



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

07 May 2021

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FAC ref: 545/20

Subject: Appeal in relation to felling licence TFL00298219

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 TFL00298219.

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 TFL00298219 was granted by the DAFM on 03 July 2020.

Hearing

An oral hearing of appeal 545/20 was conducted by the FAC on 20 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 TFL00298219).

The proposal site comprises 5.68 ha of clear-felling of Sitka Spruce 100% all in one plot, and replanting is with 85% Sitka Spruce and 15% Additional Broadleaves at Knockacappul, Co Sligo.

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Kilminchy Court,
Portlaoise,
Co Laois
R32 DWT5

Eon/Telephone 057 866 7167
057 863 1900

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 proposal is within an area sensitive to fisheries. The application was referred to the Inland Fisheries Ireland (IFI), the National Parks and Wildlife Services (NPWS) and to Sligo County Council. There is no response evidenced from the IFI or from the NPWS. The Sligo County Council replied regards water quality, site entrance, public road infrastructure, the use of ½ loads and regards liaising with the Area Engineer. The Inspector's Certification states 11.42 ha for felling/thinning within a 500m radius in the past 3 years.

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 5 European sites were subject of the AA screening; Brickleive Mountains and Keishcorran SAC, Lough Arrow SAC, Lough Arrow SPA, Lough Gill SAC and the Unshin River SAC. All sites are screened out and the reasons for the screening out 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.

The DAFM also carried out an in-combination assessment (24 June 2020). The assessment using in the vicinity of the project area within the river sub-basin Feorish (Ballyfarnon)_010, identified 4 planning retentions and 8 dwelling planning permissions (2015 to 2019), checks of An Bord Pleánala and of the EPA identified no plans or projects for consideration, and other forestry related projects comprised 14 afforestation projects (2015 to 2020), 3 forest road projects (2015-2019), 19 private felling licences (2017-2020), and 3 Coillte felling licences (2017-2021). The project identified as lying in the rural landscape of Knockacappul County Sligo and the River sub-basin Feorish (Ballyfarnon)_010 has forest cover of 18%. 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.
- (i) prior to the commencement of felling activities a traffic management plan and a designated haulage route should be submitted and agreed with the area engineer

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

1. Breach of Article 4 (3) of the EIA Directive 2014/52/EU. This licence is in a class of development covered under Annex II of the EIA Directive. Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account. A number of criteria set out in Annex III do not form part of the FS screening assessment and have not been taken into account, therefore this application should be referred back to the EIA screening stage.



2. DAFM has failed to carry out an adequate EIA screening of the proposed development. The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned.
3. This licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. Clear felling has the capacity to impact on water quality, including Groundwater which is At Risk on this site.
4. There is no evidence that the impact on a non-designated European Annex I habitat has been adequately considered as part of the approval process
5. There is no AA screening on file for this licence. In the absence of AA screening no licence should have been awarded.
6. Inadequate consideration of feedback from a Consultation Body. Sligo County Council, in its submission, requested that a number of conditions be incorporated into the licence. A number of these conditions, which relate to environmental protection, have not been incorporated into the licence. Failure to incorporate the recommendations of a prescribed body leaves potential for a significant environmental impact from these works.
7. The licence contains no protection for the area of private land over which it is proposed to haul the timber. There is no mapping of the environmental features of these lands which may be impacted by the haulage.
8. Commencement and conclusion of operations. 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.
9. The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation
10. The licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals. Current legislation and regulations do not provide for adequate warning / protection for local residents, landowners and special interest and community groups within the zone of influence of the spraying.
11. 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.
12. 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

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.

In regard to Article 4(3) of the EIA Directive, this Article requires that when a Competent Authority is 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 Article 4(3) of the Directive is not applicable.

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.

Section 2

The felling and reforestation project licenced as TFL00298219 has undergone the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note & iFORIS Standard Operating procedure 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 reach a decision in approving the felling licence.

The FAC held an Oral Hearing on 20 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 referrals made to the IFI, the NPWS and to



Sligo County Council and a response was received from the County Council only. The DAFM representatives acknowledged there was a reference to a monument on the Inspector's certification on IFORIS but confirmed that while there are sites at 150m to 200m distance to the south/southeast of the proposal, there was no archaeological monument on the proposal site, the closest being site 035-028, a ring fort, which is divided from the proposal by a pasture field. The DAFM stated that while there are no turloughs in the immediate area, there are some at the other side of Lough Arrow. Also, the river water body is not considered sensitive in this location. The proposal site is very flat in the main and comprises brown earth and gley soils. The DAFM stated there was a lack of pathway for any effects on European or Nationally designated sites. In respect of non-designated blanket peat areas at c. 600m to south and to north, the DAFM responded that once beyond 200m the proposal is deemed not to have an effect. The DAFM representative responded to the FAC that the County Council reply made reference to items not on the site and the response seemed generic, and that where the County Council puts conditions on the use of the public road then those conditions should therefore apply to all users. The DAFM stated the records show there was consultation and that the DAFM's statement on the appeal should be considered by the FAC.

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 clearfelling and 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 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 clearfelling and replanting, 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 5 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 24 June 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 are the Lough Arrow SAC at c. 2.7km, the Unshin River SAC at c. 4.3km and the Bricklieve Mountains and Keshcorran SAC at c. 6.3 km, all of which are within the Sligo Bay catchment and have no hydrological connection to the proposal which is fully within the Upper Shannon 26A catchment. 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 and considers the screening conclusion by the DAFM is sound.

The appellant contends 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 animal species is identified by the appellant as being of particular concern to the proposal site and is cognisant of the protections afforded to animal species in legislation. Regards the contention the licence is contrary to the Birds Directive, again no specific evidence has been submitted in respect of the presence of wild 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). 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.

The appeal grounds contend 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 site contains no aquatic zone and is subject to the Forestry and Water Quality Guidelines. The closest EPA marked watercourse is c 350m north of the proposal and there is an unmarked stream c. 300m to the south of the proposal and both are part of the Feorish (Ballyfarnon)_010 river waterbody for which the WFD status is good per the EPA website. A minor watercourse c 100m to west also flows north per 25" mapping flow arrows to the identified northern watercourse, and is separated by pasture fields from the proposal. On the basis of the foregoing the FAC does not consider there is any significant risk to the underlying waterbody from this clearfelling and replanting proposal.

In respect of the grounds that the licence should contain a condition that the Minister be notified at both the commencement and conclusion of operations, the FAC has considered the period of the



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licence and considers the enforcement of the licence conditions is a matter for the DAFM and does not require additional conditions be attached to the licence.

The use of plant protection products is covered by way of Statutory Instruments in Ireland and there is no legal requirement to inform the public, groups or bodies 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.

While the appellant did not identify an Annex 1 habitat in their grounds, the matter was addressed at the hearing where the closest such habitats were stated to be c. 600m to south and to north of the proposal. In the absence of any real basis for an effect on these habitats the FAC finds no reason on which to affect the decision to issue the licence.

Regards the grounds that there is inadequate reflection of the County Council's response in the licence conditions, the FAC considers that water quality is addressed in respect of this proposal. The FAC also considers road access and haulage is also adequately addressed in condition (c) and condition (i) in requiring prior consultation with the Area Engineer.

The application harvest plan maps identify access to the public road at the southwest. Orto-imagery does not indicate a hardcore roadway within the internal fields. Access is shown to be along the edge of pastureland boundaries and then to a farm lane before accessing the public road through an existing entrance. The provision of any forest road will require a valid forest road licence and such is not licenced under the decision the subject of this 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 TFL00298219 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

