



An Coiste um Achomhairc  
Foraoiseachta

Forestry Appeals Committee

30 November 2020

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

Our ref: 212/2020

**Subject:** Appeal in relation to felling licence DL31 FL0062

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 DL31 FL0062.

The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by the parties to the appeal.

#### Background

Felling licence DL31 FL0062 was granted by the Department on 03 April 2020.

#### Hearing

An oral hearing of appeal 212/2020 was conducted by the FAC on 12 November 2020.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Bernadette Murphy & Mr Pat Coman
Secretary to the FAC:	Ms Ruth Kinehan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett & Mr Joseph O'Donnell

#### Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, including the response to a request for further information by the FAC, before deciding to set aside and to remit the decision to grant this licence (Reference DL31 FL0062).

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The proposal is for the clear-felling and replanting of 22.88 ha at Boeeshil, Corlea, Co Donegal. Trees to be felled are mixed species, in the greater part Sitka Spruce and Lodgepole Pine with some Japanese Larch and Norway Fir and the replanting is with 100% Sitka Spruce per the licence. Application seeks 1.14 ha of open space. The Underling soil type is approx. Blanket Peats (55%) & Podzols (Peaty), Lithosols, Peats (45%) The slope is predominantly moderate 0-15%. The proposal is in the Erne Catchment and the Billary\_SC\_10 sub-catchment, and the following river sub-basin districts; Sessiaghkeelta\_010 (27%) & Waterfoot\_010 (73%). Site is adjacent to a lake water-body, Ayellowin Lough, and to an EPA mapped watercourse – both at western edge.

Application included a harvest plan and a pre-screening report by the applicant identifying 8 SAC sites and 2 SPA sites within 15 km of the proposal site, and detailing other forestry projects of 14.82 ha clear-fell considered in combination with the proposal. The application was the subject of a desk assessment by the DAFM, who undertook an Appropriate Assessment Screening, dated 02 April 2020, and included for 14 European Sites, an in-combination assessment is dated 03 April 2020, and the proposal was screened out for Appropriate Assessment. There was referral to Donegal County Council with no response evidenced and to Inland Fisheries Ireland who replied on 23 Dec 2019 seeking strict adherence to Forestry and Water Quality Guidelines, Forest Harvesting and the Environment Guidelines, Code of Best Forest Practice – Ireland and the relevant COFORD guidelines.

The licence was issued on 03 April 2020 subject to what are relatively standard conditions (a) to (h) and the additional conditions (i), (g) to (z), (aa) and (bb), these are set out in full on the licence.

There is a single appeal against the decision to grant the licence. The grounds contend that the decision does not comply with 4(3), 4(4) or 4(5) of the Environmental Impact Assessment Directive 2014/52/EU, the application should be referred back to an EIA screening stage, and all projects, including this one, within the applicant's Forest Management Unit must be considered to form a part of the whole project. The appellant stated 8 other clear-felling applications were submitted with this proposal and total 68.82 ha. The appellant stated the 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 and there is a significant in-combination effect for the catchment and an EIA should be required. The Appropriate Assessment stage 1 screening and the Appropriate Assessment Determination are not legally valid and the proposal is partly within the catchment of the Lough Derg (Donegal) SPA (004037) and a proportion of the surface waters from this site drain into the SPA, and should be referred back to the competent authority for re-screening. Also, the site is in a catchment, the Erne-Ominey, with an extant population of Freshwater Pearl Mussel. The licence conditions do not provide a system of protection for wild birds consistent with the requirements of Article 5 of the Birds Directive. Finally the Forest Service failed to supply, on request, a copy of the EIA screening report for this licence, and there is an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive, refers to CJEU case Mellor C75/08 paragraphs 57-60, and providing of records that informed the decision.

In response to the appeal, the DAFM stated that the standard operational activities of clear-felling and replanting already established forests are not included under the specified categories of forestry activities or projects for which EIA screening is required as 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. The DAFM contended that screening for EIA was not required in this case and that no breach of Articles 4(3), 4(4) or 4(5) had occurred. The DAFM stated any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. The 22.88 ha felling and reforestation project licenced as DL31-FL0062 has been subject to the DAFM's AA Screening procedure with regards European sites within 15 km which considered the project design in the absence of measures that might otherwise mitigate impact on Natura Sites, the location of the project, whether any inputs and outcomes of the project could represent a 'source' that could impact on the Natura site (including its qualifying interests and conservation objectives), and whether there is a pathway that could link the proposal to the Natura site (its qualifying interest and conservation objectives). In the screening the DAFM concluded that there is no possibility that the project will have a significant effect due to the separation distance between the European site (Donegal Bay SPA 004151) and the project. In the screening report a number of the SCIs/QIs were truncated when outputting the form related to the screening exercise. However, all SCIs/QIs were considered during the screening exercise itself and the screening determination is considered sound. A revised Appropriate Assessment screening form was completed which includes all SCIs/QIs of the screened European Sites. The DAFM deemed that this 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

The DAFM stated that the reason for Condition (a) of the licence is to ensure protection of water quality and the environment, and adherence to Condition (b) ensures the licensee follows appropriate stump treatment procedures in the application of urea to protect water quality and the environment. Also, licence Conditions (i)-(bb) identify specific requirements in relation to harvesting and replanting operations which will ensure protection of water quality and the environment. The DAFM stated records concerning 451 licences were sought and were provided to the appellant and provided email evidence showing dates of requests and provisions.

On 12 May 2020 the FAC sought further information from the appellant specifically requesting a written submission stating to which class of development listed in the EIA Directive felling belongs. The appellant replied dated 14 May 2020 without stating the class of development included in the EIA Directive to which felling and reforestation belong.

At the oral hearing the appellant sought that the written grounds are considered where not revisited at the hearing. The DAFM referred to the statement in response to the grounds of appeal. The appellant argued that there is a requirement for reasons for the conditions of the licence and there are none set out. The DAFM set out the reasons for each of the licence conditions at the hearing. The Appellant also stated that forestry was a significant pressure on the Sessiaghkeelta\_010 river sub-basin and for the DAFM to grant a felling licence there must be certainty that there will be no impact on nearby watercourses, and for this reason a screening was needed to assess any potential in-combination effects of the proposal having regard to water quality and the requirements of the

Water Framework Directive. The appellant referred to a maximum allowable clear-fell coupe size of 25 ha and stated another licence DL31 FL0058 (4.06 ha) is issued on the same day and is inside of 120m from the proposal at appeal, it is c. 85m away. Also, there were 103 ha applied on for clear-fell at the same time and the scale of works is significant. The DAFM accepted with reference to the Interim Standards for Felling and Reforestation that the licence should have contained a condition to provide for the greening of the licence within 120m prior to clear-felling of the proposal for reasons both of a visual and an amenity nature. The appellant referred to both Lough Derg (Donegal) SPA and to Donegal Bay SPA and suggested 'some effect' was not considered in the latter and regards the former that a spatial framework was required to set out the 'vicinity' considered by the DAFM. The appellant contended there is no legal protection for nesting birds in respect of the proposed activity under National law and is required to be in place per Article 5 of the EU Birds Directive. The Applicants' described the information submitted with the application including maps and details of environmental and safety measures in a Harvest Plan which is for operational reasons. The Applicants set out that the proposal is separated from DL31 FL0058 by a stand of high forest whereas the 25 ha rule is in place to prevent large openings in the landscape, and while accepting there is less than 100m between the stands the stocked forest in DL31 FL0058 comprises 3.7 ha and there are 19.8 ha of conifer forest in the proposal site. The Applicants contended that any open space retained after replanting was for productivity or environmental reasons and would not constitute deforestation. The DAFM confirmed the 25 ha coupe rule arises from a code of best forest practice. The DAFM also confirmed there was an apparent error in respect of the Appropriate Assessment screening form regards Pettigo Plateau European sites. Lough Fad Bog pNHA was noted to be c.700m from the proposal.

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). At the Oral Hearing, the appellant argued that, based on the application submitted, 1.14 ha of the site would be left as open space and, as such, would constitute a change of land use. The FAC considers that there is no basis for this contention as the licence issued is for the felling and reforestation of 22.88 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.

