



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

07 April 2021

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Our ref: 314/2020

Subject: Appeal in relation to felling licence SO09-FL0032

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 felling licence SO09-FL0032.

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 SO09-FL0032 was granted by the Department on 12 June 2020.

Hearing

An oral hearing of appeal 314/2020 was conducted by the FAC on 02 February 2021.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy and Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
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 the 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 affirm the decision to grant this licence (Reference SO09-FL0032).

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The proposal is for clear-felling of 3.14 ha of Sitka Spruce (planted 1992), and to replant with 100% Sitka Spruce, at Srananagh, Co Sligo. The application was accompanied by a harvest plan and a pre-screening report compiled by the applicant and sought 0.16 ha of open space. The underlying soil type is given as approximately Basin Peats, Blanket Peats (some) (13%) & Surface water Gleys, Ground water Gleys (87%). The slope is predominantly moderate 0-15%. The project is located in the Ballysadare Catchment (100%), the Cappagh[Galway]_Sc_010 (100%), and the Unshin_040 (100%) Waterbody - a high status waterbody per EPA.

In processing the application the DAFM completed a Stage 1 Appropriate Assessment (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 and listing their Qualifying Interests (QIs) and Special Conservation Interests (SCIs), and assessing the possibility of effects on the Natura 2000 sites listed. Each of the following EU sites were screened out with reasons; Unshin River SAC, & Ballysadare Bay SAC - *Having considered the expert opinion and the rationale presented in Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, DAFM has concluded that there is no likelihood of the project itself (i.e. individually) having a significant effect on this European site.* Lough Gill SAC, Lough Arrow SAC, Bricklieve Mountains and Keishcorran SAC, Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC, & Templehouse And Cloonacleigha Loughs SAC - *Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.* Union Wood SAC - *Due to the absence of a hydrological pathway between the project and the Natura site – the aquatic zone flows along the boundary but does not drain into the Natura site.* Lough Arrow SPA, Ballysadare Bay SPA, & Cummeen Strand SPA - *Due to the separation distance between the Natura site and the project.* The DAFM also conducted an in-combination assessment and concluded that the proposed development alone or in-combination with other plans or projects would not be likely to have a significant effect on any Natura 2000 site.

The DAFM referred the application to Sligo County Council who responded seeking that a number of concerns be addressed, including as follows; protection of water quality, public health / drinking water, adherence to guidelines, 25m buffer by watercourses, works supervision, liability insurance, public road entrance, the use of ½ loads at harvesting, a designated haulage route agreement, that there be no damage to existing drainage of public roads, and no debris either, a traffic management plan, sightlines, utility poles to be monitored and moved if required. Also requiring the reporting of public road damage to the Engineer and repair by the applicant.

The licence was issued subject to standard conditions (a) to (g) and additional conditions denoted (h) to (p), as set out on the licence, and valid until 31 December 2022.

There is a single appeal against the decision to grant the licence, the grounds include as follows;

1. Breach of Article 4 (3) of the EIA Directive 2014/52/EU - Failure to carry out screening for EIA. This licence is in a class of development covered under Annex II of the EIA Directive. The DAFM, as the competent authority, has failed to carry out screening to determine the requirement for EIA.
2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU requiring a developer to submit a description of the aspects of the environment likely to be significantly affected by the project.



3. This licence and its associated operations threaten the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland 2018-21. This site is in a river basin which is listed by the EPA as being one on which Forestry is a significant pressure. It is in a catchment which is in a Priority Area for Action under the WFD River Basin Management Plan. The current status of this waterbody is 'High' but it is listed as being 'At Risk'. In the absence of adequate consultation, the achievement of the objectives set for the underlying waterbodies under the River Basin Management Plan for Ireland cannot be assured.
4. The Stage 1 AA conclusion is not legally valid as it has relied on an inadequate pre-screening report from Coillte, and a Stage 2 AA is required.
5. Inadequate consideration of feedback from a Consultation Body. That Sligo County Council, in its submission, requested a number of conditions relating to environmental protection be incorporated into the licence, and they have not been included in the licence.
6. Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive.
7. Commencement and Conclusion of Operations should require notification.
8. The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

In response, the DAFM addressed the written grounds of appeal, and stated with regard to Article 4(3) of the EIA Directive, that because the standard operational activities of clear-felling and replanting of an already established forest area are not 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 are not so categorised in Annex II of the 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. The DAFM also ruled out any breach of Article 4(4). Regarding consultations, that referrals to statutory consultees, including Inland Fisheries Ireland, National Parks & Wildlife Service and local authorities, are automatically triggered according to interactions with certain spatial rules. Discretionary referrals outside of these rules can also be triggered in individual cases, if deemed necessary. In this instance the licence application SO09-FL0032 was referred to the Local Authority in line with current practice and procedures, but as the Local Authority response was in relation to three licence applications i.e. SO09-FL0032 (3.14 ha), SO10-FL0097 (23.51 ha) and SO08-FL0051 (4.14 ha), the DAFM position is that conditions attached to the granted licence for SO09-FL0032 are site/licence specific and have addressed the matters raised by the Local Authority which are relevant to the site in question. The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water*. Further setbacks are also required along relevant watercourses and water-related hotspots throughout the site, where present. With the application of this restructuring, the level of protection regarding water will increase. The 3.14 ha felling and reforestation project has been subject to the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure* (v.05Nov19). The related AA screening document is on file and includes the screening

rationale identified by the relevant Inspector. AA screening was carried out by the DAFM for European sites within 15 km from the project and the DAFM carried out an in-combination assessment and included an associated in-combination statement based on this. The DAFM stated that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, which 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). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products.

The FAC held an Oral Hearing on 02 February 2021. The parties were invited to attend in person or to join remotely. The appellant, the DAFM and the applicant participated remotely. The FAC sat in person and remotely at this hearing. The Appellant sought their written grounds be considered. The appellant contended that the licence conditions were not all fully enforceable, that condition (m) *"Water hotspots must be identified prior to harvesting and a clearly marked machinery exclusion zone of 10 metres must be established around them"* should be established prior to harvesting, also there is nothing in the conditions regards agreeing a haulage route even though specifically requested by the County Council and nothing regards the use of half loads. In effect the requirements of the public body are not adhered to in the licence. The appellant stated the forestry was planted in 1992 and was part of a project that exceeded 50 ha, but was unable to confirm if this was a first planting or a restocking, and set out locations relative to the proposal at appeal. The appellant contended there is a direct hydrological connection from the border of the proposal that is visible on the 25" Ordinance Survey mapping and connects to an EPA marked watercourse and directly to the River Unshin SAC and as a result an AA was required. The northern part of the site contains Basin Peats and these are not reasoned for in the DAFM's AA Screening. Also, the in-combination appears confined to the River sub-basin whereas there should be a much wider net. At the hearing the DAFM set out the processing undergone in issuing the licence, there was referral to the Local Authority and their response was considered and the conditions of the licence reflect the relevant points to this proposal. An AA Screening was undertaken, and the in-combination assessment was finalised on 11 June 2020 prior to any decision to issue the licence. The DAFM confirmed the applicant's pre-screen was used in making the screening decision. The DAFM stated there was no deforestation involved and there is no aquatic zone on site in this instance and the licence conditions relating to aquatic zones were placed on the licence solely in response to the referral reply from the Local Authority. The applicants described the information submitted with the application including maps, a pre-screening report and details of environmental and safety measures in a Harvest Plan. The applicants stated that the watercourse indicated at the northern edge is not within the proposal site, is 25m to 30m away and was noted at a site inspection, and there is a band of broadleaf trees between the proposal and this watercourse. The applicants stated the stream that is north of the proposal runs to the Garran Beg Stream, then to the Ballygrania River and to the Unshin River SAC at a combined distance of c. 6km from the proposal. The applicants described plant protection procedures with off-site treatment as well as spot top-up treatments where required. The appellant confirmed they had not been provided with the applicant's pre-screening report on which the DAFM screening was apparently based.

Following the oral hearing the FAC circulated the applicant's AA pre-screening report for clear-fell project SO09-FL0032, dated 10 June 2020, to the parties to afford the opportunity to respond. A single



response was received. On 26 February 2021 the Appellant replied that the DAFM screened out this project from AA for the Unshin River SAC on the basis of the pre-screening report by the applicant. The initial pre-screening report submitted with the application stated that the harvest block is located within a water basin that has hydrological connectivity to an aquatic SAC, and that there is no direct connectivity between the harvest block and the Water Framework Directive rivers. The appellant submits that there is hydrological connectivity between the project site and the Unshin River SAC, has sensitive qualifying interests, which is acknowledged in the applicant's second pre-screening report. The appellant states the second pre-screening report offers no rationale for the screening out of the Unshin River SAC, merely states a number of facts but gives no explanation as to why the facts, as presented, will result in it being impossible for this project to have a significant effect (alone or in combination with other plans or projects) on the SAC. The appellant states there is a source (multiple sources), there is a pathway (hydrological) and there is a receiving environment (the aquatic SAC), and there has been no objective assessment of the sensitivity of the receiving environment. The appellant states that the CJEU in its ruling in the Waddenzee case, interpreted the threshold as being reached where "it cannot be excluded, on the basis of objective information, that [the plan or project] will have a significant effect on that site". Thus, in applying the Precautionary Principle, the CJEU interpreted the word "likely" to mean that, as long as it cannot be demonstrated that an effect will not occur, that effect is considered "likely". The appellant states a Natura site can only be screened out from AA if it can be excluded on the basis of objective scientific information that there is no possibility of it having a significant effect and the pre-screening report does not provide an objective scientific assessment to exclude such an effect and the DAFM should not have relied on the report to screen out this site. The appellant states the word possibility is key. It cannot be excluded on the basis of objective information that this project can have, or contribute to a significant effect on the Unshin River SAC and therefore an AA is required. The appellant states a possibility exists - it is not impossible for this project to have or contribute to a significant effect.

