



An Coiste um
Achomhairc
Foraoiseachta
Forestry
Appeals
Committee

[REDACTED]
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June 18th, 2021.

FAC Ref: FAC 43/2020

Subject: appeal in relation to Licence TFL00401919.

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

Background

Felling Licence TFL00401919 was granted by the Department of Agriculture, Food and the Marine (DAFM) on January 2nd 2020

Hearing

An oral hearing of appeal FAC Ref: FAC 43/2020 regarding the decision to issue the licence TFL00401919 was conducted by FAC on May 11th, 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson) Mr Donal Maguire
Mr Luke Sweetman, Mr Dan Molloy.

Administrative Secretary: Mr Michael Ryan.

Applicant representatives: [REDACTED]

DAFM Representatives: Mr Seppi Hona, Ms Eilish Kehoe.

Appellant: [REDACTED]

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

Kilminchy Court,
Portlaoise,
Co Laois
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Decision

The 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, before deciding to set aside and remit the decision of the Minister regarding Licence TFL00401919.

The proposal is for the felling and replanting of 18.53ha at Garvagh, Shivdilla, Rowan, County Leitrim. The site is subdivided into three plots, plot one (3.34ha), plot two (10.30ha) and plot six (4.89ha). The trees were planted in 1989 and the species planted on the site consists of 100% Sitka Spruce to be replanted with 80% Sitka Spruce, 10% Broad leaves and with 10% open space provided. In line with details as provided by the DAFM, the soil type underlying the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by an aquatic zone. The digitised forest area, licenced within 5km for thinning and or clear-felling operations is 13.48%. The area does not contain an archaeological site, monument or archaeological amenity.

The Lurga river (EPA-named) flows in a south easterly direction to the east of the site, the Drimna river (EPA-named) flows to the west of the site with a separation distance of approximately 90m. The site is located in the Upper Shannon 26C Catchment, Sub Catchment Cloone [LOUGHRINN]_SC_010. Cloone _030 River Waterbody with Good status.

The applicant submitted an application pack which includes maps and a document titled 'Harvest Plan'.

The DAFM referred the application to Leitrim County Council on October 1st, 2019. Leitrim County Council replied on October 14th stating, the lands were not located within any designated area as identified in the County Development Plan. In terms of capacity to accommodate forestry, the lands were located in a high capacity area. No tree preservation orders were attached to the site. The site did not appear to impact on monuments listed for protection under Sec 12 of the National Monuments Act 1994. Prior to commencement of felling and transportation, the applicant must submit details of transport vehicles, routes to be used and timing of operations. All works should be carried out in accordance with Best Practice guidelines produced by the Forestry and Wildlife Service with particular reference to protecting water quality.

The DAFM carried out Appropriate Assessment screening (AAS) on one Natura 2000 site within 15km of the project site on Cuilcagh Anierin Uplands SAC concluding the site can be excluded based on objective scientific information and that the project will not have a significant effect on this European site due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection.

The DAFM consulted the following agency websites as part of the in-combination report. An Bord Pleanála website on December 19th 2019: decisions and considerations relate to four projects in the years 2008 – 2014 and one domestic planning application. DAFM iForis Map Viewer was also consulted outlining eight Forest Road and Afforestation projects under evaluation or at different stages within the process and twelve Felling Licences.

The licence (TFL00401919) issued on January 2nd, 2020 is subject to what are relatively standard conditions (a) to (g) and additional condition (h) requiring that:

- The applicant liaise with Leitrim County Council prior to commencing operations.
- Strictly adhere to Standards for Felling & Reforestation (October 2019).
- All guidelines to apply.

There is one appeal against the decision to grant the licence. In summary the grounds of appeal contend.

