



[Redacted]

20<sup>th</sup> April 2021

**Subject:** Appeal FAC 088/2020 regarding licence TFL00343119

Dear [Redacted]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Background**

Licence TFL00429319 for felling of 5.36 ha at Annacalban, Laurencetown, Co. Galway was approved by the Department of Agriculture, Food and the Marine (DAFM) on 17<sup>th</sup> February 2020.

An oral hearing of appeal FAC 088/2020, of which all parties were notified, and representatives of the DAFM and a representative of the Applicant attended, was held by the FAC on the 31<sup>st</sup> of March 2021.

In attendance at Oral Hearing:

Department Representative(s):	Ms. Eilish Keogh, Mr. Donal Keegan,
Appellant:	[Redacted]
Applicant / Representative(s):	[Redacted]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Derek Daly and Mr. Seamus Neely.
Secretary to the FAC:	Ms. Marie Dobbyn.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence TFL00343119.

### Summary of Licence

The licence pertains to 5.36 ha of forest at Annacalban, Laurencetown, Co. Galway. Current stocking on the site is described as Sitka spruce (70%), Japanese larch (10%), Lodgepole pine (10%), and birch (10%). Replanting is to be 90% Sitka spruce. The Inspector's Report describes the site as:

*The predominant soil type underlining the project area is predominantly highly modified peat and peaty podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by /adjoins an aquatic zone(s). The vegetation types with the project area comprise conifer forest.*

The application is accompanied by a site location map and a biomap, which shows a corridor through the site to accommodate electricity lines, as well as the access route to the site. Although no watercourses are marked on the biomap, publicly available mapping from the OSI shows the presence of a watercourse bounding the east of the site and a drain bounding the west of the site. The site is located in the Kilcrow\_SC\_10 subcatchment of the 25C\_Lower Shannon Catchment. The nearest EPA marked watercourse is the Kilcrow\_040 which is ca. 930m away to which the watercourse and drain bounding the site would appear to be connected based on OSI maps. This has a Moderate status under the 2013-2018 WFD Monitoring cycle.

A referral to NPWS is on the DAFM file dated the 23<sup>rd</sup> of May 2019, and a response was received on 28<sup>th</sup> of June which, while making no specific recommendations in relation to the site, provided an appendix with general points relating to nature conservation in relation to Forestry. A referral to Galway County Council is also on file dated the 23<sup>rd</sup> of May 2019, with no apparent response.

The Inspector's Report which is on file records that DAFM undertook a screening of the proposal for Appropriate Assessment and found that there were nine European sites within a radius of 15km of the site, with no reason to extend the search area. The sites identified in the screening are:

1. Ardgraique Bog SAC [2356]
2. Glenloughaun Esker SAC [2213]
3. Lough Derg (Shannon) SPA [4058]
4. Lough Derg, North-east Shore SAC [2241]
5. Middle Shannon Callows SPA [4096]
6. Redwood Bog SAC [2353]
7. River Little Brosna Callows SPA [4086]
8. River Shannon Callows SAC [0216]
9. River Suck Callows SPA [4097]

The report indicates that these were screened out for the following reasons:

- The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection (Sites 1 and 9).

- The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection (Sites 2, 5, 6 and 8).
- The absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site (Site 2)

All sites were also screened out on the basis of there being no likelihood of the project itself (i.e. individually) having a significant effect on the European Site and as a result 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. In the case of sites 3, 4 and 7 in the list above this was the only reason provided for screening the site out.

An In-combination effects report is on file which details searches of various planning systems having taken place on the 21<sup>st</sup> of February 2020.

The Inspector's report also considers the requirement for EIA and considers a wide range of factors relating to the size of the project, other forestry proximate to the site, water quality, landscape, designated and non-designated, habitats and other criteria, and concludes that an EIA is not required.

The licence was issued on the 17<sup>th</sup> of February 2020 with a number of conditions attached including general conditions in relation to adherence to good forestry practice and standards.

#### **Grounds of Appeal**

There is one appeal against the decision to issue the licence. Briefly, the grounds of appeal include that the Appropriate Assessment Screening does not comply with the requirements of the law; that the Inspector's conclusion that there may be no effect on the Lough Derg, Northeast Shore SAC [2241] is flawed; that there is no evidence that the Inspector looked at the details of the "in combination with other plans and projects" part of the assessment; that the test for Appropriate Assessment screening is "may have an effect", the appeal also refers to case law in this regard. The appeal also makes submissions on the role and function of the FAC.

#### **Statement of Fact and Oral Hearing.**

In a statement to the FAC, the DAFM confirms the timeline of the application has outlined above and states that the application was desk assessed. In the statement it is submitted that the decision was issued in accordance with the procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures listed in the statement have been adhered to in making a decision on the application. In the statement the Inspector submitted that a desk only assessment was carried out as he had previously inspected the site for a Forest Road application in 2017 and that of particular importance to the application is that all water from the site flows south. The Inspector further submitted that the in-combination report was

requested on the 10<sup>th</sup> of February 2020 and was scanned to the application file on the 21<sup>st</sup> of February 2020.

At the Oral Hearing, representatives from DAFM restated the contents of the Statement of Fact previously provided. They confirmed that the site is within the Kilcrow\_SC\_010 Subcatchment of the 25C\_Lower Shannon Catchment, but acknowledged that it lies close to the boundary as mapped by the EPA of the Suck\_SC\_100 subcatchment of the 26D\_Upper Shannon Catchment.

Both DAFM and the applicant's representative confirmed the presence of the stream which bounds to the east of the site and the drain which bounds the west of the site and submitted that these connect to the Kilcrow\_040 river. DAFM submitted that this is connected to Lough Derg at a hydrological distance of ca. 24km.

In response to questions from the FAC, the Inspector submitted that when completing the screening for appropriate assessment, reasons for screening out individual sites would have been provided (in addition to the reason in relation to the absence of in-combination effects) and that the certification process could not have proceeded without such reasons being provided. The Inspector submitted that the absence of reasons in relation to the Lough Derg (Shannon) SPA [4058], the Lough Derg, North-east Shore SAC [2241], and the River Little Brosna Callows SPA [4086] likely arose from an upgrade to the IT systems used by DAFM and was not reflective of the text that was present at the time of certification.

The Inspector also confirmed the details provided in the Statement of Fact that the in-combination report was requested on the 10<sup>th</sup> of February but was not received to the application file until the 21<sup>st</sup> of February 2020.

#### **Consideration by the FAC**

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the Statement of Fact provided by the DAFM, and the record of the application and licensing process. The FAC also consulted with several publicly available information sources such as mapping from the EPA, the DAFM and the OSI. These confirm the details of the project site as outlined above including the presence of watercourse and the presence of the same nine European sites within 15 km of the site as recorded by DAFM.

In relation to those grounds of appeal relating to Appropriate Assessment the FAC noted the absence of an explanation in the Appropriate Assessment screening of reasons for screening out of the Lough Derg (Shannon) SPA [4058], the Lough Derg, North-east Shore SAC [2241], and the River Little Brosna Callows SPA [4086]. The FAC noted the Inspector's submission that reasons would have been provided at the time the screening was carried out, but as the application did not proceed to Appropriate Assessment, the FAC has no means to ascertain and verify the record of those reasons. The absence of a record in the documentation within the file to demonstrate the reasons relied on for screening out three of the

Natura 2000 sites in this case is a serious omission. The FAC therefore considers a serious error or errors occurred in the processing of the licence as it relates to Appropriate Assessment.

When considering the ground that there is no evidence that the Inspector looked at the details of the "in combination with other plans and projects" part of the assessment, the FAC has regard to the Statement of Fact provided by DAFM and restated at oral hearing. This states that while an in-combination report was requested prior to the issuing of licence, this was not received or added to the record until the 21<sup>st</sup> of February 2020 which is after the date on which the licence was issued. As noted the DAFM concluded that the proposal could be screened out on the basis of there being no likelihood of the project itself (i.e. individually) having a significant effect on a European Site and that as a result there is no potential for it to contribute to any cumulative adverse effects on a European site, when considered in-combination with other plans and projects. In the case of this licence application, the FAC considers this to be an incorrect test to employ as it fails to account for potential effects that could, in combination with other plans and projects, result in significant effects on a European site. In the opinion of the FAC the undertaking of an in-combination consideration after the licence had issued and the test employed in the screening undertaken represent a serious error in the processing of the licence.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors was made in making the decision. The FAC is thus setting aside and remitting the decision of the Minister regarding licence TFL00343119 in line with Article 14B of the Agricultural Appeals Act 2001, as amended for screening for Appropriate Assessment.

Yours sincerely,

A black rectangular redaction box covering the signature of John Evans.

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John Evans On Behalf of the Forestry Appeals Committee

