



An Coiste um  
Achomhairc  
Foraoiseachta  
Forestry  
Appeals  
Committee

[REDACTED]

March 26th 2021.

FAC ref: 403/2020

Subject: appeal in relation to Licence DL25-FL0091.

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 DL25-FL0091 was granted by the Department of Agriculture, Food and the Marine (DAFM) on June 26<sup>th</sup> 2020.

### **Hearing**

An oral hearing of appeal 403/2020 regarding the decision to issue the licence DL25-FL0091 was conducted by FAC on February 4<sup>th</sup> 2021.

### **Attendees:**

FAC:	Mr Des Johnson (Chairperson) Mr Pat Coman, Mr Luke Sweetman, Mr Dan Molloy.
Administrative Secretary:	Mr Michael Ryan.
Applicant representatives:	[REDACTED]
DAFM Representatives:	Ms Eilish Kehoe, Mr Luke Middleton.
Appellant:	[REDACTED]

An Coiste um Achomhairc  
Foraoiseachta  
Forestry Appeals Committee

Kilminchy Court,  
Portlaoise,  
Co Laois  
R32 DWT5

Eon/Telephone 076 106 4418  
057 863 1900

## Decision

The FAC considered all of the documentation on the file including application details, processing of the application by the DAFM, the grounds of Submissions made at oral hearing and all other submissions and has decided to affirm the decision of the Minister regarding Licence DL25-FL0091.

The proposal is for the felling and replanting of 5.54ha in Corker more, Co Donegal. The site, in one section, is planted with 100% Sitka Spruce and the planned restock species is 100% Sitka Spruce with 0.28 hectares of open space.

In line with details, as provided by the DAFM, the underlying soil type is 100% blanket peat and the slope is predominately moderate 0-15%. The project lies within a rural landscape in the River sub-basin Oily\_010 and Tullintene\_010 catchments area within the Glen-Oily-Bungosteen-Glenaddragh-Coastal catchment (100%), the Stragar\_Sc\_010 (100%) Sub-Catchment. The site lies between the Corker river to the East and the Tullintene river to the west but is not bounded by either river. The confluence of both rivers occurs approximately two kilometres to the south. The applicant submitted an application pack which included maps, harvest plan and an Appropriate Assessment (AA) pre-screening report.

The DAFM referred the application to Donegal Co Council and Inland Fisheries Ireland (IFI). There was no response from Donegal Co Council. The IFI responded on December 30<sup>th</sup>, 2019 requesting the applicant adhere to the following:

- Forestry and Water Quality Guidelines.
- Forest Harvesting and the Environment guidelines.
- Code of Best practice Ireland.
- Relevant COFORD guidelines.

DAFM carried out AA screening on Natura Sites within 15 km of the proposal. The screening comprised of seven SACs & four SPAs.

Lough Nillan BogSAC –Slieve Tooley Tormore Island/ Loughros Bog SAC - Meenaguse / Ardbane Bog SAC - St Johns Point SAC - Donegal Bay Murvagh - Meenaguse Scragh SAC were screened out due to absence of a direct upstream hydrological connection and subsequent lack of any pathway, hydrological or otherwise. Sheskinmore Lough SPA – West Donegal coast SPA - Donegal SPA were screened out due to separation distance between the Natura site and the project. West of Ardara / Mass Road SAC was screened out 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 pathway hydrological or otherwise.

Lough Nillan Bog SPA was screened in. The Inspector concluded that there is the possibility the project will have a significant effect on Lough Nillan Bog SPA: *‘Possible effects due to the proximity of potential habitat for the species listed as the Special conservation interest of this Natura site’*.



The DAFM produced an Appropriate Assessment Report (AAR) and an Appropriate Assessment Determination (AAD), both dated June 22nd 2020. The AAR and AAD were also reviewed by a second Forestry Inspector and external Ecologist.

The AAR lists the screened-out Natura sites, the reasons for their decisions and outlines that it has *'determined there is no possibility of the felling and reforestation project DL25-FL0091 having any significant effect, either individually or in combination with other plans or projects on any of the European sites screened out and that the project will not adversely affect the integrity of those European sites.'*

Section 6.1 of the AAR outlines the Special conservation interests of Lough Nillan Bog SPA - Merlin Falco Columbarius, Greenland White Fronted Goose and Golden Plover with *the objective of maintaining or restoring the favourable conservation condition of the bird species listed as Special conservation interests for this SPA.* This section also describes the required mitigations for the qualifying interests. Section 9 lists the 'site-specific' measures for Lough Nillan Bog SPA to be included as conditions on the felling licence.

*In relation to Merlin, the following mitigation measures are required, presented in the form of conditions to be attached to any licence issued:*

- *No felling or other forestry operations associated with this licence shall take place during the period 1st March to 31st August inclusive, within 100 metres of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland or within 100 metres of a clearing in the forest of larger than one hectare.*
- *Such operations can commence in sections of the project area furthest away from the 100 metre exclusion zone. Such operations can progress towards this exclusion zone but can only enter it during the period 1st September to 29th February inclusive*
- *The proposed works shall adhere to the Interim Standards for Felling & Reforestation (Oct 2019) and Environmental Requirements for Afforestation, December 2016 (DAFM, 2016)*

Following review by the DAFM Ecologist, the AA Determination report concludes *the felling and reforestation site is not in the locality of key habitats critical to the support of the favourable conditions of the features of the designated site. With the conditions outlined above, no negative impact is anticipated to the Qualifying interests.*

The AAR also considered other plans and projects for any in-combination effects with the proposal on European sites. The following planning sites were consulted: The Department of Housing, Planning & Local Government, An Bord Pleanála, the EPA, plus the DAFM's own internal records relating to forestry projects in the vicinity.

The DAFM AAR in-combination statement concluded *that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.*



The licence issued on June 26<sup>th</sup> 2020 is exercisable until December 31<sup>st</sup> 2022 and is subject to standard conditions plus additional conditions (H-O), in summary as follows.

(H) Aquatic zones setbacks should be installed and maintained at reforestation as specified in the Environmental Requirements for Afforestation (DAFM 2016).

(I) Machinery crossing of internal drains should be avoided.

(J) Historic mound drains and direct connectivity to relevant water courses or aquatic zones must be identified prior to commencement of operations. These pathways must be blocked.

(K) Water hotspots must be identified prior to harvesting and a clearly marked machinery exclusion zone of 10m must be established around them.

(L) Apply a 10m wide water exclusion zone along the edge of any aquatic zone on or adjoining the site. All machinery traffic and timber stacking are not permitted within this zone.

(M) Adhere to all water protection measures relating to water exclusion zones.

(N) No felling or other forestry operations associated with this licence shall take place during the period March 1<sup>st</sup> to August 31<sup>st</sup> inclusive, within 100M of the forest edge, where such forest edge is immediately adjacent to moors, heathland, peat bogs or natural grassland or within 100M of a clearing in the forest or larger than one hectare.

(O) The proposed works shall adhere to the: Environmental Requirements for Afforestation December 2016, Felling & Reforestation Standards, Appendix 21 of the Forestry Standards Manual, Forest Harvesting & the Environmental Guidelines (2000), Forestry Standards Manual (2015), Felling & Reforestation Policy (2017).

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

- There is a breach of Article 4(3) of the EIA Directive as the competent authority has failed to carry out screening for EIA.
- There is a breach of Article 4(4) of the EIA Directive. On the date for which this application for 5.54 hectares was made, a further 3 applications were made for the same FMU totalling 26.59ha. The appellant contends the application does not cover the whole project and that project splitting is not permitted. The purpose of the EIA Directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that the obligation to carry out an assessment within the meaning of Article 2(1) of the EIA Directive can be avoided.
- Breach of Article 4(4) of the EIA Directive 2014/52/EU. The application has not described any aspects of the environment which are likely to be significantly affected.
- 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 - 2021. Clear felling has the capacity to impact on water quality, especially as the site is on peat soil. This is a 'High Status' waterbody deemed to be 'at risk' by the EPA but there is no evidence that local authorities have had an input into the application.
- The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling and Reforestation



- Licence conditions do not provide a full system of protection for all wild birds during the period of breeding and rearing season consistent with the requirements of Article 5 of the Birds Directive.
- 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.
- The licence should contain a standard condition to notify the Minister re commencement and conclusion of operations.
- The licence should contain standard conditions that plans and works must be inspected by the Forestry Service, prior to commencement and conclusion of operations, to ensure compliance with environmental conditions.
- The licence should include conditions re notification to appropriate bodies, groups and the public if or when spraying with chemicals is taking place.

