



[REDACTED]

25th February 2021

Subject: Appeal FAC 317/2020 regarding licence DL20-FL0085

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence DL20-FL0085 for a tree felling licence on a site of 14.54 ha at Corlea and Corradooey (both in ED Gleneely) Co. Donegal, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 3rd of June 2020.

An oral hearing of the above appeal was held by the FAC on 20th of January 2020.

The following were in attendance at Oral Hearing:

Department Representative(s):	Mr. Luke Middleton, Ms. Eilish Keogh
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway, and Mr. Seamus Neely.
Secretary to the FAC:	Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions received including at the oral hearing, clarifications obtained, and the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence DL20-FL0085.

Summary of Departmental File

The application, dated the 2nd of December 2019, indicates that the current stock was planted in 1975, and is comprised approximately of 82% Lodgepole pine, with the remaining stock being Sitka Spruce. Restocking is to be 70% Sitka Spruce and 30% Lodgepole Pine. The application includes site maps, a harvest plan and an AA pre-screening report.

A submission from the appellant is on file, dated the 3rd of January 2020. Referrals to IFI and Donegal Co. Council are on file dated the 18th of December 2019 and the 27th of December 2019 respectively. A response from IFI is on file dated the 23rd of December indicating that the licence is an area over which the Loughs Agency has jurisdiction. No response from the local authority is on file. Also on the file are a screening for Appropriate Assessment, which is described below.

The licence issued has conditions a) through j), and all except h) and i) contain reasons for their inclusion. Condition h) includes a requirement that the adjacent unplanted areas, felled under licence DL20-FL0041, are to be replanted and have at least one growing season to 'Green-Up' prior to the commencement of Felling. Condition i) refers to page 13 of the Code of Best Forest Practice and page 9 of Forestry and Landscape Guidelines.

Screening for Appropriate Assessment.

A screening for Appropriate Assessment was carried out by the DAFM, the last review of which is by the Forestry Inspector dated the 28th of May 2020. This identifies six Natura sites as being within 15km of the project site. These are: Monegal Bog SAC [UK0030211], River Foyle and Tributaries SAC [UK0030320], River Finn SAC [2301], Croaghonagh Bog SAC [0129], Lough Nageage SAC [2135], and Fairy Water Bogs SAC [UK0016611]. The Likely zone of impact was not extended beyond 15km in this case.

The first four of these natura sites are screened out by reason of the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. The last two Natura sites are screened out by reason of the location of the project area being within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise. In addition, all six sites were also screened out by reason of there being no possibility of the project itself having a significant effect, and so there is not potential for it to contribute to any cumulative adverse effects when considered in combination with other plans and projects.

The screening report describes the site as having an underlying soil type approx. Blanket Peats (100%), a slope that is predominately moderate 0-15%, a habitat that is predominantly WD4 (coniferous plantation), and being within the catchment zone of both the Finn (Donegal)_080 (61%) and Mourne Beg River (Derrygoonan) (39%) waterbodies.

A summary of those projects considered for In-Combination Effects is referenced in the screening report and is also on file. This describes consultation with the websites of the local authority, An Bord Pleanála, the Environmental Protection Agency and the County Development plan on the week of the 29th of May 2020. It also describes consideration of DAFM records in relation to afforestation, forest road, and Coillte and private felling licence applications as having also taken place on the week of the 29th of May 2020. The document concludes with an In-combination statement that finds that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed.

In the Statement of Fact provided by the DAFM, it was confirmed that this was a desk based assessment.

Grounds of Appeal

The decision to grant the Licence is subject to one appeal.

The grounds include: a breach of Article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA, a breach of Article 4 (4) of the EIA Directive 2014/52/EU submitting that the licence application has not described any aspects of the environment which are likely to be significantly affected, that the 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, that the Stage 1 AA conclusion is not legally valid, submitting that the screening contains lacunae and factual errors, that the public's access to justice has been compromised, as the licence was not advertised on the stated date due to an administrative error in the DAFM, that the 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, that the licence should contain a condition that the licensee notify the Minister before commencement and conclusion of operations pertinent to the licence, 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.

Oral Hearing

At Oral Hearing, the DAFM corrected the statement of fact presented to the FAC, to the effect that the dates provided for the issue of the licence and its advertisement were not the 6th and 9th of December 2019 as stated, but in fact were the 3rd and 4th of June 2020 respectively. It was also stated that DAFM carried out a screening for Appropriate Assessment, in the course of which it took account of the expert opinion offered in the pre-screening documents supplied by the applicant.

The appellant submitted that there is confusion as to whether there is a hydrological connection to an aquatic SAC: The pre-screening report states that there is a hydrological distance of 8.75km to the River Finn SAC [2301] and no hydrological connection to the River Foyle and Tributaries [UK0030320]; while the AA screening report produced by DAFM observes no direct hydrological connection from the site to either SAC. The appellant noted that there are two water courses proximate to the site that each ultimately find their way to one of these SACs. The distance of 8.75km is consistent with a connection via the river to the north, the Finn (Donegal)_080. However, the appellant noted that the boundary to the west of the project site follows a townland boundary in a manner that suggests that it is following a watercourse. This townland boundary then continues from the site a short distance to meet the Mourne Beg River (Derrygoonan). The appellant asserted that some publicly available mapping services, such as that provided by the National Monuments Service show the presence of a watercourse (following that boundary from the road that bounds the site to the south) and connecting to the Mourne Beg River (Derrygoonan) waterbody. The appellant at oral hearing submitted that the DAFM had recorded its reason for a particular screening conclusion in relation to the SACs on the 28th May 2020 and submitted that he doesn't accept that DAFM can subsequently change the reason for screening.

The applicant stated that the site had been the subject of a site inspection, the report for which noted an adjacency to a watercourse to the south, which was taken to refer to the Garvagh Burn, part of the

Mourne Beg River (Derrygoonan) waterbody. No definitive observation was made as to the presence or absence of a pathway exiting the site, and it was stated that all groundwater leaving the site was to the south. The applicant also noted that the hydrological distance from the nearest point of the Mourne Beg River (Derrygoonan) to the River Finn SAC [2301] was ca. 40km.

The appellant further drew the FAC's attention to the response from Inland Fisheries Ireland which stated that the IFI did not have jurisdiction for the area in which the site is located, and that jurisdiction lies with the Loughs Agency. The DAFM confirmed that as the standard procedures followed by the Department at the time of the award of the licence did not include referrals to the Loughs Agency, no such referral was made. The DAFM representative confirmed that those procedures are in the process of being updated and referrals will be made to the Loughs Agency in future where appropriate.

Consideration by FAC

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the Statement of Fact provided by the DAFM, and the record of the application and licensing process. The FAC also consulted with several publicly available information sources such as mapping from the EPA, the DAFM and the OSI.

In the first instance, the FAC considered 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 is 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 14.54 ha. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered as requiring EIA in Irish Regulations. The FAC therefore agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

In relation to the contention that the 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 considered this ground together with the ground relating to the contention that the Stage 1 AA conclusion is not legally valid as the screening contains lacunae and factual errors. The appellant submitted at oral hearing that there was uncertainty as to whether there is a hydrological connection to an aquatic SAC.

The FAC consulted with water mapping from the EPA that shows two watercourses near the site. A branch of the Finn (Donegal)_080 river is shown as rising ca. 200m immediately north of the site. From this point, a hydrological distance of ca. 8.5km was noted to the River Finn SAC [2301], consistent with the distance stated in the applicant's pre-screening report. The EPA "Groundwater in Salmonid Regs" mapping shows approximately half the site as lying in Water Framework Directive (WFD) Ground Water Bodies intersecting with WFD Designated Salmonid Waters under S.I. 293/1988 [European Communities (Quality of Salmonid Waters) Regulations 1988]. To the south of the site, the Garvagh Burn river, part of the Mourne Beg River (Derrygoonan) waterbody, can be observed to flow in a south eastern direction on the far side of the road that bounds the site, ca. 200m from the south west corner of the site. A small tributary of the Garvagh Burn can also be seen to emerge, again on the opposite side of the road, close to the south east corner of the site. From the point where that watercourse emerges, a hydrological distance of ca. 9km was noted on EPA mapping to the River Foyle and Tributaries [UK0030320] SAC in Northern Ireland.

