The appellant described the proposal site as in area with high risk of landslide based on Geological Survey of Ireland datasets. The appellant detailed correspondence with the DAFM regarding the requests to access licence application files, including the one under appeal, and submitted that the documentation requested was not provided with the files before the appeal was submitted. The appellant questioned why there was no referral to the NPWS in this instance with an NHA within 100m, and believed that once within 500m there would be referral, and contended there was potential for seeding onto the NHA which is mapped as commonage – blanket bog and wet heath two annex 1 habitats. The DAFM stated there is no mandatory referral regards the NHA, and in this instance the site synopsis refers to afforestation not to felling and reforestation. In its statement on the appeal DAFM had set out as follows; *The project is not within or touching the bounds of the Corry Mountain Bog NHA. The project is down-slope in terms of hydrology and drainage from the NHA. As the project is not within the NHA, the project operations do not require consent under works found at Schedule 2 of the S.I. designating the relevant NHA.* At the hearing the DAFM contended that a Harvest Plan was submitted with the application and that DAFM had sufficient information to assess the application and to issue the licence. The DAFM stated that there was no deforestation on the licence and that open areas within a forest after felling and replanting would not be considered as deforestation. The Applicants' described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan. They submitted that an operational Harvest Plan is prepared before felling commences to inform their staff and contractors. They contended that any unplanted area retained after replanting,

suggested at 0.24 ha, was for environmental reasons and would not constitute deforestation. They suggested that the proposal would not be covered by the EIA directive. The applicants confirmed an area directly south of the proposal was planted in 2009. The hydrology of the site was discussed, and no watercourses were identified on site, the proximity of the Arigna River down-slope was noted as were the existing forestry and public road in between.

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 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 he 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). At the Oral Hearing, the appellant argued that, based on the application submitted, the reforestation would leave portion of the site as open space and, as such, would constitute a change of land use. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation of 4.77 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.

In the matter of the Corry Mountain Bog NHA the FAC notes the project is down-slope from the NHA, and is in excess of 100m from the boundary of the NHA, and on balance concludes there is no likelihood of a significant effect on the NHA posed by the proposed felling or replanting.

The grounds specify that there was a failure to consult with the IFI or the EPA on the suite of applications (SO10). In this regard the FAC considers the licence before it, 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, and considers the consultations suggested were not mandatory in this case.

In respect of the grounds raised by the appellant at the hearing regards landslide, the FAC notes that the colouration data referred to by the appellant refers to landslide susceptibility and not to risk per GSi. The site in this instance comprises Peat 11% and Peaty Gleys 89% and falls within 4 'landslide susceptibility classifications' (Low, Moderately Low, Moderately High and High) with the greater part in the moderately low classification. Based on the nature of works involved in felling and replanting on this relatively small site, its location surrounded by forests of varying ages, in addition to the degree of separation and absence of a direct hydrological connection, 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.

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.

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 and, as such, is not necessary as a condition attaching to the felling licence. The applicants indicated that, as a matter of course, inspections take place before any felling commences to determine any actions needed in respect of the protection of birds nesting and rearing. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species, and stating at the oral hearing that these grounds related to a shortcoming in law. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

The FAC noted that even though a harvest plan was submitted with the application, 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.

Regards the licence conditions the FAC notes that the indexation sequence (a) to (h) as was used for the standard conditions and (i) to (k) for additional conditions are used again to denote additional conditions. However, in this instance the FAC is satisfied there is no repetition of actual licence conditions and considers each apply.

In this instance the licence SO10 FL0099 was issued for the felling of 4.77 ha and requires replanting of 4.77 ha. At the hearing the appellant contended open spaces were a basis for the grounds of appeal related to EIA. In this matter the written grounds were very clear in referring only to 'the whole project' as the basis of appeal. In addition on 12 May 2020 the FAC issued a request to the

appellant under regulation 3(10) of SI 68/2018 the FAC Regulation allowing a period of 3 weeks for the appellant to identify the class of project listed in Annex I or Annex II of the EIA Directive that the appellant considered the proposed felling developments, the subject of appeal SO10 FL0099, falls within. The appellant did not provide the item of information requested within the time period provided by the FAC and instead responded on other matters.

Regards County Council referral, the FAC considers the fact there was only referral to Leitrim County Council did not impinge the County Council's ability to respond and 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 be notified one week prior to the commencement of operations. The FAC considers the conditions to be acceptable and reflect the submission received by the County Council.

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 8 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 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. The FAC noted that the qualifying interests listed in the 08 March assessment were truncated on the DAFM documentation, but considered that this was not a serious or significant error as there was no possibility of any significant effects on the designated sites for the reasons given in the DAFM assessment. However, in respect of its assessment of in combination effects, the DAFM relied exclusively on the applicant's in-combination statement, and have subsequently carried out a separate in-combination assessment and included an associated in-combination statement based on this information which is consistent with the licensee's in-combination statement and submitted this to the FAC. This includes listings of other plans and projects (which were significantly different from the details submitted by the applicant), including forest roads and afforestation, there is also a current wind-turbine related project which is not included. Having regard to the number and nature of projects listed, the FAC is satisfied that the failure of the DAFM to carry out a satisfactory in combination assessment prior to the granting of the licence constituted a serious 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

Pat Coman, on behalf of the FAC