The DAFM have provided a written statement in response to the grounds of appeal as set out by the Appellant and have stated that their decision was issued in accordance with procedures S.I. 191/2017 and the 2014 Forestry Act. The written statement of response also states that the licenced application has been subject to DAFM AA screening procedure.

In summary, the DAFM statement to the FAC outlines, that while a provision in the Act does not impose an obligation on the Minister in the making of the decision on whether to grant a tree felling licence, with or without conditions, and to also consider whether that function requires carrying out screening for an environmental impact assessment and if necessary the carrying out of an EIA, that statutory obligation is fully discharged once it has been clearly identified that the relevant application does not involve activity or a project that falls within categories set out in schedule 5 part 2 of the Planning and Development Regulations 2001 as amended Regulations 13(2) of the Forestry Regulations 2017, afforestation projects which involve an area of 50 hectares or more and Forest road works which involve a distance of 2000 metres or more. With regard to 4(3) of the Directive and because the standard operational activities of clear felling and replanting of an already established area are not so categorised either in Annex II of the Directive or in the national transposing legislation, a screening assessment for sub threshold EIA did not need to be carried out by the DAFM in this case.

In relation to the licence application relating to an area of 5.54 hectares and the appellant's ground of appeal that, on the same date the application for this licence was submitted, a further three applications for clear felling licences were submitted for the same Forestry Management unit amounting to 26.59 hectares, the DAFM pointed out, the outputs from the Forest Management Unit planning process undertaken by the applicant and any resultant Business Area Unit should not be a material consideration in the DAFM's assessment *inter alia* of the potential environmental effect of the application.

Amongst other reasons, this is because the FMU planning process and any resultant BAU strategic plan is not an obligatory statutory process, arising either from the legislation governing the operation of the company (the Forestry Act 1988 and the Forestry (Amendment) Act 2009) nor from the provisions for forest management plans set out in Section 10 of the Forestry Act 2014.



Similarly, they do not constitute a plan or programme subject to the requirements of the SEA Directive, as transposed *inter alia* by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004, as amended. The DAFM have outlined that because the standard operational activities of clear-felling and replanting an already established forest area are not 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 DAFM in this case and thus Article 4(4) of the Directive is not applicable. 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, Achieving Objectives under Ireland's River Basin Management Plan 2018-2021*. Any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019). Those standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The water-related eco-system services such a buffer delivers are described in the document *Woodland for Water: Creating new native woodlands to protect and enhance Ireland's waters* (DAFM, 2018). The DAFM also state they considered the application and associated information as submitted by the applicant in support of the granted licence and deemed this information meeting DAFM requirements. It's 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 site-specific mitigations identified in the AAR and AAD statement were attached as conditions of the licence issued for felling and reforestation for project DL25-FL0091.

It is the Minister that may, at any time, attach or vary conditions to any licence granted (see Section 17.4 of the 2014 Forestry Act). In this instance a commencement/conclusion notice in respect of the proposed project was considered not warranted by DAFM.

The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. 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 for forest owners to inform adjacent land owners of their intention to spray, (although many do) nor is there a need for animals in adjacent properties to be moved as the application of this PPP is by hand in a very targeted manner that minimises exposure of the environment. Regulations require users of this PPP to be professionally trained and they are required to refrain from application within 20m of watercourses.

The FAC held an oral hearing on February 4<sup>th</sup> 2021. All parties were invited to attend and participate. The FAC sat in person and remotely and the DAFM participated remotely. Neither the appellant nor the applicant participated.

**An Coiste um Achomhairc  
Foraoiseachta  
Forestry Appeals Committee**

Kilminchy Court,  
Portlaoise,  
Co Laois  
R32 DWT5

Eon/Telephone 076 106 4418  
057 863 1900



At the hearing the DAFM set out the processing procedure undergone in issuing the licence, that there were referrals to Donegal Co Council, (no response received) and IFI who replied on December 30<sup>th</sup> 2019. IFI responded stating the applicant should adhere strictly to the appropriate sections of Forestry and Water Quality Guidelines, Forest Harvesting & the Environment guidelines, Code of Best practice Ireland and relevant COFORD guidelines. As part of FAC questioning, the DAFM were asked about a stream running from the northern end of the site into the Tullinteane river, the DAFM stated the stream rises within the site and flows into the Tullintaene river. Corkermore wind farm lies to the north east of the site and while a stream rises within the site (DL25-FL0091), this stream flows to the west of the wind farm. Two other streams rise further to the north of the site, approximately 400 metres separation, both flowing in a southerly direction connecting to the Tullinteane river, there is no hydrological connection between either of the streams with Corkermore wind farm or Lough Nilan Bog SAC.

The FAC sought clarification on a long rectangular area to the north west of the site, the DAFM confirmed this area is part of the site DL25-FL0091, the DAFM also confirmed that the AAR and AAD were completed and considered prior to their decision to grant the licence.

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 felling and replanting of 5.54 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.

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 AA screening in relation to eleven sites, ten of the sites were screened out and it was determined one of the sites, Lough Nillan Bog SPA, required AA.



The DAFM completed an AAR in June 2020 providing an analysis of the potential adverse effects on Lough Nillan Bog SPA as a result of the felling and reforestation project.

The AAD report was completed on June 22nd and was reviewed by an external Ecologist. As part of the AAD report the DAFM outlined that they looked at information from iForis, including GIS layers on the map viewer, responses from referral bodies, submissions from third parties and the DAFM AA internal report. In relation to Lough Nillan Bog SPA, *the DAFM stated as a result of mitigation measures outlined in the AA determination report, it has been determined the project will not adversely affect the integrity of any European site including Lough Nillan Bog SPA.*

The FAC are satisfied the mitigation measures outlined in the AAD report, which were incorporated into the felling licence as conditions, will protect Lough Nillan Bog SPA and will not adversely affect the integrity of the site.

The FAC considered that there is no convincing evidence that the licence and associated operations would threaten the achievement of the objectives for the underlying waterbody as set out under the River Basin Management Plan. In this case the FAC concluded, having regard to the nature and scale of the proposed development, and to the conditions of the licence designed to protect water quality, there would be no likelihood of any impact on the underlying waterbody.

The FAC considered the Appellant's contention that the Harvest Plan submitted by the Applicant was not consistent with the requirements of the Interim Requirements for Felling and Reforestation (DAFM, 2019). The FAC concluded that the Harvest Plan is in fact a document outlining general environment and safety rules and that all of the licenced operations on site must comply with the conditions of the felling licence.

There is no specific information before the FAC in regard to Annex IV species or wild birds which would give rise to the necessity for attaching additional conditions to the licence.

The FAC considered the appellants grounds that the licence should contain conditions relating to the commencement, carrying out and conclusion of operations. The FAC noted that the DAFM inspect a number of licences after completion of operations in order to establish the licensee's adherence to the conditions of the licences.

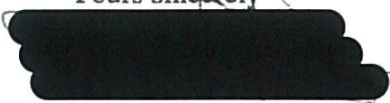
The use of PPPs is covered by way of Statutory Instruments in Ireland and there is no legal requirement to inform the public, bodies and groups of the intention to spray in individual cases.

Compliance and enforcement of conditions is a matter for the DAFM at any stage of the development and the FAC considers that the additional conditions requested by the appellant are not required.



In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is satisfied that there was no serious or significant error or series of errors in making the decision and the decision was made in line with fair procedures. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely



---

Dan Molloy, on behalf of FAC.



