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7 October 2021

Subject: Appeal FAC 548/2020 in relation to licence TFL00344919

Dear [REDACTED]

I refer to an appeal made to the Forestry Appeals Committee (FAC) in relation to this decision 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 the parties to the appeal.

Background

Tree felling licence TFL00344919 was granted by the Department of Agriculture, Food and the Marine (DAFM) on 17th July 2020.

Hearing

A hearing of appeal FAC 548/2020, was held by a division of the FAC on 1 February 2021. In attendance: FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway & Mr. Seamus Neely.

Decision

The Forestry Appeals Committee considered all of the documentation on the file, including application details, processing of the application by DAFM, the notice of appeal, and all submissions received, before deciding to set aside and remit the decision of the Minister to grant this tree felling licence (Reference TFL00344919).

The licence pertains to the thinning, felling and replanting of forest on 18.63 hectares at Teeveeny, Co. Cork. The forest is currently composed of 100% Sitka Spruce, and replanting would be of 90% Sitka spruce, 5% Common Alder and 5% Birch. The licence is for thinning in 2020, 2023 and 2026 with clearfelling in 2029. The project area consists of two plots separated by a public road, plot 1 is of 3.85 hectares to west of the road and plot 2 is of 14.78 hectares to the east of the road. Both plots are largely bounded by forest, but with agricultural land to the north of plot 2 and the public road separating both plots. A watercourse crosses to the north of both plots, flowing east to west. A watercourse also adjoins plot 1, flowing south to north along part of its western boundary, exiting the site before connecting with the watercourse that crossed the site and together they flow north. The site is located within the Shannon Estuary South WFD Catchment and the Deel (Newcastlewest)_SC_010 with the aforementioned watercourses forming some of the headwaters of the River Deel (Newcastlewest)_010, for which the WFD status was recorded as 'unassigned' during the 2013-2018 assessment.

The DAFM referred the proposal to Cork County Council, who provided a response which raised no objection and made a number of observations regarding accessing the site and utilising the public road. A DAFM Archaeologist reviewed the proposal and identified that the proposal area does not contain any

Recorded Monuments but that both plots are contiguous to Recorded Monuments, all of which are classified as Burnt Mounds. The Archaeologist proposed specific archaeological conditions be attached to the licence.

A harvest plan and an operational map was submitted with the application. The application indicates the forest was established in 2009 and proposes three thinning stages and clearfell in 2029. Replanting of the current 100% Sitka spruce to be of 90% Sitka spruce, 5% Common Alder and 5% Birch. The harvest plan indicates that the stream that traverses both plots will have to be crossed during felling and replanting operations in both plots and all timber stacking activity will take place on existing forest roads. It is included that the stream is to be crossed using bridges constructed of logs and a brash mat is to be placed on top and that if the brash mat becomes damaged that all works are to cease until it is renewed. It is outlined that all harvesting and extraction operations are to be carried out in line with all Forest Harvesting and Environmental Guidelines. Other precautionary measures are outlined including regarding machine selection, operations to be carried out in suitable conditions with extraction to cease in periods of high rainfall. The DAFM in assessing the application sought additional details on the replanting plan and a replanting map and plan was submitted that details the species to be replanted, stocking levels, cultivation type and setbacks. The licence includes the condition to strict adhere to the Standards for Felling and Reforestation Guidelines (October 2019) and the following additional environmental and silvicultural conditions;

- In replanting, stop all mound drains at least 10m from the streams and 5m back from all drains. Plant 5 rows of alder/birch along the road and stream setback.
- At each harvesting operation, install silt traps 10m and 20m back from streams in all drains directly connected to the streams.

A Stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, is documented as part of the DAFM Inspector's Certification document. This screening listed four Natura 2000 sites within 15km of the proposal and extended this radius to include an additional site, Lower River Shannon SAC 002165, in this case. The sites were considered in turn with their qualifying interests listed and the reasons for screening out each site was provided. A standalone Appropriate Assessment Screening Determination document dated as completed by DAFM on 24th June 2020 is also on file. This document also lists the Natura 2000 sites within 15km of the proposal - Ballyhoura Mountains SAC 002036, Blackwater River (Cork/Waterford) SAC 002170, Kilcolman Bog SPA 004095 and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 – and extends the radius to include Lower River Shannon SAC 002165. The document gives an expert reviewer's screening recommendation for each of the sites following the District Inspector's recommendations, and the reviewer's recommendation is to screen out all the sites for Appropriate Assessment with rationale provided for each site. The document concludes that *"...DAFM has determined that there is no possibility of TFL00344919 having any likely significant effect either individually or in combination with other plans and projects on any European site..."*

The file shows two separate documents on the proposal's potential to contribute to in-combination effects on Natura 2000 sites, with the one identified as an updated document referencing that websites were consulted on the week of the 12th June 2020. An assessment to determine EIA requirement is also on the DAFM file. The licence issued on 17th July 2020 with additional environmental and silvicultural conditions and specific archaeological conditions.

There is one appeal against the decision. Broadly the grounds of the appeal submitted are;

- before granting a felling licence, it was necessary for the Minister to establish the legitimacy of the actual forest, as this has not been done it is necessary for the FAC to do it;

- the basis on which the FAC has requested further information from the Forest Service is questioned;
- this decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive or the basic guidelines of the NPWS;
- the test for Appropriate Assessment Screening in Irish and EU law is: it is, merely necessary to determine that there may be such an effect, rather than to state that it will not have a significant effect;
- the Appropriate Assessment procedure adopted by the DAFM is flawed, with reference made to the Judgement of the CJEU in case C-323/2017 in regard to the consideration of conditions/measures at the screening stage; and
- it is the duty of the FAC to carry out both a full Appropriate Assessment Screening and a full Environmental Impact Assessment Screening in accordance with the law, with the opinion of Advocate General Kokott in Case C-254/2019 referred to in this regard.

The DAFM responded to the grounds of appeal stating that the licence application had been processed according to their procedures; SI 191 of 2017 and the Forestry Act 2014, and that all criteria were adhered to. The DAFM inspector added in the statement that:

“The application was referred on the 28-05-2019. I desk assessed the application. There was a lack of information re the proposed replanting. I certified the application on the 09-08-2019, requesting ‘further information required’ regarding replanting. A referral to Cork County Council was made on the 28-05-2019 and a response received on the 26-06-2019.

The application was referred to my worklist again on the 22-08-2019. I carried out a field inspection on the 23-08-2019. Based upon the site characteristics, application and AA procedures I screened the application ‘in.’ The site is hydrologically connected to the Blackwater river SAC. An AA determination was completed by Manus Crowley and Ken Bucke, dated the 24-06-2020, in which they screen the application ‘out.’ Based upon their screening ‘out,’ the application was returned to my worklist. The in-combination report was completed by the ecological unit and is in contacts, dated the 25-06-2020.

Based upon the site characteristic, application and various procedures and standards, I recommended ‘approval with conditions’ of the application. The various conditions are outlined in the application in iforis.”

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU 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 (nor clear-felling) are 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 decision under appeal relates to a licence for the thinning, felling and replanting of an area of 18.63 hectares. 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 considers that screening for EIA was not required in this case.

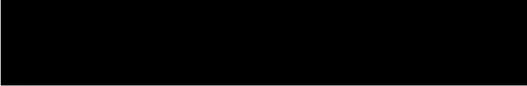
In addressing the Habitat Directive grounds of appeal, the FAC considered, Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 Appropriate Assessment screening, found four European sites within 15km of the proposal - Ballyhoura Mountains SAC 002036, Blackwater River (Cork/Waterford) SAC 002170, Kilcolman Bog SPA 004095 and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 – and extended the 15km radius to include Lower River Shannon SAC 002165. The FAC consulted publicly available information from the NPWS and EPA and identified the same four sites with 15km of the proposal area and the Lower River Shannon SAC beyond this radius. The AA screening determination was to screen out all the sites for Appropriate Assessment with rationale provided for each screening conclusion. The rationale given for both the Blackwater River (Cork/Waterford) SAC and Ballyhoura Mountains SAC 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. The rationale for the Kilcolman Bog SPA included these reasons also along with the project site being outside the foraging range of the special conservation interests of the SPA and is comprised of closed canopy forest. Regarding the Lower River Shannon SAC, the project area is stated as being located greater than 55km upstream of the SAC and in a separate waterbody sub catchment to that containing the Natura site. The waterbody on which the project is located is referenced and the flow of the watercourse/river to the SAC is documented, with the WFD status for the different sections of the waterbody referred to. Based on the flow regime; potential of nutrient and/or sediment load from the project area; hydrological distance; the number of waterbodies; and the location at which the river joins the SAC it concluded that the project does not have the potential to have an effect on the SAC. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and they 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 having considered all of the evidence before it, consider the procedures adopted by the DAFM in their screening are acceptable and the FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision regarding Appropriate Assessment and concurs with the conclusions provided.

The FAC noted that part of the proposed site adjoins the River Deel (Newcastlewest)_010 waterbody which forms the border along a section of its length in proximity to the project site. The Water Framework Directive (WFD) status of this river in EPA data sources is stated to be 'unassigned' in the 2013-2018 assessment. The FAC noted that the Bio Map for this application shows a direct connection from the project lands to the River Deel (Newcastlewest)_010 waterbody. Having regard to the High Court (Hyland J.) judgment in *Sweetman v An Bord Pleanála* (2021) IEHC 16, delivered in January 2021, and to the fact that there is direct connectivity between the project lands and the River Deel (Newcastlewest)_010 waterbody, and given its scale, nature and extent, the FAC is not satisfied that, based on the information before it, it can be reasonably concluded that the proposed development would not have an impact on an 'unassigned' waterbody. The FAC considered this to be a significant error in the making of the decision to grant the licence.

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 concluded that the Minister made significant errors in the making of the decision to grant the licence by not conclusively establishing that the

proposed development would not have an impact on an unassigned WFD waterbody. In deciding to set aside and remit the decision, the FAC concluded that the Minister should reassess the potential for the proposed development to have an impact on the River Deel (Newcastlewest)_010 WFD waterbody, having regard to the 'Hyland' High Court judgment previously referred to, before making a new decision in respect of TFL00344919.

Yours sincerely,

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Mr. Myles Mac Donncadha (on behalf of the Forestry Appeals Committee)