



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20th July 2021

Subject: Appeal FAC 240/2020 regarding licence TFL00416819

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 TFL00416819 is for the felling of 33.51 hectares at Ballyformoyle, Co Roscommon, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 6th May 2020.

An oral hearing of appeal FAC 240/2020 was held by the FAC on the 6th May 2021.

In Attendance:

FAC Members; Mr. John Evans (Deputy Chairperson), Mr Dan Molloy, Mr Iain Douglas and Mr Derek Daly.

Secretary to the FAC: Mr. Michael Ryan.

DAFM Representatives: Ms. Eilish Kehoe, Mr Momme Reibisch.

Applicant / Representative: [REDACTED]

Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received, and, in particular, the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence TFL00416819.

Licence

The licence pertains to the felling of 33.51 hectares planted circa 1988 at Ballyformoyle, Co Roscommon. The proposed species to be felled is 100% Sitka Spruce and replanting is proposed with 80% Sitka Spruce and the remaining areas with broadleaves and open space. The Inspector Certification Report refers to predominant soil type underlying the project area is predominantly brown podzols in nature. The slope

is predominantly flat to moderate. The vegetation type(s) within the project area comprise conifer plantation. The Inspector's Certification also refers to the project area not adjoining or containing an aquatic zone(s). The project site is within the sub-catchment of the Shannon Upper_40 River Waterbody WFD, the status of which is stated as moderate and in terms of risk is indicated as at risk.

The proposal comprises three plots of land indicated on the maps accompanying the application as plots 1, 2 and 3 with an area of 33.51 hectares which is part of an overall area of 54.90 hectares demarcated as having a total of 11 plots which includes other areas of woodland and bio areas.

The application included an application form, maps, a harvest plan and details of species mix in the proposed replanting.

The application was referred to Roscommon County Council on the 4th December 2019 and a response was received on the 3rd of January 2020 commenting that the site is steep and run off would be rapid in wet weather and felling should only occur in dry weather. Conditions are recommended. The licence application was also referred for archaeological appraisal and the response recommended conditions to be included in an approval of a licence.

An Appropriate Assessment screening was carried out by DAFM and is recorded as part of the Inspector's Certification report on the file. Four Natura sites were found to be within 15kms of the project site, with no other sites outside this radius being deemed necessary for consideration. The European sites considered were Bricklieve Mountains and Keishcorran SAC 001656 which was screened out due to the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site and the absence of any significant relevant watercourse(s) within or adjoining the project area; Cuilcagh - Anierin Uplands SAC 000584 screened out due to the absence of any significant relevant watercourse(s) within or adjoining the project area; Lough Arrow SAC 001673 screened out due to the absence of any significant relevant watercourse(s) within or adjoining the project area and Lough Arrow SPA 004050 which was screened out due to the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site and distance of the project from Natura site. Screening concluded no likelihood of a significant effect on any European site, and Appropriate Assessment not required. An In-Combination report referring to the week of the 24th April 2020 indicates that the project when considered in combination with other plans and projects will give not rise to the possibility of an effect on any Natura site.

The licence was issued on the 6th May 2020 subject to conditions. Condition (h) refers to archaeological conditions requiring a 20m archaeological exclusion zone to be established from the outermost extent of the earthwork (RO 004-037), no felling in this excluded area pending a thorough field inspection by a suitably qualified archaeologist retained by the licence holder/consultant forester and the preparation with the forester of a plan outlining the most appropriate means to fell and remove trees from, on and around the monument for the consideration and agreement in advance of the Forest Service, DAFM and the National Monuments Service; no saplings should be replanted within 20m of the Recorded

Monument and no new drains within 30m referring to an accompanying archaeological report and illustrative map.

Appeal.

There is one appeal against the decision.

The grounds contend that the decision is in breach of Article 4 (3) of the EIA Directive 2014/52/EU referring to where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III do not form part of the FS screening assessment and have not been taken into account, therefore this application should be referred back to the EIA screening stage. That the DAFM has failed to carry out an adequate EIA screening of the proposed development, the determination of the EIA screening is inadequately reasoned; in particular in respect of the Inspector's response to Q7 on the assessment of the cumulative effect and extent of the project; the licence being screened out from EIA on the basis of mitigations contained in the Forest Service Guidelines and Standards; that such screening out on the basis of mitigation is only permissible where it can be assured that such mitigating actions will be monitored and enforced, and that the inspection rate for felling licences is so low in Co. Roscommon that no such assurance can be given. It is also contended that there is inadequate consideration of the objectives of the WFD River Basin Management Plan Clear felling has the capacity to impact on water quality. There is a very significant amount of forestry development and activity in this area and the potential for cumulative impact on water quality has not been adequately addressed. In this regard that neither IFI or the EPA were consulted despite the licence being for a significant area of clear fell within the Lough Allen priority Area for Action under the WFD River Basin Management Plan, and that in the absence of adequate consultation the achievement of the 'good ecological status' recovery objectives set for the underlining waterbody or waterbodies under the WFD River Basin Management Plan cannot be assured. It is also contended that the licence conditions do not limit works to particular years or to be robust and the licence should contain a standard condition for the licensee to notify the Minister at both the commencement and conclusion of operations pertinent to the licence and will also permit an assessment of the conditions of the licence with the regulatory framework that is current. The grounds also indicate that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, group; and the public concerned in the case of any spraying of chemicals and that licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive.

In a Statement of Fact (SoF) to the FAC, that in regard to the granted licence for the proposed felling under TFL00354919 the DAFM indicated that the decision was issued in accordance with 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 that follow in the statement have been adhered to in making a decision on the application.

