



22nd March 2022

Subject: Appeal FAC659/2020 regarding licence TFL00477520

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TFL00477520 for felling on 10.1 ha at Toormore, Co. Kerry was issued by the Minister for Agriculture, Food and the Marine (DAFM) on 6th August 2020.

Oral Hearing

An oral hearing of appeal FAC659/2020 was held by a division of the FAC on 7th March 2022. In attendance at the hearing:

FAC Members: Mr. Myles Mac Donncadha (Deputy Chairperson), Mr. Iain Douglas and Mr. Vincent Upton.
Secretary to the FAC: Mr. Michael A. Ryan.

DAFM Representatives: Ms. Eilish Kehoe, Mr. Michael O'Brien, Ms. Katherine Duff.

Appellant:

Applicant's Representative:

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received including at the oral hearing and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister for Agriculture, Food and the Marine regarding licence TFL00477520.

Background

The licence decision pertains to an application for the felling of trees on 10.1 hectares at Toormore, Co. Kerry. The forest is divided into five plots. Plot 1 is comprised of alder and would undergo a first thinning,

Plot 2 is comprised of Sitka spruce and alder and would be clearfelled, Plot 3 is comprised of Sitka spruce and would be clearfelled, Plot 4 is comprised of ash and would undergo a second thinning, and Plot 5 is comprised of sycamore and would undergo a second thinning. Plots 2 and 3 would be replanted with Sitka spruce and alder. The application included inventory and environmental information and a number of maps showing species, environmental and location information. The DAFM sought, through a further information request and after referral to a DAFM Ecologist, a harvest plan as per the *Standards for Felling and Reforestation* to include information on setbacks and soil and site conditions, amongst other details. This plan included specific information regarding the operations to be undertaken including that the existing 10 metre buffer along the riverbank would not be traversed, location of silt traps and crossing points, supervision during works, harvesting and extraction of Plots 2 and 3 to be carried out during the Summer/Autumn, use of harvester and low ground pressure forwarder, the presence of an existing gravel foundation at the fuel, urea and maintenance area. Details were also provided of the replanting of Plots 2 and 3, in addition to further maps. In addition to an Ecologist, the application was also referred to a DAFM Archaeologist who recommended a number of additional conditions related to an exclusion zone/setback from a recorded monument on lands adjoining the proposed extraction route.

The Application was referred to the NPWS and Kerry County Council and no response is recorded from either body.

The DAFM recorded a screening for Appropriate Assessment and recorded six European sites within 15km of the proposal. This included that the proposal should proceed to Appropriate Assessment in relation to Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC and Killarney National Park SPA. The DAFM prepared an Appropriate Assessment Report which described the nature, scale and location of the operations, the qualifying interests and conservations objectives of the SAC and SPA, the potential adverse impacts and the type of mitigation required. The DAFM considered each qualifying interest in turn and reasons are provided for the mitigations proposed in each case. The DAFM recorded a consideration of other plans and projects, both forestry and non-forestry.

The DAFM prepared an Appropriate Assessment Determination that outlines the screening and Appropriate Assessment undertaken and the mitigation measures required and concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The measures include adherence with the submitted management plan. The DAFM also recorded a consideration of the proposal across a range of criteria and concluded that it should not proceed to the EIA process.

The decision to approve the licence subject to conditions was issued on 6th August 2020. The conditions include adherence with the Appropriate Assessment Report and Determination and the conditions of the Archaeological Report.

Appeal

There is one appeal against the decision and the Notice of Appeal and full grounds of appeal were provided to all parties. The grounds submit that the licence is in a class of development covered under Annex II of the EIA Directive and that a number of criteria set out in Annex III of the Directive do not form part of the screening. It is further submitted that there is no foundation to the conclusions provided and that the afforestation of the lands was carried out without screening for the requirement for EIA and that a retrospective assessment of the need for an EIA is required. It is submitted that there is no evidence that the potential impact on a non-designated European Annex I habitat has been adequately considered.

It is submitted that the licence threatens the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-2021. It is submitted that the site is in a priority Area for Action under the Water Framework Directive and that forestry is noted as a Significant Pressure on the water quality of the River Sub-Basin. It is submitted that the AA Determination contains recommendations, not requirements, and that this not sufficient to ensure compliance with Article 6.3 of the Habitats Directive. It is submitted that the licence should contain a requirement for the issuance of commencement and conclusion notices and conditions regarding notification of any spraying of chemicals and that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive or a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive.

DAFM Statement

In a statement to the FAC that was provided to the parties, the DAFM submitted the details of the application and processing and that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in their standards and procedures have been adhered to in making a decision on the application. It is submitted by the District Inspector,

Following the current DAFM AA Screening guidance document I carried out a 15km radius screening on the Natura 2000 sites in the area. I had reviewed the qualifying interests of the Natura 2000 sites in question and by using the latest information available to some Natura 2000 sites were screened out, the remainder have had an appropriate assessment report (AAR) and subsequently an appropriate assessment determination (AAD) has been carried out. Following the recommendation from the AAD I have recommended this licence to proceed.

The statement further submits details of an inspection of the lands after the licence had issued and correspondence with a number of consultation bodies was submitted. The FAC considered that these matters did not relate to the process of making the decision under appeal.

Oral Hearing

An oral hearing of the appeal was held on Tuesday 7th March 2022 of which all parties were notified and attended by the Appellant, a representative of the Applicant and three representatives of the DAFM, an Executive Officer, District Inspector, and Ecologist. An agenda and procedures for the oral hearing were provided to the parties prior to the hearing.

During the oral hearing, the DAFM submitted that the application was in fact advertised and that the statement provided was in error in this regard. They stated that the application was advertised on 25th March 2020 and submitted a link to the gov.ie website with the relevant advertisement. This was provided to the parties during the hearing and the FAC is satisfied that the application had been placed on the DAFM website. It was submitted that there were no submissions on the application. It was submitted that an IT error had led to certain questions being recorded incorrectly on the Inspectors Certification and that, in relation to the EIA screening, Q9 should have been answered as a Yes and Q10 and Q11 as No. It was submitted that the marked farm track and forwarding route was considered suitable but that any application for a forest road would have been considered if one was made.

The Ecologist submitted an overview of the Appropriate Assessment undertaken and submitted that, in relation to the consideration of the proposal in-combination with other plans and projects, while the proposal could act as a source of effects there was no pathway as a result of the measures required. They submitted that the measures in the Appropriate Assessment were required to be adhered with as stated in the licence conditions. They submitted that the measures were site specific and included the location of silt traps and water crossing points among other measures identified in the Harvest Plan. They submitted that the forests were not of particular value as a habitat for nesting or breeding birds as they were comprised of commercial conifer and immature broadleaf species.

The Appellant stated that they wished to expand on a sub-set of their grounds. They questioned a number of responses contained in the EIA screening, including Q10 and Q11 which were recorded as N/A. They submitted that there were no archaeological features marked on the Harvest Plan submitted. They submitted, as stated in their appeal, that they considered the mitigation measures in the Appropriate Assessment to be recommendations of a general nature and not to be site specific and to be too subjective. They referenced case C461/2017 of the Court of Justice of the EU in relation to the developer being free to subsequently determine certain parameters relating to the construction phase. They questioned the suitability of the marked farm track as a forest road. They questioned the text provided in the Appropriate Assessment Report in relation to the consideration of the proposal in-combination with other plans and projects. They questioned the content of the submitted Harvest Plan and whether it contained sufficiently objective information. They submitted that there was a discrepancy in law between the Wildlife Act and the EU Birds Directive in relation to the protection of wild birds. In relation to their grounds that refer to a non-designated Annex I habitat, they submitted that they could not now identify any such habitat.

Considerations of the FAC

The FAC was established under the Agriculture Appeals Act 2001, as amended, as an appellate body in relation to decisions of the Minister for Agriculture, Food and the Marine under section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. The FAC considers that only matters related to the making of the decision to grant licence TFL00477520 fall within its remit.

