



29th July 2021

Subject: Appeals FAC277/2020 in relation to afforestation licence TY11-FL0032

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

Afforestation licence TY11-FL0032 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 22nd May 2020.

Hearing

A hearing of appeal FAC277/2020 was held by the FAC on the 15th June 2021:

FAC Members - Mr Des Johnson (Chairperson), Mr Donal Maguire, Mr Dan Molloy & Mr Luke Sweetman

FAC Secretary - Mr Michael Ryan

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to affirm the decision to grant TY11-FL0032.

This licence is for the clearfelling and replanting of 2.11ha of 100% Norway spruce in the Townland of Gortard and Gortussa, Co. Tipperary. The restock species are a mix of 80% Scots pine (1.43ha) and 20% Alder (0.36ha) with the provision of 0.32ha open space. The DAFM information states the underlying soils are approximately 62% Surface water Gleys, Ground water Gleys, and 38% Acid Brown Earths, Brown Podzolics. The slope is predominantly flat to moderate (<15%),

The application site is in the 16 Suir Catchment, the Suir_SC_060 Sub-Catchment, and the Multeen_030 River Sub-Basin. The Multeen_030 Waterbody was assigned 'Moderate' status and deemed to be 'Not at Risk' under the Environmental Protection Agency (EPA) 2013-2018 reporting period. Two EPA-named watercourses cross / adjoin the proposal. The Rossacrow flows roughly north-east to south-west through the southern section of the application area. The western corner of the proposal adjoins the Drumminacroahy, a 1st-order stream which rises c.650m to the north / north-east of the proposal. This watercourse joins the Rossacrow just beyond the western boundary of the proposal.

An application was submitted which included maps, a Harvest Plan document, and an Appropriate Assessment (AA) Pre-Screening Report (PSR). The DAFM referred the application to Tipperary County Council with no response. The PSR, dated 7th May 2020, includes an AA Screening (AAS) which screens the following five European sites within 15km of the proposal; (i) **Anglesey Road SAC**, (ii) **Lower River**

Shannon SAC, (iii) Lower River Suir SAC, (iv) Philipston Marsh SAC, (v) Slievefelim to Silvermines Mountains SPA. The AAS lists the individual Qualifying Interests (QIs) of each European site and states whether the project itself (individually) could possibly have a significant effect on the European site, based on potential sources and pathways, the nature of the receptor, and excluding any mitigation measure. In all cases the conclusion is no possibility of significant effects. The Lower River Suir SAC has QIs including Lampreys, Freshwater Pearl Mussel (FPM), Atlantic salmon, and Otter. The following is an example, addressing the FPM, of the rationale for the screen-out conclusions listed in the PSR for each of these QIs: “based on a hydrological review of site characteristics including a hydrological distance of 4,763 metres, a project area of 2.11 hectares, a mineral soil type, a gentle slope (15% or less), the FPM, in our expert opinion there is no possibility for significant effects.”

The DAFM completed an AAS, dated 22nd May 2020, which screened the same five Natura sites within 15km of the proposal as the PSR. All sites were screened out for Stage 2 AA for the following reasons:

- **Anglesey Road SAC**
 - Due to the position of the project area downstream from the Natura site, and the subsequent lack of any pathway, hydrological or otherwise.
- **Lower River Shannon SAC**
 - Due to 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 pathway, hydrological or otherwise.
- **Lower River Suir SAC**
 - Having considered the expert opinion and the rationale presented in the PSR (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, DAFM has concluded that there is no likelihood of the project itself (individually) having a significant effect on this European site.
- **Philipston Marsh SAC**
 - Due to 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 pathway, hydrological or otherwise.
- **Slievefelim to Silvermines Mountains SPA**
 - Due to the separation distance between the Natura site and the project.

The DAFM also considered the potential for the project to contribute to an in-combination effect on European sites. Various planning websites were consulted along with the DAFM’s internal records for other plans and projects, focusing on the general vicinity of the project area in the River Sub Basin (Multeen_030). The DAFM concluded that the proposed development, when considered in combination with other forestry and non-forestry plans and projects, “will not give rise to the possibility of an effect on the Natura site(s) listed above.”

The DAFM issued the licence on the 22nd May 2020 with relatively standard conditions (a) – (g) plus additional conditions (h) – (n) which detail requirements for aquatic zone setbacks, water crossings, blocking of drains, prevention of rutting, machinery exclusion zones, and adherence to specified standards and guidelines. The reasons for the additional conditions are listed as for the protection of soil stability, water quality and the environment during harvesting and restocking operations.

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC and are summarised below:

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- The decision does not comply with the Habitats / Birds / EIA Directives.

- The test for AA in EU and Irish law is it is merely necessary to determine that there may be such an effect.
- If the development is within 15km of a Natura site it has been screened in.
- It is not appropriate, at screening stage, to take account of the measures that are intended to avoid or reduce the harmful effects of the plan or project on that site.
- AA, under Article 6(3) of the Habitats Directive must not have lacunae and must contain complete, precise and definitive findings and conclusions.
- The screening must state the catchment the application is in.
- A map showing the Natura sites and the proposed development should be submitted.
- Regarding EIA screening – it is necessary to show that cumulative forestry in the area does not exceed 50ha. It is necessary to show total km's of forest roads in the area.
- It is the duty of the FAC to carry out a full AAS and EIA Screening in accordance with the law.
- There is an obligation on the FAC to comply with European law and to achieve the result envisaged in the Directives.

The DAFM provided a written response to the grounds of appeal in a Statement of Facts which was considered in full by the FAC and is summarised below:

The 2.11ha felling and reforestation project was subjected to the DAFM's AAS procedure. The AAS report completed by the inspector is included on file. A map is included on file in respect of the location proposal in respect of adjacent European sites. AAS was carried out for European sites within 15 km. Application information submitted by Coillte in the form of maps (GIS and softcopy), harvesting and establishment operational procedures as well as an AA PSR and associated PSR methodology document were considered.

Having reviewed the details of relevant European sites, their QIs and Conservation Objectives, the Department deemed that the proposal, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on the relevant screened European sites. As such, the clearfell and reforestation project was screened out for Stage 2 AA.

DAFM has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulation 2011 (as amended) and based on objective information, that the project TY11-FL0032, either individually or in-combination with other plans or projects, will not adversely affect the integrity of any European site. A felling licence was issued having considered the comments and observations of referral bodies who submitted information to DAFM.

A number of the QIs were truncated on the AAS form for project TY11-FL0032 when outputting the form related to the screening exercise. However, all QIs were considered during the screening exercise itself and the screening determination is considered sound. A revised AAS form, including a full QIs listing for all screened European sites, is included on file.

The DAFM carried out an in-combination assessment and included an associated in-combination statement based on this information. This statement is consistent with the licensee's in-combination statement submitted in their AA Pre-screening report.

It is the position of the Department that clear-felling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally 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).

The FAC held a Hearing on the 15th June 2021 to consider appeal FAC277/2020. The FAC noted that a number of the grounds of appeal are related to the obligations and functioning of the FAC and are not grounds related to the decision of the DAFM to grant felling licence TY11-FL0032.

The FAC considered the appellant's submission that the decision does not comply with the Habitats, Birds and EIA Directives. Regarding the EIA Directive, The FAC noted that the 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 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 assessment under 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 FAC does not consider that the proposed clearfell and replanting project falls within the classes included in the Annexes of the EIA Directive or considered for EIA in Irish Regulations. In these circumstances, the FAC concluded that the licence is not in breach of the provisions of the EIA Directive.

Regarding the appellant's submission related to the Habitats Directive, the FAC considered the AA procedures adopted by the DAFM in processing the licence application. The DAFM completed a Stage 1 AA Screening of the five European sites within 15km of the proposal and all five sites were screened out for Stage 2 AA with reasons provided. The FAC reviewed publicly available information on the EPA website and found the same five European sites within 15km of the proposal as the DAFM's AAS and the PSR. In screening out the Lower River Suir SAC, the DAFM state that they relied on "the expert opinion and the rationale presented in the PSR (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance)". Specifically in relation to the FPM, the FAC noted that the Conservation Objective document for this Natura site states that "the conservation objective applies to the Clodiagh FPM (*Margaritifera margaritifera*) population, which is listed on The European Communities Environmental Objectives (Freshwater Pearl Mussel) Regulations 2009. (S.I. 296 of 2009)." EPA mapping shows the *Margaritifera* SAC Catchment for this population is to the south-east and downstream of the proposed development but in a different 'leg' of the Lower River Suir SAC with no hydrological pathway for effects from the proposal. Based on the evidence before it, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors in completing a Stage 1 AAS. The FAC considers the AAS conclusions reached by the DAFM to be sound and that their approach is in line with the requirements of the Habitats Directive.

In relation to the Birds Directive, the FAC noted the appellant did not specify which element(s) of the Birds Directive they contend the decision to grant TY11-FL0032 does not comply with. There is no evidence before the FAC in respect of the existence of species of wild birds likely to be adversely affected by the proposed development. In these circumstances, the FAC concludes there is no related reason on which to affect the decision.

The FAC considered the appellant's other grounds of appeal related to AA. The FAC considers that European sites should only undergo Stage 2 AA as a result of a Stage 1 Screening procedure and does not consider that the location of a European site within 15km of a proposed development necessitates that site being screened-in for Stage 2 AA as contended by the appellant. The FAC noted that, although

the DAFM's Statement of Facts states that "a map is included on file in respect of the location proposal in respect of adjacent European sites", none was in evidence before the FAC. However, the FAC noted that the AAS lists the European sites (including site codes) which were screened for AA and does not consider it a necessary requirement that these sites be shown on a map. The FAC considered that there is no evidence before it to indicate that the DAFM took into account, at screening stage, measures intended to avoid or reduce potential harmful effects on a European site.

Based on the information before it, as outlined above, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in deciding to issue TY11-FL0032 and did so in compliance with fair procedures. In deciding to affirm the decision of the Minister, the FAC considered that the proposed development is in line with Government policy and good forestry practice.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on behalf of the Forestry Appeals Committee

