



An Coiste um Achomhairc  
Foraoiseachta

Forestry Appeals Committee

11 January 2021

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

[REDACTED]  
[REDACTED]

**FAC ref:** 564/2020 & 594/2020

**Subject:** Appeal in relation to felling licence DL15 FL0027

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence DL15 FL0027.

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 DL15 FL0027 was granted by the Department of Agriculture, Food and Marine (DAFM) on 10 July 2020.

#### **Hearing**

An oral hearing of appeals 564/2020 and 594/2020, both against the decision to issue licence DL15 FL0027, was conducted by the FAC on 08 December 2020.

#### **Attendees:**

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch  
& Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Appellants\*: [REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Frank Barrett & Mr Alan Sheridan

[REDACTED] did not attend

#### **Decision**

An Coiste um Achomhairc  
Foraoiseachta  
Forestry Appeals Committee

Kilminchy Court,  
Portlaoise,  
Co Laois  
R32 DWT5

Eon/Telephone 076 106 4418  
057 363 1900

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, before deciding to affirm the decision to grant this licence (Reference DL15 FL0027).

The proposal is for the clear-felling and replanting of 7.34 ha at Urbaldeevan, Co Donegal. Current stocking comprises 100% Sitka Spruce planted 1989, two smaller areas (0.45 ha and 0.47 ha) are listed as burned. Replanting is with 100% Sitka Spruce. The application sought 0.37 ha of open space. The application was accompanied by a pre-screening document prepared by the applicant and by a harvest plan document.

The Underling soil type is approximately Blanket Peats (100%), the slope is predominantly moderate 0-15%. The proposal borders the Owenea River along its length, is partially within the West of Ardara Maas Road SAC, is partially within the West of Ardara Maas Road pNHA, is within the Gweebarra Sheephaven Catchment, the Owenea\_SC\_10 sub-catchment and the Owenea\_30 River Sub-Basin.

The application was the subject of desk assessment by the DAFM and the application was referred to Donegal County Council, Inland Fisheries Ireland (IFI) and the National Parks and Wildlife Services (NPWS). No response from the County Council is evidenced, the IFI sought that the proposal adhere to listed DAFM and COFORD guidelines, and the NPWS replied that it had no comments to make.

The DAFM completed a Stage 1 screening for Appropriate Assessment (AA) and identified Natura sites within a 15 km radius of the proposal as follows; West of Ardara Maas Road SAC, Lough Nillan Bog (Carrickatlieve) SAC, Lough Nillan Bog SPA, Slieve Toomey/Tormore Island/Loughros Beg Bay SAC, Sheskinmore Lough SPA, West Donegal Coast SPA, Inishkeel SPA, Gannivegil Bog SAC, Meenaguse/Ardbane Bog SAC, Meenaguse Scragh SAC and Roaninish SPA. The proposal was screened in for stage 2 Appropriate Assessment due to likely significant effects on the West of Ardara Maas Road SAC and the Lough Nilan Bog SPA. An Appropriate Assessment Report (AAR) and an Appropriate Assessment Determination (AAD) were completed and both reviewed by an external ecologist on 06 July 2020. The determination included that mitigation was required regards the specified qualifying interests of Otter, Merlin and Freshwater Pearl Mussel.

Licence issued 10 July 2020 and is valid until 31 Dec 2022 and is subject to what are relatively standard conditions (a) to (g) and the additional conditions (h) to (p), these are set out in full on the licence with reasons.

There are two appeals against the decision to grant the licence. The grounds of appeal include that the AA screening does not comply with *Finlay J in Kelly*, the decision is invalid as the Minister is being judge in his/her case, there have been no investigations as to whether the application site has complied with the requirements of EU law, the basic requirements of the NPWS have not been complied with. An issue raised regard the FAC in the appeal is not a valid ground of appeal against a decision to issue a felling licence. The grounds also include that there is a breach of Article 4(3) of the EIA Directive as there was no screening for EIA and a breach of Article 4(4) of the EIA Directive as the details of the whole project have not been submitted. One appellant contends that the licence and associated operations threaten the achievement of the objectives of the underlying waterbody



and states clear felling has the capacity to impact on water quality. The grounds also contend that the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation, the Stage 1 and 2 AAs are not legally valid and the Minister did not seek the opinion of the general public under Article 6(3) of the Habitats Directive. The grounds include that the licence does not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive and the licence conditions do not provide for the strict protection of Annex IV species. The grounds contend that the licence should include a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations, that plans and works must be inspected by the Forestry Service prior to, during and post works to ensure compliance. Also, the licence should include enforceable conditions regarding the notification of appropriate bodies, groups and the public concerned in the case of the spraying of chemicals.

In response to the grounds of appeal the DAFM stated the 7.34 ha felling and reforestation project was subject to the DAFM's AA Screening procedure, and the DAFM identified the possibility of the project having a significant effect on screened European sites, the West of Ardara/Maas Road SAC and the Lough Nillan Bog SPA. The project was screened in and an AA carried out on a precautionary basis and site-specific measures prescribed by the DAFM to mitigate against such impacts were described. The mitigations ensure that individually the proposed project will not prevent or obstruct the Special Conservation Interests or Qualifying Interests of the European sites from reaching favourable conservation status, as per Article 1 of the EU Habitats Directive. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set in the AAR and AAD statement ensure that the proposal will not result in any adverse effect on any European Site. The potential for the proposed project to contribute to an in-combination impact on the West of Ardara/Maas Road SAC or Lough Nillan Bog SPA was considered and it was concluded that the proposal when considered on its own, will not result in any residual adverse effect on the screened in European site and associated Special Conservation Interests, Qualifying Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on this European site, when considered in-combination with other plans and projects. The DAFM concluded that the identified potential pathways for any adverse effect are robustly blocked using avoidance, appropriate design and the implementation of best practice, and through the mitigation as set out within the AAR and AAD Statement. The DAFM determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. The site-specific mitigations identified in the Report and AA Determination Statement were attached as conditions of the licence issued for felling and reforestation project DL15-FL0027

The DAFM stated that regards Article 4(3) of the EIA Directive, because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either 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. DAFM also ruled out any breach of Article 4(4). Where the Minister for Agriculture, Food and the Marine receives such an application he or she is required amongst things to (1) Publish a notice of the application and (2) Inform the public that any person may make a submission or observation in writing concerning the application to the Minister within 30 days from the date of publication of that notice. Regards the opinion of the general public in the making of a related determination under Article 6(3) of Habitats Directive, Regulation 20 of the Forestry Regulation 2017 expressly provides that in the making his or her decision on a felling licence application the Minister must have had regard to any written submissions or observations made by the public under Part 6, and Regulation 19(4) expressly requires the Minister when carrying out an Appropriate Assessment of the implications of a felling licence application for a European site, either individually or in combination with other plans or projects, and in view of that site's conservation objectives, in doing so, to take into account inter alia, and if appropriate, any written submissions or observations made by the public under Part 6. The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and 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. There is no legal requirement to notify adjacent landowners.

The FAC held an Oral Hearing on 08 December 2020. The parties were invited to attend in person or to join electronically. One of the Appellants participated electronically while the other did not participate. The DAFM and the Applicant both participated electronically. The FAC sat in person at this hearing. At the hearing, the DAFM detailed their approach to processing and issuing the licence application and the reasons for the additional licence conditions. The DAFM confirmed the AAR and AAD were completed and reviewed by an external ecologist prior to any decision on the licence and the conditions of the licence include the mitigations from the AA. The Appellant sought that the written grounds of appeal are considered where not revisited at the hearing. The Appellant stated the proposal was planted in 1989 on Blanket Peat, is part of a larger block of forestry, and questioned if the planting was subject to EIA screening at that time and if not screened then a 'retrospective screening' is required. The appellant stated the licence requires replanting of the whole area with conifers, whereas over 50% of the proposal is within the SAC and there is Alpine Heath amongst that. Also, there are extensive aquatic zones with a 25m buffer of which 10m must be planted with broadleaves, yet the broadleaves are not quantified by area or reflected in the replanting schedule. The Appellant also stated the AA did not consider an ongoing threat of replanting with conifer trees. The Appellant questioned the use of a 100m buffer for the Merlin in the licence conditions on the basis 1.2 km is afforded a nesting Hen Harrier and the Merlin is at least as vulnerable to disturbance. There is no reference to weather conditions in the mitigation measures for the Freshwater Pearl Mussel. Areas for no woody weed removal are not mapped and the condition appears to be an enhancement rather than a mitigation. Also, potential damage to silt traps does not meet the test at Article 6(3) of the Habitats Directive. The Applicants described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan which is for operational reasons. The Applicants set out that the proposal



is on a flat site, the northern edge had suffered burning and a couple of pockets were included in the application in error as the existing area has scrub and Willow of 25m to 30 width between the forestry and the river, and the Bluestack Walking Trail goes along this intermediate area. The Applicants stated there is no change of land use involved and they were aware of their responsibilities regards the mitigations in the licence to protect the qualifying interests of the SAC and SPA. The DAFM identified other licence applications in the vicinity that were currently under consideration. The Applicants confirmed there was no evidence of windthrow affecting the current crop on the proposal site.

In addressing the grounds of appeal, the FAC considered the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU Directive sets out a list of projects in Annex I 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 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 7.34 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.

The FAC considered the AA screening, the AAR and AAD in this instance. The FAC considered that the procedures adopted in these were consistent with the requirements of Article 6(3) of the Habitats Directive and that the conclusions reached were sound. The FAC noted that the recommended conditions, as contained in the AAD, had been incorporated into the licence granted as conditions. The FAC concluded that the proposed development, carried out in accordance with the mitigation measures recommended in the Determination and attached to the licence as conditions, would not adversely affect the integrity of the Natura 2000 sites that were the subject of the AA, having regard to their conservation objectives. The licence condition (o) applied regards the Merlin has been reviewed by an external ecologist and there is no convincing evidence before the FAC that the good conservation status of the Merlin will be disaffected by the proposal with the mitigations afforded in the licence conditions. In addition, condition (l) requires silt fences should be checked at least once per month in wet weather, and repaired/upgraded if water is bypassing it, if torn, collapsed or not functioning. Condition (l) also states that if full of silt, this should be removed to a dry, vegetated area upslope of the silt fence, and that a series of smaller sediment traps are recommended over several larger sediment traps. The FAC considers these are important maintenance requirements regards the mitigations required by the licence to protect the qualifying interests of the SAC from

any silt from the proposed works, and that there is sufficient certainty in requiring this be undertaken once per month.

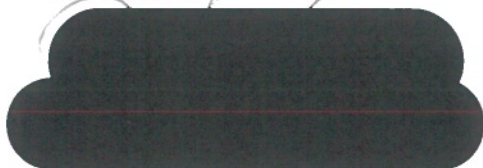
The proposal is within the Owenea\_30 River Sub-Basin, and based on the information before it, and having regard to the licence conditions that are in place for reasons of water quality, the FAC considered that there is no convincing reason to conclude that the proposed development would threaten the achievement of the objectives of protecting the underlying waterbody. Furthermore, the FAC considered that the conditions attached to the licence would provide for satisfactory protection of the environment, including water quality. The FAC also noted that all works included in a Harvest Plan and carried out must comply with the terms of the licence.

In regard to a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season and for the animal species listed in Annex IV (a) of that Directive, the FAC observe that the Appellant did not provide any site-specific details in relation to any species of concern. The FAC note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the information before it, the FAC concluded that additional conditions of the nature described by the Appellant should not be attached to the licence.

With regard any notification of certain parties in the case of any spraying of chemicals, the FAC notes that the use of pesticides is governed by the European Communities (Sustainable Use of Pesticides) Regulations 2012 (S.I.155/2012) and European Communities (Plant Protection Products) Regulations 2012 (S.I. 159/2012) that all users of pesticide products registered for professional use must follow the principles of good plant protection practice. The FAC concludes there is insufficient basis on which to apply an additional condition as contended by the Appellant.

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

A large black rectangular redaction box covers the signature of Pat Coman. A thin red horizontal line is visible across the middle of the redacted area.

Pat Coman, on behalf of the FAC