



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

29 October 2020

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Our ref: 169/2020

Subject: Appeal in relation to felling licence SO10 FL0097

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 FL0097.

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 FL0097 was granted by the Department on 09 March 2020.

Hearing

An oral hearing of appeal 169/2020 was conducted by the FAC on 14 October 2020.

Attendees:

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 FL0097).

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The proposal is for felling and replanting on a stated site of 23.51 ha at Carrowmore and at Carrownadargny, Co. Sligo. The forest was originally planted in 1974 with Sitka spruce and restocking of 23.51 ha is to be with 40% Sitka Spruce and 60% Lodgepole Pine. The application was accompanied by a harvest plan and a pre-screening report compiled by the applicant. The underlying soil type is approximated as Blanket Peats (100%) and the slope is stated to be predominantly moderate. 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 with reference to the provisions of Article 6(3) of the Habitats Directive, identifying 15 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 a detailed response to a referral by the DAFM, Sligo County Council requested that all works are undertaken in a manner compatible with the protection of the environment and in particular with water quality. The County Council recommended that there be a 25m buffer zone in proximity to any watercourses during replanting works. There was referral to Inland Fisheries Ireland per the DAFM at the hearing and no reply was received.

The licence contains several additional conditions denoted (i) to (k) and (a) to (v), along with the standard conditions (a) to (h), including for a 25m buffer zone to any watercourses.

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 Coillte Forest Management Unit lies between 2 NHAs and is hydrologically connected to one of them, there were 3 other felling licence applications submitted on the same date so a total area of 38.03ha applies. The grounds include that 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 Roscommon County Council should have also been consulted as there may be an impact on the Roscommon 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.

In response regards 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 the specific licence.



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Forestry Appeals Committee

The DAFM response on grounds relating to Articles 4(3), 4(4) and 4(5) of the EIA Directive included as follows;

- the standard operational activities of clear-felling and replanting of an already established forest area are not categorised in Annex II of the EIA 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.
 - a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(4) of the Directive is not applicable.
 - a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(5) of the Directive is not applicable.

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 have been subject to scrutiny before the award of the licence or at least required to be submitted to the DAFM for approval. The appellant submitted that there should have been referrals to Leitrim and Roscommon County Councils due to the extraction routes to the public road in Co Leitrim and to the road networks of Co Roscommon, and not be based upon a ‘split-referral’. Also, the appellant submitted that with NHAs at each side (blanket bog) and Sitka Spruce having the potential to colonise areas, this is a sensitive site and there should have been referral to the NPWS in this instance. 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 argued there was duplication in the licence conditions, and many were unenforceable in the way worded. The DAFM contended that they had sufficient information to assess the application and to issue the licence. The DAFM stated that as the entire site was within Co Sligo it was sufficient to refer only to that County Council and certain of the licence conditions provide the protections required. 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. The Applicant did not accept that the Forestry Management Unit defines the project area. They also contended that any unplanted areas retained after replanting was for productivity or environmental reasons and would not constitute deforestation. They stated with the nearest connected EU site at c. 70km downstream there was no risk posed. They suggested that the proposal would not be covered by the EU EIA directive.

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 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). 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 23.51 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 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



**An Coiste um Achomhairc
Foraoiseachta**

Forestry Appeals Committee

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 finds that while is the indexation sequence (a) to (h) used for the standard conditions and additional conditions (i) to (k) are reused to denote that many of the 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 FL0097 was issued for the felling of 23.51 ha and requires replanting of 23.51 ha with 60% Lodge Pole and 40% Sitka Spruce. 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 FL0097, 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 Sligo 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 haulage routes and traffic management plan to be prior agreed with the area engineer, 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 15 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The screening form dated 08 March 2020 included for Lough Gill SAC, Lough Arrow SAC, Lough Arrow SPA,

Unshin River SAC, Boleybrack Mountain SAC, Bricklieve Mountains and Keishcorran SAC, Bricklieve Mountains and Keishcorran SAC and Cuilcagh - Anierin Uplands SAC. The FAC notes each site is in excess of 7km from the proposal. 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 this 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, afforestation and felling projects. Having regard to the number and nature of forestry 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 the DAFM should be set aside and remitted to the Minister to carry out a screening for appropriate assessment of the proposed development on Natura 2000 sites within a 15km radius of the project lands specifically in combination with other plans and projects, before making the decision in respect of the licence.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Pat Coman', written over a horizontal line.

Pat Coman, on behalf of the FAC