In the SoF it is also submitted in response to the grounds of appeal that whilst a provision in the Act to also consider whether the performance of that function also requires the carrying out of a screening for an environmental impact assessment (EIA) and if necessary the carrying out of an EIA, that statutory

obligation is fully discharged once it has been clearly identified at the outset that application in question does not involve an activity or project that falls within the specified categories of forestry activities or projects set out in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017, and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed. It is submitted that the standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities. In regard to Article 4(3) of the EIA Directive, it is submitted that because the standard operational activities of clear-felling and replanting of an already established forest area are not so categorised either in Annex II of the Directive or in the national transposing legislation a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. It is submitted that EIA screening is not required for felling operations of existing forests and is not categorised in Annex II of the EIA Directive. In the SoF it is further submitted by DAFM that the Department applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document *Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (2018). It is submitted that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. In relation to ground 6, it is submitted that mandatory commencement and conclusion notifications are not deemed necessary by the DAFM. In relation to ground no 7, the SoF submits that it is a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply.

The SoF also includes a statement from the Forestry Inspectorate which indicates the AA screening procedure relevant at the time was applied. The proposal was screened out using the Habitat Table 18Dec19 and the Bird Foraging table 06Jan20. In combination assessment was carried out. All relevant information can be found on file. There is no requirement to use native provenance at reforestation stage. The condition where it states "where available" is request not a condition.

An oral hearing was held of which all parties were notified and representatives of the DAFM and applicant attended. The DAFM presented an overview of their processing of the licence and clarified that the assessment was desk only and that the project was assessed and all data reviewed. In response to questions from the FAC the applicant indicated there was no stream on the site. In relation to the topography of the site, the middle area was steep and windthrow was occurring. The underlying soil was poor and thin in places giving rise to open areas and areas within the overall site were not suitable for planting. The method proposed harvesting in blocks of 10 hectares was outlined. Replanting would follow conventional practice. The reference in the grounds of appeal to the response to Q7 of the Inspector's certification regarding cumulative effect was raised, and the DAFM response restated the

Department's position on EIA put forward in the SoF, and further restated the view that based on the extent of licenced thinning and or clearfelling the cumulative effect of this application is not likely to have a significant impact. In relation to the felling operations the conditions of the licence it was stated that the licensee shall ensure that all felling and planting operations are carried out in accordance with all guidelines and the code of best forest practice. Hydrology and water flows from drains located on the site were raised by the FAC and it was reiterated that any hydrological flows from the site do not drain towards any Natura site.

In addressing the grounds of appeal, the FAC considered, in the first instance, those grounds relating to the application of the EU EIA Directive the contention that the proposed development should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered 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 felling and replanting of an area of 33.51 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 concluded that screening for EIA was not required in this case and that breaches of the EIA Directive had not occurred.

In considering the appeal the FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the felling of 33.51 hectares planted c 1988. The FAC examined publicly available information from the EPA and NPWS and identified the same four sites as the DAFM within 15km from the proposal and the FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined and forestry projects are indicated in the in-combination report. The proposed works are located outside of any European site and there is no evidence of a pathway of effects to a European site. Neither is there evidence of protected habitats

or species on the site. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached.

In relation to cumulative effects arising from the project the FAC noted the in-combination assessment submitted and the responses included in the Inspector's Certification in particular to Qs 3, 4, 5 and 6 which informed the response to Q7. The responses acknowledge forest area licenced for thinning and or clearfelling operations is in close proximity to the site and the wider 5 kilometre radius. It is noted that thinning, felling and reforestation form an integral part of the management of forests and the level and scale of these operations will for any particular area will vary depending on the timescale in which they occur, and data is reviewed. In the overall context of all of the responses in the certification and the general documentation which informed the decision the response to Q7 is not considered to be a serious error.

In relation to the grounds of appeal that the project is being screened out from EIA on the basis of mitigations contained in the Forest Service Guidelines and Standards and that such screening out on the basis of mitigation is only permissible where it can be assured that such mitigating actions will be monitored and enforced. As already concluded by the FAC screening for EIA was not required in this case and that breaches of the EIA Directive have not occurred having regard to the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations.

In relation to the conditions of the licence and the grounds of appeal which indicate that licence conditions do not limit works to particular years, there is nothing within the terms of the licence to prevent all of the trees being felled once the licence is issued and that the conditions are not robust it was indicated that felling would occur in blocks of 10 hectares and that best forestry practice will be required to be observed including a two year greening period. In examining the licence, it was noted by the FAC that the conditions of the licence require adherence to standards in relation to water quality, biodiversity, forest harvesting and the environment, archaeology, aerial fertilisation guidelines and the Code of Best Forest Practice and that the licence provides for a requirement to erect notices when felling is to occur. The FAC is satisfied that the conditions provide for the provision of best forest practice.

In relation to potential hydrological impacts on Natura 2000 sites and on water quality generally it is noted that no specific drainage works are required to facilitate this project and that no hydrological connection is identified to a Natura site. The FAC examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area concluded and is satisfied based on the submissions received that the proposed project will not impact on any Natura 2000 sites or any receiving waters. Regarding water quality the site is within the river subbasin Shannon Upper_40 River Waterbody WFD, the status of which is stated as moderate and in

terms of risk is indicated as at risk. Forestry is not identified as a pressure in terms of risk on the river waterbody. Based on the information available to it, the FAC is not satisfied that the proposal poses a significant threat to water quality.

In relation to the protection of wild birds and the reference in the grounds of appeal that licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive it is noted that the project is located outside of any European site and there is no evidence of a pathway of effects to a European site. There is no evidence of protected habitats or species on the site and the grounds of appeal do not provide any details in this regard. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received at the oral hearing. The FAC is satisfied that no serious or significant error or series of errors was made in making the decision and that the decision was made in keeping with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence TFL00416819 in accordance with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,

A black rectangular redaction box covering the signature of Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee

