



28th November 2022

Subject: Appeal FAC 014/2022 against licence decision DL14-FL0019

Dear

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

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence DL14-FL0019. The reasons for this decision are set out hereunder.

Licence

Licence DL14-FL0019 is for the clearfelling and replanting of 9.07 Ha. in the townland of Cleengort, Co. Donegal and was submitted to the DAFM on the 15th of March 2021. On the 21st February 2022 the DAFM issued a notice granting the licence with conditions including compliance with mitigation measures in relation to the Special Area of Conservation (SAC) adjoining the site, West of Ardara/Maas Road SAC (Site Code 000197) and the replanting of the site.

Forestry Appeals Committee.

The appeal was considered at the sitting of the FAC held on the 12th of October 2022. In attendance were FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton and secretary to the FAC, Mr. Michael Ryan.

Background

The proposal consists of the clearfelling of 9.07 Ha. of primarily Sitka spruce, Lodgepole pine, Japanese larch and some broadleaved species planted between 1956 and 1998 at Cleengort, Co. Donegal. The area is to be replanted with Sitka spruce.

The licence was referred to Inland Fisheries Ireland and Donegal County Council on the 13th of April 2021 and the National Parks & Wildlife Service (NPWS) on the 23rd of April 2021. IFI responded the same day stating that the applicant should adhere to the DAFM Forestry and Water Quality Guidelines, the Forest Harvesting and the Environment Guidelines, the Code of Best Forest Practice – Ireland and the relevant COFORD guidelines. Donegal County Council did not respond. The NPWS responded on the 6th of May 2021 stating that the site was adjacent to the West of Ardara/Maas Road Special Area of Conservation (SAC) (Site Code 000197) and that the project must be screened for appropriate assessment as per Regulation 42(1) of the European Communities (Birds and Natural Habitats) Regulations 2011.

The application documentation included operational and environmental details and a series of maps. The application included general environmental and safety rules that the applicant submitted would be adhered to in carrying out the felling and replanting. Maps submitted show environmental and operational details, including the location of European sites, and the location of the stand to be felled. The Applicant submitted a pre-assessment screening report which screened the proposal for Appropriate Assessment under Article 6(3) of the Habitats Directive. This screens-in the proposal for one site, West of Ardara/Maas Road SAC. On foot of that pre-assessment screening report a Natura Impact Statement (NIS) for that site was submitted and provides mitigation measures and further operational details and maps.

The DAFM carried out a screening for Appropriate Assessment (AASR) dated 2nd December 2021 and identified eighteen European sites within 15km of the proposal. Each site was considered individually along with its qualifying interests and conservation objectives. The ASSR concluded that the proposal should proceed to Appropriate Assessment due to its direct hydrological connectivity with the West of Ardara/Maas Road SAC. The remaining sites were screened out. The DAFM documented other plans and projects in an In-combination statement dated 2nd December 2021.

The DAFM recorded a separate Appropriate Assessment Determination (AAD) dated the 15th of December 2021 in which the screening process was outlined, potential effects and mitigation measures assessed and which concluded,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

There was one third-party submission, an objection, made on the licence application.

Appeal

There is one third party appeal against the decision and the full grounds of appeal have been provided to all parties. In summary the grounds contest:

That the appellants requested to be informed of the decisions on four licence numbers (including this licence) and submits that this only occurred with DL14-FL0018.

That the Natura Impact Statement (NIS) is flawed for the following reasons: (i) the NIS is for two sites not adjoining each other, this site, DL14-FL0019 and DL14-FL0020, (ii) there is no reference in the NIS to the fact that this site is adjacent to the Gweebarra River SAC, (iii) there is no reference to birds in the NIS, (iv) the NIS identifies possible effect on a number of Qualifying Interests (QIS) yet conclusion of the NIS is that

there is no cumulative impact, (v) the precautionary principle applies to SACs, (vi) the NIS does not fulfil the requirements of the Habitats Directive.

That the site should be replanted with native oak.

That the Appropriate Assessment (AA) is flawed for the following reasons (i) the site adjoins 2 aquatic zones and the use of fertiliser & pesticide is contrary to the Habitats Directive, (ii) the mitigation measures in the AA for fertiliser & pesticide not acceptable as they should not be used in aquatic zone, (iii) there is no reference to fauna currently on the site including protected species.

