



11th October 2023

Subject: Appeal FAC 014/2023 in relation to licence LM08-FL0192

Dear Sir,

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 (MAFM). 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

A tree felling licence LM08-FL0192 for the felling of forest on an area of 20.52 ha at Dergvone, Co. Leitrim was issued by the DAFM on the 19th of June 2023. A hearing of appeal FAC 014/2023 was held remotely by the FAC on the 21st of September 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton & Mr. Iain Douglas.
Secretariat to the FAC: Ms. Vanessa Healey.

The FAC noted that following the notification of the hearing, and circulation of the documentation to the parties relating to same, a further submission was received on the 19th of August 2023 from the Appellant. This submission was circulated to the Applicant and DAFM on the 21st of August 2023 allowing a period within which any further observation / submission could be made to the FAC. The DAFM responded on the 5th of September 2023 indicating that it had no observations or comments to make on the submission. No further submissions were received.

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 allow the appeal and set aside the decision of the Minister for Agriculture, Food and the Marine to grant the licence LM08-FL0192. The reasons for this decision are set out hereunder.

Background

The licence pertains to the felling of forest on 20.52 ha at Dergvone, Co. Leitrim. The forest area to be felled comprises two sub-plots (14.31 ha and 6.21 ha numbered 1 and 5 on the 'Felling Licence Application Map' submitted). The 'Reforestation Map' as submitted with the application also shows two sub areas of the overall site marked 1 and 2 and these two are separated by what is shown on the said map as a public road. The area to be felled is currently composed of Sitka spruce. Based on the information on file it is deduced that the trees were planted in 1991 and are planned for felling in 2025. The application is accompanied by maps showing the location of the proposal area and bio-mapping. The project area lies in the River Sub-Basin OWENNAYLE_010. The larger Plot on the Reforestation Map (19.3 ha) is proposed to be planted with 65% Sitka spruce, 25% LPS and 10% as Open Space. The smaller Plot (1.22 ha) is proposed to be planted with 50% OB and 50% as Open Space.

The proposal was referred to Leitrim Co Council on the 12th of April 2023 who replied on the 10th of May 2023. In its response the Council indicated that the Planning Authority had no objection to the proposed tree felling and gave an overview of the County Development Plan designations relating to the site including that the project lies partly in an area of outstanding Natural Beauty and that the project area is affected by two designations relating to the accommodation of forestry. These are LCT 6 Moorland Hills (this is stated to have a high sensitivity to commercial forestry), and LCT 7 Upland Farmland and Foothills (this is stated to have a medium to high sensitivity to commercial forestry). The submission refers to a District Engineer's Report that recorded that no details had been submitted for access points. The Council indicated that further consideration should be given to an increase in the broadleaf component at re-stock and conditions are suggested for inclusion in the decision if approved.

Appropriate Assessment Screening and Determination (AASRD) dated 17th May 2023

The DAFM undertook and documented a screening for Appropriate Assessment (AA) dated the 17th of May 2023 which examined seven European Sites together with their qualifying / special conservation interests. All seven sites are screened out and reasons for the screening conclusion reached are recorded on file. The seven sites examined are as follows;

- Boleybrack Mountain SAC IE0002032 (within 15 km of proposal site)
- Cuilcagh - Anierin Uplands SAC IE0000584 (within 15 km of proposal site)
- Lough Gill SAC IE0001976 (within 15 km of proposal site)
- Corratirrim SAC IE0000979 (within 15 km of proposal site)
- Cuilcagh Mountain SAC UK0016603 (within 15 km of proposal site)
- Arroo Mountain SAC IE0001403 (within 15 km of proposal site)
- Lough Forbes Complex SAC IE0001818 (beyond 15 km of proposal site)

There is an Ecological review (of the screening conclusions) on file dated the 23rd of May 2023. The Determination under Section 42(16) of S.I. No. 477 of 2011 as set out at page 19 of the AASRD records that as the project will not have any significant effect, alone or in combination with other plans and projects, on the European Sites listed above, DAFM also determines that the project will not adversely affect the integrity of the European Sites listed.

The Licence

The licence was originally approved on the 31st of May 2023 and was revoked due to an advertising error. The new decision issued on the 19th of June 2023 and is subject to 32 conditions.

The Appeal

There is a single appeal against the decision to grant the licence. The full grounds of appeal are to be found on file and in summary are as follows.

1. Inadequate and ineffective public notice in contravention of Article 6 (2) of the Aarhus Convention.
2. DAFM perverting the Appeals process by withdrawing and then re-issuing a licence.
3. Breach of Article 6 (9) and / or Article 9 (4) of the Aarhus Convention.
4. Inadequate consideration of Leitrim County Council's Submission.

DAFM Statement of Facts

The DAFM provided a statement to the FAC relating to the appeal which was provided to the parties. The statement contained an overview of the processing of the application and the steps and dates involved. It is stated that the application was submitted on the 24th of March 2023, was advertised on the 12th of April 2023, and that the application was referred to Leitrim County Council who responded on the 10th of May 2023. It also states that the original decision (31st May 2023) was revoked due to an advertising error. It sets out that a new decision (issued) on the 19th of June 2023. The SOF includes content addressing the grounds of appeal and confirms that the application was desk assessed. It sets out that the original advertising date was the 1st of June 2023, and the new advertising date was the 20th of June 2023.

Post Appeal Correspondence

As noted earlier in this letter, the Appellant made a submission / response on the 19th of August 2023 as a follow on to circulation of the DAFM SOF in which a request for an oral hearing of the appeal is made. This submission was circulated to the Applicant and the FSU DAFM. The Applicant made no further response and the FSU DAFM responded to state that no further submission was being made.

Consideration by the FAC

The FAC in the first instance considered whether an oral hearing was required in this case and having regard to the particular circumstances of the appeal, the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The grounds contend that a public participation process was required under Article 6(2) of the Aarhus Convention and that the procedure that was implemented was not sufficient for this purpose. However, Article 6(2) refers to the public notification requirements where an environmental impact assessment is being undertaken and not at the screening stage. Indeed, one of the requirements is that the public is informed of the fact that a development is subject to an assessment. The public clearly cannot be informed that a development is subject to an assessment before it has been decided that the development is to be subject to an assessment. The FAC understands that the EU has transposed the Aarhus Convention

through a number of Directives including the Environmental Impact Assessment (EIA) Directive (2011/92/EU as amended by 2014/52/EU). The recital of the EIA Directives states,

Moreover, taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice.

This is reflected in the consultation requirements provided for under Article 6 which is required after the competent authority has determined that a development is subject to an EIA. The procedure adopted in this case provided for a public consultation period in keeping with the requirements of the Forestry Regulations 2017 (Statutory Instrument 191 of 2017).

The FAC understands that the EU Habitats Directive (Directive 92/43/EEC) does not require a screening for appropriate assessment to be undertaken but a public authority has general obligations to provide reasons for its decision making. Statutory Instrument 293 of 2021 requires a public authority to engage in a public consultation process where it has determined that a development is subject to an Appropriate Assessment (AA). The Forestry Regulations 2017 require a licencing application to be screened for likely significant effects on European sites and AA. The Forestry Regulations also provides for public consultation in the context of further information being published. In this case the DAFM determined that the licence application was not required to be subject to an AA and provided reasons for this conclusion. The grounds do not challenge this conclusion or express any specific concerns regarding likely significant effects on a European site or on the environment.

Nonetheless for completeness, the FAC reviewed the screening undertaken by the Minister. As noted in the screening the proposal would not take place within a European site and involves the harvesting and replanting of a commercial coniferous plantation. By its nature the operations would take place in a defined area and over a limited period of time. The screening identifies six sites that are within 15km of the proposal boundary and one that is outside of 15 km. Each European site is considered in turn with its qualifying interests/special conservation interests and conservation objectives. The DAFM records details of other plans and projects considered in combination with the proposal. The DAFM screens out each site and provides reasons, having considered the nature of the proposed works, the European site and potential pathways. The FAC reviewed the procedure and reasons and having regard to the nature, scale and location of the proposal was satisfied that the screening undertaken adopted the correct procedure and reached the correct conclusion and that no Appropriate Assessment was required in this instance. It should be noted that this conclusion was based on the evidence before it and the FAC did determine that the application that was made was deficient as outlined below.

The licence does include a number of conditions that relate to the protection of the environment generally, but these were not relied on in the Appropriate Assessment screening and the FAC is satisfied that they would not be required in order to reach the stated conclusions. These measures include setbacks from watercourses, roads and dwellings. This will likely improve visual impacts and water quality both within the general footprint of the proposal and its immediate surroundings. Such measures are standard

good practice measures that are reflective of the standards published by the Minister and form an inherent part of all such licences.

The FAC was established to determine appeals from a person that is dissatisfied with certain decisions of the Minister for Agriculture, Food and the Marine, namely Section 7 of the Forestry Act 2014 (excluding grants) and the Forestry Regulations 2017 as they pertain to afforestation, forest road works, aerial fertilisation and felling. The Forestry Regulations 2017 transpose the EIA Directive in relation to certain forestry activities, including in relation to Article 6 and 11 of the Directive. The EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case-by-case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation 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 Forestry Regulations 2017 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 and replanting of trees in a commercial plantation as part of a forestry operation, with no change in land use, such as that the subject of the appeal does not fall within the classes referred to in the Directive and is similarly not covered by the Irish Regulations.

In relation to LM08-FL0192, the Minister opened the application to public consultation and the information was available on the DAFM website and separately on the DAFM’s map-based Forestry Licence Viewer. The Forestry Regulations 2017 prescribe the requirements for public consultation in relation to the decision making of the Minister on certain applications for licence. Regulation 10 provides for the Minister to publish a notice of the application in a manner determined by the Minister and that the Minister may make the application available to the public.