In regard to any requirement for the curtailment of felling activities during the bird breeding and rearing season, the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute and, as such, is not necessary as a condition attaching to



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the felling licence. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on this site while contending that coniferous forests would generally support some bird species, and stating at the oral hearing that these grounds related to a shortcoming in law which is inconsistent with Article 5 of the Birds Directive. In these circumstances, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

The FAC is satisfied from the evidence that the provisions of 3.2 of the Interim Standards for Felling and Reforestation were not reflected in the licence at appeal regards the following; *The maximum allowable size for any single clear-fell coupe is 25 ha. No other coupe within 120 m can be clear-felled until the original coupe has greened up, and no less than 12 months after the completion of felling.* The evidence shows another licenced clear-fell exists inside of 120m from the proposal at appeal and that the combined areas of the both felling licences exceed the 25 ha.

Regards the provisions of 10(3) that the Minister may make specified records available to the public free of charge, the FAC noted the DAFM's confirmation that on 20 December 2019 the Appellant sought records concerning 451 licences and shows the DAFM entered into dialogue with the appellant and provided the documents on 19 February 2020. The appellant made no further submission to the DAFM following the production of the documents. The FAC noted that the written grounds of appeal would indicate that the appellant had knowledge of the proposed development at the time of lodging his appeal.

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 Appropriate Assessment screening in relation to Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The European Sites screened for were as follows; 002301 River Finn SAC, 004057 Lough Derg (Donegal) SPA, 001992 Tamur Bog SAC, 004099 Pettigo Plateau Nature Reserve SPA, 001125 Dunragh Loughs/Pettigo Plateau SAC, UK0030320 River Foyle and Tributaries SAC, UK0016607 Pettigoe Plateau SAC (input twice), 002135 Lough Nageage SAC, 002164 Lough Golagh And Breesy Hill SAC, 000163 Lough Eske and Ardnamona Wood SAC, 000115 Ballintra SAC, 000133 Donegal Bay (Murvagh) SAC and 004151 Donegal Bay SPA.

The FAC notes the proposal site is fully within the Erne Catchment and does not share the catchment with the Lough Derg SPA, also drainage to the SPA does not arise. The EPA mapping tool shows the proposal has a direct downstream connection of c. 40km to Donegal Bay SPA, this is via a river and lake network as follows; Ayellowin Lough, Loughultan R. through Ultan Lough, Waterfoot R., Lower Lough Erne and the Erne R. to Donegal Bay and the SPA. Qualifying interests are; *Great Northern Diver, Light-bellied Brent Goose, Common Scoter, Sanderling, and Wetlands and water-birds.* The FAC finds no convincing basis on which to suspect any likelihood of significant effects on the SPA. Also, there is no evidence before the FAC that populations of FWPM arise downstream of the proposal,

and the proposal is not evidenced as within a FWPM catchment, and no significant effects are therefore likely.

The FAC noted that the qualifying interests listed in this Appropriate Assessment Screening were truncated on the DAFM documentation. In respect of its screening assessment the DAFM provided an amended version purporting to address the truncation. However, in neither version are the qualifying interest species of the River Foyle and Tributaries SAC set out for. Also, in respect of the Pettigo Plateau SAC the screening specifies the Eurasian Golden Plover as the sole qualifying interest whereas instead Natural Dystrophic Lakes and Ponds, and Blanket Bogs arise for the SAC. The Eurasian Golden Plover is the sole qualifying interest for the Pettigo Plateau SPA UK9020051, a site within 15 km of the proposal but not identified on the screening undertaken. The FAC considers that the Appropriate Assessment screening therefore contains a series of errors.

In the above circumstances the FAC considers a series of errors arise in this instance and the FAC conclude that the decision of the DAFM should be set aside and remitted to the Minister to carry out an assessment of the proposed development on Natura 2000 sites on its own and in combination with other plans and projects, before making a new decision in respect of the licence, while also having regard to 3.2 of the Interim Standards for Felling and Reforestation.

Pat Coman, on behalf of the FAC

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