It was submitted at the oral hearing by the Appellant that a relevant watercourse emerged from the site and flowed following the line of the townland boundary on the east of the site to the Garvagh river continuing south to join the River Foyle and Tributaries SAC after c.4.3km. The River Finn SAC lies upstream of this SAC but they share a number of qualifying interests. The appellant pointed to public mapping from the National Monuments Service. The FAC viewed this mapping, and this indicates that the branch of the Finn (Donegal)_080 waterbody (the Drummannon_01 river) extends further east to that shown in the EPA or OSI maps, to a point ca. 100m from the north east corner of the site, before turning sharply north. Aerial imagery available from the OSI, Google and Microsoft indicate that this water course is likely a drain, or series of drains and there is no evident connection to the project site. To the south, the National Monuments Service mapping indicates a watercourse commencing immediately on the opposite side of the road from the south western corner of the site and following a line coincidental with the townland boundary before entering the Garvagh Burn river. It is not possible using aerial imagery to verify this feature of the National Monuments Service mapping, or to corroborate or rule out the appellants contention that this water course emerges in the project site and follows the townland boundary north on the same side of the road as the project site is located. This is in addition to the tributary of the Garvagh Burn river that can be seen to emerge on the opposite side of the road at the south east of the site on a number of public mapping systems.

As noted above, the hydrological distance to the River Foyle and Tributaries [UK0030320] SAC in Northern Ireland, should a direct connection exist, is ca 4.3km, via which there would also be a subsequent hydrological connection at a distance to the River Finn SAC [2301] ca. 40km.

Atlantic Salmon is an Annex II species listed as a primary reason for the selection of the River Foyle and Tributaries SAC, and the Finn (Donegal)_080 is a designated river for that species. The project site is at the upper reaches of the waterbodies in question and is unlikely to have an effect on that species. Nevertheless the DAFM Appropriate Assessment screening appears to contradict the information submitted by the Applicant regarding the hydrological connections from the site and no reasons have been provided for this divergence. Furthermore, this issue could not be clarified at oral hearing to the satisfaction of the FAC. Furthermore the relevant competent authority was not consulted. The FAC

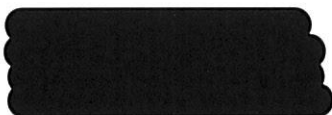
considers that this latter omission represents a serious error in the consideration of the licence application and that on this basis the licence should be remitted to the DAFM for Screening for Appropriate Assessment having regard to any response provided by the correct referral body (the Loughs Agency) made within the appropriate time period and the best available scientific information available.

When considering the ground of appeal that that the public's access to justice has been compromised, as the licence was not advertised on the stated date due to an administrative error in the DAFM, the FAC noted the DAFMs submission that the advertisement had been posted in error to the applications section of the Department's website on the 3rd of June, but that this was rectified the following day. The FAC observes that the decision is itself the subject of an appeal, and that the error does not constitute a serious error in the consideration of the licence.

In relation to the appellants stated grounds of appeal that the 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 and Article 12 of the Habitats directive, and that conditions should be in place in relation to the spraying of chemicals, the FAC had regard to the DAFM statement and note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the Appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site and is of the view that additional conditions of the nature described by the appellant should not be attached to the licence in this case.

Conclusion

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds in the appeal, other submissions received, and the submissions and clarifications obtained at the oral hearing. In the above circumstances, the FAC concluded that a serious error or series of errors were made in the decision of the DAFM regarding DL20-FL0085 and that the decision should be set aside and remitted to the Minister to carry out a screening for appropriate assessment under Article 6 of the Habitats Directive and that the opinion of the Loughs Agency should be sought before a new decision is made.



John Evans On Behalf of the Forestry Appeals Committee