The grounds refer to the fact that a site notice is required in relation to afforestation and forest road works but not for felling. The FAC agrees that the Forestry Regulations 2017 do not require the erection of a site notice when an application for felling is made. A site notice is required to inform the public that the felling and extraction operations are being undertaken under licence. The activity of tree felling and replanting in a commercial forest without a change in land use such as the subject of the decision under appeal has clear differences from other activities that might require licencing or the attainment of permission. As previously noted, such activities are not covered by the Annexes of the EIA Directive. Unlike planning matters, the felling of trees in a commercial plantation is an operational decision that does not involve a change in the existing use of the land. The trees in this case have been planted decades previously for the purpose of timber production through felling and trees will be replanted and the forest regenerated. There is no new development but the undertaking of a standard practice in the existing land use. In any case the FAC is satisfied that the public consultation process adopted in the making of the decision was in keeping with the requirements of the Forestry Regulations 2017.

The grounds contend that the DAFM sought to pervert the appeals process by withdrawing a licence after it had been issued and appealed by the Appellant. A decision had been made and issued on the 31st of May 2023 and subsequently appealed by the Appellant with a Notice of Appeal received on the 13th of June 2023. The FAC was then informed on the 19th of June 2023 that the Minister was withdrawing the decision on the basis that an error was made in the advertising of the decision. As the decision no longer existed the appeal could not be considered, and the Appellant was informed of this by the administration to the FAC. The Appellant was also informed when the new licence decision of 19th of June 2023 was made and an appeal was subsequently made against the decision, which is the subject of the current consideration of the FAC. While the Minister is required to inform the public of a decision in a circumstance when a submission is made on an application no submission was made in this case and there is no explicit requirement for the Minister to notify the Appellant directly in writing. Nonetheless, the FAC administration did keep the Appellant informed of the situation promptly as soon as they were advised by the DAFM and the Appellant submitted a Notice of Appeal.

The grounds also challenge the appeal period provided for an appeal to the FAC. The period is prescribed in law by the Minister. The FAC is precluded from considering an appeal received after the prescribed period and has no discretion in this matter.

Ultimately the FAC concluded that these grounds, numbered 1 to 3 by the Appellant, sought to challenge Ireland's, and indeed the EU's, transposition of the Aarhus Convention and related questions of law and the legislation under which the FAC is required to act. The FAC considered that such matters are not generally considered to fall within the remit of an administrative appellate body.

The fourth ground related to the consideration of Leitrim County Council's submission following a referral of the application by the DAFM in relation to broadleaf planting and access. The DAFM submitted, in responding to the appeal, that the Council's submission was considered fully, and that the proposal included a setback from the public road which corresponded to the area of outstanding natural beauty raised as a concern by the County Council. The DAFM also noted the diversification of the forest at replanting stage and the aquatic setbacks and that it was satisfied that the application contained due consideration of the matters raised by the County Council. The FAC also noted that the licence as issued contains a condition requiring consultation with the County Council. The requirement under the Forestry Regulations 2017 is for the Minister to have regard to submissions made on an application but the FAC does not understand that this would remove the authority of the Minister to make decisions on licence applications. The FAC is satisfied that this aspect of the County Council submission was clearly considered in the making of the decision.

However, the County Council also submitted that the application lacked details of access to the public road. The FAC reviewed the application which included details of the felling and replanting and a number of maps. This included a "Harvest Plan Map" which shows a number of operational and environmental details, however the FAC did not find that access to the site is identified on this or any of the other maps submitted. Furthermore, while the Harvest Plan Map does not mark the public road, a "Reforestation

Map” marks the public road as bordering the eastern boundary and dissecting the plots. While a stacking area is marked on or very close to this road on the Harvest Plan Map, access and related infrastructure is not identified.

The submission from the County Council related in part to the requirements related to the creation of a new entrance to a public road which is the subject of a separate consent process and not relevant to the application that was made in this case. However, the Standards for Felling and Reforestation (DAFM, 2019) are stated to apply to all felling licences issued by the Minister under SI 191 of 2017. These also lay out the required content of a harvest plan and map. While the FAC understands the submission of such is not a requirement in all cases, it understands that, where submitted, the Harvest Plan forms part of the application itself (page 1). It is stated that such a plan must describe, existing and planned forest road(s) to and from the public road, including associated features such as landings, turntables and bridges.

The FAC considers that the application and maps as submitted and provided to the FAC do not identify details of access to the site or to the public road. The FAC does consider that the maps are generally of a high quality and provide considerable detail concerning features inside and outside the proposal boundary. However, the specific issue of access is not addressed, and this was raised by the County Council in its submission. In this context the FAC is satisfied that the matter constitutes a serious error in the making of the decision and in the making of the application.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence LM08-FL0192. The FAC is therefore allowing the appeal and is setting aside the decision of the Minister regarding licence LM08-FL0192.

Yours sincerely,



Seamus Neely, On Behalf of the Forestry Appeals Committee

