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7th December 2021

Subject: Appeals FAC 728/2020 & 754/2020 regarding licence TFL00463620

Dear [REDACTED]

I refer to the appeals 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 & Hearing

Licence TFL00463620 for the felling and replanting of forest on 21.58 ha at Annaghaderg, Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 2nd September 2020. The soil type underlying the project area is described on file as being predominantly podzolic in nature, the slope is described as being predominantly flat to moderate (<15%), the project area is said to be crossed by / adjoins an aquatic zone(s) and the vegetation type(s) within the project area comprise conifer plantation. The forest is currently composed of Sitka spruce and replanting of the project area would be 80% Sitka spruce, 10% Additional Broadleaf and 10% Open Space. The application was referred to Leitrim County Council and two responses are to be found on file. The response from the Planning Department sets out that the lands are not within any designated area as per the County Development Plan 2015-2021 and that the site is partially in an area with high capacity and partially within an area with medium capacity to accommodate forestry. The response from the district engineering office raised no objections to the proposal and included conditions to be included in the licence.

The application was referred to the DAFM Archaeologist and a report was received which recommended conditions for inclusion in the licence. The project area is located in the river sub-basin of the Yellow (Ballinamore)_020 and that waterbody has an unassigned status in the EPA 2013-18 Water Framework Directive Assessment period. The DAFM statement to the FAC sets out that the project was desk assessed. A hearing of appeals FAC 728/2020 & 754/2020 of which all parties were notified was held on 21st June 2021.

In attendance at Oral Hearing:

Department Representative(s):	Mr Seppi Hona, & Ms Eilish Kehoe.
Appellant (FAC 754/2020):	██████████
Appellant (FAC 728/2020):	██████████
Applicant / Representative(s):	██████████
FAC Members:	Mr. Seamus Neely (Deputy Chairperson), Mr. James Conway, and Mr Derek Daly.
Secretary to the FAC:	Ms. Ruth Kinehan.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to allow the appeals and set aside the decision of the Minister regarding licence TFL00463620.

Appropriate Assessment

The DAFM carried out a stage 1 Appropriate Assessment (AA) Screening and identified one European site (Cuilcagh - Anierin Uplands SAC 000584) within 15km of the proposal. This European site was screened out and the reason given was the position of the project area downstream of the Natura site and the subsequent lack of any hydrological connection. A stand alone In-Combination effects report is to be found on file which outlines that websites were reviewed on the week of 5/8/20 focusing on the general vicinity of the project area in the River Sub Basin Yellow_020 with details given regarding the Department of Housing, Planning and Local Government (no data found), An Bord Pleanála (no data found), EPA (1), Leitrim County Development Plan 2015-2021 and other forestry projects; Afforestation, Roads, Private felling and Coillte felling. DAFM deemed the project, in combination with other plans and projects, would not give rise to the possibility of an effect on the Natura site(s) listed.

Appeals

There are two appeals against the decision to grant the licence in this case.

The grounds in appeal FAC 728/2020 submit that this is an application for clearfell and afforestation, that no Environmental Impact Assessment screening has ever been carried out, that it is necessary to establish if the planting of this forest compiled (sic) with the law, that no Appropriate Assessment screening has been carried out according to the requirements of the EU Directive and Irish implementing law.

The grounds in appeal FAC 754/2020 submit that there is a breach of Article 4 (3) of the EIA Directive 2014/52/EU, that the Determination of the Inspector in terms of the Requirement for an EIA is

inadequately reasoned, that there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which includes errors and unqualified uncertainties) or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application, that the amount of thinning and clear-felling activity in this locality is known by the Inspector to be a significant issue, that his response to Q8 of the EIA screening on IFORIS must be challenged, that there has been inadequate consideration of feedback from a Consultation Body, that this licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21, that there is insufficient detail and clarity in the In-Combination information to enable a definitive position to be reached on the cumulative effect of this project with other plans and projects, that the Harvest Plan is not an adequate or accurate representation of the requirements of the Interim Standards for Felling & Reforestation, that the Proposed Measures to Protect Social and Environmental Features and Considerations contained in the Harvest Plan include "Consult with local residents" and that there is no evidence presented as to the methodology that will be used for consultation, that in the absence of such detail it cannot be assumed that any consultation will be adequate, timely or effective that there should be Commencement and Conclusion of Operations conditions, that the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, and that this licence should contain a condition that plans and works must be inspected by the Forestry Service prior to, during and post works to ensure compliance with all environmental conditions and mitigations.

DAFM Statement to the FAC

In the statements to the FAC in relation to the two appeals (728/2020 & 754/2020) the DAFM provide a response wherein it submitted that the decision was issued in accordance with the procedures S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures as listed on the statement have been adhered to in making a decision on the application. It also sets out that the application was desk assessed and provides a response to grounds in the two appeals.

