



3rd July 2024

Subject: Appeal FAC 002/2024 regarding Licence Ref: SO09-FL0042

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 (The Minister). The FAC established in accordance with Section 14A(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 Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statement of Fact (SoF) provided by the DAFM, all materials on file, the notice, and grounds of appeal and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence SO09-FL0042

THE LICENCE.

Licence SO09-FL0042 is for felling of 1.21 Ha. across two plots, one comprised of 100% Lodgepole pine (south coastal) planated in 1966 and a second comprised of Sitka Spruce (77%) of Hybrid larch (13%), Willow (6%) and Lodgepole pine (south coastal) (4%) planted in 2003, located in the townland of Greaghnafarna, Co. Leitrim.

The application for the licence as submitted to the DAFM was dated the 24th of March 2023. A decision approving the licence was issued on the 9th of January 2024 with a requirement for adherence to a series of conditions including replanting 95% of the site with Lodgepole pine and leaving 5% of the site as Open Space.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC was held remotely on the 12th of June 2024 which considered the appeal (FAC 002/2024) against the decision to issue the licence of the 9th of January 2024. The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton and Mr. Iain Douglas. The Secretary to the FAC was Ms. Aedin Doran.

BACKGROUND.

The proposal consists of the felling of 1.21 Ha. of Sitka spruce, Hybrid larch, willow and Lodgepole pine. The soils on the site are described as 100% blanket peat. The slope is described as being <15% sloping northwest between 220m and 200m elevation. It is stated that the site does not adjoin an aquatic zone or relevant watercourse. The habitat on the site is 100% conifer plantation high forest.

The site lies in the Water Framework Directive (WFD) Sligo Bay & Drowse Catchment and the Bonet_SC_020 Sub-catchment. The site is located within the Killanummery_010 River Sub-Basin. The nearest WFD River Waterbody to the site is the Douglas [Sligo]_010 ca. 400m south-west of the site. This river water body had Poor status in the period 2016-2021 and its status is not at risk in the WFD 3rd cycle. There is an unnamed first order EPA stream on the south-eastern boundary which had High status in the period 2016-2021 and its status is considered to At Risk in the WFD 3rd cycle. Forestry & Agriculture have been identified as pressures on this waterbody. The underlying groundwater body is the South Belhavel Lough IE_WE_G_0110 which was of Good status in the 2016-2021 monitoring period and is stated as not being At Risk in the WFD 3rd cycle.

The application documents before the FAC included an Application pack consisting of an Application Form and maps dated the 24th of March 2023, an undated Harvest Plan Map marked as uploaded on the 13th of December 2023 and an Appropriate Assessment Pre-Screening Report (AASR) dated the 31st of July 2023.

The licence application was referred to Leitrim County Council on the 12th of April 2023 which replied on the 10th of May 2023 stating that the site does not fall within any visually designated area, is located in an area that is sensitive to forestry, is not in a Natura 2000 site, does not impact on any recorded monuments listed for protection or Tree Preservation Orders. The response requests the DAFM to consider increased broadleaf planting given the area's sensitivity to forestry and concludes with the statement that *"The Planning Authority has no objection to the proposed tree felling"* and requests conditions be included requiring liaison with the council by the Forest Service and that all work is carried out in accordance with best practice guidelines. Attached to the response is a report from the District Engineer outlining the Council's requirements relating to roads. The response

The DAFM file on the Forestry Licence Viewer (FLV) relating to the licence dated 09/01/2024, includes a DAFM Appropriate Assessment Screening Report & Determination (ASSRD) dated the 06/09/2023, and an In-combination Report dated the 06/09/2024 which is marked as an Appendix to the AASRD.

The Applicant's Appropriate Assessment Pre-Screening Report (AASR) is dated 31/07/2023 and is marked as being *'for Clearfell and Reforestation project SO09-FL0042, located at Garryduff, Co. Leitrim'*. It identified seven Natura 2000 sites within 15 km of the proposed felling and replanting project namely Unshin River SAC (001898), Union Wood SAC (000638), Lough Gill SAC (001976), Lough Arrow SPA (004050), Lough Arrow SAC (001673), Bricklieve Mountains and Keishcorran SAC (001656), Boleybrack Mountain SAC (002032). All seven European Sites were screened out. The DAFM AASRD, identified the same sites as being within 15Km of the site and in addition two sites outside that distance; Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC (000627) and Cummeen Strand SPA (004035) to which the site had hydrological connections.

The file records that there were no third-party submissions on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application. The grounds of appeal are in summary:

1. That there is inadequate and ineffective public notice in contravention of Article 6 (2) of the Aarhus convention.
2. That there are failures in respect of Article 6(3) of the Habitats Directive.
3. That there is a lack of potential for enforcement.
4. That re-stocking of blanket peat is not consistent with Government Policy on Climate Change.

5. That there is no evidence that the comments of a consultation body have been considered resulting in a failure of due process.

There is a post-appeal submission from the applicant in response to the DAFM Statement of Fact

CONSIDERATION BY THE FAC.

At its sitting on the 12th of June 2024, the FAC had before it the full DAFM record of the decision as made available on the FLV, the Notice of Appeal Form, the grounds of appeal, the SoF provided by the DAFM, submissions made, and all materials on file. The FAC having reviewed all the documentation and submissions, including that of the appellant, considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal which is dated the 8/4/2024 confirms the administrative details of the licence application. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

The SoF also contains a statement from the Forestry Inspectorate dated 02/02/2024 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and containing a response to the grounds of appeal.

GROUND OF APPEAL.

The FAC considered the appeal under the headings as presented in the grounds of appeal SO09-FL0042 date stamped 24 Jan. 2024.

That there is inadequate and ineffective public notice in contravention of Article 6 (2) of the Aarhus convention.

This ground of appeal contends that there is inadequate and ineffective public notification of felling licences, in contravention of Article 6(2) of the Aarhus convention and that there is inconsistency in the Forestry Regulations 2017 (as amended) between requirement for a public notice on site for afforestation and forest roads while the public notice for felling is required after the licence has been issued.

In considering this ground of appeal the FAC noted the comments of the Forestry Inspector dated the 02/02/2024 in the DAFM SoF that its chosen method of notifying the public of felling licence applications is through the FLV on its website. The FAC also noted the appellant's response to the SoF received 26/04/2024.

The role of the FAC is to consider whether the Minister made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. With regard to the notification of the decision and the Aarhus Convention, the FAC understands the Aarhus Convention to be a convention under the United Nations Economic and Social Council (UNECE) and that it does not form part of domestic legislation. The FAC noted that the decision on this licence was made on 09/01/2024 and advertised the same day on the DAFM website in accordance with the DAFM procedures and the provisions of the Forestry Act 2014 and Forestry Regulations 2017 and concluded that this in itself did not constitute a failure of due process or a failure of fair procedures by the DAFM under the Forestry Regulations 2017.

The FAC considers that any challenge to the transposition and interpretation of the Aarhus Convention by Ireland is not within the remit of the FAC.

That there are failures in respect of Article 6(3) of the Habitats Directive.

This ground of appeal contends that the DAFM AASRD contains two determinations, one by the Forestry Inspector and one by an ecologist; that the applicant's AASR pre-screening refers to a different townland; that there is an error in the applicant's AASR regarding "relevant watercourses"; that the Stacking & Service Areas although located outside the site are integral to the project and should be considered in any assessment; that the Stacking & Service Areas are located adjacent to an aquatic zone and relevant watercourse which are hydrologically connected to Lough Gill SAC and therefore the possibility of impacts on that SAC cannot be excluded; and that there is no evidence to support the reason of the DAFM ecologist to screen out AA of the project on Lough Gill "Due to the lack of sufficient pathway of impact hydrological or otherwise". The FAC also noted the appellant's response to the SoF received 26/04/2024.

The FAC noted that the DAFM AASRD prepared by the Forestry Inspector dated 06/09/2023 concludes:

"DAFM has determined that it cannot be ruled out, based on objective scientific information, that the Felling and Reforestation project proposed under SO09-FL0042 will have a significant effect, either individually or in combination with other plans and projects, on the following European sites, for the reasons set out in Part A: Screening Report:

➤ *Lough Gill SAC IE0001976.*

As a result, the project must advance to the appropriate assessment stage in relation to these European Sites."

The reason given is "Possible effect due to the direct hydrological connectivity exists (sic) between the project area and this European site."

The FAC further noted that the DAFM AASRD contains an undated Appendix C an "Ecological Review" carried out by Niall Phelan, an ecologist, which states:

"I have determined that there is no possibility of the clearfell and reforestation project (SO09-FL0042) having any significant effect, either individually or in combination with other plans or projects, on any of the European site(s) listed below, for the reasons set out in the Screening Report."

The FAC considers that the ecologist's determination that AA Stage 2 was not required "for the reasons set out in the Screening Report." is not consistent with the reason given in the AASRD that AA Stage 2 for Lough Gill SAC was required due to "Possible effect due to the direct hydrological connectivity exists between the project area and this European site.". The reason given for ecologist's determination is "Due to the lack of a sufficient pathway of impact hydrological or otherwise." The FAC considers the wording of the reason is unclear as it is not established on what basis "a sufficient pathway of impact hydrological or otherwise" is defined.

The FAC considers that, in accordance with both national and European guidelines, there should be one clear and unequivocal determination in an AA Screening Report, in this case there are two conflicting determinations in the DAFM AASRD and it is not apparent that the determination made by the ecologist was accepted by the DAFM. The ecologist's determination is contained in an Appendix to the Forestry Inspector's determination rather than amending that determination or clearly superseding it.

The FAC further noted that the DAFM ASSRD indicates that the screening for AA took into account “input from the District Inspector (including information following field inspection)” however the SoF of 02/02/2024 indicates that the site was desk assessed only.

The FAC noted that the application form submitted for the proposal states that the trees to be felled are located in the townland Greaghnafarna, Co. Leitrim but that the applicant’s AASR refers to the proposal as being in the townland of Garryduff Co. Leitrim which is different to that within which licence SO009-FL0042 is located.

The FAC noted that the revised Harvest Plan Map (pre-licence) marked as uploaded to the FLV on the 13th of December 2023 identifies a relevant watercourse following the forest road north-east of the proposed felling site and along which are located a series of proposed stacking areas, proposed service areas and proposed water crossing points. While these features are located outside of the felling and replanting area subject of this licence, the FAC considers this Harvest Plan Map to be part of the supporting documentation for the licence application and that such features form an inherent part of the activity and therefore these features are part of the project. The FAC noted that neither the applicant’s AASR nor the DAFM AASRD appeared to clearly assess the impact of the proposed stacking areas, proposed service areas and proposed water crossing points in their AA screening documents notwithstanding the fact that the relevant watercourse is hydrologically connected to Lough Gill SAC nor does the file record demonstrate that the use of the stacking areas to service the project were separately assessed. The FAC considers the failure to clearly address the impact of proposed stacking areas, proposed service areas and proposed water crossing points in AA screening, in combination with the contradiction in screening conclusions and reasons, represents a serious error in the processing of the licence.

The FAC considers that there is a lack of clarity and inconsistencies in the DAFM AASRD. Therefore, the FAC considers that, there has been a serious error in the processing of this licence application in so far as Appropriate Assessment is concerned.

That there is a lack of potential for enforcement.

This ground of appeal contends that the absence of a requirement to notify the DAFM on the commencement of works means that there is the potential for the DAFM to be unaware that enforcement action may be necessary and refers to the inadequacy of Condition 24 of the licence. The FAC noted the response to this ground in the SoF of 02/02/2024 which outlined the enforcement procedures adopted by the DAFM and implemented through the staff of the DAFM including regionally based Forestry Inspectors, the FAC also noted the appellant’s replying submission.

The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. The FAC does not consider that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

That re-stocking of blanket peat is not consistent with Government Policy on Climate Change.

This ground of appeal contends that the replanting of trees on blanket peat is not consistent with Government Policy on Climate Change. The ground refers to a submission made by the National Parks & Wildlife Service (NPWS) on licence ref. LS09-FL0188 which acknowledges that the current Forest Service Guidelines prohibit the planting of peat soils for afforestation and suggests that the DAFM consider the prohibition be extended to replanting on peatland. The FAC noted that the appellant has adduced no evidence that the current site is directly comparable to the site to which licence ref. LS09-FL0188 relates and that the quotation from the NPWS report contained in the grounds of appeal requested that the Forest Service give “consideration” to not replanting that particular site rather than

it being a firm recommendation or requirement. The FAC further noted that the that the DAFM is the competent authority for issuing forestry licences and that the proposal as it stands does not contravene current Forest Service Guidelines which refer only to the prohibition of initial planting on blanket peat and do not prohibit replanting. The carbon balance of afforesting deep peats for the first time clearly differs from the restocking of an existing forest where the drainage system and micro-climate has been altered for many decades. In addition, if the Minister had not placed conditions on the restocking of the site the most likely outcome is that the forest would restock through natural regeneration in an uncontrolled manner given the size of the area, the development of a forest micro-climate and the location within an area with an existing seed supply. The grounds provide no basis for concluding that the licence contradicts climate change policy. The FAC does not consider that the Climate Action Plan includes an action or policy which would require the Minister to have made a different decision in this instance. The FAC is not satisfied that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

That there is no evidence that the comments of a consultation body have been considered resulting in a failure of due process.

This ground of appeal contends that there is no evidence that the DAFM have taken into account Leitrim County Council's comment that broadleaved planting should be considered in the replanting scheme. The FAC noted that the DAFM is the competent authority for issuing forestry licences and that in Section 3 of its AASRD is sets out that the responses received from consultation bodies were considered in the preparation of the AASRD. The FAC is not satisfied that the DAFM has erred in its processing of the application regarding this ground of appeal.

IN-COMBINATION REPORT.

In reviewing the documentation on file, the FAC noted that the AASRD relies on an in-combination report (Appendix A of the AASRD completed on 06/09/2023 which includes the statement:

"Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in-combination with other plans and projects".

The FAC consider that an in-combination assessment conducted at AA screening stage should not consider the potential "residual" effects of a proposed plan or project. The FAC consider that this wording is ambiguous as it is not clear whether residual effects are being considered cumulatively in-combination with other plans and projects, or individually in-combination with other plans and projects, and that as a result it is unclear if the proper test has been applied.

The FAC noted that the in-combination assessment referred to the policies and objectives of the Leitrim County Development Plan 2015 – 2021 but that on the date the in-combination assessment was carried out (06/09/2023) the operative county development plan was Leitrim County Development Plan 2023-2029 which came into effect on 21/03/2023. The in-combination assessment also referred to the Forestry Programme 2014-2020 while the operative Forestry Programme at the date the in-combination was carried out is the Forestry Programme 2023-2027 of August 2023.

The FAC considers the use of out-of-date information in carrying out an AA Screening is a serious error in the processing of the licence.

LICENCE.

In reviewing the documentation on file, the FAC noted that condition 3 attached to the licence requires adherence with a number of published standards and guidelines developed by the DAFM. The FAC noted that the titles of some of these documents appeared with errors. There is a reference to "forestry biodiversity" whereas the FAC would understand this should be Forest Biodiversity

Guidelines. The FAC would consider that such documents should be clearly identified, ideally with the associated date to avoid any confusion, and be readily available. However, the FAC considers this to be a minor error as these documents are, in general, well recognised in practice. Of more significance is the absence of the requirement for full compliance with the Standards for Felling and Reforestation (DAFM, 2019). These standards state, *'This document sets out the universal standards that apply to all felling and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the DAFM under the Forestry Regulations 2017.'*

The FAC understand this to be a policy statement and that it is the adopted policy of the Minister for Agriculture, Food and the Marine to condition adherence with these standards on felling licences unless there was a stated reason otherwise. In addition, the Forestry Regulations 2017 require the Minister to have regard to such standards in making licencing decisions. The FAC noted that the only requirement in the licence to comply with the Standards for Felling and Reforestation (DAFM, 2019) is at licence condition 23 which only requires compliance with Section 8 of the Standards. The FAC considers the failure to include full compliance with these standards as a condition on the licence represents a serious error.

CONCLUSION.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, submissions made, and the SoF submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of serious errors was made in the making of the decision in relation to licence SO09-FL0042. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence SO09-FL0042 to ensure that the project is subjected to the screening and, if required, Appropriate Assessment process such that the requirements of the law are met and to address other errors identified by the FAC in this letter before a new decision is made.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee

