



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

18 December 2020

Our ref: 172/2020

Subject: Appeal in relation to felling licence SO10 FL0100

Dear

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 SO10 FL00100.

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 SO10-FL0100 for felling and replanting of 4.91 ha in 2 plots at Boleymaguire, Co. Leitrim and Carrownadargny, Co Sligo was approved by the Department of Agriculture, Food and the Marine (DAFM) on 09 March 2020 and is exercisable until 31 December 2022.

Hearing

An oral hearing of appeal 172/2020 was conducted by the FAC on 19 November 2020.

Attendees:

FAC Members: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Mr Pat Coman and Ms Bernadette Murphy

Secretary to the FAC: Mr Michael Ryan

Appellant:

Applicant representatives:

DAFM representatives: Mr Frank Barrett and Ms Eilish Kehoe

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 allow the appeal and set aside the decision to grant this licence (Reference SO10 FL0100).

The proposal is for felling of 4.91 ha in 2 plots at Boleymaguire, Co. Leitrim and Carrownadargny, Co Sligo. The majority of plots comprise Sitka Spruce. A 0.41 ha plot consists of 56% Lodgepole Pine and 44% Sitka Spruce. There is 0.83 ha of Birch and 2 areas are described as felled (0.39 ha and 0.63 ha). A 0.97 ha area of Sitka Spruce is described as blown. The remaining areas comprise of very small areas (<0.1 ha) of Japanese Larch, Lodgepole Pine, Rowan and Alder. Restocking will be with 90% Sitka Spruce and 10% Birch. The underlying soil type is given as approximately 28% Blanket Peats, 41% Peaty Gleys with 27% comprising Lithosols/ Peats and the remaining 5% variable. The slope is described as predominantly moderate (0- 15%). The proposal is located in the Upper Shannon Catchment_26A and the Arigna (Roscommon)_10 Sub-Catchment (26A_4). DAFM give the location of the proposal as 100% within the Arigna (Roscommon)_10 River Sub-basin.

The proposal was referred to Inland Fisheries Ireland (IFI), Leitrim County Council and Sligo County Council. In their response IFI requested that ground stability be kept under constant review and felling operations be carried out in such manner as not to result in the creation of unstable ground conditions (leading to the excess run off of silt into water courses) or subsequently lead to post harvesting ground stability issues. If any water course is to be crossed during the felling operations then IFI sought this to be done by either be a clear span bridge or embedded culvert of diameter greater than 900mm and where at least 25% of the culvert is embedded, to include all internal forestry drains. IFI Limerick office is to be contacted at least one month prior to commencement of works. IFI require that all work must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines. Leitrim County Council expressed its objection to the replanting of the lands within the *Low Capacity Area* where new forestation is strongly discouraged and the existing area under forestry will be reduced. It was recommended that the proposal be referred to Sligo County Council as some of the proposal appeared to be situated in Sligo. Leitrim County Council also sought prior notification of commencement of works and the submission of a proposed *Transport Scheme* in addition to adherence with the DAFM and National Parks and Wildlife Service (NPWS) best practice harvesting guidelines, with particular reference to water quality. Sligo County Council specified that it was important to ensure that there was no negative impact on water quality in any surface waters in proximity to the development and that current water quality status is taken into consideration along with compliance with the Water Framework Directive. The licence conditions should protect the source catchment area of any public water supply. The works are to be carried out in accordance with the provisions of various guidelines to protect the environment and water quality in particular. An increased buffer of 25m was sought in proximity to any watercourse during replanting works. It was requested that the works be supervised by a competent technical professional to ensure adherence with the guidelines and the licence conditions. A designated haulage route shall be agreed, and A *Traffic Management Plan* is to be submitted and agreed with the Area Engineer prior to the commencement of felling. All timber and associated by-products are to be removed from the site in half loads using a rigid and trailer vehicle. Various provisions were made regarding entrances, sightlines and damage to public roads, drainage, infrastructure and utility poles.

The application included a Harvest Plan, including maps and general environmental and site safety rules. In processing the application, DAFM completed a Stage 1 Appropriate Assessment screening with reference to the provisions of Article 6(3) of the Habitats Directive and identified 7 Natura sites (6 SAC & 1 SPA) within 15km and found no reason to extend this radius in this case; 4050 Lough Arrow SPA c9.1km, 1673 Lough Arrow SAC c9.1km, 584 Cuilcagh - Anierin Uplands SAC c10.7km, 1898 Unshin River SAC 11.9km, 2032 Boleybrack Mountain SAC c12.3km, 1656 Bricklieve Mountains and Keishcorran SAC c12.7km and 1976 Lough Gill SAC c14km. The 6 SAC sites were screened out for Appropriate Assessment due the absence of a pathway and the SPA site due to separation distance.



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

The licence was approved with a number of general conditions and others which are more directly concerned with the protection of water. There are specific conditions relating to communication with both Leitrim and Sligo County Councils prior to works commencing regarding timber haulage from the site. Leitrim County Council is to be notified 1 week prior to the commencement of works. The licence provides for increased Buffer Zones (25m) in proximity to any watercourses during any proposed replanting works. The licence requires that timber loading areas are located at least 50 m from the nearest aquatic zone and at least 20 m from the nearest relevant watercourse. The licence states, that IFI Limerick office should be contacted at least one month prior to commencement of works. The licence includes a condition that specifies the method by which water is to be crossed during operations. The licence conditions also require, as per Forestry and Water Quality Guidelines, that 20% of the aquatic buffer zone is to be pit planted with broadleaves in an undulating fashion to create a sequence of varying spaces with sharply defined edges to be avoided to create a gradual transition from forest into the riparian zone. Furthermore, no trees are permitted to be closer than 5m of an Aquatic Zone but buffer zone widths may vary depending on soil type, slope and land forms. A minimum initial planting density within the buffer is required by licence.

There is one appeal against the decision. The grounds contend that the licence was issued in breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU. It is submitted that the DAFM did not have regard to the criteria in Annex III of the Directive, that the information submitted by the Applicant did not represent the whole project and that the competent authority did not consider information of the whole project in a screening. The Appellant contends that Roscommon County Council should have also been consulted as there may be an impact on that road network arising from timber transportation. The Appellant also specifies that the extraction route to the nearest regional road should be detailed on the licence. The grounds state that there was a failure to consult with the NPWS, IFI or the EPA on the suite of applications (SO10). It is further submitted by the Appellant that that licence references contain duplication and that the licence conditions are not worded in a manner that permits meaningful enforcement. The Appellant argues that licence condition j (25m buffer) virtually precludes planting of conifers due to the width of the site. The Appellant stated that the licence conditions do not provide a system of protection for wild birds during the breeding and rearing season consistent with Article 5 of the Birds Directive. The grounds also contend there has been a breach of Article 10(3) of the Forestry Regulations as relevant application information was not made available on request.

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 responded 14 May 2020 that his appeal should be considered on its own merits and that the applicability of EU Law and National Law are matters for the FAC and "cannot be circumvented by any process of interrogation of me" but did not state the class of development included in the EIA Directive to which felling and reforestation belong.

In a statement to the FAC, the DAFM submitted 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 screening for EIA 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 breaches of Article 4(3), 4(4) and 4(5) had not occurred. DAFM stated that the proposal was located on the boundary between County Leitrim and County Sligo and was referred to both Councils as per standard procedure. It is stated that both responded and that the

responses are on file and were taken into consideration regarding the licence conditions. DAFM indicated that standard procedures were followed in respect of referrals to statutory bodies in relation to this felling licence application. DAFM hold that conditions attached to the licence allow for meaningful enforcement and refer to Section 17.4 of the 2014 Forestry Act which states that the Minister may at any time attach or vary conditions to any licence granted. The DAFM contend that duplicate conditions on a licence as the result of a clerical error are materially inconsequential. In relation to the lack of protection afforded wild birds by the licence, DAFM submitted that 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"*. Regarding Article 10(3) of the Forestry Regulations, the DAFM stated that the Appellant had requested information on 451 applications and contend that the Appellant has exercised their right to appeal this licence. The statement goes on to describe the Appropriate Assessment procedure adopted by the DAFM in processing the licence and submits that the screening relied exclusively on information from the Applicant in relation to considering the potential for in-combination effects with other plans and projects and that a separate in-combination assessment was undertaken subsequent to the licence being issued.

An oral hearing was held at which the Appellant submitted that the proposal included an area of deforestation and is thus a class of project covered by Annex II of the EU EIA Directive. The appellant contended that based on the application submitted, the reforestation would leave 20% of the site as open space, and as such, would constitute deforestation and a change of land use. The increase from 5% open space in this instance was noted by him as significant. The Appellant queried what the purpose of the open space was. It was further queried whether a forest road would qualify as open space and if it would constitute a change of land use. It was submitted that the open space area should be mapped and maintained. The Appellant argued that if the forest is the BAU then that entire area must be assessed cumulatively regarding open space in which case planning permission and/ or EIA are required. He indicated that broadleaf high forest currently listed would be replaced. The Appellant inquired of the Applicant why this proposal comprised 2 different blocks. The Appellant stated that landslide susceptibility was not properly addressed explaining that a good proportion of the site had a moderate to high susceptibility and that a small proportion was highly susceptible. The Appellant set out that the Harvest Plan was not compliant with the Interim Standards and that it should inform the issuing of the licence. He specified that the haulage route should be mapped. It is believed by the Appellant that small local roads in County Roscommon will be used for haulage and that these roads will be impacted by increased traffic with heavy weight loads. The Appellant commented that Roscommon County Council had not been given an opportunity to comment regarding the proposal and so had not been given an opportunity to discharge their official duties regarding matters arising. The Applicant clarified that the haulage route would depend on the timber customer. The Appellant contended that if the haulage route is not certain then all possible routes must be presented as a requirement of the Harvest Plan in line with the Interim Standards. The Appellant explained that Sligo County Council sought that timber be loaded in a certain way and that this request had not been incorporated into the licence. DAFM clarified that it was the application maps that were submitted by them to Leitrim County Council. The Appellant specified that the NPWS should have been consulted in this case but were not. The Appellant submitted that the IFI specifications regarding water crossings had not been incorporated into the licence but DAFM confirmed that they were. The FAC found this to be correct. The Appellant considered the DAFM response regarding enforceability of licence conditions as inadequate. He considered the licence provisions requiring prior discussion with County Councils regarding haulage routes as ineffective and that a prior written agreement should be required by the licence instead. It was implied by the Appellant that references throughout the licence are too vague to be enforced and require clearer definition, citing licence condition [c] (2nd) as an example which refers to "a major rainfall event". The Appellant queried what defines "a major rainfall event". The Appellant



An Coiste um Achromhairc
Foraoiseachta

Forestry Appeals Committee

does not consider that licence condition (i) (2nd) can be implemented in compliance with the Interim Standards given the width of the site. He considers that there would be no compliant area available in the northern plot to load timber and very little within the southern plot. The Appellant also referred to unmapped relevant watercourses on site. Licence condition (j) (1st) would mean that less than 50% of the plots are available for planting according to the Appellant. The Appellant explained that the current licence restocking schedule is mathematically impossible if the buffers provided for on the licence are to be taken into account and needs to be modified to allow for compliance, as compliance with both is currently impossible. The Appellant argues that the licence conditions do not take account of the practicalities of implementing the licence conditions on a site-specific basis and in line with realities on the ground. It is submitted by the Appellant that the information sought by him was not provided within the correct timeframe.

The Applicant contended that the proposal does not include any deforestation or land use change. The Applicant indicated that the unplanted areas are provided with the intention of creating unplanted riparian zones with broadleaf buffers along watercourses and between conifers forests. The buffer is to contain elements of open space interspersed with suitable broadleaves such as Alder and Birch. The Applicants consider that the licence conditions compliment this aim and that the main aim of the buffer is the protection of water quality. The Applicant did not accept that the Forestry Management Unit defines the project area. The Applicant explained that the proposal was located on moderately sloping east facing sites adjacent to 2 tributaries of the Argina River, which flows for c21km into Lough Allen. The hydrological connection distance from the proposal to the nearest Natura site was stated to be c74km having flowed through 5 lakes. It was clarified by the Applicant that there are existing drains present, the management of which will be discussed with the operator prior to operations. The Applicant stated that mounding would not be carried out on the sites. The DAFM confirmed the soils types are those detailed above and the slope as moderate. The FAC noted that c20% of the site is given as wind blown and the Applicant explained that the trees had reached their critical top height, at which point the risk of wind blow increases dramatically. The Applicant stated that ground stability was not an issue at these sites. The Applicant noted 2 Natural Heritage Areas (NHA's) c500m upslope from the proposal with no hydrological connection and indicated that the various environmental protection requirements would be adhered to. The Applicant explained that prior to any operations the site is inspected to determine any environmental features and any actions needed regarding protection including the protection of bird nesting and rearing. The Applicant specified that there was good existing road access to the site. The Applicant clarified that the current inventory listed on the application is out of date (2001) and that areas listed as felled were felled in c2000 but had since been replanted with broadleaves.

The DAFM asserted their contention that the proposal does not include a class of project covered by the EIA Directive. DAFM and the Applicants are satisfied that the licence is enforceable and operable regarding buffers and setbacks even after consideration of the narrow width of the proposal sites adjacent to watercourses. Both considered that land will be still available on which to operate. The Applicant submitted that extraction routes would need to be planned in advance but that there would be internal road areas on which timber could be stacked. The Applicants acknowledged that restocking will be very constrained given the nature of the site but commented that conifers will be planted at the fringes of buffer zones. It was clarified to FAC the only buffer in which trees could not be planted was within 5m of an Aquatic Zone and that this comprised the c20% unplanted area. In response to the objection by Leitrim County Council to the replanting of the lands within the *Low Capacity*

Area DAFM stated that it was DAFM policy to replant after felling. DAFM confirmed that the proposal had been screened regarding archaeological features based on information initially provided by the Applicants and that it is on that basis that the need for further investigation is decided.

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 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 or not 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 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 felling of trees, as part of a forestry 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 decision under appeal relates to a licence for the felling and replanting of an area of 4.91 ha. Unplanted area left during restocking is ancillary to the forestry land use. It does not have a use as open space, does not have public access and is not to be maintained. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within any other classes included in the Annexes I or II of the EIA Directive or considered for EIA in Irish Regulations.

The colouration data referred to by the Appellant refers to landslide susceptibility and not to risk per GSi. The site in this instance comprises approximately 28% Blanket Peats, 41% Peaty Gleys with 27% comprising Lithosols/Peats and the remaining 5% variable. The northern site falls within 4 'landslide susceptibility classifications' (Low, Moderately Low, Moderately High and High) with the greater parts in the Moderately High and Low classifications. The southern site falls within 3 'landslide susceptibility classifications' (Low, Moderately Low and Moderately High) with the greater parts also in the Moderately High and Low classifications. The Applicants have stated that ground stability is not an issue at the proposal sites. The FAC notes the proximity to the tributaries of the Arigna River and the physical nature of the proposal sites, and based on the susceptibility to landslide and the nature of works involved in felling and replanting and the size in addition to the location of the sites, the FAC considers there is no real likelihood of a significant landslide effect on the environment in this instance.

The FAC considers in respect of County Council referrals, that referral to Leitrim and Sligo County Councils only, did not impinge Roscommon County Council's ability to make recommendations regards public roads. There are specific conditions on the licence requiring communication with both Leitrim and Sligo County Council prior to works commencing regarding timber haulage from the site. Leitrim County Council is to be notified 1 week prior to the commencement of works. The FAC notes that Leitrim County Council objected to replanting within a *Low Capacity Area* and that Sligo County Council, within whose district the greater part of the proposal lies, made no such objection. Having considered this evidence and the evidence at the oral hearing the FAC is satisfied with the DAFM decision to allow for replanting. The FAC considers these licence specific conditions to be acceptable and reflect the submissions received by the County Councils. The FAC did however note that Sligo County Council sought that all timber and associated by products be removed from the site in half loads using a rigid and trailer vehicle but that the licence did not incorporate this provision. In the particular circumstances of this case, the FAC considered that such a provision should have been required as a condition on the licence.

The grounds specify that there was a failure to consult with the NPWS, IFI or the EPA on the suite of applications (SO10). In this regard the FAC is required to consider the licence before it. The FAC notes that IFI, Leitrim and



Sligo County Councils were consulted in this case. The FAC notes 3 NHA sites within 2km of the proposal; 002415 Carrane Hill Bog NHA (North East), 002321 Corry Mountain Bog NHA (East) and 00617 Kilonan Mountain Bog NHA (South). The FAC considered the proposals location relative to all designated sites along with potential pathways to such sites. FAC noted also that there was no statutory requirement to consult in this instance. The FAC has taken the nature of works involved in felling and replanting and the relatively small size of the sites into its consideration. DAFM followed standard consultation procedures. The FAC considers the consultation process to be acceptable in this case.

