



[REDACTED]

21<sup>st</sup> May 2021

**Subject:** Appeal FAC 522/2020 regarding licence TFL00320319

Dear [REDACTED]

I refer to your 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 TFL00320319, for felling of trees on 6.44 ha at Ballykelly, New Ross, Co. Wexford, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 13<sup>th</sup> of July 2020.

#### **Hearing**

A hearing of the above appeal was held by the FAC on 9<sup>th</sup> of March 2021.

FAC Members in attendance: Mr. Des Johnson (Chairperson), Mr. John Evans, Mr. Luke Sweetman, and Mr. Dan Molloy.

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, and, in particular, the following considerations, the FAC has decided to remit the decision of the Minister regarding licence TFL00320319.

The licence pertains to the felling for the purposes of thinning a forest on a site of 6.44ha in two separate parcels at Ballykelly, New Ross, Co. Wexford. The current stock is a mix of various broadleaf (Oak and Japanese larch) and conifer (Sitka spruce and Douglas fir). The application was dated the 6<sup>h</sup> of March 2019. Based on the stated felling age, planting of the stock took place in 1994.

An Inspector's Certification Report is on file which indicates that the site was field and desk assessed, with an inspection date given as the 17<sup>th</sup> of June 2020. The report describes the site as comprising 6.44 ha of thinning, the soil type to be predominantly podzols in nature, the slope to be flat to moderate, and that the project is crossed by/adjoins an aquatic zone.

The report records the site as being both located within an NHA, SAC or SPA and within 0-0.5km of such sites; and also within a 3km buffer zone, upstream of, and hydrologically connected to an NHA, SAC or SPA. The report notes referrals to the National Parks and Wildlife Service with a response received on the 8<sup>th</sup> of May 2019 with no objection raised.

A record of screening for Appropriate Assessment exists in both an Appropriate Assessment Screening (AAS) form, and as a section in the Inspector's Certification report. The AAS is dated the 16<sup>th</sup> of August, 2019 and identifies the River Barrow and River Nore SAC as being within a radius of 3km of the project site. No site code is given, but subsequent parts of the document refer to the site code [2122] which relates to the unconnected Wicklow Mountains SAC. The River Barrow and River Nore SAC site code is [2162], so this is assumed by the FAC to be a clerical error. The AAS concludes that in relation to site [2122] (assumed to refer in this case to the River Barrow and River Nore SAC), that the project will not have any significant impact due to:

*mandatory adherence to any safeguards within the project, as set out in published Forest Service guidelines, requirements and procedures; excluding any safeguards that are 'above and beyond' those set out in published Forest Service guidelines, requirements & procedures, and any specific measures that might otherwise be attached to any recommendation to 'Approve with Conditions'.*

A screening for Appropriate Assessment is also recorded in the Inspector's Certification Report. This identifies five European sites within 15km of the project site. Each is considered in turn with reference to the Qualifying Interests/Special Conservation Interests. The sites considered are:

1. Bannow Bay SAC [0697]
2. Bannow Bay SPA [4033]
3. Lower River Suir SAC [2137]
4. River Barrow And River Nore SAC [2162]
5. River Nore SPA [4233]

Each of these sites are screened out for the following reasons.

- The absence of any significant relevant watercourse(s) within or adjoining the project area. (Sites 1 and 3 above).
- The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site. (Sites 2, 4 and 5 above).

Each of these sites is also screened out on the basis that:

*as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this European*



*Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects.*

Two in-combination assessment reports are on file. One notes searches of planning systems including those operated by Wexford County Council, An Bord Pleanála, the EPA and DAFM as having taken place on the 22<sup>nd</sup> of January 2020. A second report carried out similar planning searches, which are recorded as having taken place on the week of the 3<sup>rd</sup> of July 2020.

The FAC is satisfied that it was the Screening Assessment contained in the Inspector's Certification Report, which is more comprehensive, together with the second of the in-combination reports which were relied upon in making the decision in relation to the licence.

There is one appeal to the granting to the licence. Briefly and in summary, the grounds of appeal are:

- That before granting a felling license, it was necessary for the Minister to establish the legitimacy of the actual forest, and that as this has not been done it is necessary for the FAC to do it.
- That the Forestry Service and the FAC have overruled the Judgement of Finlay J (taken to refer to. Finlay J in *Kelly v. An Bord Pleanála* [2014] IEHC 400).
- That if the appealed decision was correct, it would not be necessary for the FAC to look for the information which should be on file prior to making the decision.
- That incomplete decisions should be returned to the FS.
- That the decision does not comply with the Habitats Directive, the Birds Directive, and the Environmental Impact Assessment Directive or the basic guidelines of the NPWS, for the following reasons:
  - That the test for Appropriate Assessment Screening (of a proposed project) in Irish and EU law is that it is merely necessary to determine that there may be an effect rather than to state that it will not have a significant effect.
  - That if a development is within 15km of a Natura 2000 site it has been screened in.
  - That the judgement in Case C-323/17 People Over Wind and Peter Sweetman v Coillte by the Court of Justice of the European Union (CJEU) applies, and that: It is not appropriate, as the screening stage, to take account of the measures intended to avoid or reduce the effects of the plan or project on that site; and that an assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings capable of removing all scientific doubt as to the effects of the proposed works on the protected site concerned.
  - That a map showing the SACs and SPAs and the site of the proposed development should be attached.
  - That no inference should be taken from the absence of a response from NPWS.

- That regarding screening for Environmental Impact Assessment, it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha, and also that it is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development including thinning and clear-fell.
- That 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.

Prior to considering the grounds of appeal, the FAC commissioned a consultant's report to consider the particulars of the licence as they relate to the grounds of appeal. In his report, the consultant concluded that the likelihoods of significant effects on two areas, the River Barrow and Nore SAC and Ballykelly pNHA, are of such a magnitude that appropriate assessments are necessary to ensure that their integrity is not adversely affected.

In considering the grounds of appeal, the FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the Forest Service, and other on-line services. These readily confirm the details of the site as outlined above, in particular the presence of the five European sites identified in the Inspector's Certification report as being within 15km of the project site. The two parcels that comprise the licence are observed to be ca. 260m apart. One plot is bounded on the east by the R733 road, and to the south by the L8052. The second larger plot lies to the northwest of the first plot. EPA mapping does not show any streams or rivers proximate to either site however a small unnamed lake of ca. 1.1 ha adjoins the larger plot on its southwest side. This lake has no classification/identification by the EPA. OSI mapping shows several small water courses, likely drains. The River Barrow is ca. 2.1 km to the west, while a small tributary of the Barrow called the Oldcourt river is about 88m to the NE at its closest point. From this point, there is a hydrological distance of ca. 3.1km to the River Barrow and River Nore SAC [2162]. The Oldcourt is part of the Hill Camlin\_010 waterbody which has an unassigned WFD status based on the 2013-2018 monitoring cycle. The larger most westerly plot can be observed to be partially located in the Ballykelly Marsh proposed National Heritage Area (pNHA), the NPWS site synopsis for which states:

*This site combines an arable field with a high quality wetland site. The arable field contains a rare arable weed community including the protected flora species Sharpleaved Fluellen (Kickxia elatine). Adjacent to this field is a small species-rich lake and fen area. Such small wetlands are characteristic of the south-east of Ireland but are decreasing rapidly due to drainage and land reclamation.*

In the first instance, the FAC considered the appellant's ground of appeal relating to the legitimacy of the forest. Based on information provided in the application, the stock present on the site was planted in 1994 which follows the introduction of Directive 85/337/EEC but predates its amendment by Directive 97/11/EC which introduced the requirement for member states to set thresholds for those activities set



out in Annex II of the directive or to assess projects on a case-by-case examination. The appellant does not raise specific concerns in relation to the legitimacy of the forest, and the FAC is satisfied that the forestry under consideration was established in line with those statutory requirements which were in place at the time of its planting and that DAFM has not made an error in the processing of the decision in this regard.

The FAC further considered those other grounds of appeal relating to the EIA directive. Directive 2011/92/EU, as amended by 2014/52/EU, 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 decision under appeal relates to a licence for the felling for the purposes of thinning of an area of 6.44 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 as requiring EIA in Irish Regulations. The FAC therefore concludes that no error was made in the processing of the licence with respect to the requirements of the EIA Directive.

In addressing those grounds of appeal relating to Appropriate Assessment, 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 or projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening, and found five 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 as noted above in summarising the Inspectors Certification Report file. The appellant submits that all of these sites should have been screened in by virtue of their being within 15km of the project site but provides no basis for this assertion. The DAFM considered each of these five sites in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. The DAFM 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.

In screening out the five sites, two sites (Bannow Bay SAC [0697] and Lower River Suir SAC [2137]) are screened out on the basis of the absence of any significant relevant watercourse(s) within or adjoining the project area. Three sites (Bannow Bay SPA [4033], River Barrow and River Nore SAC [2162], and River Nore SPA [4233]) are screened out on the basis of the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site.

The FAC notes that the closest of these sites is the River Barrow and River Nore SAC [2162], which is ca. 2.1km direct distance from the project site. The closest hydrological path to this SAC, some 88m distant from the northern edge of the larger plot, is via the Oldcourt River at a hydrological distance of ca. 3.1km. The Qualifying Interests for this SAC include several aquatic species, including Atlantic Salmon, lamprey, otter, crayfish and species of pearl mussel. EPA mapping indicates that Freshwater Pearl Mussel, *Margaritifera margaritifera*, catchment areas lie some distance upstream on the Barrow catchment. The FAC also notes that OSI mapping and aerial photography indicates the presence of a field drain or similar watercourse a small distance (less than 30m) to the west of the small lake mentioned in the site synopsis for the Ballykelly Marsh pNHA, which adjoins the project site. The FAC notes that this site synopsis states that this small lake is species rich, which indicates it is not standing or stagnant water. Based on the above, the FAC is of the opinion that the possibility that a hydrological connection to the River Barrow and River Nore SAC has not been excluded, and further notes that the absence of such a possibility does not form part of the basis for the screening out of that European site and that as a consequence the screening decision arrived at by DAFM is flawed.

The FAC notes the conclusion of its consultant's report that an appropriate assessment is required, but considers that an error has occurred at an earlier point in the process, specifically in the screening for Appropriate Assessment and the manner in which the decision not to proceed to Appropriate Assessment was recorded. It further notes the consultant's comments in relation to Ballykelly Marsh pNHA but, noting the limited protections available to pNHAs, cannot identify an error in the processing of the application by DAFM in this regard.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was a serious or significant error or series of errors in the making of the decision to grant the licence. As a result, the FAC concluded that the decision of the DAFM regarding TFL00320319 should be set aside and remitted to the Minister to carry out a screening for appropriate assessment, and if necessary Appropriate Assessment, under Article 6 of the Habitats Directive before a new decision is made.



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John Evans On Behalf of the Forestry Appeals Committee