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22nd September 2021

Subject: Appeal 018/2021 regarding licence TFL00136218

Dear [REDACTED]

I refer to appeals made to the Forestry Appeals Committee (FAC) in relation to this decision 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 the parties to the appeal.

Background and Hearing

Licence TFL00136218 was approved by the Department of Agriculture, Food and the Marine (DAFM) for thinning of 45.32 ha in three plots (1,2 and 3) at Curraghmore west, Co. Kerry on 6th January 2021. The original licence application in this case comprised thinning of three plots (1,2 and 3) and clearfell of four plots (5,7,8 and 9) and both thinning and clearfell of one plot (10). The total size of the footprint of such activities being 113.8 hectares. All thinnings to take place in 2018 and all clearfells to take place in 2021. In the case of plot 10 the timing was reversed (thinning in 2021 after clearfell in 2018) which can be assumed to be an error.

The licence was applied for on 29th March 2018. In May 2019 the applicant clarified that the areas subject to activity would be considerably smaller in scale than initially indicated although it was still a mixture of thinning and clearfell totalling 77.94 ha. In July 2019, before a decision was issued with regard to TFL00136218 a new application was made (TFL00381019) covering the same lands and activities. It was approved on 13th August 2020 and attracted an appeal soon thereafter. On November 18th 2020 it appears that the application TFL00136218 was reduced in scale such that only the thinning activity remained (45.32 ha). About one week later on 26th November 2020 a new application (TFL00593720) covering 19.2 ha of clearfell was received by DAFM. This was approved on 13th May 2021 and does not appear to be the subject of any appeal. TFL00381019 was under the remit of the FAC when TFL00136218 was approved by DAFM on 6th January 2020. TFL00136218 was appealed and the consideration of same is subject of this letter (reference FAC 018/2021). In February 2021 the

licence application TFL00381019, covering the areas and activities applied for under TFL00136218 and TFL00593720, was withdrawn.

A hearing of appeal FAC 018/2021 with regard to TFL00136218 was held by a division of the FAC on 19th July 2021. The FAC members in attendance at the hearing were Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.

Decision

Having regard to the evidence before it, including the licence application, processing by the Department of Agriculture, Food and the Marine (DAFM), the grounds of appeal, all materials on file, and in particular the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside the decision of the Minister regarding licence TFL00136218.

General

The predominant soil type underlining the project area is predominantly podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise Sitka spruce with some wet grassland.

The project is located in WFD Catchment 22 (Laune - Maine- Dingle Bay) and WFD Sub-Catchment Maine_SC_030. The relevant River Sub-basin is Maine_040. The WFD River Waterbody Status 2013 - 2018 for the relevant river waterbody (IE_SW_22M010700) is classified as 'moderate'. No River Forestry Pressures are recorded.

The project area does not fall within any designated Natura 2000 site but is within 15kms of nine Natura 2000 sites: Akeragh, Banna and Barrow Harbour SAC 000332, Ballyseedy Wood SAC 002112, Castlemaine Harbour SAC 000343, Castlemaine Harbour SPA 004029, Lower River Shannon SAC 002165, Slieve Mish Mountains SAC 002185, Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161, Tralee Bay and Magherees Peninsula, West to Cloghane SAC 002070, Tralee Bay Complex SPA 004188.

The licence application was referred to NPWS and Kerry County Council but there is no reply on file from these bodies. One submission was received in relation to the proposal in April 2018. The site having been referred to it, the DAFM Archaeology unit recommended that an exclusion zone be applied for the monument identified as lying 50m outside of the boundary.

The licence was approved and issued on 6th January 2021. Standard conditions are attached with the addition of the specific archaeology condition mentioned above (although the thinning area licenced lies at least 800m from the monument that is the focus of the Archaeology condition).

Appropriate Assessment Screening

The site was desk 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) that applied a 3km radius of interest. Slieve Mish Mountains SAC 002185 was assessed but screened out. A second screening, applying the current standard of a 15km radius, screens out three of the nine above mentioned sites.

This was then addressed in the AA Screening Determination, dated 3rd September 2020, when each of the nine separate screening conclusions of the district inspector was affirmed, indicating that AA was required for six sites. No Appropriate Assessment Determination is on file for this case despite there being a completed Appropriate Assessment Report on file.

The Appeal

There is one third party appeal against the decision. The grounds of appeal relate principally to DAFM concurrently processing two licences for the same area and activities. The appellant submits that the behaviour of submitting multiple applications for the same area is 'suspicious' and 'dubious practice' in order to get around appeals on licences; submits that there was collusion between DAFM inspector and the applicant in an attempt to exclude application from AA; submits that the applicant makes reference to an objection to licence TFL00136218 and that this objection is undocumented in the shared files; submits that there is no evidence of NIS for either TFL00136218 or TFL00381019 even though sites are screened-in by the AA Report; submits that an amended application should be resubmitted to referral bodies given the change in proposed activities and this did not occur; submits that there has been no assessment of climate change impacts; the site should have been referred to IFI for their comments as the adjoining site is a salmonid river; that the requirements of the Water Framework Directive are not met.

The appellant also submits that the approval is not consistent with the Habitats directive including a significant difference between the extent and nature of the proposed activity between the AA Report and that which was actually intended by the applicant, that the threat of colonisation of the Slieve Mish Mountains SAC by Sitka spruce seed dispersal should have been taken into account during AA assessment given that it is 260m away rather than the 600m as stated in the AA Report and AA Determination and that the mitigations mentioned in the AA Report are not properly reflected in the approval and that there are significant errors and anomalies in the AA that mean it cannot be relied upon. Also submits that the area estimates of forestry in the Inspector's Certification AA Screening are inconsistent with the approved licence, that the areas quoted in the EIA screening are extremely high at 219 Ha and are inconsistent with the in-combination section of the AA Report. Submits that no response was received from Kerry County Council despite Inspectors Certification saying this was considered. Submits that the approval is not consistent with Birds Directive nor the protections that must be afforded species listed under Annex IV (a) of the Habitats Directive and that the monitoring regime employed by DAFM is inadequate.

DAFM Statement to the FAC

The DAFM in a statement to the FAC confirmed that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. It also sets out the various processing dates relating to the application and that one submission had been received from members of the public on 27th April 2018. The statement also includes a response to the appeal that is limited to the application of the latest procedures in the AA process.

Consideration by the FAC

The FAC held a hearing of the appeal on 19th July 2021. Addressing the written grounds of appeal, the Committee considered, in the first instance, if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the EIA and Habitats Directives. Regarding Environmental Impact Assessment (EIA) 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. The Irish Regulations, in relation to forestry licence applications, require mandatory EIA 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 proposal (as amended) is for the thinning of 45.32ha and therefore does not attract mandatory submission of an EIA report.

The FAC noted an error in EIA screening where the question 'Were comments from the Local Authority received and examined?' ticked 'Yes' where no such comments appear on the file. FAC does not regard this as a serious error. The FAC notes the figure of 219.19 Hectares in questions 3 and 4 of the same document and recognises this may in large part be due to double-counting of different licence applications for the same land in the immediate area of licence application TFL00136218. This is likely to have been known to the inspector at the time of his assessment. In relation to the digitised forest area licenced for thinning and clearfelling (Q.6) a clearfell licence (TFL00593720) was submitted approximately one month after the spatial run of the Inspector's Certification and therefore is not picked up by this report. This clearfell area had originally been included in TFL00136218 but was excluded in November 2020.

The FAC found that the DAFM assessed the proposal and considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects. However, in relation to cumulative effects the FAC finds that an area of clearfell (previously included in this application) did not appear in question 5 of the EIA requirement assessment because a new application referring to the proposed clearfelling had not yet been lodged. At the same time, the original application covering all aspects was still extant but it too did not appear under question 5 of the EIA requirement assessment. For these reasons the FAC determines that there have been significant errors in the processing of the application as it relates to the EIA Directive in this case.

Regarding Appropriate Assessment and related matters, the FAC finds that the DAFM carried out an Appropriate Assessment Screening and identified nine Natura 2000 sites within 15km of the project area. The AA Screening, Inspectors Certification, AA Screening Determination and AA Report were all drawn up on the basis of thinning and clearfell occurring. The FAC considered that this screening for an activity which differs from the revised proposal constitutes an error in the processing of the application. However the FAC considered that even heavy thinning is generally a less disruptive and less impactful activity than clearfell and reforestation and that the exclusion of an area of clearfell from an application will result in reduced risk of environmental impact and as a consequence this error is not considered to be a serious or significant error. Regarding the grounds of appeal that the AAS

and AAD incorrectly report the distance between the site and the Slieve Mish Mountains SAC, the FAC concurs. Regarding the grounds of appeal citing the lack of NIS, the FAC does not determine this as an error in itself as such documents are not mandatory. As described above, the AA Screening Determination concurred that AA was required for six sites. In the AA Report however, only four of the six sites screened-in were examined, leaving out Lower River Shannon SAC 002165 and Tralee Bay and Magherees Peninsula, West to Cloghane SAC 002070. In section 7 of the Appropriate Assessment report of 3rd September 2020 an Appropriate Assessment Determination is said to be on file; however no such document was made available to the FAC to inform its deliberations and it is unclear whether or not such a file was available at the time of decision making in this case. The FAC considered these as serious errors in the processing of the application under Article 6 of the EU Habitats Directive.

Regarding the grounds of appeal that is critical of the processing by DAFM of two or more licences for the same area concurrently, the FAC finds two licences applications extant for the same area between July 2019 and February 2021. When the new clearfell application TFL00593720 is considered, there were three licence applications extant for the same area from November 2020 until February 2021. The clearfell licence TFL00593720 was applied for in November 2020, after the imposition of a fee to lodge a felling licence appeal. The activity and associated lands covered by TFL00593720 were already the subject of licence applications TFL00136218 and TFL00381019, one of which was severely delayed and the other the subject of an appeal at this time. The fact that licence TFL00381019 had been appealed and TFL00136218 was still awaiting a decision also constitutes a source of potential confusion for third parties, the general public and appellants in terms of site notices, appeal procedures and their understanding of what was being proposed, assessed or approved. This also runs contrary to DAFM practice where existing appeals are extinguished before a new application is considered for the same lands. The absence of an Appropriate Assessment Determination in the record of the case, and lack of clarity as to its availability at the time of decision making and in the appeal process marks a serious error in the application of procedures. For these reasons FAC finds that the decision making of DAFM in this case was contrary to the principle of fair procedure.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC is satisfied that a serious or significant error or a series of errors were made in making the decision in relation to this licence and that the decision making of DAFM in this case was contrary to the principle of fair procedure and is therefore setting aside the decision regarding licence TFL00136218.

Yours sincerely,



Myles Mac Donncadha On Behalf of the Forestry Appeals Committee

