



[REDACTED]

28 May 2021

Subject: Appeal FAC 377/2019 in relation to licence TFL00396319

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence TFL00396319.

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

Licence TFL00396319 for felling and replanting of 2 hectares at Rasheeny, Co. Donegal was granted by the Department of Agriculture, Food and the Marine (DAFM) on 5th November 2019.

Hearing

A hearing of appeal FAC 377/2019 was held by a division of the FAC on 19th April 2021. In attendance:

FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely & Mr. Derek Daly

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 licence (Reference TFL00396319).

The licence pertains to the felling and replanting of 2 hectares of forest at Rashenny, Co. Donegal. Currently it comprises of 60% Sitka Spruce and 40% Lodgepole Pine, planting would be of 85% Sitka Spruce and 15% Additional Broadleaf. It is described as having a soil type which is predominantly podzolic in nature, a site that it is flat to moderate in slope and does not adjoin or contain an aquatic zone(s) and that the vegetation type within the project area is forest.

The proposal area is in the Donagh-Moville WFD catchment 40, Glenagannon_SC_010 subcatchment and Rashenny_010 River Sub Basin. The Rashenny_010 river waterbody appears to be c. 90m to the south of the proposal area and it has an unassigned WFD status, with agriculture recorded as a pressure.

The application was desk assessed by DAFM and referred to Donegal County Council, Inland Fisheries Ireland (IFI) and NPWS. Donegal County Council responded stating no objection and making some observations including that no visual amenity concerns arise, no built heritage and conservation concerns and the Planning Authority would rely on the DAFM, as the consent authority, to have appropriate regard to Article 6 of the Habitats Directive. IFI replied stating that the applicant should adhere strictly to various listed guidelines. NPWS replied stating they had no comment on the application but provided generic material with regard to the Habitats Directive and EIA.

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 five European sites within 15km of the proposal, Lough Swilly SAC, Magheradrumman Bog SAC, Malin Head SPA, North Inishowen Coast SAC and Trawbreaga Bay SAC, and there was no reason to extend this radius in this case. The sites were considered in turn with reasons given for screening out each site. The DAFM also considered the environmental effects of the proposal across a range of criteria and determined that the project was not required to undergo the EIA process. The DAFM approved the application on 5th November 2019 with conditions.

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

- Based on the information supplied, it is not possible to make a decision which would be in compliance with the requirements of the Habitats Directive, and the Environmental Impact Assessment Directive;
- the test for Appropriate Assessment Screening in Irish law is "Finlay Geoghegan J. in Kelly v An Bord Pleanala (2014) IEHC 400 (25 July 2014): 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;
- if mud was to enter the lakes it could have an effect on the SAC/SPA, the fact that the distance is over 15km has no relevance to the fact that there still may be an effect;
- "Finlay Geoghegan J. in Kelly v An Bord Pleanala (2014) IEHC 400 (25 July 2014) is further quoted from including its reference to the opinion of Advocate General Sharpston in Case C-258/2011.

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 procedures/guidelines were adhered to.

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 felling and subsequent replanting of 2 hectares. The grounds of appeal do not outline any specific concerns regarding significant effects on the environment of the proposal. The FAC concluded that the felling and replanting 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 not covered by Irish regulations and that the breach as submitted in this ground of appeal had not occurred.

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 five European sites within 15km of the proposal - Lough Swilly SAC, Magheradrumman Bog SAC, Malin Head SPA, North Inishowen Coast SAC and Trawbreaga Bay SAC, and there was no reason to extend this radius in this case. The FAC consulted publicly available information from the NPWS and EPA and identified the same five sites within 15km of the proposal area. The DAFM considered each site in turn and listed the reasons for their screening conclusions. The closest European sites to the proposal area being North Inishowen Coast SAC and Trawbreaga Bay SPA, at a distance of c. 1.2km. The DAFM's reasons for screening out the different sites were site dependant.

The DAFM Appropriate Assessment screening determination was to screen out all the sites for Appropriate Assessment. The record does not contain a consideration of other plans and projects in combination with the proposal. Based on the information before it, the FAC considered that the requirements of the Habitats Directive in respect of stage 1 screening for Appropriate Assessment were not satisfactorily met prior to the granting of the licence. The FAC is satisfied that this constitutes a serious error in the making of the decision.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a serious or significant error or a series of errors was made in making the decision. The FAC is therefore setting aside and remitting the decision regarding licence TFL00396319 to the Minister to carry out and record a new 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.

Yours sincerely,

A black rectangular redaction box covering the signature of Mr. James Conway.

Mr. James Conway (on behalf of the Forestry Appeals Committee)

