



30 April 2021

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FAC ref: 751/20

Subject: Appeal in relation to felling licence TFL00511720

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 TFL00511720.

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 TFL00511720 was granted by the DAFM on 09 September 2020.

Hearing

An oral hearing of appeal 751/20 was conducted by the FAC on 22 April 2021.

Attendees:

FAC Members:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Dan Molloy & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
DAFM representatives:	Mr Jahn Crane & Ms Eilish Kehoe

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 other submissions before deciding to affirm the decision to grant this licence (Reference TFL00511720).

The proposal site comprises 9.33 ha in 6 plots for thinning only, in 2020 and 2024. Plots 1 – 4 are 100% Norway Spruce and plots 5-6 are 100% Sitka Spruce at Aughawillan, Co Leitrim.

The application was desk assessed by the DAFM. The certification states that the predominant soil type is podzols in nature, the slope is flat to moderate, and that the site does not contain or adjoin an aquatic zone. The area is not sensitive to fisheries. There were no referrals made to referral bodies or to the DAFM Archaeologist. Certification states 18.67 ha for felling/thinning within a 500m radius in the past 3 years and that 5.3% of the area within 5km radius is licensed for felling / thinning.

The DAFM Inspector carried out an Appropriate Assessment (AA) screening with reference to the provisions of Article 6(3) of the Habitats Directive, identifying the following Natura 2000 sites within a 15km radius of the project lands: the following 2 EU sites within a 15 km radius; Lough Oughter & Associated Loughs SAC and Lough Oughter Complex SPA. Both Natura 2000 sites were screened out. Reasons for screening out the SAC included the absence of aquatic zones within or adjoining the project area, and the absence of any significant relevant watercourses within or adjoining the project area. Reasons for screening out the SPA were the unsuitability of the project area for use by any of the species listed as qualifying interests of the Natura site, and other factors - distance.

The DAFM also carried out an in-combination assessment (done week of 29 July 2020), the assessment using in the vicinity of the project area within the river sub-basin Cullies_020, identified one planning permission (2016) for an unroofed slatted tank, An Bord Pleanála was checked and no project was identified and an urban waste water plant was identified on the EPA website. Other forestry related projects comprised an afforestation project of c 19 ha (2017), and eight private felling licences (2017-2019). The project is identified as lying in the rural landscape of Aughawillan, Co Leitrim. Within the River sub-basin Cullies_020 which has forest cover of 6%. The conclusion reached is that this project when considered in-combination with other plans or projects will not give rise to the possibility of an effect on any of the Natura sites listed. The overall conclusion was to screen out the proposal with no Stage 2 AA required.

The licence was issued with relatively standard conditions as well as the following additional condition: (h) strictly adhere to the Standards for Felling and Reforestation October 2019. These standards replace the existing Forest Harvesting & the Environment Guidelines 2000.

There is one appeal against the decision to award the licence TFL00511720 and the grounds are as follows:

1. The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned. There is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which contain errors and unqualified uncertainties) or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application. The basis for the screening out from EIA of this application includes mitigations contained in the Forest Service Guidelines and Standards. Screening out on the basis of mitigation is only permissible where it can be assured that such mitigating actions will be monitored and enforced. The inspection rate for felling licences is so low in Co. Leitrim that no such assurance can be given.
2. The amount of thinning and clear-felling activity in this locality is known by the Inspector to be a significant issue. His response to Q8 of the EIA screening on IFORIS must be challenged.
3. The afforestation of these lands was carried out without adequate screening for the requirement for an EIA. This was contrary to European Law. There is a requirement under EU law for the remediation of any deficiency in the implementation of EU law. No licence should



be awarded for felling activity until there has been a retrospective assessment of the need for an EIA for the afforestation of these lands.

4. This licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. Forestry activity has the capacity to impact on water quality. There is a very significant amount of forestry development and activity in this area and the potential for cumulative impact on water quality has not been adequately addressed. Neither IFI nor the EPA has been consulted. In the absence of adequate consultation and assessment of the cumulative impact of this project with other forestry activities approved or planned in the same catchment the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured.
5. There is insufficient detail and clarity in the In-Combination information to enable a definitive position to be reached on the cumulative effect of this project with other plans or projects
6. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. All hedgerows have not been recorded.
7. The proposed measures to Protect Social and Environmental Features and Considerations contained in the Harvest Plan include "Consult with local residents". No evidence has been presented as to the methodology that will be used for consultation. In the absence of such detail it cannot be assumed that any consultation will be adequate, timely or effective. Surely consultation should take place before the licence is issued to enable relevant conditions be incorporated in to the licence if needed.
8. The licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence. This would facilitate the Department in being able to logistically schedule monitoring and inspection procedures. In the case of works that are scheduled years in to the future it will also permit an assessment of the conditions of the licence with the regulatory framework that is current.
9. Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.
10. 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
11. This licence should contain a condition that plans and works must be inspected by Forest Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations.
12. There has been inadequate consideration of issues raised in a third-party submission

The DAFM responded as follows to the appeal:

Whilst a provision in the Act does impose an obligation on the Minister in the making of the decision whether to grant a Tree Felling Licence (TFL), with or without conditions, or to refuse it, further to the making of an application for the same under the relevant statutory provisions, to also consider whether the performance of that function also requires the carrying out of a screening for an environmental impact assessment (EIA) and if necessary the carrying out of an EIA, that statutory obligation is fully discharged once it has been clearly identified at the outset that 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. In the case of the former, those are:

- Projects involving the replacement of broadleaf high forest by conifer species, where the area involved would be greater than 10 hectares; and
- Projects involving deforestation for the purpose of conversion to another type of land use, where the area to be deforested would be greater than 10 hectares of natural woodlands or 70 hectares of conifer forest.

In the case of the latter, those are:

- Initial afforestation projects which would involve an area of 50 hectares or more; and
- Forest road works which would involve a length of 2000 metres or more.

The standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities. It is the position of the Department that clear-felling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally 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).

Furthermore, an application for a licence to clear-fell and replant an established plantation forest does not constitute a change or extension of an earlier authorisation for that project [within the meaning of Point 13 of Annex II of the EIA Directive] (if such an authorisation was originally required), as the future clear-felling and replanting (being as it is a standard operational activity integral to many such projects) would have been envisioned and accounted for at time of the of the plantation forest's establishment as one of the main cyclical management options going forward. On the other hand, there is also no requirement on a forest owner/forest manager to apply for a licence for clear-felling and replanting to continue to operate the forest. As set out inter alia in the Department's Felling and Reforestation Policy document (May 2017) there are a variety of different harvesting / management interventions available to owners/managers to aid them in their management of the forest and the fulfilment of the objectives they have for it, including for example Continuous Cover Forestry (CCF) which involves the periodic felling of portions of the trees from the canopy to promote the regeneration of young trees.

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. The thinning project licensed as TFL00511720 has undergone the DAFM's AA Screening procedure, as set out in the document entitled Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19) (DAFM, 2019). The AA Screening report was completed by the Inspector and contains the recommendations regarding screened out European Sites. Screening information for each Natura 2000 site is available on file. All information supplied by the applicant as part of the application was found to be sufficient to determine an outcome and approve the licence with conditions.



The FAC held an Oral Hearing on 22 April 2021. The parties were invited to attend in person or to join remotely. The applicant and the appellant did not participate. The DAFM representatives participated remotely. The FAC sat remotely at this hearing. At the hearing the DAFM described the processes involved in considering the application, that there were no referrals made to referral bodies. The proposal was the subject of an AA screening in respect of Natura Sites within a 15km radius, on its own and in-combination with other plans or projects, with all sites screened out for Stage 2 AA, prior to the decision to grant the licence. The DAFM Inspector explained that the application bio-map showed the hedgerows in a green dotted line, marked internal hedgerows. In respect of a possible drain showing on the 25" map along plot 4, the DAFM replied there may have been a drain there at the time of the 25" mapping and that the building of the earthen ditches usually led to the construct of drains at each side, but they are satisfied based on the checks that there is no watercourse there. The DAFM added that there would normally be mound drains installed at the time of afforestation – one every 8m. The DAFM stated that while there is 5.3% clear-felling / thinning within 5 km there is also not a significant forest area in the vicinity of the proposal and considered the response to point 8 on the Certification to be correct.

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 or thinning) 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 thinning, 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 thinning of 9.33 ha and does not consent to any change of land use. The FAC is satisfied the completion of the EIA questionnaire on IFORIS in this instance does not affect the foregoing. Based on the evidence before the FAC the proposal site contains no aquatic zones or relevant watercourses and the thinning, per licence condition (a) is subject to the Forestry and Water Quality Guidelines. As such, having regard to the nature and scale of the proposal, the absence of aquatic zones and the separation distances, the FAC concluded that the proposal would not have any impact on water quality. In addition, the FAC concluded there is no breach of the provisions of the EIA Directive in the decision to grant the licence.

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 screening in relation to 2 Natura 2000 sites as evidenced on the IFORIS certification pages with all European sites screened out for Stage 2 AA and an in-combination screening is also evidenced as compiled week commencing 29 July 2020, and for each site the DAFM concluded *"AA Screening has been carried out in accordance with S.I.477 of 2011 (as amended) and S.I.191 of 2017 (as amended). The project is not directly connected with or necessary to the management of any European Site. Furthermore, DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on this European site"*. The FAC notes the most proximate of the European sites is the Lough Oughter and Associated Loughs SAC at c. 6.7km and is 13.4 km downstream from Gulladoo Lough, also Lough Oughter Complex SPA is c. 8.9 km from the proposal and is 17.8 km downstream from Gulladoo Lough, the proposal shares the Erne Catchment with these Natura 2000 sites. However, the FAC is satisfied the proposal itself, consisting of high conifers, has no direct hydrological connection to the European sites and is sufficiently distant so as not to give rise to any possibility of significant effects on its own or in combination with others plans or projects on the migratory waterbirds that utilise the SPA.

Regards the grounds that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. The FAC is cognisant that no such species is identified by the appellant as being of particular concern to the proposal site. Regards the contention the licence is contrary to the Birds Directive, again no specific evidence has been submitted in respect of the presence of bird species, or reasons why the proposed development would threaten their protection. The FAC considers that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. In these circumstances, the FAC concludes there is no real related basis on which to affect the decision in respect of the proposal at appeal.

The FAC had regard to the appellant's contention that the Harvest Plan is not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). Regards consultation with local residents and the Harvest Plan, the appellant states that no evidence has been presented as to the methodology for the consultation and it cannot be assumed that any consultation will be adequate, timely or effective. This is noted. The appellant has not indicated any particular hedgerow of concern in the grounds regards such features, and the FAC is satisfied from the hearing evidence and bio-map that the hedgerows on the proposal site are in fact marked. The FAC concluded that the Harvest Plan is, in fact, a document outlining general environmental and safety rules and that all the licenced operations on site must comply with the conditions of the felling licence. The FAC considers the Harvest Plan does not excuse compliance with the requirements.

Regards the grounds that this licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. The FAC is cognisant that the proposal is not in a fishery's sensitive location per the Certification, the proposal comprises thinning only, and the proposal site contains no aquatic zone. In addition, the proposal is subject to the Forestry and Water Quality Guidelines. The Carrigallen River is c 600m to the north of the proposal and is part of the Cullies_020 river body for which the WFD status is good per EPA. The Cavan ground-waterbody has good WFD status. On the basis of the



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foregoing the FAC does not consider there is any significant risk to the underlying waterbody from this thinning proposal.

In respect of the grounds that the licence should contain a condition that plans, and works must be inspected by the Forest Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations, and a condition that the Minister be notified at both the commencement and conclusion of operations. The FAC considers the enforcement of the licence conditions is a matter for the DAFM and does not require additional conditions be attached to the licence.

Regards the grounds that there was inadequate consideration of issues raised in a third-party submission, the appellant does not specify what is considered inadequately considered. The FAC is provided evidence by the DAFM that the appellant made a submission in respect of 223 applications on 29 July 2020, including the licence at appeal. A number of the points raised are the subject of this appeal. The appellant's grounds do not identify what elements if any of the submission were not adequately considered in respect of their submission on the licence at appeal. The FAC is satisfied the appellant was afforded their full right to appeal, including an opportunity to set out all of their grounds of appeal.

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 the decision to issue licence TFL00511720 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

