



[REDACTED]

September 8th, 2021.

FAC Ref: FAC 674/2020.

Subject: appeal in relation to Licence TFL00492120.

Dear [REDACTED]

I refer to the 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 TFL00492120 was granted by the Department of Agriculture, Food and the Marine (DAFM) on August 19th, 2020.

Hearing

An oral hearing of appeal: FAC 674/2020 regarding the decision to issue the licence TFL00405119 was conducted by FAC on June 17th, 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson) Mr Seamus Neely,
Mr Luke Sweetman, Mr Dan Molloy.

Administrative Secretary: Mr Michael Ryan.

Applicant representatives: [REDACTED]

DAFM Representatives: Ms Eilish Kehoe, Mr Seppi Hona.

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 the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal and all other submissions before deciding to affirm the decision of the Minister to grant licence TFL00492120.

The proposal is for the felling and reforestation of 9.7ha at Doongelagh, Killadoon, Sligo. The site is subdivided into three plots and currently planted with, plot 1 Ash (.63ha) plot 2 Norway Spruce - Wind Blow impact (.67ha) and plot 3 Sitka Spruce (8.40ha). The trees were planted in 1995 and the planned dates of felling are set out as, plots 1 and 2 (2020), and plot 3 (2029). The site will be re-planted with 100% ADB in plot 1, plot 2 to be planted with 100% Sitka Spruce and plot 3 to be planted with 85% Sitka Spruce and 15% Broadleaves. The site is located in the River Sub Basins Douglas (Sligo)_010, Status Poor and Feorish (Ballyfarnon) _010, Status Good.

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

In line with details as provided by the DAFM, the predominant soil type underlining the project area is podzols in nature. The slope is predominantly flat to moderate (<15%) and the project area does not adjoin or contain an aquatic zone(s). The vegetation type(s) within the project area comprise conifer/broadleaf plantation. The approximate digitised forest area licenced for thinning and or clear-felling operations within 5km of the project site is 7.36%. The site is not within an area described as potentially acid sensitive by the Forest Service. The site is within an area designated as sensitive to fisheries. The site does not contain an archaeological monument and is not contiguous to any recorded monuments or feature, but historic OS maps show a farmyard with attached infields within the felling area. The site is not within a prime scenic area in the County Development plan nor within an area listed in the inventory of Outstanding Natural Landscapes, it is not within a designated SAC, SPA, NHA or pNHA.

The DAFM referred the application to North Western Regional Fisheries Board, (IFI) Ballina and also to Sligo County Council (SCC) and the National Parks and Wildlife (NPWS).

IFI replied on September 17th, 2020 stating:

- The lands lie in the Lough Bo catchment which provides habitats for brown trout, as a result SCC request strict adherence of Forestry and Water Quality Guidelines.
- The site is steeply sloped, robust silt control measures must be put in place to avoid polluting discharge.
- No forestry machinery to cross watercourses, no felling operations to take place when soils are saturated during extreme rainfall events.
- Preference to plant with suitable native tree species.
- Materials used in the transport of young species trees to be disposed of at a licenced facility and disposal records should be retained.
- IFI also state the use of silt traps will be essential in the protection of water courses along roadway verges. Silt traps should be properly maintained and regularly checked prior to work starting on the site.

The NPWS replied on May 14th, 2020 referring to the Habitats and Birds Directives 2011 regulations in relation to screening for Appropriate Assessment, record keeping obligations and also drawing attention to protected species of Flora and Fauna, key habitats including breeding sites and resting places.

SCC replied on May 8th, 2020 stressing the proposed development must not have a negative impact on water quality / surface waters in proximity to the site. All site works should be carried out in compliance with Forestry and Water Quality Guidelines and Forestry and Landscape Guidelines issued July 2000. Re-planting to be carried out in line with Buffer Zone Guidelines, Ground preparation guidelines, Fertiliser Application and Storage Guidelines, Chemicals, Fuel and Machine oil Guidelines. SCC also requested buffer zones of 25m in proximity to water courses during any proposed re-planting. Operations to be supervised by a competent technical professional person. Harvested material to be removed by half loads and discussions on approved/agreed haulage route to take place with SCC Area Engineer. Traffic management plan to be submitted.

A record of screening for Appropriate Assessment has been provided by the DAFM as part of the Inspector Certification Report. Seven Natura 2000 sites were screened within a radius of 15km of the project site, six SAC's and one SPA - all sites were screened out. The following sites, Bricklieve Mountains and Keishcorran SAC, Lough Arrow SAC, Lough Gill SAC, Templehouse and Cloonacleigha Loughs SAC, Union Wood SAC and Unshin River SAC were screened out for reasons of the absence of any aquatic zone within or adjoining the project area and the absence of any significant relevant watercourse(s) within or adjoining the project area. Lough Arrow SPA was also screened out as a result of the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site.

The DAFM carried out an in-combination report on June 23rd, 2020. The following on-line planning agency websites were consulted focusing on the general vicinity of the project area in the River Sub Basin Douglas (Sligo)_010 and Feorish (Ballyfarnon)_010.

Roscommon County Council: Nineteen domestic dwelling applications from 2015 – 2020, Public house extension 2015, Teach Ceoil (Music house) 2016, three Forest road entrance applications 2016 - 2018, all weather Playing pitch 2017, School redevelopment 2018

DAFM internal records: Afforestation projects - Planting completed on six applications 2015 – 2017. Pre-approval letter issued on three applications, 2017. Approval at different stages on eleven projects, 2018- 2019. One application referred to ecologist in 2020. Forest road projects: ten from 2015 – 2019.

Private felling licence projects: Twenty-nine, 2017 – 2018. Coillte felling Projects planned and approval pending: (11) 2017 – 2018.

The DAFM concluded that individually, the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions for individual Natura sites. Consequently, the DAFM deems that there is no potential for the project to contribute to any such effects, when considered in-combination with other plans and projects.

The felling licence (TFL00492120) issued on August 19th, 2020, is subject to relatively standard conditions (a) - (g) and additional conditions (h) – (j) requiring that:

- (h) Strictly adhere to Standards for Felling and Reforestation (October 2019). These standards replace the existing Forage Harvesting and the Environmental Guidelines (2000).
- (i) Adhere to Archaeology conditions in attached report.
- (j) The area around the historic farmyard should be noted and great care taken to avoid impacting any upstanding historic fabrics (e.g., stone walls) during the works, access and egress etc. No replanting within 10m of any upstanding historic buildings or within 5m of attached infields relating to the historic farmyards. See attached archaeological report and illustrative map for further details.

There is one appeal against the decision to grant the licence. The summarised grounds of Appeal are as follows:

- 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.
- DAFM has failed to carry out an adequate EIA screening of the proposed development.
- The afforestation of these lands was carried out without any screening for the requirement for an EIA. This was contrary to EIA Directive.
- 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 2018-2021.
- The Stage 1 AA conclusion is not legally valid.
- This licence should contain a condition that plans and works must be inspected by Forestry Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations.
- Commencement and Conclusion of Operations: the licence should contain a standard condition for the licensee to notify the Minister at both commencement and conclusion of operations pertinent to the licence.
- The Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation.
- Inadequate consideration of feedback from a Consultation Body.
- 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.
- 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.

- 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.
- A licence cannot be awarded which absolves the licensee from future legal or regulatory requirements.

The DAFM has provided a written statement in response to the grounds of appeal as set out by the Appellant which states the following: 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 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 the 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 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 the 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 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 granting 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 TFL00492120 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 paperwork submitted as part of the application was deemed sufficient to determine an outcome and approve the licence with conditions.

Oral Hearing.

The FAC held an oral hearing on June 17th ,2021. All parties were invited to attend and participate. The FAC sat remotely and the DAFM participated remotely. The applicant and representative for the applicant also participated remotely. The appellant did not attend.

At the hearing the DAFM set out the processing procedures undergone in issuing the licence, that there were referrals to SCC, the NPWS and IFI, that the application was desk assessed and that an AAS was carried out. The DAFM clarified that an in-combination report was carried out on June 23rd ,2020 and that the report was taken into consideration as part of the licensing process.

The FAC sought clarification from the DAFM of the area applied for in the application of April 22nd , 2020 and the area stated in the referral notification to IFI on May 8th , 2020. The application as submitted states; plot (1) .63ha, plot (2) .67ha and plot (3) 8.40ha. The referral notification to IFI stated .65ha of clear-fell Ash, .65ha of windblow Norway Spruce 16.59ha of clear-fell Sitka Spruce. The DAFM stated that this was an error in over stating the area of plot (3) in the referral notification to the NPWS. The FAC considers the over declaration of plot (3) as a clerical error by the DAFM when forwarding the referral notice to IFI on May 8th , 2020.

The DAFM was asked by the FAC, why the observations/ recommendations outlined by the IFI were not referred to in the licence. The DAFM stated, the reply from IFI, dated September 16th, 2020 was received outside of the statutory timeline, the licence was previously issued by the DAFM on August 19th, 2020.

The applicant in addressing the FAC stated, he is involved in Forestry for two reasons, to provide a family income and for Environmental concerns. The applicant also informed the FAC that most of the trees in Plot (2) were blown down and going to waste, accumulating a considerable financial loss to his family and to the environment. The applicant also stated that it was a ridiculous situation that timber had to rot on the ground. The Chairman informed Mr Merrick that some of the points he put forward may be outside the remit of the FAC.

The FAC sought clarification from the representative for the applicant in relation to the Harvest plan which stated, 'Silt traps will be installed within the drains along roadside drains and along extraction routes as required to intercept sediment and needles. The FAC were informed that there is mound at plots 2&3 of the site along the roadside (man-made) which exists from the original development of the site. The FAC was also informed that silt traps will be used to intercept any sediment or needles from entering roadside drains and that there is no other hydrological connection from these drains.

The DAFM were asked about the risk of silt or sediment entering Lough Bo, The DAFM stated the applicant is obliged to comply with the Standards for Felling and Reforestation Guidelines, that the topography of the site is relatively flat, that the lake is bisected from the site by a country road and that there is no hydrological connection from the site to Lough Bo.

Based on observation from Bing maps imagery, the FAC sought clarification from the applicant in relation to an area of the site within plot (3) where a portion of planted species appears to be under performing. The applicant's representative stated, there is underlying peat in a small section of the plot and that trees were underperforming in this area. The applicant also stated that if the licence is granted following appeal, these trees would be retained.

The FAC sought clarification from the DAFM on the total area declared on the application, 9.7ha, the area stated on the licence as issued on August 20th, 2020 (9.7ha), the area stated on public declaration of the application, 9.6ha and the public notification of decision declared on August 21st, 2020 (9.6ha). The DAFM in providing clarification, read the following statement into the record of the appeal hearing and later provided a draft text of the statement to the FAC:

In a lot of instances with private licences there will be a difference between the applied for area (as submitted by the applicant on the application form) and the digitised area (as measured by DAFM's computerised mapping and payment system IFORIS against the maps supplied by the applicant). The digitised area is the entire area of the forest plot within the perimeter boundary of that plot.

The area referred to on table 1, page 5 of the licence and on table 2 page 8 of the licence are the areas stated on application submitted by licensee and are referred to as such on the licence. The maps that accompany the licence are the digitised maps and as per Schedule 4

page 9 of the licence all harvesting events should be carried out within the boundaries of the relevant land.

The FAC are satisfied that the variance between the site area declared at application and the area declared by the DAFM on public declaration of the decision on August 21st, 2020 arises as a result of the digitisation process carried out by the DAFM and that no significant or serious error was made by the DAFM in this regard.

In considering the grounds of appeal, the FAC considered the appellant's contention that there is a breach of Article 4 (3) of the EIA Directive 2014/52/EU, that this licence is in a class of development covered under Annex II of the EIA Directive and a number of criteria set out in Annex III do not form part of the screening and have not been taken into account, therefore this application should be referred back to the EIA screening stage.

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 felling and reforestation and does not consent to any change of land use. As such, the FAC have concluded that there is no breach of any of the provisions of the EIA Directive.

The FAC considered the appellant's contention that the afforestation of these lands was carried out without any screening for the requirement of an EIA and that this was contrary to EIA Directive. The FAC noted, there is no specific information submitted by the appellant to indicate that the existing development is in any way unauthorised or whether it was initial afforestation for the purpose of conversion to another type of land use, or to conclude that there was any significant or serious error made in granting the licence under appeal in this regard.

In relation to the appellants contention that 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 2018-2021. The FAC noted from the Harvest plan submitted by the applicant that clear-felling will be carried out during suitable weather conditions and that silt traps will be installed along roadside drains and extraction routes for the purpose of intercepting sediment and needles. The FAC also noted that there are no streams or rivers adjacent to or flowing through the site and that while the site lies within the Lough Bo catchment area, the site is separated from Lough Bo by a public road and there is no evidence before the FAC indicating a hydrological connection between the project area and Lough Bo. In this case the FAC concluded, having regard to the nature and scale of the proposed development, the conditions of the licence designed to protect water quality and the

measures outlined in the Harvest Plan, there would be no likelihood of any impact on the underlying waterbody.

In consideration of the appellant's contention that the stage (1) AA conclusion is not legally valid, the FAC considered the detail of the AAS carried out and found no reason to consider that the conclusion reached by the DAFM that Stage 2 Appropriate Assessment is not required or that the procedures followed were incorrect.

The FAC considered the appellant's contention that this licence should contain a condition that plans, and works must be inspected by the Forestry Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations; 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

The FAC considered the appellant's contention that 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. 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 licence and that enforcement of licence conditions is a matter for the DAFM.

The FAC considered the appellant's contention that, the Harvest Plan is not consistent with the requirements of the Interim Standard for Felling & Reforestation. The FAC concluded that the Harvest Plan is a document outlining general environmental and safety rules and that the licenced operations must comply with the conditions of the felling licence.

The FAC considered the appellant's contention in relation to inadequate consideration from a consultation body; the DAFM referred the application to North Western Fisheries Board, (IFI) Sligo County Council (SCC) and the National Parks and Wildlife (NPWS). Replies were received from all referrals, however IFI replied outside of the statutory timeline. The NPWS stated '*The Department has no comment to make on this application.*' also attaching general points of relevance. SCC having reviewed the referral correspondence from the DAFM provided comments and advice. The FAC is satisfied that the conditions attached to the licence address the observations/comments outlined by SCC in their reply of May 19th, 2020.

The FAC considered the appellants contention that 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. 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.

In relation to the appellants contention that 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

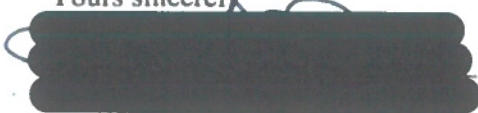
disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration and in addition that licence conditions do not provide a system of protection for Species of wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, the FAC noted that there is no specific information before it in regard to Annex iv species or species of wild birds which would give rise to the necessity for attaching additional conditions to the licence.

The FAC considered the appellants contention that a licence cannot be awarded which absolves the licensee from future legal or regulatory requirements. The FAC are satisfied that the licensee is obliged to and must act in accordance with the law and carry out works in compliance with the requirements set out by the competent authority.

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.