



10th November 2022

Subject: Appeal FAC009/2022 against licence decision DL14-FL0018

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.

Oral Hearing

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.

A hearing of appeal FAC009/2022 was held remotely by the FAC on 12th October 2022. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Mr. Michael Ryan

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-FL0018. The reasons for this decision are set out hereunder.

Background

The appeal relates to a licence for tree felling issued by the Minister for Agriculture, Food and the Marine for 3.99 hectares at Derk More, Co. Donegal. The application was for the clearfelling of Sitka spruce planted almost entirely in 1973 and replanting with the same species. The application 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. This screens the proposal in for one site, West of Ardara/Maas Road SAC IE0000197, and provides suggested mitigation measures and further operational details and maps.

The proposal was referred to the NPWS, Inland Fisheries Ireland and the Local Authority. The NPWS replied that it had no comment to make on the application. Inland Fisheries Ireland submitted that the application should adhere to a list of guidelines related to forestry and water quality. The County Council made no response.

The DAFM undertook a screening for Appropriate Assessment and identified fifteen European sites within 15km of the proposal. Each site is considered in turn along with its qualifying interests and conservation objectives. It was concluded that the proposal should proceed to Appropriate Assessment in relation to West of Ardara/Maas Road SAC IE0000197 due to direct hydrological connectivity. The remaining 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 in which the screening process was outlined, potential effects and mitigation measures assessed. The Determination 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.

The licence was issued on 7th February 2022 with conditions including a requirement to adhere with the measures outlined in the Appropriate Assessment.

Appeal

There is one third party appeal against the decision and an overview follows. The Grounds of Appeal list four licence numbers and submits that they asked to be informed when the decisions were made but that this only occurred with DL14-FL0018, the appeal considered in this case. It is submitted that the Appellant should have been informed by law but they were not. They submit that the Precautionary Principle should always apply in proximity to SACs and public water supplies.

It is submitted that there are numerous errors in the Appropriate Assessment (AA) Pre-Screening Report and that it is a desk study which isn't good enough. It is submitted that the NIS is almost the same as the AA bar reference to silt traps which it is submitted aren't good enough in an area with such high rainfall. It is submitted that the closest village is Lettermacaward not Glenties and that the water supply for this village comes from Lough Derkmore beneath the area to be clearfelled and with the stated intention of replanting and the use of pesticides and fertilisers. It is submitted that the pesticides and fertilisers proposed pose a health risk to thousands of people and a Health Impact Assessment in accordance with EU and WHO protocols is queried. It is submitted that the AA acknowledges a direct hydrological link with

Lough Derkmore but does not mention the fact that it is a mains Water Reservoir and the AA is quoted. It is submitted that as the location is blanket peat that it is folly to disturb the ground above the water supply and adjacent Nature Reserve. It is submitted that parts of the land have been felled illegally and that there is no mention of specified protected species or of when felling would take place.

It is submitted that there are 16 European sites within 15 km of the project and that the nearest is West of Ardara/Maas Road SAC and that the distance to the site differs and that both are disputed. It is submitted that the cumulative effect of felling and replanting plans in this area have been effectively ignored and that the assessment only mention "possible effects" on the SAC and effects on Blanket bog are queried. It is submitted that the proposal is actually for the development of a wind farm and that the law is being ignored. It is submitted that the NIS acknowledges the potential release of significant sediment to the streams connected to Lough Derkmore and Gweebarra River and then only offers silt traps as mitigation measures. It is queried why the site is not being restored to bogland or planted with native trees.

In responding to the appeal the DAFM outlined the application information and process adopted and submitted that the licence was issued in accordance with their procedures SI 191/2017 and the 2014 Forestry Act. The DAFM go on to outline their procedures in more detail including the Appropriate Assessment and issuing of conditions and adherence with standards. It is submitted that Part 6 of the Forestry Regulations 2017 require the Minister for Agriculture, Food and the Marine to publish a notice of the application and to inform the public that they make a submission or observation within 30 days. It is submitted that the licence application was first advertised on the 19/03/21 and for a second time on 12/07/21 and that the licence was published on the date of issue, 07/02/22.

In relation to West of Ardara/Maas Road SAC it is submitted that the hydrological distance was 2,543 metres in the Applicant's submission and that the terrestrial distance was 1,052 metres which was confirmed by the DAFM. It is submitted that cumulative effects of all forest projects were taken into account during the AA process and that the DAFM deems that DL14-FL0018 when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. It is submitted that the licence only provides for the use of insecticide off site and that any on-site application would only be undertaken following an appraisal using the Integrated Pest Management Policy and applied by manual spot spraying only. It is submitted that the insecticide has been approved by the Department's Pesticide Control Division and may be used in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009. It is submitted that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out under the Wildlife Acts.

The Applicant also made a submission on the appeal. This outlined the operational and site details and the information submitted with the application. The European sites that were screened as part of the process are identified and it is submitted that the AA process adopted by the Applicant is informed by geo-spatial analysis and the findings of a field assessment. It is submitted that the protection of water quality was clearly outlined in the process and that 35 of the 36 conditions related to the protection of

water quality. The site is described as a conifer plantation planted in 1973 and is largely a mixed peatland/podzol and lithosol site with outcropping rock and that there is no land use change proposed. It is submitted that no harvesting of windblown trees has occurred and 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 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. It is submitted that the proposal is not adjacent to an SPA and that the Applicant has no information of known protected species within or adjacent to the project area. It is submitted that prior to operations commencing the land will be walked to access the site for ecological or other environmental features and that should evidence be found that further advice and mitigation may be agreed with the Environment Manager. It is submitted that the forest lies 1.1km in direct distance and 2.5km in hydrological distance from West of Ardara/Maas Road SAC.

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.

Considerations

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 receive notification in relation to the licence considered in this appeal, DL14-FL0018. 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-FL0018, 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.

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-FL0018, the application is for the felling and replanting of a commercial forest that was established in 1973. The Yield Class of the subcompartments is recorded as 8, 14, 16 and the undertaking of a clearfell 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

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

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 deforestation or change in landuse 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 in regards to the related grounds of appeal.

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 and planning websites. The Forestry Licence Viewer 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 (i.e. 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 screening for Appropriate Assessment to be undertaken, and Appropriate Assessment 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. An Appropriate Assessment was undertaken in relation to West of Ardara/Maas Road SAC.

Furthermore, in reviewing the record of the decision the FAC noted that the waterbody Mulnamin Beg 010 is recorded as unassigned. In reviewing the publicly available records of the EPA² 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.

A number of grounds relate to the suggestion that the lands should be planted with alternative species. While the licence conditions require the planting of broadleaf species adjacent to setbacks, the proposal is for the felling and replanting of a commercial forest and it is this application that was before the Minister for Agriculture, Food and the Marine.

² https://www.catchments.ie/data/#/waterbody/IE_NW_38M290990?k=kalsuo

In relation to the Appropriate Assessment undertaken, the FAC would consider it appropriate and necessary for the DAFM to consider potential effects on the species and habitats associated with the West of Ardara/Maas Road SAC. As recorded, the proposal lies outside of any European site and is surrounded by forests. In relation to the distance from the proposal to the SAC, the FAC considers that it is clearly stated on the record that a terrestrial separation distance of 1,052 m while the hydrological distance is 2,543 metres. The FAC considers it appropriate that both measures should have formed part of the considerations of the DAFM and the application given the nature of the qualifying interests and, in reviewing maps of the area, the FAC is satisfied that this is an accurate reflection of the distance to the SAC at the closest point.

In relation to Blanket Bogs which are a qualifying interest of the SAC, the lands to be felled are identified as lying on mineral and blanket peat soils but the habitat and land use is conifer plantation and the current forest was established in 1973. The NPWS records that Blanket Bogs have not been mapped in detail for the SAC but refer to these habitats being present to the east of the SAC. The closest point to the boundary of the SAC is over a 1km which the FAC considers in itself, having regard to the nature and the scale of the proposal, is sufficient to rule out any effects on the habitats as recorded in the NIS. Furthermore, the closest point is to a tidal portion of the SAC which is mapped as part of the estuary.

The grounds contend that the report is a desk study only while 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 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 water system of this species 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 measures 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 considered the nature, scale and location of the proposal being for the felling and replanting of 3.99 hectares 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.

In relation to other species and habitats, the FAC noted that the lands adjoin and partially overlap a proposed Natural Heritage Area. The application described this as *Derkmore Wood Nature Reserve, a 7ha woodland renowned as an area of oak scrub with well-developed bryophyte and lichen flora*. The application was referred to the NPWS which had no comment to make on the proposal. The harvest plan states that *Access to the site is from the south east via Forest Road DL14R0018 along the south east* and this road is marked on the maps provided. There is no application to fell any native species of tree as part of the proposal and access and extraction would take place away from the pNHA as recorded in the application. The appeal submits that there are a number of species present in the general area but provides no evidence of their presence in the specific lands under licence which are comprised of mature commercial, conifer plantation. 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. The FAC considers that the screening undertaken by the DAFM should be undertaken again to properly address the potential for in-combination effects to occur but considers that the Appropriate Assessment in relation to West of Ardara/Maas Road SAC has been completed properly. 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.

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 but provides no specific evidence of potential adverse effects. 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 Appropriate Assessment 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 addressed in the Appropriate Assessment 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,

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.

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 more clear and precise. The FAC is satisfied that the mitigation measures overall make it clear that fertilisation can not take place in setback areas or on broadleaf planting lines along the setback.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including those at the oral hearing. 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-FL0018 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new screening for Appropriate Assessment and to amend the record to address the status of the waterbody and the specification of condition CC..

Yours sincerely,

Vincent Upton, On Behalf of the Forestry Appeals Committee