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21<sup>st</sup> September 2021.

**Subject: Appeal FAC 785/2020 regarding licence TFL00452820**

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**

Licence TFL00452820 is for the felling of 20.57 hectares at Aghavilla, Co. Leitrim which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 11th September 2020 subject to a number of standard conditions including a condition in relation to archaeology.

**Hearing**

An oral hearing of appeal FAC 785/2020 was held by a division of the FAC on the 21<sup>st</sup> June 2021 of which all parties were notified.

In attendance at Oral Hearing:

FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr. Derek Daly
Department Representative(s):	Ms. Eilish Kehoe, Mr. Seppi Hona
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
Secretary to the FAC:	Ms. Ruth Kinehan

**Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions made at the oral hearing, all other submissions received, all

materials on file, and in particular the following considerations, the FAC has decided to vary the decision of the Minister regarding licence TFL00452820.

### **Licence**

The licence pertains to the felling of 20.57 hectares at Aghavilla, Co. Leitrim. The overall site comprises 13 plots as indicated on maps and documentation. The project area is predominately covered by Sitka Spruce but there are blocks of other species including mixed deciduous. The proposal provides for thinning and felling over a period of nine years. Replanting indicated in relation to plots 1,2,8,9,10,11,12 and 13. Documentation submitted includes site notice, environmental and operational details including a harvesting plan and mapping.

Documentation on file in relation to the site refers to the soil underlining the project area as being podzols in nature. The slope is predominantly flat to moderate. The project area is crossed by or adjoining an aquatic zone. The vegetation type within the project area comprises mixed plantation.

In relation to WFD the project site would appear to lie within the Laheen Stream\_010 River Waterbody WFD, status of which is indicated as poor and in terms of risk is indicated as at risk.

The licence application was referred to Leitrim County Council who in a response indicated that the site is not within a designated area, is located within a high capacity area in relation to forestry and submitted conditions for inclusion in any grant of the licence. Two submissions were made to DAFM during the consideration of the licence.

The assessment of the licence application by DAFM included a desk assessment as indicated in the Statement of Facts (SoF) to the FAC. In relation to Appropriate Assessment screening as indicated in the Inspector's Certification two Natura sites were identified (Lough Oughter and Associated Loughs SAC 000007 and Lough Oughter SPA 004049) within 15 kilometres which were screened out due to absence of an aquatic zone within or adjoining the project area, or significant watercourse within or adjoining the project area and distance to a Natura site when considering the qualifying interests of the sites. Furthermore, it was stated that DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on these European sites.

An in-combination report was prepared with a date of the week of the 31st of August 2020. Section 1.1.5 indicates a high number of afforestation projects in the area. Section 2.1 of the Statement indicates that "the project lies in a rural landscape in Aughavilla, Co. Leitrim in the Laheen Stream\_010 River Waterbody WFD which has approximately 23% forest cover, which is higher than the national average of 11%. The project is considered large in scale". The Statement concludes that DAFM excludes the likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on European Sites.

### **Appeal**

There is an appeal against the decision to grant the licence.

The grounds of appeal refers to;

- Submission contends that this licence is in a class of development covered under Annex II of the EIA Directive that Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account and that a number of criteria set out in Annex III do not form part of the FS screening assessment and have not been taken into account and that an adequate screening has been conducted.
- That the Determination of the Inspector in terms of the requirement for an EIA is inadequately reasoned as there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries or any other basis upon which this conclusion is made.
- That the amount of thinning and clear felling in this locality is known by the inspector to be a significant issue and that the response to Q8 on IFORIS must be challenged.
- That the afforestation of these lands was carried out without adequate screening for EIA.
- That this licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-2021.
- That there is insufficient 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.
- The harvest plan is not consistent with standards and all hedgerows are not recorded.
- It is not clear how hedgerows can be retained during harvesting.
- The Stage 1 conclusion for site no 000007\* is not legally valid as it is based on an error of fact.
- The licence should include a condition in relation to commencement and conclusion of operations.
- 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 general system of protection for all species of birds as would be required by Article 5 of the Birds Directive.
- The licence should include a condition in relation to inspection by the FS prior to during and post works to ensure compliance.
- The licence should include a condition that the applicant comply with all regulatory and statutory requirements that are current at the time of operations.

\* Lough Oughter and Associated Loughs SAC 000007

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act. It also states that DAFM is satisfied that all criteria as outlined in the standards and procedures have been adhered to in making a decision on the application. The Statement from Inspectorate in summary in Section 1 of the statement of facts relates specifically to the issues raised by the appellant in relation to aspects of the EIA Directive and that Article 4(3) of the Directive is not applicable. In section 2 it is indicated that the felling and reforestation



project licenced as TFL00452820 has undergone the DAFM's AA Screening procedure, as set out in the document entitled *Appropriate Assessment Procedure: Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v.05Nov19)* (DAFM, 2019). The AA Screening report was completed by the Inspector and contains the recommendations regarding screened out European Sites. Screening information for each Natura 2000 site is available on file. All paperwork submitted as part of the application was deemed sufficient to determine an outcome and approve the licence with conditions.

At the oral hearing the appellant raised issues in relation to the project raising matters stated in the grounds of appeal. The proposal to restock plot 13 from broadleaf to conifer was raised; reference was made to the scale of forestry in the area as indicated in Qs 3 and 4 of the Inspector's Certification; the absence of a response to Q14; issues relating to the harvest plan and how hedgerows will be retained; the presence of a watercourse; the variation between the conditions as recommended by the archaeologist and what was stated in the licence and the protection of bird species was raised. The appellant mentioned having visited the location of the site and indicated that he had not inspected the whole site.

The DAFM Inspector explained that the site was desk assessed and the issue of hydrological connectivity was considered in the context of watercourses on the site. In a discussion and in questions to the Inspector focusing primarily on the Statement of Facts submitted and the issue of water it was indicated in response to Q14 that there is no evidence of high nutrient levels and there are water protection measures required to be adhered to in the conditions of the licence. In a response to the Inspector the appellant raised the issue of what constitutes a relevant watercourse.

In addressing the grounds of appeal, the FAC considered the requirements of the Habitats and EIA Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In considering the appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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 Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation which involve 50 hectares or more and 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 is for the felling of 20.57 hectares and not afforestation or road construction. Having regard to the record of the decision and the submitted grounds, and the nature, scale and location of the proposal, the FAC is satisfied that the DAFM did not err in its decision concerning EIA.

The FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the felling of 20.57 hectares. Having examined the documentation submitted the FAC has identified the

same two sites as the DAFM within 15km from the proposal. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined. The proposed works are located outside of any European site. Neither is there evidence of protected habitats or species on the site. In relation to a pathway of effects to a European site which is stated in the grounds of appeal, the FAC noted that reference is made in the Inspector's Certification that the project area is crossed by or adjoining an aquatic zone but it was also indicated by the Inspector that no significant watercourse or connection to a Natura site arises.

In relation to this matter the FAC examined mapping and other documentation and characteristics relating to the area. It was noted that there is a watercourse to the north, northeast and east of the site running generally eastwards. Although contours would indicate lands on the project site would drain towards this watercourse it does not appear that the project lands have any direct connection or proximity to this watercourse. In this regard the reference in the grounds of appeal to the Stage 1 conclusion for site no 000007 as not legally valid as it is based on an error of fact is noted and was examined by the FAC. Lough Oughter and Associated Loughs SAC 000007 are a group of loughs located at the closest point over four kilometres from the site with many of the loughs a considerable distance away. The main threats to the quality of the Natura site are water polluting activities such as runoff from fertiliser and slurry application, and sewage discharge (rather than forestry) which have raised the nutrient status of some lakes to hypertrophic. There is no evidence presented that the project under appeal presents such a threat. The FAC is therefore not satisfied, having regard to the record of the decision, that a serious or significant error was made by the DAFM in the decision regarding Appropriate Assessment screening.

In relation to other matters arising in the grounds of appeal the FAC noted that the appellant raised concerns in relation to the Inspector Certification, that it was only desk assessed and the responses as stated in the certification should have raised issues in granting the licence. In particular concern is raised in relation to the level of forestry. In this regard the FAC noted that the certification and the in-combination report note the high level of forestry in the area and WFD catchment as above the national average. It is also noted that Leitrim County Council's response noted that the project area is located within a high capacity area in relation to forestry and raised no objection to the project which is an established forestry project and therefore, given current national policy and that is a thinning and felling proposal the proposal is considered by the FAC as acceptable.

In relation to the references to the Inspector's Certification the FAC noted the reference to S/A in the certification for question to 14 the inspector at the oral hearing indicated that the site is not within a high nutrient sensitive area and there is no evidence to suggest otherwise.

In relation to the absence of mapping of hedgerows and that all hedgerows are not indicated it is noted that the site is an established woodland and the harvest operational map does indicate hedgerows in particular within the individual plots in the project area. It is also noted that the FAC that there are requirements in relation to forestry practice for the retention of hedgerows as identified and located on the site.



In relation to potential hydrological impacts on Natura 2000 sites and on water quality generally it is noted that the project is for thinning and felling. The project site would appear to lie within the Laheen Stream\_010 River Waterbody WFD the status of which is indicated as poor and in terms of risk is indicated as at risk. There is, as already noted, an absence of watercourses within the site. The FAC has examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area and has taken into account the nature and scale of the project and considered that the proposal will have no effect on the waterbodies arising from the project planting proposed subject to compliance with forestry standards as specified in the conditions.

In relation to impact on birds the site is not indicated or referenced in relation to any qualifying species. The appellant made a reference at the oral hearing to buzzards nesting on the site but no conclusive evidence was presented in relation to this.

In relation to archaeology and the protection of archaeological material the FAC noted that the DAFM referred the project for assessment and the archaeologist report outlines conditions to be adhered to. Condition (h) states that a 20 metres exclusion zone be adhered to in relation to the recorded centrepiece of SMR Enclosure LF L030-006 as illustrated. The licence also includes the full report of the archaeologist with exclusion maps which state 30 metres. Notwithstanding the foregoing the FAC considered that there is an ambiguity in relation to the exclusion zone conditioned in this case and that this represents a significant error in the processing of this application. To avoid any ambiguity in relation to the exclusion zone the FAC considers that the licence should be varied to remove this ambiguity and the condition be amended that condition (h) specify that the conditions of the archaeologist report as attached to the licence be adhered to.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal. As outlined in this letter, the FAC is not satisfied that the DAFM made significant or serious errors in the making of the decision at the assessment stages. The FAC, as alluded above, concluded that a serious error was made in that the archaeological conditions were not clearly recorded as conditions of the licence as issued and is thus varying the decision of the Minister regarding licence TFL00452820 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, by the omission of condition (h) as stated and requiring that it is replaced with a new condition (h) that states that all requirements and conditions as specified in the archaeology report attached to the licence be adhered to in full.

Yours sincerely,

A black rectangular redaction box covering the signature of the official.

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Derek Daly On Behalf of the Forestry Appeals Committee