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). The FAC considers the licence issued is for the felling and reforestation of 3.14 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 regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the FAC noted that the Appellant did not submit any specific details in relation the presence of species of wild birds, bird nesting or rearing on this site. The FAC considers the granting of the licence does not exempt the holder from meeting any legal requirements set out in any other statute and, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

Regards the County Council referral, the FAC accepts that five licence applications were referred to Sligo County Council by the DAFM on the 08 January 2020 and three of these were replied upon in a single communication from the County Council on 23 January 2020, including SO09-FL0032. The licence conditions contain a number of measures that include public road setback, 25m aquatic buffer zones, aquatic zone setbacks, exclusion of machinery from aquatic zones, retention of broadleaves, internal drain crossings, blocking of historic mound drains, identification of water hotspots and use of exclusion zone, water protection from the Standards for Felling and Reforestation 2019, and the Guidelines the works must adhere to. The licence does not directly address haulage routes and the use of ½ loads when transporting. However, the licence does require the applicant to contact the Area Engineer prior to the commencement of operations to discuss haulage of timber from the site. While the FAC considers it an error to not more fully reflect the submission received from the County Council in the licence conditions in this instance, the FAC does not conclude this to be a significant error in the circumstances outlined including that prior consultation with the Area Engineer is specified for in the licence conditions.

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, the DAFM undertook a Stage 1 AA screening in relation to 11 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 has noted that the reasoning in the AA screening by the DAFM in screening out the Ballysadare Bay SAC and Unshin River SAC, and raised in the grounds of appeal, is given as; *having considered the expert opinion and the rationale presented in Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, the DAFM has concluded that there is no likelihood of the project itself (i.e. individually) having a significant effect on this European site.* The FAC also notes the DAFM undertook its own in-combination assessment of other plans and projects with the proposal. The Applicant's pre-screening stated the harvest block is located within a water basin that has hydrological connectivity to an aquatic SAC, and there is no direct connectivity between the harvest block and Water Framework Directive rivers.

The appellant referred to a mapped watercourse on Ordinance Survey. The FAC notes the 25" Ordinance Survey maps indicate a watercourse beginning at the north-western edge of the proposal flowing c. 20m north then veering to southeast joined by another watercourse beginning from the north-eastern edge of the proposal before flowing southeast per map arrow to the EPA marked Gaddan Beg River. The applicant's 10 June 2020 pre-screening states regards the Unshin River SAC that there is a hydrological distance of 6.5 Kms and therefore acknowledges the watercourse



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connectivity. The FAC is satisfied based on the report that the hydrological distance is acknowledged and assessed and is used as a basis for the screening out. At the hearing the applicants further suggested the watercourse is some 25m to 30m away from the edge of the proposal. The DAFM AA screening confirms the DAFM had considered the applicant's pre-screening. Having regard to this and to the soil type given as approximately Basin Peats, Blanket Peats (some) (13%) & Surface water Gleys, Ground water Gleys (87%), and to the predominantly moderate slope 0-15%, the FAC is satisfied with the screening conclusion that there is no likelihood of the project itself (i.e. individually) having a significant effect on the River Unshin SAC. The in-combination assessment completed by the DAFM on 11 June 2020, prior to the decision at appeal, used the River sub-basin Unshin_040 as a basis for other plans or projects, and concluded there was no likelihood of significant effects from the proposal on its own or in-combination with other plans and projects. The FAC considers, in the circumstances of the case, this conclusion to be sound, and no significant or serious error or series of errors has occurred.

The FAC considered the appellant's submission that licence conditions should require the Licensee to notify the DAFM at commencement and conclusion of operations and conditions relating to DAFM inspections of the licenced operations at various stages. The FAC considers that the enforcement of the licence conditions is a matter for the DAFM and concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

Regarding additional conditions related to the spraying of chemicals, the FAC noted the DAFM's submission that the use of PPPs in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU 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), and that users of PPPs shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. In these circumstances, the FAC concluded that additional conditions as described by the appellant should not be attached to the licence.

In the circumstances outlined above, and based on the evidence 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 felling licence SO09-FL0032 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

