



12th April 2022.

Subject: Appeal FAC 428/2020 regarding TFL00328419

Dear

I refer to the appeal 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 as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence TFL00328419 for tree felling on 25.21 hectares at Ballintogher, County Tipperary was granted by the Department of Agriculture, Food and the Marine (DAFM) on the 8th July 2020 subject to conditions.

Hearing

A hearing of appeal FAC 428/2020 was held by a division of the FAC on the 14th March 2022.

In Attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, & Mr. Vincent Upton
Secretary to the FAC: Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence TFL00328419.

Licence

The licence pertains to tree felling on 25.21 hectares at Ballintogher, County Tipperary where thinning within an overall forest of ten plots is proposed. The site is irregular in configuration with a long road frontage on the northern boundary. The site has a diverse range of tree species in nine identified plots and a tenth plot is identified as a biodiversity plot. Plot 1 has 1.5 hectares of Sycamore, plot 2, 2.8 hectares of Ash, plot 3, 0.47 hectares of Japanese Larch, plot 4, 1.18 hectares consisting of Sitka spruce and Japanese Larch, plot 5, 3.51 hectares of Ash, plot 6, 8.09 hectares of Sitka spruce, plot 7, 0.52 hectares of Sycamore, plot 8, 1.32 hectares of Ash, plot 9 is a bio plot 0,64 hectares in area and not proposed for thinning and plot 10, 3.66 hectares of Norway spruce.

The application was accompanied by mapping including location and species maps and a schedule of thinning. Following a further information request a Harvest Plan with additional mapping and further details of the proposed operations was submitted.

The site is within the within the River Sub-Basin Clashawley_SC_010River Waterbody WFD of the Suir Catchment, for which the EPA records the status as moderate and in terms of risk is indicated as at risk. Agriculture and pasture were identified as significant pressures during the second WFD cycle.

The application was referred to the National Parks and Wildlife Service who in a response dated 15th July 2019 indicated no specific comment. The licence was referred to Tipperary County Council with no response received. A submission was also received from the appellant.

DAFM Assessment

The DAFM assessment includes an initial assessment from the District Inspector that records a desk and field assessment and screening of Natura Sites within 3 kilometres identifying no sites within this radius of the site. The licence was also the subject of Appropriate Assessment Screening (AAS) and Appropriate Assessment Determination (AAD). The AAS identifies two sites within 15 kilometres. Each site is considered in turn and its qualifying interests and conservation objectives are identified. The River Barrow and River Nore SAC (002162) which was screened out and the Lower River Suir SAC (002137) which was screened in. The proposal lies in the Suir Catchment while the Nore Catchment lies to the east.

The Appropriate Assessment Report (AAR) and Appropriate Assessment Determination (AAD) indicated the thinning project proposed under TFL00328419 is not directly connected with or necessary to the management of any European site. The AAR considers each qualifying interest in turn and identifies possible effects and mitigation measures where required. These relate to a number of identified aquatic species and habitats and otter. The AAR considers potential residual impacts and in-combination effects and identifies other plans and projects considered, both forestry and non-forestry. Mitigation measures are outlined in relation to the Lower River Suir SAC 002137 and the basis for this AA Determination was that the project is not located within a European site but located in the Clashawley 010 waterbody, c. 18km upstream of the Lower River Suir SAC. The project area has an established water setback from a stream, which has a low flow and velocity at this point. In addition to the existing vegetated setbacks, mitigation measures will ensure no adverse effects on the integrity of the listed European Sites, and will ensure no deleterious effect on the water column or substrate of the Clashawley. The AAD concludes no adverse effect on the integrity of any European site.

A condition to adhere with the AA determination mitigations was included in the licence as issued.

Appeal

There is one appeal against the decision to refuse the licence.

The grounds of appeal refer to;

- The test for Appropriate Assessment Screening in Irish and EU law is: 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 the development which is within 15km of a Natura 2000 site it has been screened in.
- Reference is made to Case C-323/17 and that Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.
- A full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.
- That the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.
- Reference is made to the mobility of Birds
- A map showing the SACs and SPAs and the site of the proposed development should be attached.
- It is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha. Also, it is necessary to give the total km of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out this development, that includes thinning and clearfell.
- It is the duty of the FAC to carry out both a full Appropriate Assessment Screening and a full Environmental Impact Assessment Screening in accordance with the law. Reference is made to Case C-254/19 in this regard.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. The licence application was desk and field assessed. The Statement from Inspectorate refers to procedures followed in the assessment of the licence and the Appropriate Assessment carried out. Reference is made to the mitigation measures required to protect the integrity of the relevant Natura 2000 sites and these mitigation and guidance measures included as condition of approval. An in-combination/cumulative analysis was also carried out as part of the exercise by the ecological unit and any effect on Natura sites ruled out. All DAFM procedures and standards were adhered to in making the decision to recommend approval.

Assessment of Appeal.

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.

The FAC considered if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the EIA 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 described is for the thinning of 25.21 hectares of managed forest. No change of land use would occur and the proposal does not constitute afforestation or deforestation. The FAC concluded that the proposal did not constitute a class of development under the Forestry Regulations 2017 or the EU EIA Directive and that error had occurred in the making of the decision in relation to these grounds of appeal.

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The proposal as described is for the thinning of 25.21 hectares of managed forest. No change of land use would occur and the proposal does not constitute afforestation or deforestation. Existing access to the public road is in place at a number of points as identified on the Harvest Plan and access and stacking areas are clearly marked. The current forest is comprised of a mixture of conifer and broadleaf species and was established in 2000. It lies in a rural area c.1km northeast of Killenaule and is surrounded by agricultural land mainly in pasture with small areas of forest and extractive industries in the wider landscape. Historic mapping shows the area to have been enclosed agricultural land in pasture for a considerable time prior to planting.

The application was referred to the NPWS and Tipperary County Council with only the NPWS replying with general observations. The lands do not lie within an area designated for conservation and was

subject to an Appropriate Assessment, including measures to protect water quality, to the satisfaction of the FAC as documented below. There are no recorded monuments in or adjoining the proposal. The FAC, in considering the nature, scale and location of the proposal, was satisfied that the proposal would not result in any likely significant effects on the environment. The FAC concluded that the proposal did not constitute project or a class of development under the Forestry Regulations 2017 or the EU EIA Directive and that no error had occurred in the making of the decision in relation to these grounds of appeal.

In considering the appeal the FAC examined the Appropriate Assessment (AA) Screening process as undertaken by the DAFM as it related to the felling of 25.21 hectares noting that the proposed licence is for thinning. The AA process included an AAS, AAR and AAD. Having examined the documentation submitted, the FAC noted that the DAFM assessment identified two sites within a 15 kilometre radius of the site. The FAC has identified the same two Natura sites as the DAFM within 15 kilometres from the proposal and the FAC is satisfied that there was no need to extend the radius in this case. 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 out one site and screening in one site for Appropriate Assessment. Details of other plans and projects were also examined. As noted, the Lower River Suir SAC lies downstream from the proposal while the River Barrow and River Nore SAC lies in a different catchment.

The FAC noted the AAD concluded that the licence site is not directly connected with or necessary to the management of any European site; that mitigation measures are outlined in relation to the Lower River Suir SAC 002137 and the basis for this AA Determination was that the project is not located within a European site but located in the Clashawley 010 waterbody, c. 18km upstream of the Lower River Suir SAC. The AAD also indicated that the project area has an established water setback from a stream, which has a low flow and velocity at this point, mitigation measures will ensure no adverse effects on the integrity of the listed European Sites, and will ensure no deleterious effect on the water column or substrate of the Clashawley.

In considering the AAD the FAC considered the provisions of the Forestry Regulations 2017 in particular Part 8 which refers to Appropriate Assessment Protection of European sites. The FAC considered that the DAFM in carrying out the determination, having regard to the record of the decision, did not make a serious or significant error in the decision regarding Appropriate Assessment screening and determination. The FAC noted reference in the grounds of appeal to mobility of birds with no specific details in relation to species. The FAC however also noted that in relation to the Natura sites within 15 kilometres of the project no bird species are listed as Qualifying Interests.

The FAC also noted that an Incombination assessment was completed that considered both forestry and non-forestry plans and projects. This includes blocks of felling to the north on the opposite side of the public road.

In relation to and on water quality generally the FAC notes that in relation to WFD the project is within the River Sub-Basin Clashawley 10 River Waterbody WFD for which the EPA records the status as moderate and in terms of risk is indicated as at risk. As noted, agriculture was identified as a significant pressure in the second cycle and is identified as a pressure in the 3rd Cycle Draft Suir Catchment Report prepared by the EPA. Forestry is not identified as a pressure in this, or adjoining, waterbodies. 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; the location and nature of watercourses in the area generally; the existing vegetated setbacks and the mitigation measures as outlined in the AAD, that the development will not have adverse effects on receiving waters.

The FAC also consider that the documentation submitted including mapping were sufficient to provide for an assessment of the project.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal. The FAC is satisfied that no serious or significant error or series of errors was made in making the decision or that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence TFL00328419 in accordance with Section 14B of the Agricultural Appeals Act 2001 (as amended). In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee