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7th May 2021

Subject: Appeals 099/2019, 100/2019, 101/2019, 102/2019, 103/2019, 104/2019 regarding licence TFL00198118

Dear [REDACTED]

I refer to appeals made 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 TFL00198118 for thinning of 2.78 ha of at Quivvy, Co. Cavan was approved by the Department of Agriculture, Food and the Marine (DAFM) on 2nd April 2019.

Hearing

An oral hearing of the appeals FAC 099/2019, 100/2019, 101/2019, 102/2019, 103/2019 & 104/2019 was held by a division of the FAC on 18th January 2021.

In attendance:

FAC Members: Mr. Myles McDonagh (Deputy Chairperson), Mr. James Conway, Ms. Mary Lawlor
Secretary to the FAC: Ms. Emma Guerin

Appellants/Representative(s): [REDACTED]
[REDACTED]

Applicant/Representative(s): [REDACTED]

DAFM Representative(s): Mr. Jhan Crane, Ms. Eilish Kehoe

Decision

The proposal at Quivvy, Co. Cavan comprises three thinnings over ten years (in 2018, 2022 and 2026) of an unthinned 43 year old Sitka spruce plantation of 2.78 ha in size in one contiguous block. The site is flat to moderately sloped and the soils are podzolic in nature. The lands are accessed via a right of way.

The project area does not fall within any designated Natura 2000 site but is immediately adjacent to Lough Oughter and Associated Loughs SAC (Site code 000007), approximately 13kms from Kilroosky Lough Cluster SAC (site code 001786) and 7.6 kms from Lough Oughter Complex SPA (site code

004049) in the Republic of Ireland and within 500m of Upper Lough Erne SAC (site code UK0016614), 6.8 kms from Moninea Bog SAC (site code UK0030212) and 11.6kms from Magheraveely Marl Loughs SAC (site code UK0016621). The site lies within the Erne Catchment (ID 36) and the sub-catchment of Erne_SC_040 (id 36_22). The Erne River is classed as having 'Moderate' status by Northern Ireland Environment Agency.

The licence application was submitted on 20 July 2018 and the project was referred to NPWS on 1 August 2018 with a reply received on 14 September 2018. The response draws attention to the proximity of the site to Lough Oughter and Associated Loughs SAC (Site code 000007) and that works that are likely to be necessary for the removal of the timber may impact on the breeding place of otter, a qualifying interest for the Lough Oughter site. Six submissions were received in relation to the proposed thinning in September 2018. The site was desk and field assessed and an AA Screening conclusion was made on 1 April 2019 using the AA Screening procedure in place at the time (November 2018 version). The licence was approved with conditions and issued on 2nd April 2019. The standard conditions are attached with the addition of a condition that access via the route marked on the application map be restricted to jeep and trailer.

There are six third party appeals against the decision. The grounds of appeal relate principally to use by the applicant of a right of way to access the forest. This right of way passes by a single dwelling inhabited by a number of the appellants that is situated very close to the carriageway of the laneway in question. The laneway is approximately 2.2m in width and has a surface of chip and tar with grass currently growing down the centre. Specific concerns relate to the structural integrity of the dwelling, increased traffic, noise, road damage and safety hazard caused by transport of harvesting machinery and of the timber resulting from harvest. The contention by DAFM that the harvesting activity will not increase traffic levels is also criticised. The application is also described as 'clearfell by stealth' and the condition of using a jeep and trailer is not specific enough to limit the expected damage, hazard and inconvenience. Reference is also made to there being no absolute right to thin, nor is it recommended in all cases.

In a statement to the FAC, the DAFM responded to the grounds of appeal stating that all submissions and appeals were reviewed. Attention is drawn to the fact that this is a thinning, rather than a clearfell operation that is being licenced. The condition of only using a jeep and trailer to access the property is based on agreement between the applicant, his agent and Forest Service that the proposed access is not suitable for the transport of forestry machinery. The statement mentions that some timber (which is expected to be small dimension) may be used at the house occasionally used by the applicant on-site but some may also be removed using the right of way.

At the oral hearing, DAFM summarised their approach to processing the application and issuing the licence, outlining that they had considered access to the site, which included contact with the applicant and his forester on the matter, and which gave rise to them adding a non standard condition to the licence. The appellants in attendance advanced their grounds of appeal, highlighting in particular the potential impact on their property and safety, submitted that the property connected to the site would not consume much firewood due to it being very rarely used, claimed the non standard licence condition was open to exploitation and that there were errors in the Appropriate Assessment screening. The applicant broadly outlined his intentions both for the forest and the timber to be taken from it and refuted that his house adjoining the property was abandoned. The DAFM also gave a technical perspective on the volume and type of timber approved for thinning under the licence and of following their standards and procedures at the time of processing.

The FAC had regard to the record of the decision under appeal, the submitted grounds and submissions received including at the oral hearing. The additional licence condition imposed of access by the applicant to be limited to jeep and trailer appears to be a genuine effort on behalf of DAFM to respond to the submissions and concerns raised. While the applicant has indicated that some timber may be used at the dwelling adjacent to the harvest site the licence specifies the full volume and the FAC must therefore apply the precautionary principle and assume the entire thinning volume will be removed at each thinning event and transported over the right of way in a concentrated period of time.

The applicant has indicated a volume per thinning of 40m³ per hectare, which equates to approximately 112m³ per thinning from the whole site. Each cubic metre of timber will weight slightly less than one tonne; at a conversion of 0.9t per m³ the total mass of timber to be removed could be approximately 100 tonnes. The trailer in a standard jeep and trailer setup will commonly have a maximum gross trailer weight of 3.5 tonnes. Net of the trailer itself, this would equate to a maximum timber load of perhaps 2.5 to 2.8 tonnes and require approximately 37 trips. Many trailers of this capacity that may be towed by a jeep are in excess of 2m in overall width and would not fit in the narrow laneway described. A smaller trailer will of course increase the number of trips required. From video materials supplied by the appellants there appears to be a gate near the dwelling house and while these trips would constitute an increase in traffic it may be assumed that it will have low speed when traversing the road near the gate and dwelling.

While the applicant cites his intention to remove only small dimension material a forest stand of this age and typical productivity of the area would have large dimension material, even in thinnings. During submissions made at the oral hearing firewood was mentioned as the main likely product to be transported but it was unclear what form that would take. Even a standard firewood log of four feet long would have significant mass if taken from a 43 year old Sitka spruce tree.

Another ground of appeal, 'clearfell by stealth' is an activity whereby large quantities of timber are removed through successive heavy thinnings under a thinning (rather than clearfell) licence. DAFM and indeed the FAC can only make its decisions based on the proposals put to it. If there are infringements of the Forestry Act then DAFM is obliged to investigate and take enforcement actions if needed.

Responding to the grounds of appeal related to vehicular access to the site, the FAC notes that NPWS has raised concerns about the extensive access improvement works it felt might be necessary to harvest this timber. The current solution of jeep and trailer transport put forward by the applicant, his agent and DAFM is commendable in that it could see such works being avoided.

The DAFM Appropriate Assessment screening process currently in use requires screening of Natura 2000 sites within a 15km distance of each proposed project and not the 3km limit used in this decision. While a response is on file from NPWS, there is no record of consultation or screening of Natura 2000 sites in Northern Ireland, the nearest of which is approximately 500m distant. Nor is there a record of consideration of other plans or projects in combination with the proposal.

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. In deciding to set aside and remit the decision of DAFM, the FAC is satisfied that the application of the November 2018 Appropriate Assessment protocol and the absence of an in-combination assessment constitutes a significant error in this case. In addition, the FAC is of the view that the condition imposed of access by jeep and trailer is not specific enough and consideration should be given to specifying that the maximum

overall width of any trailer used by the applicant on the right of way be limited to 2m; that any equipment transported to and from the site using the right of way also be limited to 2m in width and that, in the interest of safety, any trailer used to transport logs to and from the site have high sides with a view to preventing the possibility of logs rolling off the trailer at any point. It should be noted that these suggestions are made without prejudice to any other proceedings regarding the definition of the right of way at issue here.

The decision is therefore 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 before a new decision is made and pending the outcome of any new Appropriate Assessment screening to consider the suggested conditions above.

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Myles Mac Donncadha On Behalf of the Forestry Appeals Committee