



27th November 2023.

Subject: Appeal FAC 163/2022 regarding SO10-FL0114

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). 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.

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 FAC 163/2022 was held remotely by the FAC on 14th June 2023. The file of the licencing decision was made available to the FAC by means of the DAFM Forest Licence Viewer (FLV). The parties were informed that the FAC would be referring to this source.

In attendance

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton and Mr. Derek Daly.
Secretary to the FAC: Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence SO10-FL0114.

Background

This project is for the felling of an approved area of 19.76 hectares over 5 sub plots comprising predominantly Sitka Spruce and Lodgepole Pine with some biodiversity planting. The site is accessed via onsite tracks/forest roads which connect to the public road network. The site is part of a wider managed forest area. There are watercourses crossing the site.

On file the application submitted includes an application pack with an application map, mapping of the wider area, a harvest map and reforestation plan which were uploaded on the Forestry Licence Viewer (FLV). The application pack includes a declaration dated 05/07/2022.

The project area is described in the documentation as lying between 284m and 309m above sea level. The average slope across the site is moderate, at 5% and ranges from 0% to 14%. The habitat is described as WD4 and the soil type as 100% blanket peat (BktPt). The site is predominantly within County Sligo but a small section of the site at the northern area is located within County Leitrim.

The site is shown on Environmental Protection Agency (EPA) mapping to be within the River Sub-Basin ARIGNA (ROSCOMMON)_010 (100%). These mapping data indicate the status as "good" and in terms of risk to be "not at risk".

DAFM Assessment

The application was subject to desk assessment by the DAFM, and files associated with the processing of the application were uploaded to the Forestry Licence Viewer (FLV).

An Appropriate Assessment Screening Report & Determination (AASRD) dated 06/09/2022 was prepared and uploaded and labelled as a Screening Form on the FLV on the 13/10/2022. Section 4 of this AASRD identified 7 Natura sites, 6 of which were within 15 kilometres of the project site. These are: Lough Gill SAC IE0001976; Lough Arrow SAC IE0001673; Unshin River SAC IE0001898; Lough Arrow SPA IE0004050; Boleybrack Mountain SAC IE0002032; Bricklieve Mountains and Keishcorran SAC IE0001656 and also Lough Forbes Complex SAC IE0001818 which is outside of 15km from the project and is hydrologically connected. Section 5 of the AASRD is an Assessment for Potential Significant Effects on European sites which reviews the sites and their Qualifying Interests (QIs) and states reasons for screening out all the sites.

However, having screened out all the sites the AASRD also includes a section entitled "Screened-In European Sites" which states that following AA screening, DAFM has determined that it cannot be ruled out, based on objective scientific information, that the felling and reforestation project proposed under SO10-FL0114 will have a significant effect, either individually or in combination with other plans and projects, on the following European sites. No sites are subsequently listed.

An In-Combination Statement completed on the: 30/08/2022 and uploaded on the FLV on the 13/10/2022 focused on the general vicinity of the project area in the River Sub-Basin ARIGNA (ROSCOMMON)_010. This states that approximately 59% of the sub-basin is under forest cover and that this is greater than the national average of 11%. The Statement concluded that:

There is no likelihood of the proposed Felling and Reforestation project SO10- FL0114 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.

The project was referred to referred to Inland Fisheries Ireland (IFI), Sligo County Council, and Leitrim County Council. In a response dated 4th August 2022 Sligo County Council outlined a number of

recommendations. Leitrim County Council in a response dated 16th August 2022 indicated that the land is not located within an Area of Visual sensitivity and is in an area designated Low Capacity for forestry. In relation to areas of Low Capacity the response states:

'These include the County's Mountain and moorland landscapes and steep slopes above and around 300m AOD. These are characteristically open landscapes. New woodlands are highly visible and seldom in keeping with moorlands character. New afforestation in these areas will be strongly discouraged and where possible the existing area under forestry will be reduced.'

There is an objection to replanting of lands within County Leitrim but no objection to the clear felling.

IFI in a response dated the 2nd October 2022 stated no objection in principle to the thinning/felling application but highlighted a number of named streams associated with the Arigna river which is stated to be an important salmonid habitat that flow through the site and along its boundaries: one of these flows alongside the site's northern boundary while two others run through the southern half of the parcel. The response outlines the importance of mitigation measures and the importance of the mitigation of silt and measures in relation to this are outlined.

DAFM Decision.