Oral Hearing

At the oral hearing the DAFM representatives went through the processing of the application setting out steps taken and the relevant dates for receipt and approval of same. The information contained in the DAFM statement to the FAC was reiterated. The appellant in attendance then contextualised his grounds of appeal. He asserted that having visited the site location some days earlier he observed that a number of the plots subject of this application for a felling licence had already been felled and replanted. The appellant (754/2020) then proceeded to go through his submitted grounds of appeal. He

also referenced a confusion in that the site shows a total of seven plots whereas the application is for six plots and drew attention to the submission made on the application by the 'Save Leitrim Group' in the context of the extent of forestry projects within 500m of the site within the previous three years. He drew attention to the harvest plan and the mention within it of the presence of aquatic zones and asserted that this was an inherent water quality issue. While presenting no evidence of the presence of otter on the site the appellant asserted that there was no evidence that the NPWS was contacted in relation to the species. He asserted that some of the content of the archaeologists report had not been transferred to the licence conditions. There were some connection difficulties experienced in relation to the appellants audio to the hearing during the submission made to the FAC and for completeness the Deputy Chairperson afforded the appellant an opportunity to repeat some parts of the presentation made.

In response to questions from the FAC the DAFM representative asserted that while he didn't have the reference number to hand, that the felling on plots 1,2 & 3 was authorised by a separate licence. He also submitted in response to a question from the FAC that there may be a watercourse on site although he could not confirm that. In response to a question from the FAC the DAFM representative asserted that 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.

The FAC posed some questions to the DAFM on water quality matters, the unassigned status of the waterbody in which sub-basin the project area is situated, and the inter relationships of licences / conditions in a circumstance where more than one licence has been issued for the same activity. In response the DAFM asserted that the matter of the unassigned status of the waterbody had not been specifically considered at the time of the processing of the application. The DAFM representative asserted that the DAFM was satisfied that the matters of water quality generally had been adequately addressed in the processing of the application. The DAFM representative also asserted the view that the issue of a subsequent licence for an activity which included a previously approved element was not precluded subject to the subsequent application being for more activity / area than the original. The DAFM representative also stated that he was not in a position to confirm when the felling of the trees on plots 1,2 & 3 had occurred.

Consideration by the FAC

The FAC, in the first instance, considered the matters relating to the circumstance that the trees on plots 1,2 & 3 (and which plots were subject to licence application TFL00463620) appeared (on the basis of submissions made at the oral hearing) to be felled already. Having considered the matter in some detail the FAC sought further information from the DAFM by e-mail of 28/06/2021 which set out the context of the request (in particular that it was asserted that Plots 1,2 & 3 on the Map on file dated 03/01/2020 had already been felled and replanted and that the felling had occurred under the authorisation of an extant licence). The request to DAFM sought:

- A confirmation of the extent of clearfell and replanting that has already occurred,
- Details of the licence under which the felling is asserted to have occurred, to include the reference number, date of issue, the dates setting out any limitation on the exercise of the licence and a copy of the conditions attached to same,
- Ideally that a copy of the licence should be provided,
- Details of when the felling and replanting (which was asserted at the oral hearing to have already occurred) took place and in particular a confirmation from DAFM as to whether the said felling and replanting as asserted, occurred before or after the decision to issue the licence TFL00463620.

The DAFM responded on 05/07/2021 and confirmed that the extent of clearfell and replanting that had already occurred in this case was Plots 1, 2 & 3 as per TFL00124918 and attached a copy of licence TFL00124918. The response stated that Felling Licence TFL00124918 issued 22/06/2018, was valid for 2 years from date of licence and that the forester for the licensee made a request on 22/06/2020 for the said tree felling licence to be extended (due to wind damage within the licenced area) until 21/06/2021. It was confirmed that this extension was granted on 13/07/2020. A copy of the amended licence was provided with the response which noted that the licence under appeal (TFL00463620) issued on 02/09/2020.

As the response from the DAFM didn't clarify when the felling of plots 1,2 & 3 had occurred the FAC then sought additional information from the applicant / applicant's representative by email dated 24/09/2021 which also set out the context of the request (in particular that at the hearing of the appeals against the licence in this case that it became apparent to the FAC that some of the felling which was applied for in the application (TFL00463620) has already occurred). In that context the request to the applicant /applicant's representative sought details of when the felling and replanting (which was asserted at the oral hearing to have already occurred on plots 1,2 & 3) took place. The applicant's representative responded on the same date and confirmed that:

- No felling was undertaken under licence TFL00463620,
- TFL00124918 Felling (which included Plots 1,2 & 3) took place approx. Aug 2020 and was replanted in 2021,
- Felling covered by GFL15108 (Plot 7) took place approx. April 2015 prior to the appeal.

In the interest of fair procedure, the FAC circulated to the parties (to the appeals) copies of the requests it had made for additional information to the DAFM and the applicant / applicant's representative together with copies of the responses received and afforded a period within which further submissions arising from the information circulated could be made. The FAC considered any such further submission received in this context.

In considering the response from the applicant's representative the FAC established that plots 1,2 & 3 as contained in the licence application under appeal (which were also included in the application for

licence TFL00124918) and that these plots were felled in August 2020 under the authority contained in licence TFL00124918. It further established that the felling of plots 1,2 & 3 had occurred in the period between the extension of licence TFL00124918 (on 13/07/2020) and the issue of licence TFL00463620 (on 02/09/2020). The FAC concluded that the DAFM, in issuing a licence on 02/09/2020 for a felling activity, a significant portion of which had already occurred, made a serious error in the processing of the application for licence TFL00463620.

The FAC considered the contentions in the appeals in relation to the EIA Directive and related matters. 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). 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 and replanting of an area of 21.58ha. 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 agrees that screening for EIA was not required in this case and that breaches of Article 4(3) had not occurred.

Regarding Appropriate Assessment and related matters, the FAC finds the DAFM carried out an Appropriate Assessment Screening and one Natura 2000 site (Cuilcagh - Anierin Uplands SAC 000584) was identified within 15km of the proposal as set out in the Inspectors report on file. This site was screened out and the reasons for the screening conclusions reached are set out in the said report. The FAC finds that an In-Combination report is to be found on file which sets out that in relation to TFL00463620, the DAFM deems that there is no potential for the project to contribute to any effects on the same European site, when considered in-combination with other plans and projects. The FAC examined publicly available information from the NPWS and EPA and identified the same European site. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, types and characteristics of potential impacts, to determine the likely significant effects of the proposal itself or in combination with other plans or projects on a European site. The FAC considered that the procedures adopted by the DAFM in their assessment are acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions reached.

The FAC considered the contention in the grounds of appeal that in processing the licence TFL00463620 DAFM had taken inadequate consideration of feedback from a consultation body – in this case Leitrim County Council. In its consideration of this contention the FAC had regard to the referral made by DAFM to the Council and noted the two responses made in reply to same. The FAC considered that the DAFM is the competent authority for the issue of felling licences and that while the specific conditions suggested by the Council in relation to roads had not been included in the licence a more general condition in relation to the protection of public roads had been. The FAC concluded that it had not been satisfied that the DAFM had made a serious or significant error or a series of errors in its consideration of the Leitrim County Council submissions.

The FAC considered the grounds of appeal that this licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21. The FAC examined the record available to it in relation to the Environmental Considerations relating to the project and noted the answers on record regarding the questions associated with the compatibility of the project with Water Framework Directive objectives (i.e. to prevent any deterioration in status of the underlying waterbody). The FAC finds that while the DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, that the failure to consider the potential for the project to have an effect on an unassigned waterbody (as stated by the DAFM at the oral hearing) represented a serious error in the processing of the application as it relates to these grounds in the appeals and as is necessary under the Water Framework Directive in this case.

Regarding the conditions that the appellant (FAC 574/2020) suggested should be attached to the licence relating to protections for birds and in relation to animal species listed in Annex IV (a) of the habitats directive and in relation to a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive, the FAC considered the existing legislative safeguards in place with regard to these species and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC considered that the granting of the felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required. Regarding the conditions that the appellant (FAC 574/2020) suggested should be attached to the licence relating to commencement and conclusion of operations, and inspections, the FAC considered that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case was not required.

The FAC considered the grounds of appeal that the harvest plan is not an adequate or accurate representation of the requirements of the Interim Standard for Felling & Reforestation and related matters. The FAC find a harvest plan was provided with the application and concluded that it is a document outlining general environment and safety rules, that other accompanying documents outlined

inventory and restocking details and that maps identified the proposal area, river waterbodies, designated sites and other features. The FAC is satisfied that the information submitted with the application is sufficient to inform the decision-making process in this case.

The FAC considered the full grounds in the appeals and had regard to all materials on file, submissions made, the submissions made at the oral hearing, the responses to further information sought by the FAC post the oral hearing and including observations made on same. The FAC, in considering that some of the project area as included in the licence application TFL00463620 had already been felled at the time the decision was made on the application and that the DAFM had not made an assessment of the potential of the project to have an effect on an unassigned waterbody, concluded that the DAFM made a serious error or a series of errors in the processing of the application in this case and decided to allow the appeals and set aside the decision regarding licence TFL00463620.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee