



30 April 2021

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FAC refs: 311/20 & 328/20
Subject: Appeal in relation to felling licence TFL00302619

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of licence TFL00302619.

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 TFL00302619 was granted by the DAFM on 08 June 2020.

Hearing

An oral hearing of appeals 311/20 and 328/20 was conducted by the FAC on 25 March 2021.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman & Mr Derek Daly
Secretary to the FAC:	Mr Michael Ryan
DAFM representatives:	Mr Seppi Hona & Ms Eilish Kehoe
Applicant:	[REDACTED]
Applicant representative:	[REDACTED]
Appellant*:	[REDACTED]

* [REDACTED]

Decision

The 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 submissions/observations, before deciding to vary the decision to grant the Licence (TFL00302619).

The proposal is for felling and restocking on a stated site area of 10.89ha at Cloonbaniff, Loughil, Co. Sligo. The existing stock is stated to be 100% Sitka spruce. The proposed felling year is 2019, and the

age of trees to be felled c. 30 years. Proposed restocking would be with 85% Sitka Spruce and 15% ADB. (This was subsequently changed to 50% Alder, 30% Broadleaves and 20% Scot's pine).

The Inspector's certification was based on the revised restocking proposal. It states that the area is sensitive to fisheries. It is not within 6km of a Freshwater Pearl Mussel zone. There are no Hen Harrier issues or High Amenity Landscape considerations. Soils are predominantly highly modified peat and peaty podzols, and the slope is flat to moderate. Thirteen Natura 2000 sites were screened (12 SACs and 1 SPA), and all were screened out for Stage 2 Appropriate Assessment.

A Natura Impact Statement, prepared by a consultant ecologist, is on file date stamped 05.09.2019. This states that the trees were planted in 1989 and that the site has been thinned. There are no aquatic setbacks. There are collector drains running in plot boundaries which, in turn, drain to the River Moy. Replanting would include natives in the understorey – including wild cherry, Holly, Rowan, and Hawthorn. Broadleaves would be planted on inverted mounds. No fertiliser would be applied. Herbicides would be applied in line with Forestry Service Guidelines. The proposed restocking includes a 20m buffer zone from the River Moy and 5m from existing drains. There are earth banks (up to 8m high) composed of alluvial material all the way along the River Moy banks – following flood management activities. The banks are located 15-20m away from the aquatic zones and are heavily vegetated. There is a small watercourse running through the site and straight into the River Moy. Parts of the site are within the River Moy SAC. Impacts considered are as follows:

Direct – sedimentation, hydrocarbon and chemical pollution. Of concern particularly due to the lack of a multi-layer structure on the forest edges and along watercourses, and the highly erodible nature of the soils within the buffer.

- Noise may affect birds and their prey. Also red squirrel and pine marten.

Indirect – Noise and dust. Fuels, cement dust threats to aquatic species habitat and/or foraging areas for prey populations.

Short-term, long-term and Cumulative impacts - also considered. Thinning/harvesting operations should not be carried out simultaneously in adjacent forest areas.

Mitigation measures are proposed in relation to road construction/upgrade/maintenance, drainage, sediment traps & other sediment control measures, harvesting/felling, timing of operations, storage of hydrocarbons & chemicals, reforestation (including 20m buffer along River Moy) and Otters

The DAFM commissioned an Appropriate Assessment Report (AAR), and this was prepared by MKO planning & Environmental Consultants and dated February 2020. The AAR reviews the application documentation plus the NIS. Project details are given as a Native Woodland Scheme. During replanting there would be a buffer of 10m along drains and small watercourses, and a 20m buffer adjacent to the River Moy. The site is in the Moy River catchment. Drainage ditches and watercourses within the site provide hydrological connection to the River Moy SAC.

The AAR reviews the screening for Appropriate Assessment with all Natura 2000 sites within a 15km radius considered and their Qualifying Interests and Conservation Objectives reviewed. The AAR verifies that the following are screened out for Stage 2 Appropriate Assessment - Ox Mountains Bogs SAC (c. 1.5km NW), Unshin River SAC (c. 3.5km NE), Templehouse & Clooncleigha Loughs SAC (c.



