



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

26<sup>th</sup> February 2021

**Subject:** Appeal FAC242/2020 in relation to felling licence LM06-FL0141

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**

Felling licence LM06-FL0141 was issued by the Department of Agriculture, Food and the Marine (DAFM) on 7<sup>th</sup> May 2020.

#### **Hearing**

An oral hearing of appeal FAC242/2020 was held by the FAC on 21<sup>st</sup> January 2021. Attendees:

FAC:	Mr Des Johnson (Chairperson), Mr Pat Coman, Ms Paula Lynch & Mr Luke Sweetman
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Frank Barrett & Ms Eilish Kehoe

## **Decision**

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant felling licence LM06-FL0141.

The licence granted is for the clearfell and replanting of 8.22ha at Garvagh Glebe, Co. Leitrim. The species to be felled comprises 53% Sitka spruce and 47% Lodgepole pine. The restock species applied for is 50% Sitka spruce, 50% Lodgepole pine with 0.41ha of open space retained. The underlying soils are approximately 85% Blanket Peats and 15% Peaty Gleys on a predominately moderate north-facing slope. The proposed development is located in the Sligo Bay & Drowse Catchment, the Bonet\_SC\_020 Sub-Catchment and the Killanummery\_010 River Sub-Basin. The Killanummery\_010 is not a high Status Objective Waterbody, it is rated as 'Poor' and 'At Risk' by the Environmental Protection Agency (EPA).

The Applicant submitted a harvest plan document, inventory data, maps, and an Appropriate Assessment (AA) Pre-Screening Report (PSR) (29<sup>th</sup> April 2020) which included 6 Natura sites (5 SACs & 1 SPA). The DAFM undertook and documented an AA screening (AAS) (dated 5<sup>th</sup> May 2020) of the same 6 Natura sites (5 SACs & 1 SPA) within 15km and found that there was no reason to extend this radius in this case. The following are the Natura sites screened out by the DAFM:

- **Lough Gill SAC:**
  - Having considered the expert opinion and the rationale presented in PSR (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, DAFM has concluded that there is no likelihood of the project itself (i.e. individually) having a significant effect on this European site
- **Boleybrack Mountain SAC, Unshin River SAC, Lough Arrow SAC, and Bricklieve Mountains and Keishcorran SAC:**
  - Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.
- **Lough Arrow SPA:**
  - Due to the separation distance between the Natura site and the project.

The DAFM referred the application to the Leitrim County Council (LCC) who submitted the following response:

- The planning authority expresses its objection to the replanting of the lands within the low capacity designation and area of high visual amenity as the landscape capacity designations envisions, in part, that new afforestation will be strongly discouraged and that the existing area under forestry will be reduced.
- Should works proceed – the Forest Service (FS) must satisfy itself as regards requirements for AA and/or Environmental Impact Assessment (EIA) Report. This should be undertaken not only individually but in combination with other forestry in the greater area.
- Should the works proceed the following should be observed:
  - FS notify District Engineer's Office prior to any works commencing regarding use of public roads/weight restrictions, remedial road works, etc. Weight restrictions and bonding against damage to public roads may be required.
  - Prior to tree felling and timber transportation, the landowner and/or transport operator shall be required to submit a proposed transport scheme showing details of location of the activity, volume of produce to be transported, details of vehicles to be used, routes to be used and the timing of operations. The L.A. reserves the right to specify alternative routing. (Leitrim County Dev Plan 2015-2021 Section 5 Development Control Standards 5.4.7 Forestry.)
- All works shall be carried out in accordance with the best practice guidelines produced by the forest and wildlife service with particular reference to protecting water quality.

LCC also referenced relevant sections of the Planning and Development Regulations 2013.

The licence issued on the 7<sup>th</sup> May 2020 and is exercisable until 31st December 2022. It is subject to relatively standard conditions (a) to (g) plus additional conditions (h), (i) and (j) which relate to completion of a harvest plan, notify the LCC District Engineer, and contacting LCC to discuss haulage operations respectively.