That the statement that there are no windfarm applications is incorrect and that Coille/Orsted are in pre-planning consultation with An Bord Pleanala with the townland of Cleengort included.

That the objective of the Natura 2000 areas and SACs is to maintain and extend them, not encroach, and threaten their integrity.

That the closest village is Lettermacaward not Glenties and that, it is that village that will be impacted upon by the clearfelling.

Hearing

At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM and all materials on file. Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

DAFM Statement of Fact provided to the FAC

The SoF provided by the DAFM dated the 31st of May 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed only. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in the making the decision on this licence application. The SoF included a statement dated the 30th of May 2022 from the Forestry Inspector confirming that the Appropriate Assessment Screening was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a response to the grounds of appeal.

Applicant Submission on the appeal

The applicant made a submission on the appeal that was provided to the parties that which outlined the operational and site details, the information submitted with the application, and stating that (i) that the AA process adopted by the applicant is informed by geo-spatial analysis and the findings of a field assessment, (ii) The AA, including the NIS, was completed for this project jointly with project DL14-FL0018 because both projects are located within the same river sub-basin (Mulnamin_Beg_010 (IE_NW_38M290990) and it is considered good ecological assessment practice that they are assessed jointly, (iii) that the protection of water quality was clearly outlined in the process and that the reforestation plan includes the implementation of a 20m open area along the two identified aquatic zones followed by the planting of 5 rows of broadleaves along the outer edge of these setbacks, (iv) that the use of chemicals and fertilizer on the site is not contrary to the Habitats Directive providing it is considered in

the AA screening, the potential impacts assessed and appropriate mitigation is identified to avoid any potential impact on the identified European site in the NIS and subsequent AAD completed by DAFM, (v) that the proposal has no association with the proposed Cloghercor Windfarm. It is submitted that when the AA was completed that the windfarm was in pre-planning and the nature and extent of the development was not clear and so, and in line with common practice, it did not form part of the in-combination assessment. It is further submitted that should the windfarm proceed any related felling is not likely to commence before 2028 and that there is no potential for cumulative effects to arise, (vi) that each project area was considered individually by the Coillte ecology team, and that the subsequent pre-screening AA report and NIS completed by the applicant was reviewed by the DAFM prior to completion of its AAD and issuing of the licence.

Consideration by the FAC.

The Notice of Appeal, responding Statement and subsequent submissions were provided to all parties. The DAFM submitted that the relevant records of the decision were available on the online Forestry Licence Viewer and, as the parties were informed, the FAC relied on these records, in addition to the Notice of Appeal and submissions and publicly available information as noted, in making its decision.

Appropriate Assessment.

The proposed afforestation is not within a Natura 2000 site nor is it required for the management of a Natura 2000 site. The FAC has confirmed that the sites identified for screening in the DAFM AASR are the only sites within a 15Km threshold distance for impacts to Natura 2000 sites.

The DAFM undertook a screening for Appropriate Assessment (AASR) and identified eighteen Natura 2000 sites within 15km of the proposal. Each site was considered in turn along with its qualifying interests and conservation objectives. The AASR concluded that the proposal should proceed to Appropriate Assessment Stage 2 for the West of Ardara/Maas Road SAC due to the direct hydrological connectivity with the site of the proposed felling. The remaining Natura 2000 sites were screened out. The DAFM documented other plans and projects that were considered in-combination with the proposal.

The DAFM recorded a separate Appropriate Assessment Determination (AAD) in which the screening process was outlined, potential effects and mitigation measures assessed. The AAD concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

Environmental Impact Assessment (EIA).

The FAC has had regard to the fact that the EU EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory and in Annex II, 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 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/replanting 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) under which the decision before the FAC was made.

Water Framework Directive (WFD).

EPA mapping shows the site lying within Catchment 38 Gweebarra-Sheephaven and the Gweebarra_SC_010 sub catchment. Forestry not identified as a pressure in the sub-catchment. The site is within the Mulnamin_Beg_010 River Sub Basin. There are two WFD river water bodies on the site Mulnamin_Beg_010 emanating from Lough Smuttan forms the north-east site boundary and the Mulnamin_Beg_010 emanating from Lough Doo bisects the south-west part of the site. Both were of Good Status in the period 2013-2018 and their status is to be reviewed in the 3rd WFD cycle (domestic & municipal wastewater and drinking water treatment are the pressures associated with the review). The northern site boundary abuts Transitional Waterbody the Gweebarra Estuary IE_NW_120_0100 which was of Good Status between 2013-2018) and is At Risk in the 3rd WFD Cycle. The underlying groundwater body of this site is NW Donegal IE_NW_G_049 which had Good Status in the period 2013-2018 and is Not at Risk in the 3rd WFD cycle.

In reviewing the record of the decision, the FAC noted that the waterbody Mulnamin Beg 010 is recorded as unassigned in the AA Determination. In reviewing the publicly available records of the EPA¹ the FAC noted that this waterbody has been assigned a Good Status. While this assignment may have occurred after the decision was made the FAC considers that as a new decision is being made that this should be corrected in the record and considered by the DAFM. The FAC does not consider that this would have any impact on the conclusions of the Appropriate Assessment.

Donegal County Development Plan 2018-2024

The site is located in an area classified as an Area of Areas of Especially High Scenic Amenity (EHSA) Donegal County Development Plan 2018-2024. The County Council made no response to the referral provided.

FAC Consideration of the Grounds of Appeal.

In addressing the grounds of appeal, the FAC considered the following:

Notification

Regarding notification of the decision, the FAC noted that Regulation 21 of the Forestry Regulations 2017 requires the Minister to inform any person who made a submission under Regulation 10 which includes applications for felling licences, with some stated exceptions. The record includes a note that the appellant objected to the proposal and the appellant has submitted that they did not receive notification in relation to the licence considered in this appeal, DL14-FL0019. The FAC noted that the DAFM suspended the licence issued originally for DL14-FL0019 and that it corrected the procedural error in a letter to the appellant dated 21st February 2022 as provided on the record. The FAC is of the view that each appeal should be considered on its own merits and that the other identified licences represent separate decisions of the Minister. In relation to DL14-FL0019, it is evident that the appellant was notified of the decision which they subsequently appealed and the FAC is not satisfied that an error was made in the making of the decision in relation to notification.

¹ https://www.catchments.ie/data/#/waterbody/IE_NW_38M290990?k=kalsuo

Natura Impact Statement

Single NIS for DL14-FL0019 and DL14-FL0020.

This ground contends that a single NIS has been prepared for the sites subject of licences the DL14-FL0019 and DL14-FL0020. The FAC noted that no NIS was required for licence DL14-FL0020. The applicant did submit that the AA, including the NIS, was completed for DL14-FL0019 jointly with DL14-FL0018 because both projects are located within the same river sub-basin, and it is considered good ecological assessment practice that they are assessed jointly. The applicant further states that each project area was considered individually by the applicant's ecology team and that the NISs for each site were reviewed by the DAFM ecologist prior to completion of its AAD and the issuing of the licence. The FAC noted that the NIS for DL14-FL0019 was "stand alone" and that there was no reference to the site of DL14-FL0020 (or DL14-FL0018) in the NIS for the project subject of this licence.

No reference is made to the fact that this site is adjacent to the Gweebarra River.

The FAC noted that the in several instances the NIS states that: *"The nearest site is West of Ardara/Maas Road SAC (Site Code: 000197) which is largely adjacent to the northern boundary of the site (and with minor overlap)"* and *"The project area is bordered to the north by the Gweebarra River which feeds into Gweebarra Bay and the Atlantic Ocean"* and *"The connected European site is: West of Ardara/Maas Road SAC (Site Code: 000197) - Distance: 0 metres"*. The FAC further noted that in the NPWS Site Synopsis for the West of Ardara/Maas Road SAC is described as *"This extensive site occupies the area of coast immediately north of Ardara in south-west Co. Donegal. From Ardara, it continues northwards around the coast, and then up the Gweebarra River to Doocherry"*. The original application also stated that the lands adjoin the SAC and submitted maps of the lands.

While the grounds contend that the report is a desk study only, the applicant submits that the report was informed by geo-spatial analysis and the findings of a field assessment. The information submitted by the application includes site and operational details including the identification of drains on the site which are not mapped on OS maps.

No reference to birds in the NIS.

The FAC noted that the West of Ardara/Maas Road SAC subject of the NIS does not have any avian species as a Qualifying Interest and that an assessment of the impact on avian species in Special Protection Areas formed part of both the applicant's Appropriate Assessment Pre-Screening Report and the DAFM Appropriate Assessment Screening Report & Determination.

In relation to the above matters and the NIS, the FAC is satisfied that the information available to the DAFM was sufficient to process the application and to undertake an AAD having regard to the nature, scale and location of the proposal. The FAC are not satisfied that an error was made in the making of the decision by the Minister in relation to these matters.

The NIS conclusion of no cumulative impact.

The grounds contend more generally that the cumulative effect of felling and replanting in the area has not been adequately considered although there is no specific evidence of this provided. The FAC noted that the application and the DAFM recorded other plans and projects in the area and further information is available on the Forestry Licence Viewer (FLV) and planning websites. The FLV shows applications and licences for felling to be spread out spatially and temporally which would be in keeping with Good Forestry Practice and the Standards for Felling and Reforestation. However, in screening for Appropriate Assessment the DAFM recorded the following,

Furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (ie. individually) having a significant effect on this European site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects.

Notwithstanding the fact that an Appropriate Assessment Stage 2 (NIS) was undertaken in relation to West of Ardara/Maas Road SAC, the FAC considers this to be a serious error as it suggests that the screening undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other plans and projects result in a significant effect on a European site. The FAC considers that the decision should be set-aside and remitted for a new Appropriate Assessment Screening Report to be undertaken, and Appropriate Assessment Stage 2 as required, before a new decision is made. The screening should consider the potential for significant effects to arise from the felling and replanting application itself and in-combination with other plans and projects.

Natura 2000 Sites & the precautionary principle applying to SACs.

The FAC considered this ground of appeal and noted that the purpose of the appropriate assessment is to consider the potential significant effects of the proposed operations, itself and in-combination with other plans and projects, on identified Natura 2000 sites and identify mitigation measures to avoid such effects to ensure the integrity of Natura 2000 sites is maintained. When a Natura 2000 site is 'screened in', each qualifying interest is assessed separately, as is the case of the of the West of Ardara/Maas Road SAC, where for example, from the appellant's submission, the Geyer's Whorl Snail and Embryonic shifting dunes, located some 1.5km from the project site, were not considered to be potentially impacted by the proposed forest operations.

The qualifying interests of the SAC include a number of aquatic species and habitats. The FAC noted that the Freshwater Pearl Mussel is a qualifying interest of the SAC and is a species that is particularly at risk from changes in water quality. However, as noted the proposal does not drain to the part of the water system where this species is located and the lands of this proposal drain to a part of the estuary with mudflat habitat. The species, include salmon, and habitats which might be impacted by the works are identified and the potential effects primarily relate to indirect effects resulting from changes in water quality. In relation to otter, measures are specified related to the avoidance of disturbance. While the grounds contend that only silt traps are proposed the FAC considered that multiple mitigation measures identified in the NIS and DAFM AAD and which are intended to avoid risk to the SAC and maintain the site's integrity have been specified in detail that include setbacks and operational restrictions. This includes the imposition of an aquatic setback of 25 metres at replanting along with broadleaf planting. The FAC does not consider that the DAFM has erred with regard to this ground of appeal.

The NIS does not fulfil the requirements of the Habitats Directive.

The FAC considered the nature, scale and location of the proposal being for the felling and replanting of 9.07 Ha. of commercial coniferous forest. The operations are specified to occur over a set period of time and would not be continuous. The FAC considered that the NIS described the whole project and lands, including operations and habitats, the potential effects of the proposal on the qualifying interests of the SAC and measures to avoid these potential effects.

The FAC considers that the DAFM completed an Appropriate Assessment Determination having regard to the best available scientific information. The FAC considered the record of the decision and was satisfied that the proposal as licenced following the Appropriate Assessment would not have an adverse impact on

the integrity of the SAC and is not satisfied that an error was made in the making of the decision in relation to these grounds of appeal.

The site should be replanted with native oak.

The FAC considered the ground that the lands should be planted with native oak. While the licence conditions require the planting of broadleaf species adjacent to setbacks, the proposal as applied for is for the felling and planting of a commercial forest.

Use of fertiliser & pesticide.

The site adjoins 2 aquatic zones, and the grounds contend that the use of fertiliser & pesticide is contrary to the Habitats Directive, (ii) the mitigation measures in the AA for fertiliser & pesticide not acceptable as they should not be used in aquatic zone. Regarding the use of fertiliser and insecticide in the proposal, the grounds express a general concern regarding the use of these inputs on the site. In relation to fertiliser, the proposal is to use ground rock phosphate which is a slow-release fertiliser that is commonly used in forestry. The insecticide proposed is acetamiprid which would be applied to young trees to protect them from *Hylobius abietis*, a common forestry pest. Any further spraying would be spot spraying following a risk appraisal. These are clearly stated in the application and considered in the AA and a number of measures related to these operations directly and indirectly, including the implementation of operational and replanting setbacks. Furthermore, the proposal would have to adhere with the Standards for Felling and Reforestation and the use of pesticides is controlled by law. The FAC considers that the granting of the felling licence does not remove the requirement for the applicant or their agents to comply with any other legal obligation. National legislation controls the registration and use of pesticides including their use in proximity to abstraction points. Furthermore, pesticides and fertiliser could not be used in the setback areas. The proposal was referred to the Local Authority which provided no submission. The FAC is not satisfied that these matters were not fully considered and addressed in the AA or that the proposal as licenced would have an adverse impact on human health or that a significant or serious error was made in the making of the decision in relation to these grounds of appeal.

The FAC noted that condition CC. of the AAD states,

CC. As set out in the NIS, fertiliser application will be manual and restricted to elemental phosphate at no more than 42 kgs/ha to support the establishment and growth of newly-planted trees and will be conducted up to 50m from any site associated aquatic zone. Fertiliser will be applied between 1st April to 31st August and should not be applied during/before times of heavy rainfall.

While this is an obvious error in that it suggests that fertilisation will be carried out up to 50 metres from any site associated aquatic zone while the NIS refers to manual applications within 50 metres, in the context of the decisions being set aside and remitted the FAC considers that this measure should be restated to be clearer and more precise. The FAC is satisfied that the mitigation measures overall make it clear that fertilisation cannot take place in setback areas or on broadleaf planting lines along the setback.

The NIS makes no reference to fauna currently on the site including protected species.

In relation to other species and habitats, the FAC noted that the lands are entirely a commercial forest and do not adjoin any other protected site other than the West of Ardara/Maas Road SAC which was subject to a NIS. The appeal submits that there are a number of protected species present in the general area but provides no evidence of their presence in the specific lands under licence. The FAC finds that the granting of the licence for the operations in this case does not exempt the holder from meeting any legal

requirements set out under the Wildlife Act or any other statute. FAC is not satisfied that an error was made in the making of the decision in relation to these more general grounds of appeal.

Windfarm.

The grounds contend that the proposal is related to a windfarm development. The applicant in their submission stated that the proposal is part of routine forest management and is not part of a windfarm development and that the Cloghercor Windfarm was at pre-application stage and that should it proceed any felling is not likely to commence before 2028. The FAC examined the available public records and noted that the website of An Bord Pleanala² records the windfarm as being at pre-application consultation stage and that an application for permission has not been made. The FAC understands that the details of the application are not known yet. In relation to DL14-FL0019, the application is for the felling and replanting of a commercial forest that was established between 1956 and 1999. The Yield Class of the sub-compartments is recorded as between 12 and 22 and the undertaking of a clear-fell at this age is not unusual for a forest of this productivity level and the application states the replanting proposal with the goal of *Standard conifer reforestation for roundwood production*. Schedule 3 of the licence as issued requires the replanting of the lands and provides the species and stocking level which are in keeping with the application. The FAC consider that the application is for the felling and replanting of a section of a larger commercial forest complex in keeping with standard forestry practice and that no change in land-use is provided for in the application or licence. The FAC consider that there is no evidence that the proposed felling and replanting was inaccurately or incompletely described or licenced under the Forestry Act 2014 or Forestry Regulations 2017. The FAC is not satisfied that an error was made regarding this ground of appeal.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a serious error was made in the making of the decision. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence DL14-FL0019 in accordance with Section 14B of the Agriculture Appeals Act 2001 (as amended) to undertake a new screening for Appropriate Assessment, and Appropriate Assessment if required, and to amend the record to address the status of the waterbody and the specification of condition CC.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee

² <https://www.pleanala.ie/en-ie/case/311323>