During the oral hearing, the Appellant submitted that there was a reference on the file to the prioritisation of the application. This was not submitted in the appeal. This was addressed by the Applicant's representative in relation to the personal circumstances of the Applicant and to the satisfaction of the FAC.

In considering the possibility of significant effects on the environment and related obligations on the Minister for Agriculture, Food and the Marine, the FAC considered whether 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) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) 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 before the FAC relates to the felling of 10.1 ha of managed forest and no change of land use would occur. The FAC concluded that 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 not covered by national Forestry Regulations and that screening for significant effects under the EIA Directive was not required in this case.

The DAFM did undertake and record a screening for EIA and a number of grounds of appeal relate to this screening and other EIA matters. A number of versions of the screening were submitted to the FAC and the DAFM confirmed at the oral hearing that the most recent version dated in August 2020 was the one on which the decision was made. In relation to the criteria recorded in the screening the Appellant was invited, during the oral hearing, to elaborate on what criteria or effects they believed were not considered as part of the screening and declined to make a further submission on these matters. The FAC considered the range of matters considered as part of the making of the decision including those recorded in the Inspector's certification, Appropriate Assessment and other documents on file and considered that the relevant factors and criteria were considered as part of the processing of the application. During the oral hearing the Appellant submitted that they could not identify what undesignated European Annex I habitat they were referring to in the grounds.

The Appellant questioned the suitability of the identified farm track as a forest road. It is specified on the application that this is a forwarder route rather than a forest road and would lead from the forest to the stacking area from where haulage and transport would occur. The Applicant's representative submitted that this was an established farm track used to access the land for many years and was ideally suited as a forwarder route. The DAFM submitted that this route was suitable subject to conditions and that an application for forest road works would be required if this was to be used as a forest road. The FAC are satisfied that this route is the forwarding route and not to be employed as a forest road and is suitable subject to the conditions stated.

The Appellant also questioned whether the recorded monument identified by the DAFM Archaeologist should have been identified on the Harvest Plan submitted. The FAC considered this matter with reference to the DAFM Felling and Reforestation Standards (2019) and the archaeological report by the DAFM and related conditions. The works as proposed would not traverse the monuments but would pass some 30 metres from them. While the monuments are not marked or noted on the Harvest Plan submitted at the request of the DAFM, they are marked on the Hazards map submitted by the Applicant and were considered by a DAFM Archaeologist which attached clear conditions in relation to setbacks. These were subsequently attached to the licence when issued and the FAC is satisfied that this matter was sufficiently addressed.

In relation to questions 9, 10 and 11 and the answers provided as recorded in the EIA screening, the DAFM submitted that a technical error had led to an incorrect recording of the responses. While no evidence of a technical error was submitted, the FAC did review the maps published in the Forestry Standards Manual (2015) which describes the procedures of the DAFM and noted that the area in question was not located in an area designated as fisheries or acid sensitive. The FAC further considered that these responses should be read in combination with other responses recorded and the file in its entirety including the Appropriate Assessment. The FAC concluded that while the recording of responses to these questions did represent an error that there was no significance to this given the nature, scale and location of the proposal. The proposal is for felling in a private, managed forest to include thinning of three plots and clearfelling and replanting in two plots. The lands lie in a rural area and largely surrounded by agricultural land. The lands do not lie within any designated area and were subject to an Appropriate Assessment and related conditions, which the FAC considered to be acceptable. In addition to not being a class of development included in the EU EIA Directive, the FAC considered that the proposal as licenced was not likely to result in significant effects on the environment and that the DAFM did not err in not undertaking an EIA of the proposal.

The Appellant submitted that the afforestation of the lands was carried out without any screening for the requirement of EIA. The FAC noted that the Appellant did not further substantiate these grounds. The application details suggest that the current forest was planted in different sections in 1983, 1989, and 2003 thus a portion of the current forest predates the EU EIA Directive. Historic Ordnance Survey mapping shows the lands to have been enclosed for agriculture for a considerable time and were classed as largely rough pasture and furze. The forested lands are surrounded by agricultural land in pasture while a small

number of pockets of forest are situated to the south and west. The lands do not lie within any designated areas. There is a recorded monument to the north of the forest but there is no reason to consider that this might have been impacted by the proposal. The FAC was not provided with any evidence that the planting of the lands was regulatorily deficient or that it might have been likely to result in significant effects on the environment. The FAC is not satisfied that the DAFM have erred in the making of the decision in regard to these grounds of appeal.

In relation to the protection of water quality and the requirements of the Water Framework Directive, the FAC noted that the forest lies in the Deenagh_SC_010 subcatchment and Laune-Maine-Dingle Bay Catchment. The Deenagh 010 waterbody flows through part of the site and has been classed as Poor (Ecological Status or Potential, Invertebrate Status or Potential) and At Risk with Extractive Industry Peat – Harvesting identified as pressures in the second WFD Cycle. It lies in the ground waterbody of Scartaglin IE_SW_G_073 which has been classed as Good and Not At Risk. The Appeal identifies the area as being a priority area for action and that forestry is a significant pressure. The FAC noted that peat extraction has been identified as a pressure for the second cycle and considered the document *Local Authority Water Programme Deenagh PAA Desk Study AFA0060 Southwest Region* (2021). This document states that forestry is not a significant pressure, although it may be a localised pressure, and that agriculture is a significant pressure on the waterbody. Furthermore, the proposal is of a limited scope and scale and the licence as issued includes a significant number of water protection measures and includes a redesigning of the forest at replanting stage, such as setbacks, which will likely provide for improved outcomes in the future. The FAC is not satisfied that the DAFM erred in relation to these grounds of appeal.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

The FAC considered the Appropriate Assessment (AA) undertaken by the DAFM which includes, in addition to operational details, a number of measures specific to the felling and replanting stages. The felling would take place in a private, commercial forest that lies outside of any designated areas and does not contain qualifying interest habitat related to the SAC and SPA, which were the subject to the AA. The AA focused on water protection measures and the potential pathway between the forest and the downstream European sites, as well as measures related to otter. The FAC considered, in particular, the Harvest Plan submitted and considered it to include specific measures related to the protection of water quality including setbacks, the location of silt traps and specified crossing point and other operational details. Furthermore, the FAC considered the nature, scale and location of the proposal being for tree felling and replanting in some sections over a specified period and subject to the conditions as specified. The licence includes a condition to *i) Adhere to mitigations in the AAR and AAD*. The FAC are satisfied that the screening decisions of the AA undertaken by the DAFM were correct, that an AA was undertaken in relation to Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC and Killarney National Park SPA and that adherence with the identified measures would ensure that the proposal would not adversely affect the integrity of these sites. Furthermore the FAC considers that the AA and identified

Harvest Plan include site-specified requirements and that adherence with these requirements are a condition of the licence. The FAC is not satisfied that errors were made in the decision in this regard.

In relation to the submitted grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with Article 5 of the Birds Directive and relating to the requirements of Article 12 of the Habitats Directive, the FAC considers that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing or animals on the proposed site. The Appellant submitted that they did not have any information regarding an undesignated Annex I habitat and the FAC could not identify such information.

In relation to the use of chemicals, the FAC concluded that, as with the use of plant protection products in other forms of land management, there is no requirement to engage in the consultation methods suggested in the grounds and that the use of such chemicals would be required to follow best practice and relevant legislation. Regarding notifications and inspections, the FAC considered that the Applicant will be required to erect a site notice when operations commence. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant should not be attached to the licence.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and other submissions received including at the oral hearing. The FAC is not satisfied that a serious or significant error or a series of errors was made in making the decision or that the decision was made without regard to fair procedures. The FAC is thus affirming the decision to the Minister regarding licence TFL00477520 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In affirming the decision the FAC considered that the proposal as licenced is in keeping with Good Forest Practice and Government Policy.

Yours sincerely,

Vincent Upton *On* Behalf of the Forestry Appeals Committee