



1st December 2022

Subject: Appeal FAC 015/2022 against licence decision DL14-FL0020

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-FL0020. The reasons for this decision are set out hereunder.

Licence

Licence DL14-FL0020 is for the felling and replanting of 6.63 Ha. of mostly Sitka spruce (89%) and some Lodgepole pine, in the townland of Derryloaghan, 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 standard conditions and the replanting of the site with Sitka spruce.

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 6.63 Ha. of primarily Sitka spruce and some Lodgepole pine planted across a number of years starting in 1970 at Derryloaghan, Co. Donegal. The area is to be replanted with Sitka spruce with 5% of open space.

The licence was referred to Inland Fisheries Ireland and Donegal County Council on the 22nd 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 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 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.

The DAFM carried out a screening for Appropriate Assessment (AASR) dated 24.11.2021 and identified sixteen European sites within 15km of the proposal. Each site was considered individually along with its qualifying interests and conservation objectives. The ASSR concluded that all the sites were screened out. The DAFM documented other plans and projects in an In-combination statement dated 23.11.21.

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

The licence was issued on 21st February 2022 subject to conditions.

Appeal

There is one third party appeal against the decision and the grounds are summarised as:

That the appellant 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 site should be replanted with native oak. DL14-FL0020 has a connection to the Gweebarra River via what the authors call the Doire Luchain river and another stream.

That the Appropriate Assessment (AA) is flawed for the following reasons (i) the mitigation measures in the AA for fertiliser & pesticide not acceptable as they should not be used in aquatic zone, (ii) 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.

That the closest villages are Doochary and Lettermacaward not Glenties.

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 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 which outlined the operational and site details and 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) that the protection of water quality was clearly outlined in the process and that the closest tributary of the Gweebarra is the Doire Luachain River which lies 60 metres from the felling area, slopes away from this watercourse. (iii) 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 (iv) 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 preplanning 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. (v) The project site is not located within or adjacent to an SPA. The nearest SPA is c.5.4km distant and the applicant has not identified and has not been informed of any nesting sites of protected bird species within or adjacent to the area.

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 making its decision.

Appropriate Assessment Screening.

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 sixteen European sites within 15km of the proposal. Each site was considered in turn along with its qualifying interests and conservation objectives. The AASR concluded that all the sites were screened out and reasons are provided. The DAFM documented other plans and projects that were considered in-combination with the proposal.

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 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/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).

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, but there are no watercourses on site. 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.

FAC Consideration of the Grounds of Appeal.

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. 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-FL0020. The FAC noted that the DAFM suspended the licence issued originally for DL14-FL0020 and that it corrected the procedural error. 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-FL0020, it is evident that the appellant was notified of the decision and the FAC is not satisfied that an error was made in the making of the decision in relation to notification.

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. The FAC is satisfied that the information available to the DAFM was sufficient to process the application.

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.

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 prepared, 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.

The FAC considered the nature, scale and location of the proposal being for the felling and replanting of 6.63 Ha. of commercial coniferous forest. The operations are specified to occur over a set period of time and would not be continuous. The application states that the lands lie 60 metres from the Doire Luachain river, that the project slopes away from this river and that the intermediate land is comprised of forest and heath. This river flows northerly to enter the Gweebarra estuary and the SAC. The FAC is satisfied that there is no hydrological connection from the lands to the SAC or the Gweebarra estuary by which effects on the SAC might arise.

In considering the appeal and having regard to the record of the decision, the FAC noted that the licence conditions do not require adherence with the DAFM's Felling and Reforestation Standards (2019). That document states on page 1 that the standards apply to all felling projects in Ireland. The Forestry Regulations 2017 require the Minister to have regard to standards and guidelines for good forest practice. Indeed, in replying to the appeal the DAFM submit that adherence with these standards is conditional in granting a licence. The FAC does not understand that these specific standards have a statutory basis as such and that adherence with the standards should be stated as a condition of the licence if considered necessary. This would appear to be a serious error unless the Applicant was required to adhere with these standards through some other process. The FAC considers that the Minister should address this matter in making a new decision.

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 is for the felling and planting of a commercial forest. This ground appears to relate more generally to policy matters that do not fall within the remit of the FAC.

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. This is clearly stated as part of the application. 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 considered as part of the making of the decision 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.

In relation to other species and habitats, the FAC noted that the lands are entirely a commercial forest and do not adjoin any protected site. 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. The FAC is not satisfied that an error was made in the making of the decision in relation to these more general grounds of appeal.

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 Pleanála¹ 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-FL0020, the application is for the felling and replanting of a commercial forest that was established starting in 1970 and the undertaking of a clear-fell at this age is not unusual for a forest of this type 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-FL0020 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 consider whether the Standards for Felling and Reforestation should be attached as a condition of the licence.

Yours sincerely,

Donal Maguire on behalf of the Forestry appeals Committee

¹ <https://www.pleanala.ie/en-ie/case/311323>