- The EIA Screening process and determination for this project are not consistent with Article 4 (paragraphs 3,4,5) of Directive 2014/52/EU of 16th of April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
- The AA Screening process, including the screening decision justification is flawed.
a) By restricting the in-combination assessment to plans and projects within the townlands of Shindilla and Garvagh, the assessment has failed to take account of plans and projects which may be immediately adjacent to the site. (b) the justification for screening out this application is based solely on the lack of any hydrological connectivity. Other sources/pathways which exist have not been considered. The precautionary principle must apply, AA is required.
- The licensed conditions are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance.
- The Harvest Plan provided is inadequate and does not provide all of the information required by the (Interim) Standards for Felling and Reforestation. As such there are not sufficient assurances that this project will not impact negatively on the environment.
- There is a discrepancy between the published area for clear-felling on September 18th, 2019, and the actual area of the license awarded. The area for the license awarded cannot be greater than that which was published for the public consultation.
- There are procedural flaws with this license which means that it must be cancelled
- The appellant refers to his rights under the Aarhus Convention.

The DAFM have provided a written statement in response to the grounds of appeal Summary: While a provision within the Act does impose an obligation on the Minister to grant a Tree Felling Licence with or without conditions or to refuse and also consider whether the performance of that function also requires carrying out screening for EIA or the carrying out of an EIA, that statutory obligation is discharged when it is identified that the application in question does not involve activity that falls within specified categories of forestry as set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001 as amended in Reg 13(2) of the Forestry Regulations 2017 and where in 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

Article 4(3) of the EIA Directive requires that when a Competent Authority in considering whether a category of project listed in Annex II of the Directive or in any national transposing legislation, e.g. initial afforestation, should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. However, 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 Articles 4(3) of the Directive are not applicable.

Article 4(4) of the EIA Directive requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation (i.e. where not otherwise automatically required by nationally prescribed thresholds or criteria) are required to be subject to a determination as whether a sub-threshold EIA needs to be carried out or not, the applicant is required to provide information on the characteristics of the project and its likely significant effects on the environment. A detailed list of information to be provided is specified in Annex IIA of the Directive (as transposed by Schedule 1 of the Forestry Regulations 2017) and includes, amongst other things, a description of the physical characteristics of the whole project. However, because the standard operational activities of clear-felling and replanting 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(4) of the Directive is not applicable.

Article 4(5) of the EIA Directive requires that where a category of project listed in Annex II of the Directive or in the national transposing legislation (i.e. where not otherwise automatically required by nationally prescribed thresholds or criteria) are required to be subject to a determination as whether a sub-threshold EIA needs to be carried out or not, and the Competent Authority decides that an EIA is not required, it must (a) State the main reasons for not requiring the EIA, with reference to the relevant criteria listed in Annex III of the Directive (as transposed by Schedule 3 of the Forestry Regulations 2017) and where proposed by the applicant, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment; and (b) Make the determination available to the public. However, because the standard operational activities 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(5) of the Directive is not applicable

The relevant AA procedure was applied as required. The screening information is clearly outlined on file including the justification used, the in-combination statement was issued on 23/12/19, the approval issued 2/1/20.

The licence conditions are clear and are outlined in detail in the licence issued to the applicant. The Harvest Plan submitted as part of the application is sufficient and outlines all requirements from an environmental point of view. Written detail which outlines the operations that will take place as part of the harvesting is also included.

The DAFM also state, the area submitted by the applicant is 18.53 ha. This area is also given in the licence issued under Schedule 2. There may have been some discrepancy when the maps were digitized by DAFM based on the map provided by applicant. The maps supplied and attached to the licence are correct.

The FAC held an oral hearing on May 11th, 2021, all parties were invited to attend and participate. The FAC sat remotely and the DAFM and the applicant participated remotely. The appellant did not participate or attend.

At the hearing the DAFM set out processing procedures undergone in issuing the licence- that assessment of the application was desk based only, that there were referrals to Leitrim Co Council on October 1st 2019, reply received on October 14th 2019 and that there was just one Natura 2000 site within 15km of the project at a distance of approximately 10km to the north west of the site..