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. The FAC notes that the Applicants inspect sites prior to any operations to determine any actions needed regarding protection of bird nesting and rearing. The FAC further notes that the Appellant did not submit any specific details in relation to bird nesting or rearing on this site. Based on the evidence before it, the FAC concluded that a condition of the nature detailed by the appellant should not be attached to the licence.

In respect of the contention that there was a breach of Regulation 10(3) of the Forestry Regulations, Regulation 10(3) of SI 191 of 2017 is as follows; (3) *The Minister may make available for inspection to the public free of charge, or for purchase at a fee not exceeding the reasonable cost of doing so, the application, a map of the proposed development and any other information or documentation relevant to the application that the Minister has in his or her possession other than personal data within the meaning of the Data Protection Acts 1988 and 2003 where the data subject does not consent to the release of his or her personal data.* In not accepting this ground, the FAC concluded that there is evidence to show that on 20 December 2019 the appellant requested from DAFM copies of the file along with 350 other files including applications, maps and draft harvest plans, all related to the Applicant in this instance. The Appellant made a submission on the subject licence on 03 January 2020. Evidence shows the DAFM entered into dialogue with the Appellant and shows provision of the copies occurred in or about the 19 February 2020. Furthermore, the FAC is satisfied that the appellant has not been inhibited in the making of submissions in respect of this 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, DAFM undertook a Stage 1 screening in relation to 7 Natura 2000 sites and concluded that the proposed project alone would not be likely to have significant effects on any Natura 2000 site. The FAC noted that *Qualifying Interests* were truncated on some of the DAFM documentation but considered that this omission was not critical to the overall conclusions reached, having regard to the assessment reasons for concluding no possibility of significant effects on those designated sites. The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development alone would not be likely to give rise to significant effects, were correct and the FAC concurs with the conclusion. The FAC noted however, that the DAFM failed to carry out an in-combination assessment before the decision to grant the licence was made. The DAFM subsequently submitted to the FAC listings of other plans and projects, including forestry projects (Afforestation- 3, Forest Roads – 20 & Coilte Felling - 52). Having regard to the nature of the site and the surrounding area, and to the nature and number of other forestry projects listed,

the FAC is satisfied that the failure of DAFM to carry out a satisfactory in-combination assessment prior to the granting of the licence constituted a significant error in the making of the decision the subject of the appeal.

The FAC noted that the Harvest Plan set out for in the licence conditions is essentially an operator's manual for the carrying out of the development permitted by the licence. Condition (h) of the licence requires a harvest plan to be completed prior to the commencement of felling. The FAC noted that all works included in a harvest plan must comply with the terms of the licence. In these circumstances, the FAC considers that the implementation of the harvest plan would not create the likelihood of significant effects occurring on any Natura 2000 site or on the environment.

The FAC notes duplication of alphabetical labels used to enumerate conditions but is satisfied there is no repetition of actual licence conditions and considers that each condition applies.

The licence was approved with a number of general conditions and others which are more directly concerned with the protection of water and/or soil in addition to some specific conditions as outlined above. The FAC examined the licence conditions and considers that these conditions are sufficient for the protection of watercourses and/or soil. The FAC however, is not satisfied that the conditions relating to setbacks from watercourses can be practically implemented or that operations can be carried out in a manner that will protect water and / or soil, given the specific characteristics of the proposal sites, which are sloping, narrow and adjacent to watercourses on peat soils. This concern particularly relates to condition (l) (2nd) which provides for a 50m timber loading setback. This provision would exclude the majority of the area of the northern plot and much of the southern plot (c50%). Furthermore, it is not clear to the FAC that the replanting schedule can be carried out in compliance with the licence conditions or vice versa, particularly in relation to condition (j) (1st) which provides for an increased 25m buffer in proximity to any watercourse and condition (m) (1st) which provides for planting of such buffers with 20% broadleaves. The replanting schedule meanwhile provides for replanting with 90% Sitka Spruce and 10% Birch. While it is more likely that the southern plot could comply with these provisions, the FAC is not satisfied that the northern plot could, considering the width of the plot, at either side of the watercourse which dissects it. The FAC is not therefore satisfied that the licence is operable.

In the above circumstances, the FAC concluded that the appeal should be allowed and the decision of the Minister to grant the licence be set aside.

Yours Sincerely,

Bernadette Murphy, on behalf of the FAC