5.6km SE), Turloughmore (Sligo) SAC (c. 6.1km SE), Knocklongy & Knockachree Cliffs SAC (c. 7.3km NE), Lough Nabrickkeagh Bog SAC (c. 10.6km), Dooncastle Turlough SAC (c. 11.1km SE), Ballysadare Bay SAC (c. 12.1km SE), Lough Hoe Bog SAC (12.9km), Cloonakillina Lough SAC (11km SE), Flughany Bog SAC (11.3km SE) and Ballysadare Bay SPA (12.9km NE). The reasons for screening these sites out for Stage 2 assessment are lack of hydrological connectivity, the nature of the Qualifying Interests and the nature of habitats at project site.

The AAR screens in the River Moy SAC for Stage 2 Appropriate Assessment for reason that the site is partially within the SAC boundary and has hydrological connectivity. Qualifying Interests and Conservation Objectives are considered and there is an examination of the potential for impacts arising from the proposed development. The AAR concludes that *It is reasonable to conclude that adherence to best forest practice (which includes mitigations outlined in the NIS in relation to water setbacks from aquatic zones and relevant watercourses and mitigations to ensure no disturbance/displacement for the otter) ensures that there will be no deterioration in water quality or adverse impact on the aquatic Qualifying Interests of the River Moy SAC.*

The AAR contains recommended mitigation measures in respect of drainage and sediment measures, harvesting/felling (including a 10m buffer along drains and small watercourses and 20m along the River Moy), timing of operations, chemicals, fuel and machine oil, reforestation, all works will comply with any Inland Fisheries Ireland (IFI) recommendations (this includes a 25m buffer (Aquatic) on replanting), and other disturbance mitigation measures. Cumulative projects considered included dwellings, and forestry related (since 2015) – afforestation (3) and felling (4).

The DAFM made an Appropriate Assessment Determination (AAD), dated 22.05.2020. This states that the Local authority response (20.03.19) and IFI response (09.05.19) had specific recommendations in relation to water setbacks (25m from aquatic zones), silt/sedimentation control measures and 2 weeks prior notification of works. Subsequent to these referrals a revised replanting proposal was submitted changing from conifers to broadleaf high forest. The NIS states that the site will have 20m unplanted buffer along the River Moy. The AAR contains a fair and reasonable examination, evaluation and analysis of likely significant effects on the River Moy SAC. The AAD does not accept the AAR in respect of Otter mitigation measures, all works to comply with IFI recommendation as 20m buffer is sufficient, existing collector drains will be retained following felling but should not be filled with brash, there should be no forwarder movement within 20m of the River Moy, and there should be no operations between March and August (inclusive). The AAD adopts the AAR conclusions with the above exceptions. The AAD concludes that *the proposed development, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular the River Moy SAC, having regard to their conservation objectives, and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with specific mitigations to be attached as conditions to the licence.*

The DAFM referred the application to Sligo County Council and the IFI. In response the County Council stress the importance of protecting water quality in any surface water in proximity to the proposed development and state that the provisions of the Water Framework Directive (WFD) should be taken

into account. All works should be carried out in accordance with specified Guidelines. It is requested that the buffer zones be increased to 25m to any watercourse during replanting. The area between the existing road edge and a point 10m in from the road edge to be cleared and soled and surfaced to the requirements of the planning authority. Designated haulage route and designated depot location to be agreed in writing with the Area Engineer within 30 days of the commencement of works on the site, and a traffic management plan to be submitted and agreed with the Area Engineer prior to commencement of development. The IFI response states that the lands lie adjacent to the River Moy – a nationally important salmon and trout fishery. Parts of the site are within the River Moy SAC – designated for the protection of Atlantic salmon, White-clawed Crayfish and Lamprey species. The catchment has been designated high ecological status in the River Basin Management Plan (RBMP) and this must be protected. Forestry and Water Quality Guidelines should be strictly adhered to in addition to silt control measures, control of the construction of roadways (silt control), protection of all riparian vegetation, trees and scrub, aquatic buffer zone must be extended to a minimum of 25m, and notification of IFI two weeks prior to commencement.

The licence issued on 08.06.2020. It is subject to standard conditions plus a condition that all mitigations set out in the AAD must be adhered to. The licence relates to restocking with Common Alder (50%), Birch (30%) and Scot's Pine (20%).

There are two appeals against the decision to grant the licence. In summary, the appeals are as follows:

Appeal 1 -

- DAFM failed to carry out an adequate EIA screening and exceeded the limits of discretion under Articles 2(1) and 4(2) of the Directive
- No EIA was conducted and the decision made is not consistent with the law.
- The Harvest Plan is inadequate and does not contain the required information
- The licence and associated operations threaten the achievement of the objectives set for the underlying waterbody under the River Basin Management Plan for Ireland
- The Appropriate Assessment Determination is not legally valid
- DAFM did not seek the opinion of the general public under Article 6(3) of the Habitats Directive
- Mitigation measures in the Appropriate Assessment Determination are inadequate
- DAFM is not the competent authority for part of this site. The NPWS (the competent authority) played no part in the awarding of this licence.
- Inadequate consideration was given to the submission of Sligo County Council
- The licence should contain a standard condition to notify the Minister at the commencement and conclusion of operations.
- The licence should contain stringent and enforceable conditions in respect of notification of the intention to spray chemicals.

Appeal 2 –

- Details of the proposed development changed during the processing of the application. The original application was for felling of 10.54ha of Sitka spruce and restocking with 85% Sitka spruce and 15% Broadleaves. This was referred to 3 consultees. Subsequently, the proposal changed to Native Woodland Establishment and the application appears to have been processed on this basis, including a reduced watercourse setback from 25m to 20m. There are potential negative consequences for the Qualifying Interests of the SAC and water quality standards.



**An Coiste um Achomhairc
Foraoiseachta**

Forestry Appeals Committee

- There is a lack of a consistent and credible scientific examination of the proposal. The MKO report is a selective and contradictory summary of the NIS submitted. The NIS fails to include the EPA Flood Risk Map. Conditions attached to the licence are contradictory.
- The in-combination assessment fails to draw attention to TFL 00316419 which is contiguous to the project lands. The AAD merely refers to other projects. Only the Ecologist specified that the two projects should not happen at the same time because of cumulative effects. The proposed development and TFL 00316419 should be assessed together as they are contemporaneous, contiguous and interlinked.

An Oral Hearing was convened on 25.03.2021 and all parties were invited to attend. The FAC sat remotely. The DAFM, the applicant (and his Forester) and one appellant participated remotely. The second appellant did not attend. The DAFM detailed the procedures followed leading to the decision to grant the licence. The digitised site area is 10.54ha. The DAFM read two statements from the Head of Ecology, Forestry Inspectorate into the record. These note that the buffer zones referred to in the Local Authority response were in relation to replanting works. The replanting with native woodland would ensure protection of water quality. The NIS submitted states that Red Squirrel and Pine Marten (protected species under the Wildlife Act) were present on the site and a condition requiring no operations between March and August inclusive was attached. It was subsequently clarified by the Ecologist in correspondence that there are no signs or records of these species on the adjoining site and that reference should have been to 'in the vicinity'. In light of the clarification the condition is no longer required and, given aquatic sensitivities, works should be allowed during this time period. The NIS requires that two felling projects should not happen at the same time and this is not amended by any conditions. The AAD was based on the AAR by MKO, which included all information and the NIS. Specific mitigations are listed to ensure no adverse effect on the River Moy during felling and reforestation. The Sligo County Council response was considered and the NIS was also considered. The NIS states that there is an existing buffer of semi-natural vegetation with earth banks approximately 10m wide along the River Moy and there will be no machinery within the first 10m of conifers (20m buffer from the River Moy). The recommendations of the NIS are based on a site visit by the Consultant Ecologist. The reforestation with native woodland and associated requirements were also considered. In acknowledging the content of the statements, the Chairperson noted that the author was not present at the Oral Hearing to answer any questions regarding the content of these submissions. The DAFM confirmed that the original Appropriate Assessment screening was based on the original proposal to reforest with conifers, but the NIS was based on the revised proposal for native woodland. The submission of the NIS had been requested by the DAFM on 19.06.2020. The MKO AAR had reviewed the NIS. Asked why the referral bodies were not consulted in regard to the revised proposal, the DAFM representatives were unsure of the reason. The appellant stated that the DAFM response was inadequate. Part of this site is within the SAC. The proposal relates to 'notifiable activities' and require separate consent from the NPWS. The Prescribed Bodies and the public were not aware of the revised proposal. There were potential risks during periods of high rainfall and this should be addressed. Other IFI recommendations had not been fully addressed and the County Council response had not been fully incorporated. The IFI requirement for a 25m setback from the River Moy does not specifically relate to conifers. The Carrowmore SAC is in the same sub-basin and this was not fully assessed. The cumulative impacts with felling on an adjoining site had not been properly considered. The applicant stated that the trees had been planted in 1989 as a long-term investment. The delay in obtaining the felling licence had given rise to significant human problems. The applicant has huge respect for the environment. The forest cannot be left in the land. The original proposal for conifers

may have been 'a bit naïve'. The applicant's representative stated that the River Moy had a natural tree buffer. There would be no objection to a requirement for a 25m buffer. (under questioning by the FAC, the DAFM stated no objection to a 25m buffer while stating that such a buffer would not be warranted. The appellant stated that it was not a red flag issue and essentially a matter for the Prescribed Bodies). The River Moy was dredged in the past and there is 10m of spoil providing a natural buffer. In response to FAC questions the applicant's representative stated that the site is dry enough for the proposed restocking species. The applicant stated that there was no record of flooding since 1969 and that the dredging of the river had been transformative.

In considering the appeals against the DAFM decision to grant a conditional licence, the FAC examined, in the first instance, the changes made to the original proposal and the procedures followed in the consideration of the revised proposed development. The original proposal was for felling and restocking on a stated site area of 10.89ha. Restocking was proposed with 85% Sitka spruce and 15% Broadleaves. This original proposal was referred to the County Council and Inland Fisheries Ireland (IFI) and responses were received, including recommended conditions in the event of the licence being granted. The proposal was subsequently changed to Native Woodland on the same site area, and this appears to have occurred at an early stage in the processing of the application. The Inspector's Certification, the NIS, The AAR and AAD were all based on the revised proposal, and the licence relates to the revised proposal. However, the DAFM did not refer the revised proposal to the County Council or the IFI for their comments and recommendations, while rejecting some of their recommendations on the basis that the nature of the proposed development had changed. Having regard to the fact that parts of the site are within the River Moy SAC and the importance of that site in respect of fisheries, the FAC concluded that the revised proposal should have been referred back to the County Council and IFI for their comments and recommendations and that, in the absence of such referrals, the recommendations contained in the submissions received from the referral bodies should be considered.

Addressing the written grounds of appeal, the FAC considered the contention that the licence granted is in conflict with the provisions of the EIA Directive. The proposal is for clearfelling and restocking as part of a forestry management operation and the FAC concluded that this is not a class of development contained in either Annex I or Annex II of the Directive and, as such, is not subject to the provisions of the EIA Directive. Furthermore, the FAC concluded that the proposed development does not include any works which, by themselves, would constitute a class of development covered by the Directive. In these circumstances, the FAC found that the licence decision is not contrary to the provisions of the EIA Directive.

The FAC considered the procedures adopted by the DAFM in the context of the provisions of the Habitats Directive. The Inspector's certification includes a screening for Appropriate Assessment and concludes that all sites should be screened out. A Natura Impact Statement (NIS), prepared by a consultant ecologist, was subsequently submitted. DAFM commissioned an Appropriate Assessment Report (AAR) by Planning and Environmental consultants and this reviewed the application documentation together with the NIS. The AAR reviewed the screening for Appropriate Assessment for all Natura 2000 sites within a 15km radius and concluded that 12 designated sites should be screened out for reasons relating to the lack of hydrological connectivity, the nature of Qualifying Interests and the nature of the habitats at the project site. The AAR screened in the *River Moy* SAC for Stage 2 Appropriate Assessment for reason that the site is partly within the SAC boundary and has hydrological connectivity. Qualifying interests and conservation objectives are considered and there



is an examination of the potential for effects arising from the proposed development. Cumulative projects considered include dwellings and forestry related projects (since 2015) -afforestation (3) and felling (4). The AAR contains recommended mitigation measures in respect of drainage and sediment measures, harvesting/felling, timing of operations, chemicals, reforestation, all works to comply with IFI recommendations, and other disturbance mitigation measures. The FAC noted an apparent contradiction in the mitigations recommended in that they include for harvesting/felling a 10m buffer along drains and small watercourses and 20m along the River Moy, whereas compliance with IFI recommendations would include a 25m buffer along the River Moy. The DAFM made an Appropriate Assessment Determination (AAD) which does not accept some of the recommended mitigation measures in the AAR. The AAD concludes that a 20m buffer along the River Moy is sufficient. In light of the referral submissions made to the DAFM by the County Council and the IFI, and in the absence of further referrals to those bodies, and having regard to the location of the project lands partly within the River Moy SAC and the qualifying interests of that designated site and applying the Precautionary Principle, based on the evidence before it, the FAC concluded that a buffer zone of 25m along the River Moy should be required in the event of the licence being granted. Otherwise, the FAC concluded that the procedures followed by the DAFM leading to the AAD were consistent with the requirements of Article 6(3) of the Habitats Directive and that the overall conclusion reached was sound.

The FAC noted that the 'Harvest Plan' submitted provides a roadmap for the operators carrying out the development who, nevertheless, must comply fully with the terms of the licence granted.

It is contended that the proposed development would threaten the achievement of the objectives of the underlying waterbody. No specific evidence is submitted in support of this contention. Based on the information before it, the FAC finds no reason to conclude that the licensed development would have any significant impact on water quality or would threaten the achievements of the underlying waterbody.

It is contended that the proposed development would constitute 'notifiable activities' and, as such, would require separate consent from the NPWS. The FAC concluded that the granting of the licence under appeal would not preclude any requirement for the applicant to obtain any other consent legally required.

The compliance and enforcement of the terms of a licence is a matter for the DAFM, and legal powers are provided to the enforcement authority in this respect. In these circumstances, the FAC concluded that additional conditions were not required to be added to any felling and restocking licence granted. The spraying of chemicals is controlled through Statutory Instruments to which the applicant is required to comply.

The issue of flood risk is raised by one appellant. The evidence before the FAC is that the River Moy was dredged in the past and that there is no record of flooding since 1969 and that the dredging of the river had been transformative. Based on the information before it, the FAC finds no reason to indicate that the development would give rise to flooding or would be impacted by flooding.

It is a recommendation of the NIS, which is carried forward into the AAR and AAD, that "disturbing forestry operations should not be carried out simultaneously in adjacent forest development to minimise disturbance". The licence requires that the mitigations contained in the AAD must be fully adhered to (condition h). The FAC concluded that, in the specific circumstances of this case, the DAFM should have required the applicant to submit, for the DAFM's written agreement, a timescale for the carrying out of the development to ensure that it is not carried out simultaneously with other forestry developments in the near vicinity. The absence of such a requirement was a significant error.

The FAC concluded that the DAFM made significant and serious errors in the making of the decision to grant the licence by not referring the revised proposed development to Sligo County Council and Inland Fisheries Ireland or incorporating the recommended buffer of 25m from the River Moy into a condition of the licence, and not requiring the applicant to submit, for agreement of the DAFM, a timescale for the carrying out of the development to prevent operations being carried out simultaneously with other forestry developments in vicinity. In deciding to vary the licence, the FAC requires the addition of the following conditions (one of which amends condition h of the licence) to the licence:

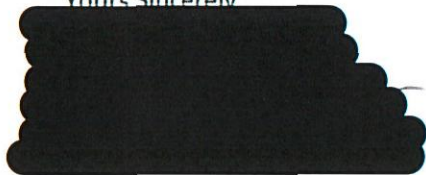
The mitigation measures recommended by Inland Fisheries Ireland (including the provision of a 25m buffer zone along the River Moy) shall be complied with in full in the carrying out of the development.

Reason: In the interests of protecting water quality and the qualifying interests of the River Moy SAC.

Before any operations commence, the applicant shall submit for the written agreement of the DAFM, a timescale for the carrying out of the development to ensure that operations are not carried out simultaneously with any other forestry operations in the vicinity of the site. A copy of the timescale and written agreement shall be placed on the DAFM file.

Reason: To prevent undue disturbance in the vicinity of the site during forestry operations and in the interests of environmental protection.

Yours Sincerely



Pat Coman, for the FAC