As part of FAC questioning the DAFM were asked if the in-combination report was taken into consideration. The DAFM confirmed the in-combination report was received on December 20th 2019 and was taken into consideration prior to issuing their decision on the application. The DAFM were asked if there are streams on the site and if there were hydrological connections from the site to the Lurga river or to the stream to the west of the site, EPA name Drimna. The DAFM stated there may be mound drains or field drains on the site, that there is likely to be a hydrological connection from the site to the Lurga river and that there is no sign of a hydrological connection between the site and the Drimna stream to the west of the site. The representative, attending on behalf of the applicant stated, part of the site is cut over bog land. The FAC sought clarification from the DAFM in relation to the area of the site as stated on the licence TFL00401919 and the published area (advertised) for clear-felling on September 18th 2019. The DAFM administrative representative at the meeting reverted to check the site area advertised and outlined to the hearing, the area advertised on September 18th 2019 was 14.36 ha. Plots were re-digitised on September 20th 2019 to include Plot 1 giving the correct area of 17.74ha but was not readvertised'.

In addressing the grounds of appeal, the FAC considered, the appellants contention that the *Environmental Impact Assessment screening process and determination for this project are not consistent with Article 4 (paragraphs 3, 4 & 5) of Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.* Article (4)3 of the Directive states, 'where a case by case examination is carried out or thresholds or criteria are set out for the purpose of paragraph 2, the relevant selection criteria set out in Annex 111

shall be taken into account. Member states may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact statement, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5'.

The EIA 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 EIA is required. Neither afforestation nor deforestation 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 assessment under 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 considers that the felling of trees, as part of a clear-felling and replanting operation with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The FAC considers the licence issued is for the felling and reforestation of 18.53ha, is sub threshold 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 appellants contention that the Appropriate Assessment screening including the screening decision justification is flawed and by restricting the in-combination assessment to plans and projects within the immediate townlands, the assessment has failed to take account of plans and projects which may be immediately adjacent to the site, the justification for screening out this application is based solely on lack of any hydrological connection and the FS need to explain why the licence was drafted almost two weeks in advance of the in-combination report for the AA screening of this project.

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 the case of TFL00401919, the DAFM undertook stage one screening on one Natura 2000 site within 15km of the project site, following which, the site was screened out for stage 2 Appropriate Assessment. The DAFM also compiled an in-combination report on December 20th 2019 and concluded that the project when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. In relation to the appellants contention that the licence was drafted almost two weeks in advance of the in-combination report for AA screening. As part of the Inspector Certification report, the date recorded by the DAFM Forestry Inspector of 'Last Spatial Run date' is December 12th 2019, the in-combination report was completed on December 20th 2019 and the licence issue date as outlined on the licence is January 2nd 2020. The FAC is satisfied that AA screening and the in-combination report was carried out in accordance with S.I.477 of 2011 (as amended) S.I.191 of 2017 (as amended) and Article 6(3) of the Habitats Directive. The FAC finds no evidence to suggest pre-emption by the DAFM of the AA screening decision. The FAC are also satisfied that the conditions attached to the licence set out under schedule 2, felling operations authorised and other conditions along with schedule 3 and 4, re planting and

Harvest type description are set out clearly regarding requirements and procedures for the compliance of the applicant and the contractor. While the Harvest Plan submitted by the applicant does not include all of the information outlined in the Interim Standards for Felling and Reforestation, the Harvest Plan is an operational document for the contractor who also must comply fully with the conditions attached to the licence.

In relation to the appellants contention that there is a discrepancy between the published area for clear-felling on September 18th 2019 and the actual area of the licence awarded, the FAC have concluded that the DAFM erred by advertising the incorrect area (14.41ha) on September 18th 2019.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received at the oral hearing. The FAC concluded that there was a significant error by the DAFM in advertising the incorrect area on September 18th 2019. The FAC have decided to set aside and remit the decision requiring the Minister to re-advertise the correct area of 17.74ha and to consider any submissions received during the public consultation phase before making a new decision in respect of the felling licence application.

Yours sincerely.



Dan Molloy, on behalf of FAC.