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC, the following is a summary of the issues raised:

- The EIA Directive has been breached - failure to carry out screening for EIA, this application has not described any aspects of the environment which are likely to be significantly affected, and the application for this licence does not represent the whole project therefore



- Inadequate consideration of the objectives of the Water Framework Directive (WFD) River Basin Management Plan. This site is in the catchment of the Killanummery\_010. The current status of this waterbody is 'Unassigned' and it is listed as being for 'Review'. Forestry is listed as a significant pressure on the water quality of this catchment. WFD River Basin Management Plan cannot be assured and an EIA should be required.
- The AAS conclusion is flawed – the site is in the catchment of Lough Gill SAC. There is some evidence that there is a relevant watercourse linking the site to the Killanummery\_010 which is of considerable importance for fish species that are listed on Annex II of the E.U. Habitats Directive. The proposed activity represents a source of potential significant impact on the specific structure and functions which are necessary for the SAC's long-term maintenance in favourable conservation condition and Stage 2 AA is required. The 'Standards' contained in the Interim Standards for Felling and Reforestation (Oct 2019) are not sufficiently clear and do not preclude an adverse impact on the designated site.
- Licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive
- The 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 DAFM responded to the Appellant's grounds of appeal in a written statement to the FAC. This submission was considered in full by the FAC and is summarised below:

- **Article 4(3) of the EIA Directive** 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 should be subject to a sub-threshold EIA, it is required to take into account the relevant selection criteria set out in Annex III of Directive. The clear-felling and replanting of an established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Articles 4(3) and 4(4) of the Directive are not applicable.
- The DAFM has developed considerable experience in relation to the protection of water during the forestry licensing process, and is actively engaged in the WFD process, contributing proactively to both the 2nd cycle and the 3rd cycle, the latter currently under development. The

DAFM is fully informed of its responsibilities regarding the achievement of objectives under the WFD.

- The 8.22 ha felling and reforestation project licenced as LM06-FL0141 has been subject to the DAFM's AAS procedure. The related AAS document and screening rationale is on file. AAS was carried out by the DAFM for European sites within 15 km from the clearfell and reforestation project submitted for licencing. The DAFM carried out an in-combination assessment and included an associated in-combination statement based on this. The felling licence was issued having considered the comments and observations of referral bodies who submitted information to DAFM in respect of the licence. The Interim Standards for Felling and Reforestation (DAFM, 2019), set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works.
- It's 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.
- The use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012. Both of these S.I.s are based on, and give effect to, EU legislation on PPPs - respectively Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No 1107/2009 (concerning the placing of plant protection products on the market). Users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. These are published by the DAFM and provide the basis for the proper and appropriate use of these products.

The FAC held an Oral Hearing on the 21<sup>st</sup> January 2021. The FAC members sat in person and remotely at this hearing. The Appellant, the Applicant, and the DAFM all participated remotely. The DAFM detailed the process leading to their decision to grant the licence and clarified that conditions (i) and (j) were attached following consideration of the LCC response. The Applicant stated they had completed a site



visit on 2/10/2020 and described the site as sloping gently to the north and being firm at higher elevation with surface water in the northern section. They stated the site is on a plateau between two streams. The Tullynascreen Stream is c.150m from the western boundary of the proposed development. There is an unnamed EPA-mapped tributary to the Killanummery River waterbody c.60m from the eastern boundary. There are two relevant watercourses (RWCs) exiting the project site; one to the north-west which flows to the Tullynascreen Stream and another leaving the north-east of the site which flows c.45m to a tributary to the Killanummery Stream after crossing under a forest road. These RWCs provide a direct hydrological link from the project lands to the Lough Gill SAC of c.7.5km. The Appellant stated that a linear feature running from south-east to north-west across the site is a mapped watercourse on the OSi 6" Map. They stated the Killanummery\_010 is deemed 'At Risk' by the EPA and that in a high rainfall event, run-off from the peat soils on site could have a deleterious effect on water quality. They contended that the Applicant's PSR only lists data but does not contain the rationale or scientific basis for the decision to screen-out the Lough Gill SAC for possible significant effects from the proposed development. They submitted that the forest cover in the area was c. 50%. They argued that the PSR states the hydrological distance between the application site and the Lough Gill SAC is 8.25km but the subsequent field visit revised this down to 7.5km. They submitted that the DAFM should not have relied on the PSR and could not rule out the possibility of the project having a significant effect on this SAC and their decision did not comply with Article 6 (3) of the Habitats Directive. The Appellant highlighted the DAFM's lack of consultation with Inland Fisheries Ireland (IFI) and the National Parks & Wildlife Service (NPWS). The Appellant submitted that the word 'likely' used in the English translation of Article 6 (3) of the Habitats Directive was the wrong interpretation and that EU case law supports the use of the word 'possibility' in terms of assessing significant effects. Responding to FAC questions, the DAFM stated that the felling licences included in their in-combination report were likely to be those issued for clear-felling only, and did not include thinning licences. They indicated that both thinning and clearfell licences were included in in-combination reports from November 2020 onwards. The DAFM stated that the LCC request for the Applicant to submit a transport scheme was not carried over to the licence conditions in this instance and that the DAFM deemed the additional conditions attached to be sufficient. They confirmed that they considered the PSR and relied upon the expertise of the Applicant's Hydrologist, Ecologist and other contributors. The Applicant, responding to FAC questions, confirmed that the hydrological connection listed in the PSR was based on a desk assessment using a digital elevation model (DEM) and confirmed their application included a map which did not show the RWCs found during their field visit. They clarified that their DEM estimates the pathway of water leaving the

site based on topography, soils etc and is effective in identifying potential hydrological connections on a large scale. The FAC questioned the DAFM as to what water setbacks would apply to these RWCs, with regard to the peat soils present. The DAFM stated the licence condition (a) includes water protection guidelines/measures which define the required setbacks based on soils, slope etc. Responding to FAC questions, the Applicant stated that the criteria used to screen out sites includes the distance of hydrological connection as well as separation distance 'as the crow flies'. The FAC queried the Applicant's consideration of the County Development Plan when selecting restock species. The Applicant stated that they consider landscape sensitivity when planning replanting and that the peat soils on site limited the choice of available species. They noted the visual difference between the Spruce and Pine species selected and referenced the potential nursing properties of Pine when planted in Pine/Spruce mixtures; helping to ameliorate poor site conditions by fixing Nitrogen in the soil. The Applicants confirmed that the project lands are not especially used for recreation but the site may possibly be used by walkers. They stated that the PSR primarily considers thinning licences in the area and that the rationale for screening out Lough Gill SAC is based on scientific research. The Appellant stated that the site would not be approved for afforestation under current criteria and that it should not be restocked.

In considering the grounds of appeal, the FAC addressed the contention that the proposed development should have been addressed in the context of the EIA Directive. 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 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 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 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 8.22ha. 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 for EIA in Irish Regulations.

The FAC considered the grounds relating to the WFD and specifically the 'Unassigned' status of the Killanummery\_010 Waterbody. The FAC noted the EPA website currently lists the status of this waterbody as 'Poor'. The FAC observed that licence conditions (a) and (b) prescribe various measures to protect water quality and condition (h) specifically requires the mapping of RWCs and pathways to aquatic zones along with the locations of silt traps. Having regard to the licence conditions, the specific measures prescribed for water protection and the nature and scale of the proposed development, the FAC concluded that there would be no likelihood of any impact on the waterbody.

The FAC had regard to the Appellant's submission that the Lough Gill SAC should have been screened in for Stage 2 AA. The FAC observed that the DAFM relied on the Applicant's PSR in order to screen out this SAC. The FAC also considered the Applicant's evidence of two RWCs exiting the site and providing a hydrological connection of c.7.5km to this SAC, and that this information became available following a field inspection after the licence had been issued. The FAC concluded that, in the particular circumstances of this case, the DAFM did not have adequate regard to the precautionary principle when screening out Lough Gill SAC for AA, and as a result there was no assessment of any potential significant effect on this Natura site that the proposed project may give rise to, on its own or in combination with other plans or projects. Regarding the Interim Standards for Felling and Reforestation, the FAC noted the DAFM's response outlining the various measures included therein and concluded that, in this particular instance, any conditions attached to the licence to mitigate potential significant impacts on the Lough Gill SAC should be prescribed following the completion of Stage 2 AA.

Regarding a requirement for the licence conditions to provide a system of protection for wild birds during the bird breeding and rearing season, the FAC noted the Appellant did not provide any site-specific details in relation to any species of concern. The FAC noted the DAFM's submission 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 considered the Appellant's submission that the licence should include a stringent and enforceable condition regarding the notification of certain parties in the case of any spraying of chemicals. The FAC noted the DAFM's submission that the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU



Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No. 1107/2009 (concerning the placing of plant protection products on the market). Users of plant protection products shall apply the principles of good plant protection practice, as provided for in SI 155 of 2012. Based on the information before it, the FAC concluded that additional conditions, as outlined by the Appellant, should not be attached to the licence in this instance.

In the circumstances outlined above, and based on the evidence before it, the FAC concluded that the DAFM made a significant error in the processing of this licence application by not adequately assessing the potential for the proposed development to have a significant effect on the Lough Gill SAC. As such, the FAC concluded that the decision to issue felling licence LM06-FL0141 should be set aside and remitted to the Minister to carry out a new AA screening of the proposed development on its own and in combination with other plans and projects, including thinning projects, regarding Natura 2000 sites within a 15km radius, especially having regard to the Lough Gill SAC and the precautionary principle, before making a new decision in respect of the licence.

Yours sincerely,

A large black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee

