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16th March 2021

Subject: Appeal FAC 029/2020 in relation to licence TFL00326419

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence TFL00326419 for thinning of 3.5 hectares (ha) at Ballagh, Co. Wicklow was granted by the DAFM on 19th December 2019.

Hearing

An oral hearing of appeal FAC 029/2020, of which all parties were notified, was held by the FAC on 10th March 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	Mr. Robert Windle & Ms. Eilish Keogh
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received including at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister to grant this licence TFL00326419.

The licence relates to the thinning of forest on 3.5 ha at Ballagh, Co. Wicklow. The proposal was for thinning in 2019, 2023 and 2029. The proposal area is in one block with two plots of 2.98 ha and 0.52 ha of Sitka spruce. The underlying soil type is said to be predominately brown earths in nature, the slope is predominately flat to moderate <15%, the project area is crossed by/adjoins an aquatic zone and the vegetation type in the proposal area comprise mixed woodland (WD2). The site lies along a NW to SE axis and being long and narrow in shape. A watercourse runs along the full length of the eastern boundary, flowing north to join the DerryWater river. The site is located within the Ovoca-Varty WFD

Catchment (#10) and the DerryWater SC_010 with the watercourse that adjoins it part of the DerryWater_030 river waterbody, for which the WFD status was recorded as 'good' during the 2013-2018 assessment.

The application was referred to Inland Fisheries Ireland (IFI), however no response is on file. The DAFM undertook and documented a screening for Appropriate Assessment (AA) dated 5th May 2019, that identified no European sites within 3km and determined that Appropriate Assessment was not required. The DAFM subsequently undertook and documented a second Appropriate Assessment screening, that identified three European sites within 15km and that there was no reason to extend this radius in this case. This screening also determined that an Appropriate Assessment was not required, while giving reasons for screening out each of the sites. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The DAFM also considered the application across a range of criteria and concluded that it should not be subject to Environmental Impact Assessment (EIA). The DAFM approved the application on 19th December 2019 with standard conditions.

The decision to grant the licence is subject to one appeal. The grounds submitted broadly are that the presence of Natura sites within 15km of the project site should have triggered a screening for Appropriate Assessment; that the inspector has not provided evidence as to the review of referral responses and submissions regarding the project and the AA Screening process (Q3 on the Inspector's certification); that the inspector has not provided evidence as to there being sufficient information within the application and available from elsewhere to form a sound judgement as to whether or not the project is likely to have a significant effect on a Natura site (Q4 on the Inspector's certification); that the inspector has stated that the project is in a different catchment to a Natura site, but not stated what catchment that it is in; and that the safeguards published in the Forest Service guidelines, requirements and procedures are in fact measures intended to avoid or reduce the harmful effects of the plan or the project on that site. The following judgments and opinions are referred to in support of the grounds of appeal; the judgment in Case C-323/17, Commission notice "Managing Natura 2000 sites - The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC", C(2018) 7261 (21/11/2018) and Kelly v An Bord Pleanála & Others 2013 JR 25/07/2015 of Justice Finlay Geoghegan.

In a statement to the FAC in responding to the appeal, the DAFM submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, and the relevant AA procedure was applied in approving this licence. It was submitted that using the current AA procedure in conjunction with the Habitat & Foraging guidance tables all Natura 2000 sites have been screened out as outlined on file and that the application alone or in-combination with other forest and non-forest plans/projects in the area will not have a significant impact the qualifying interests of the Natura 2000 sites screened as part of the AA.

At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence, confirmed that no response was received from IFI and clarified that all the Appropriate Assessment screening and in-combination assessment was completed before the licence issued. The

DAFM also clarified that the area applied on was 3.5 ha but it was digitised as 3.28 ha and submitted that the watercourse will not be crossed to bring out timber from the site.

The FAC in considering the appeal, notes regarding Environmental Impact Assessment (EIA), that 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 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 Regulations, 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 of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The Forestry Act 2014 defines a forest as land under trees with a minimum area of 0.1 ha and tree crown cover of more than twenty per cent of the total area or the potential to achieve this cover at maturity. The decision under appeal relates to a licence for the thinning of an area of 3.28 ha. 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. Therefore, the FAC finds due to this application being for thinning the EIA regulation, as implemented, does not apply in this case.

In addressing the Appropriate Assessment grounds of appeal, the FAC considered, under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans and projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening, and found three European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Slaney River Valley SAC 000781, Wicklow Mountains SAC 002122 and Wicklow Mountains SPA 004040. The FAC consulted publicly available information from the NPWS and EPA and identified the same three sites. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. The DAFM's reasons for screening out the different sites were site specific. For the Slaney River Valley SAC it was; 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. For the Wicklow Mountains SAC it was; the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. For the Wicklow Mountains SPA it was; the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site. The FAC noted that the forest is recorded as WD2 in this part of the record whereas, based on the application details, it should have been recoded as coniferous plantation (WD4). While this constitutes an error in the record it was established at oral hearing that the

DAFM were familiar with the characteristics of the site and the FAC considered the error to be of a minor and clerical nature and would not impact on the decision. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. The FAC considered all of the evidence before it and is not satisfied that the DAFM erred in their decision to screen out the three Natura sites for Appropriate Assessment. Furthermore, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment.

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. Based on the evidence before it that no referrals were received in this case and that the Appropriate Assessment screening was redone by DAFM focusing on a radius of 15km, the FAC finds this response adequate. Question 4 refers to the inspector having sufficient information to make a sound judgement on the likelihood of the project having a significant effect on a European site. Having reviewed the evidence before it, including the Appropriate Assessment screening, the FAC is satisfied that the inspector had sufficient information before him to make his decision.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision, considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

A large black rectangular redaction box covering the signature of James Conway.

James Conway, On Behalf of the Forestry Appeals Committee