The decision which is the subject of this appeal was to approve the licence, which was issued on the 13th October 2022 and uploaded to FLV on the same date subject to conditions. In addition to general related conditions notifying both Sligo and Leitrim County Councils and the IFI of commencement of operations were included. There are a number of conditions outlined in relation to the protection of water quality.

Appeal

There is one appeal against the decision to grant the licence and a brief summary of same is included below. The full grounds of appeal were considered by the FAC and are to be found on file.

The grounds of appeal submit that there was undue process referring in specific to the untimely publication of the decision as the licence was issued on the 13th October 2022 and the public were informed on the 14th October 2022. The licence and reasons not made available to the public within an adequate timeframe and reference in this regard is made in this regard to the appeal window. The grounds make reference to inadequate public notice.

It is contended that there is missing information submitted in relation to the application with reference made to the issue of fertiliser use, no relevant watercourses are identified and there are discrepancies in relation to yield classes.

It is submitted that conditions which are specifically referred to as inadequate and their reasoning are unclear. It is further submitted that there is inadequate ecological and environmental assessment.

The grounds refer to the protection of species under Article 12 of the Habitats Directive and that the EIA screening does not provide for the screening of species. It is also submitted that there is inadequate AA screening, that the FAC does not have the ecological expertise, and that there is an inadequate protection of wildlife.

The issue of Climate Action / Carbon is raised in the grounds. The grounds also contend that there is a lack of potential for enforcement.

It is also contended that the project is inconsistent with Leitrim County Development Plan and that issues raised in the Leitrim County Council submission are not addressed including a stated objection to the project. Reference is also made to conditions and recommendations made in the Sligo County Council and IFI submissions.

DAFM Statement

The DAFM provided a Statement of Fact (SoF) in response to the grounds of appeal which was provided to the other parties and is on file. In summary, the statement provides an overview of the processing of the application and addresses the grounds of appeal. It indicates that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act.

Specifically in relation to matters raised in the grounds of appeal DAFM contends that publishing the licence on the Forest Licence Viewer (FLV) the day after the licence was issued is reasonable and affords the public sufficient time to appeal the decision. Members of the public have full access to the FLV and applications are also advertised on the DAFM's website.

DAFM submit that the inclusion of fertiliser information in the felling licence application is not a mandatory requirement and in regard to enforcement of the fertiliser mitigation (condition 22), the Department would contend that this condition can be enforced.

Forest drains established on the site are stated to not constitute a relevant watercourse, on the basis that they were dug nearly fifty years ago and with the growth of surrounding trees during that time along with 50 years of accumulating needles falling into these drains over this period they could not reasonably be considered a watercourse of any type.

It is submitted that yield class is an index of the potential productivity of even-aged stands of trees and comparing to actual production to what is essentially an estimate will always generate discrepancies.

The reforestation plan as set out in Part 4 of the application form and illustrated in the reforestation map, is stated to be consistent with DAFM's Felling and Reforestation Policy (2017). It is submitted that the provision of open space and area for biodiversity is significant.

The mitigations in the licence are said in the statement to be consistent with best forest practice, national forest policy and protection of the environment. These include notice to be given to County Council area engineers (both Sligo and Leitrim) and IFI Limerick in advance of works commencing.

The response contends that DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water.

In relation to reforestation, DAFM submit that those standards stipulate water setbacks adjoining aquatic zones, which can be clearly seen in the reforestation map, developed primarily to protect water. The specific mitigations ensure that the proposed felling and reforestation project SO10-FL0114 will not result in any adverse effect on any European Site nor on the water quality or the water body status regardless of hydrological connectivity.

In the statement it is submitted that condition 13 requires the applicant to monitor ground conditions and directs the applicant to take immediate action if potential pathways for silt and sediment begin to form and outlines effective measures to address this risk. It is also submitted that conditions included in the licence for SO10-FL0114 are based on DAFM policies, procedures, guidelines and standards which are outlined in the response and in the case of SO10-FL0114 there were no indications whatsoever that populations of protected species existed in the project area or in the vicinity of the project area. If populations of Annex IV species had been confirmed the Department would have taken this into account when drafting the licence.

In relation to Lough Forbes Complex SAC, the statement states that at Section 4 of the Appropriate Assessment Screening Determination document, a table states that the SAC is more than 15km from the project area, and that in fact the project is over 40km from this SAC. DAFM submit that this separation distance alone provides a valid rationale for screening out this SAC.

Other Appeal Responses

The FAC noted that further submissions were made by parties and considered these. A brief summary of the correspondence is included below, with the full submissions are to be found on file.

A response to the grounds of appeal was received from the applicant which in summary indicated that fertiliser type and rate of application is not a mandatory requirement for tree felling applications and fertiliser will not be applied within any watercourse setbacks. The applicant states that the site was surveyed and features captured on 24th June 2022 confirming the presence of the aquatic zone which will be protected by adhering to the standards for felling and reforestation and the water-specific conditions 9 to 23 of the DAFM-issued felling licence.

In relation to Yield Class, it is stated by the applicant that the Yield Class system provides a set of yield tables for species and management prescriptions (age, thinning intensity, etc.) and predicts future volume production and it is an indicator of the potential productivity of even-aged stands and it is not appropriate to estimate the Yield Class of a site by simply dividing the volume at the time of proposed felling by stand area and age as the appellant appears to have done.

The applicant states that the active management of productive forests and the production of harvested wood products is a highly effective mitigation measure through the sequestration of CO² and storage of carbon.

In relation to species protection the applicant outlines operational measures which involve checking the site for environmental (and other) features, including the location of any nesting sites and setting out the implementation of appropriate mitigation measures, where required.

There was also a response from the appellant to the applicant response which in relation to the issue of Yield asserts that the substantive point is that the project site is not a productive site and that it would not be permitted to be planted under current afforestation requirements. It is stated by the appellant in this response that the grounds relate to this low productivity plantation on deep peat, that the applicant has not disputed that this plantation will be a net source of carbon emissions, and that the applicant claims that replanting is the most appropriate measure but avoids stating that the plantation will be a carbon sink. The procedures applied for surveys for nesting sites is disputed by the appellant and it also

stated that the licence conditions applied are not reflective of the submissions from the authorities concerned.

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats Directives, the completeness of the assessment of the licence application and an examination of the procedures applied which led to the decision to grant the licence. In relation to afforestation decisions, the function of the FAC is to hear and determine appeals of decisions of the Minister for Agriculture, Food and the Marine under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017.

In the first instance the FAC considered whether an Oral Hearing was required. The FAC considered that it had sufficient information before it in order to properly and fairly determine the appeal and that an Oral Hearing was not required.

The FAC considered the submission in the grounds of appeal relating to the EIA Directive. The EU EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine through thresholds or on a case-by-case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation 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 Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence applications, require mandatory EIA 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 decision before the FAC relates to the felling of an approved area of 19.76 hectares. 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. As such, the FAC is not satisfied that an error had occurred in the making of the decision in so far as it relates to the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

The FAC considered the grounds in the appeal relating to a lack of due process arising from delay in the publication of the decision. The grounds of appeal states that the licence was issued on the 13th October 2022 but the decision was not made known to the public until the 14th October 2022. The FAC noted that the date of the issue of the licence was the 13th October 2022 and uploaded on the FLV on the same date. The FAC does not consider that there was undue delay in the publication of the decision as this occurred on the day following the issue of the decision. It is noted by the FAC that the period in which an appeal can be taken it is noted is provided for in legislation by the Minister.

The FAC considered the grounds in the appeal which contended that there is missing information submitted in relation to the application with reference made to the issue of fertiliser use, no relevant watercourses are identified and there are discrepancies in relation to yield classes.

In relation to fertiliser use the FAC notes that the project under appeal is for clear felling and that condition no 2 refers to treating of all conifer stumps but also indicates requirements to be adhered to

prevent infection occurring, and that it also stipulates it should not be within the buffer zones required by the Forestry and Water Quality guidelines.

The FAC noted that the mapping submitted with the application did indicate rivers/aquatic zones which the applicant in the response to the appeal states were identified following a survey of the site and also in this regard DAFM in their response refers to forest drains on the site and would not constitute a relevant watercourse. The FAC note the mapping documentation which identifies aquatic zones.

In relation to yield classes the appellant's primary contention is the unsuitability of the site for replanting and the FAC notes that the application of yield class is largely an index of the potential productivity and is essentially an estimate which potentially will vary within sites and between plots and is not a matter which solely will determine the suitability of a site for reforestation and the project which is the subject of this licence is for clearfelling. As noted by the applicant in their response, yield class is modelled based on cumulative production over a specified period following given management regimes. The proposal that has been licenced does not constitute afforestation. The grounds make some general comments on climate change but the lands have been subject to drainage for at least 50 years and are surrounded by commercial managed forest. The regeneration of the forest resource and the avoidance of deforestation are in keeping with government policy and good forest practice.

Based on the foregoing, the FAC does not consider an error occurred in relation to the grounds of appeal relating missing information submitted or discrepancies in relation to yield classes

In the grounds it is submitted that there are conditions which are inadequate, their reasoning unclear, and in some instances unenforceable. The FAC noted that many of the conditions are to provide for good practice, and where appropriate mitigation, to ensure adherence to good practice. The FAC also notes the provisions of section 7 of the Forestry Act 2014 wherein at subsection (3) it sets out that where conditions are specified under subsection (1) that the reasons for the inclusion of conditions shall be provided and in relation to the conditions outlined in the decision reasons are stated primarily in the interest of appropriate management of operations, the protection of water quality, the protection of the public road network and requirements to notify statutory bodies in advance of operations. The FAC does not consider that an error occurred in relation to the conditions attached to the licence.

The grounds also submit that there is inadequate ecological and environmental assessment. The decision under appeal relates to a felling licence in a commercially managed plantation of exotic species. It does not constitute a protected habitat itself nor would it be generally recognised as ideal habitat for protected species. The forest will be regenerated post felling and there are conditions which must be adhered to in the felling and replanting operations. The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC noted in this regard the project was the subject of an Appropriate Assessment Screening Report & Determination (AASRD) which identified 7 Natura sites, 6 of which were within 15 kilometres Lough Gill SAC IE0001976; Lough Arrow SAC IE0001673; Unshin River SAC IE0001898; Lough Arrow SPA IE0004050; Boleybrack Mountain SAC IE0002032; Bricklieve Mountains and Keishcorran SAC IE0001656 and also Lough Forbes Complex SAC IE0001818 which is outside of 15km from the project and is hydrologically connected. The AASRD reviewed the sites and their Qualifying Interests (QIs) and stated reasons for screening out all the sites. The FAC examined the record and statement from the DAFM and identified the same Natura sites as identified by the DAFM using publicly-available EPA maps. The FAC considered the record and the reasons stated for screening out of these sites and the reasons as stated were reasonable.

The FAC also noted however, that having screened out all the sites the AASRD also included a section Screened-In European Sites and that following AA screening stated DAFM has determined that it cannot be ruled out, based on objective scientific information, that the felling and reforestation project proposed under SO10-FL0114 will have a significant effect, either individually or in combination with other plans and projects, on the following European sites and no sites are subsequently indicated. The inclusion of this section in the AASRD would appear to the FAC to be an error that it should not have been included based on the findings outlined earlier in the document and that there is no explanation in relation to this conclusion other than a typographical error.

The FAC also noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement was prepared in relation to the project. The said In-Combination statement includes the passage;

“It is concluded that there is no likelihood of the proposed Felling and Reforestation project SO10- FL0114 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites”.

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. The FAC considers the conclusion stated above to be an error as it suggests that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which in-combination with other plans and projects could result in a significant effect on a European site. The FAC would also understand that after concluding that the project itself would not have a significant effect on a European site, the DAFM should also consider

other plans and projects and determine whether the project in-combination with other plans could have a significant effect. The FAC would consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive. The FAC considered this to be a significant error in the processing of the application.

In relation to the matters raised in the grounds of appeal that there the assessment does not satisfy requirements in relation to the protection of birds in particular during the breeding season. No evidence is produced to establish the presence of protected species or that the site is not an optimal site for the breeding and foraging range of the bird species. The FAC notes that the site is not within a Natura site or any other designated area and as noted is composed of a managed forest of exotic species. The FAC would understand that the granting of the licence does not remove any other legal obligations or restrictions that might apply to the licence holder or their agents. The FAC does not consider that the DAFM has erred in its processing of the application in so far as this ground of appeal is concerned.

In relation to the Water Framework Directive and effects on water quality generally the FAC viewed the information on the EPA and Irish Catchments websites and current mapping and data which confirmed information contained on the DAFM file that the project is within the WFD River Waterbody ARIGNA (ROSCOMMON)_010 (100%). Mapping data indicates the status as good and in terms of risk is indicated as not at risk. The FAC noted the nature of the proposed project and the issue of the protection of water quality were addressed and that this is reflected in the licence conditions and that the development will not have adverse effects on receiving waters. The applicant is required to contact Inland Fisheries Ireland prior to the commencement of works. The FAC concluded that the DAFM has not erred in its processing of the application in relation to the issue of water quality.

Conclusion

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, the DAFM's SOF, and all submissions received. The FAC concluded that serious or significant errors were made in the making of the decision in respect of licence SO10-FL0114. The FAC is therefore setting aside and remitting the decision regarding licence SO10-FL0114 to the Minister in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended to carry out a new screening of Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee

