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4th March 2021

Subject: Appeal FAC 034/2020 regarding licence TFL00335319

Dear [REDACTED]

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 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 TFL00335319 for thinning of 10.6 ha at Altlahan, Cloghan, Co. Donegal was approved by the Department of Agriculture, Food and the Marine (DAFM) on 9th January 2020.

Hearing

An oral hearing of appeal FAC 034/2020, of which all parties were notified, and representatives of the DAFM attended, was held by the FAC on 3rd March 2021.

In attendance at Oral Hearing:

Department Representative(s):	Ms. Eilish Kehoe, Mr. Martin Regan,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr Vincent Upton 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 TFL00335319.

The licence pertains to the thinning of 10.6 ha of forest at Altlahan, Cloghan, Co. Donegal. The soil type underlying the project area is described in the AA Screening documents as being predominantly highly modified peat & peaty podzols in nature and the slope is described as being predominantly steep (15% to 30%). It is also stated that the project area does not adjoin or contain an aquatic zone(s). The DAFM undertook two separate screenings for Appropriate Assessment. The first dated 8th July 2019 was based on the process being used at the time and was not relied on when making the decision in relation to this licence. The second, which is undated and was submitted to have been relied on in the making of the decision in relation to the licence, was confirmed by the author at oral hearing to have predated the certification upon which the licence issued. This later screening found that there were nine European sites within 15km and the likely zone of impact was not extended to include further Natura sites in this case. All nine sites (Cloghernagore Bog And Glenveagh National Park SAC 002047, Coolvoy Bog SAC 001107, Croaghonagh Bog SAC 000129, Derryveagh And Glendowan Mountains SPA 004039, Leannan River SAC 002176, Meenaguse Scragh SAC 001880, Meentygrannagh Bog SAC 000173, River Finn SAC 002301 and West Of Ardara/Maas Road SAC 000197) were screened out for the purposes of Appropriate Assessment and reasons are provided in the AA screening documentation on file in respect of the conclusions reached for each Natura Site. There was no evidence on file that other plans and projects were considered in combination with the proposal. The file confirms that the application was referred to the National Parks and Wildlife Service who responded and raised no issues with the proposal. The licence was approved with conditions on 9th January 2020.

There is one appeal against the decision. The grounds submitted broadly include, that the Forest Service in its screening for Appropriate Assessment found that there were Natura sites within the 15km zone of impact, that this is a trigger for the requirement for an Appropriate Assessment as it (the development) may have an effect, the grounds further submit that the District Inspector answered in the affirmative to Questions 3 & 4 in the Forestry Inspection Report but did not provide any evidence as to what this answer is based on, submits that in most cases the District Inspector states that the Natura site(s) is in a different catchment but fails to state which catchment that it is in, submits that in these circumstances the only legal answer in this case should be that the application has been (sic) screened in for Appropriate Assessment. The Case law C 323/17 regarding interpretation of Article 63) of Council directive 92/43/EEC of 21 May 1992 is referenced. The grounds also submit that safeguards published in the Forest Service guidelines, requirements & procedures are in fact measures to avoid or reduce the harmful effects of the plan or project on that site, and submits that any decision must comply with a commission notice which interprets the relevant judgements of the CJEU.

In the statement to the FAC in relation to appeal FAC 034/2020, the DAFM provide a response to the appeal wherein it 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 as listed on the statement have been adhered to in making a decision on the application.

At the oral hearing of the appeal the DAFM representative went through the main contents of the statement, confirmed that the file had been referred to the Inland Fisheries Ireland and that no reply had been received. In response to questions the DAFM representative clarified some matters in relation to

what appeared to be an anomaly in the record with regard to the area pertaining to the thinning application. This clarification was to the effect that the project applied for was 10.6 ha and that the reference to the 9.52 ha on the statement related to the digitised area of the site. It was also confirmed that an Appropriate Assessment screening dated 9th July 2019, which had assessed Natura sites within a 3 km distance, had not been relied on in the making of the decision and that a later screening for Appropriate Assessment (which is to be found in the Inspectors certificate on the file) and which assessed sites within a 15 km distance was the screening relied on in this case. The DAFM representative in response to questions at oral hearing, acknowledged that while this application was considered based on desk assessment, that he was familiar with the area, that the level of operations under this licence would be relatively modest as it is for thinning as opposed to clearfelling, and that he is satisfied that there are no relevant watercourses on the site. It was also confirmed at the oral hearing that while the application was referred to the Inland Fisheries Ireland it was acknowledged that the application in this case should have been referred to the Loughs Agency in whose area the project is located. It was further confirmed by the DAFM representative that an in-combination assessment had not been carried out in relation to this project.

The FAC, in the first instance, considered the appropriate assessment screening undertaken by the DAFM. The grounds of appeal do not make reference to any specific European site, pathways or effects of concern. The FAC found that the DAFM undertook two separate screenings for Appropriate Assessment in this case and that the first dated 8th July 2019 which was based on the process being used at the time was not relied on when making the decision in relation to this licence. The second, which is undated (and confirmed by the author at oral hearing to have predated the certification upon which the licence issued) was relied on in the making of the decision in relation to the licence and found that there were nine European sites within 15km and the Likely Zone of impact was not extended to include further Natura sites in this case. All nine sites (Cloghernagore Bog And Glenveagh National Park SAC 002047, Coolvogy Bog SAC 001107, Croaghonagh Bog SAC 000129, Derryveagh And Glendowan Mountains SPA 004039, Leannan River SAC 002176, Meenaguse Scragh SAC 001880, Meentygrannagh Bog SAC 000173, River Finn SAC 002301 and West Of Ardara/Maas Road SAC 000197) were screened out for the purposes of Appropriate Assessment and reasons are provided in the AAS in respect of the conclusions reached for each Natura Site. However, there was no evidence found on file that other plans and projects were considered in combination with the proposal and this position was clarified and confirmed at the oral hearing. The FAC is satisfied that this constitutes a serious error in the making of the decision and while noting the submissions made by DAFM at the oral hearing, the FAC concluded that a new screening of the application for Appropriate Assessment is required and should be undertaken regarding this proposal.

In considering the contention in the grounds of appeal that a Natura 2000 site was in a different catchment the FAC finds that there does not appear to be such a reference in this case and therefore no basis can be found for this particular appeal ground. Regarding the grounds of appeal that the Inspector answered in the affirmative to Questions 3 & 4 in the Certification Report but did not provide any evidence as to why he did so, the FAC finds question 3 refers to the review of all referrals and submissions in this case, and the FAC finds based on the evidence before it that referrals were made in this case to the Inland Fisheries Ireland and the National Parks and Wildlife Service (NPWS). The FAC finds that the NPWS responded and

raised no issue with the proposal. In relation to question 4 the FAC finds it refers to having sufficient information to make a sound judgement regarding the likelihood of the project having a significant effect on a European site. In this case the Inspector answered these questions on the certification / report in the negative. At oral hearing and in response to a question in this connection the author of the certification / report advised that the 'no' answers to questions 3 and 4 was an error and that the answers to both should have been 'yes'. The FAC, while noting that this was an error on the certification record, accepted the clarifications provided by the author at the oral hearing.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. In the above circumstances, the FAC concluded that a serious error or series of errors were made in the decision of the DAFM regarding TFL00335319 and that the decision should be set aside and remitted back to the Minister to undertake an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive and that the opinion of the Loughs Agency should be sought before a new decision is made.

Yours sincerely,


Seamus Ivey On Behalf of the Forestry Appeals Committee