



30th September 2022

Subject: Appeal FAC 052/2022 against licence decision TFL00757121

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 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 the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC 052/2022 was held remotely by the FAC on 14th September 2022. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly, Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence TFL00757121. The reasons for this decision are set out hereunder.

Background

The licence decision in this case relates to an application for the clearfell of 42.97 ha of forestry in four plots (15.48 ha, 17.88 ha, 3.2ha & 6.41 ha) at Greaghnaslieve, Leitrim. The clearfell proposed is phased such that plot 1 is scheduled for 2025, plot 2 is scheduled for 2029 and plots 3 and 4 are scheduled for 2032. The forest planting year is shown in the application documentation as being 1993. The forest is currently comprised of Sitka spruce and replanting is set out in the schedule to the licence as being 80% Sitka spruce, 10% broadleaf with 10% being open space. The land is described as having peaty or peaty / gley soils, having aquatic zones on / adjacent to the site, having relevant watercourses and having steep slopes. The application includes a harvest plan which shows the proposed felling and reforestation methods, social and environmental features, and the proposed methods to protect social and environmental features and considerations. The application is accompanied by a site location and site map / ortho map.

The application was submitted on the 19th January 2022 and was field and desk inspected on the 9th February 2022. The application was referred to Leitrim County Council who responded on the 21st February 2022 and to the National Parks and Wildlife Service (NPWS) who responded on the 21st January 2022. In its response the County Council noted that the lands in question are located within an area designated as High Visual Amenity as identified in the Leitrim CDP 2015-2021 and that the lands are in an area designated in the said County Development Plan as having a medium capacity to accommodate forestry. The response set out that there are no tree preservation orders affecting the lands and that the lands do not appear to impact any recorded monuments listed for protection under section 12 of the National Monuments (Amendments) Act 1994. The response set out some general observations in relation to Appropriate Assessment of the project and sought liaison with the District Engineer. The response from the NPWS indicated that the said service had no comment to make on the application while enclosing an Appendix by way of general matters to be considered. The Department of Agriculture, Food and the Marine (DAFM) statement to the FAC indicated that no submissions were made on the application.

While the DAFM statement indicates that an Appropriate Assessment screening was undertaken no evidence of same was displayed on the Forestry Licence Viewer (FLV). The record includes other plans and projects considered in combination with the proposal. The decision to approve the licence application was issued on the 6th May 2022 with conditions and was advertised on the 9th May 2022.

Appeal

There is one third party appeal against the granting of the licence and the full grounds of appeal and the response from the DAFM have been provided to the parties. A brief summary of the appeal grounds follows.

The grounds of appeal submit that there was a failure of due process in that the licence was not published on the same day as it issued and that DAFM did not fully support the licencing process in that certain documents, such as an application form, EIA screening, Appropriate Assessment (AA) screening / AA records and a Natura Impact Statement (NIS) were not displayed on the FLV. The grounds of appeal at number 2 contends that the project should have been subjected to an EIA screening process while making the point that the lands concerned were approved for afforestation under two separate licences issued to the same company - one for 19.8 ha in October 1992 and the second for 33 ha in April 1993. The grounds of appeal at number 3 make contentions that the licence conditions are not sufficiently precise to ensure the intended protection.

DAFM Statement

A response was provided to the FAC on behalf of the Minister for Agriculture, Food and the Marine. This response outlines the procedure adopted by the DAFM in processing the application and the related processing dates and the date of the final decision. It is submitted that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. The statement further submits that there is no legal requirement to publish (the licence) on the same day (as it issues) while setting out that the Department endeavours to publish as soon as possible following the issuing of a licence. It

indicates that at all stages the licence application is available to view on the FLV and that the short delay (over a weekend) is not unfair or unreasonable. The DAFM statement notes that the Appellant refers to screening documents not being available and indicates that as no EIA or AA was deemed necessary this is not relevant. It also sets out that the *'on-screen decision here is just an administrative step and no relevant information is displayed'*. The DAFM statement sets out that a NIS was not submitted and therefore could not be put on the FLV.

In relation to the grounds relating to EIA screening the DAFM statement sets out that the Appellant refers to afforestation licences and that these are not relevant here to the appeal against granting the felling licence. It also notes that the Appellant makes claims that the felling may have significant effects but supplies no evidence of this and that as part of the felling licence application, such matters are considered in any case.

In relation to the grounds of appeal contending that the conditions of licence are not sufficiently precise, the DAFM statement indicates that the licence conditions considered as part of a felling application are widely accepted and that the Department has a duty to ensure that the licence conditions, namely inspection of the site's protective measures, are met. It sets out that providing timings of such inspections are not practicable. It also notes that the Appellant expresses concern about the public road network. The statement sets out that such concerns should be expressed to the local council and are not relevant to an appeal against a Forestry Felling Licence. The statement sets out that the conditions regarding watercourses are well known and used extensively around the country and confirms that the Department stands over them and the document, 'Standards for Felling and Reforestation'.

Considerations

The FAC considered the Appellant's contention that the proposed development should have been addressed in the context of the EIA Directive. The EU 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-case-basis (or both) whether or not EIA is required. Neither afforestation nor deforestation (nor clear-felling) are 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 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 FAC concludes that the felling and subsequent replanting, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and similarly is not covered in the transposing regulations. Furthermore, the proposed development does not include any works which, by themselves, would fall within a class covered by the Directive or the transposing regulations. In considering Class 13(a) of Annex II of the Directive, the FAC found no convincing reason to conclude that the proposed clearfelling and reforestation of the project lands would constitute "any change or extension of a project 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”, as there would be no change or extension to the afforestation project and the lands would remain as managed forest after the operations concluded.

The FAC did not consider that the grounds of appeal provided any details of significant effects on the environment that were of concern to the Appellant or that the Appellant considered likely to result from the proposal. The application is for the felling of trees in a commercially managed forest and represents a standard operation in this existing land use and the Appellant submits the afforestation of the lands was licenced. The forests lie outside of any area designated for nature conservation and there is no evidence before the FAC that the lands contain any protected species or habitat or reasons to consider such to be likely. The lands lie at a significant remove from any populated area and are situated in a rural agricultural landscape. The proposal is likely to result in an increase in noise and traffic during the operations but this will be for a limited duration and will not be continual. As noted on the record, the lands lie within Owengar (Leitrim)_020, which has been assigned a Good status by the EPA. The proposal includes the implementation of setbacks and additional broadleaf planting which are likely to provide benefits in terms of water protection and biodiversity. The application and licence includes the creation of silt traps and other measures to control the release of sediment. The felling would be staggered over a number of years. The Local Authority submitted that the lands do not appear to impact on a recorded monument and no such feature is identified on the maps submitted. Neither the Local Authority nor the NPWS raised specific concerns with the proposal. The proposal adjoins other managed forests and a number of felling licences have been issued or have been applied for but these are for the thinning of the forests. A clearfelling licence was issued to the southeast of the proposal and this is primarily situated in a separate waterbody. The FAC did not consider, in having regard to the nature, scale and location of the proposal, that the proposal as licenced was likely to result in any significant effects on the environment.

Regarding the afforestation of the lands the FAC understands that while the threshold for the mandatory submission of an environmental impact statement or the required environmental information of 50 hectares is currently set out in the Forestry Regulations 2017 that a different and higher threshold would have been in force during the period stated in the appeal grounds. The licence decision before the FAC is for the felling of trees on 42.97 hectares. Furthermore, the appeal grounds do not submit evidence as to on what basis it can be concluded the land was afforested at the stated time, that the consent process in these instances was deficient or what significant effects on the environment the Appellant considers were likely at that time. The lands in question were situated in a rural, agricultural landscape and outside of any areas that have been designated for nature conservation and were not proximate to densely populated areas. As noted previously the lands do not contain a recorded monument and do not lie in an area designated for nature conservation. The waterbody in which the lands lie was retained at a Good status over the monitoring periods of the Water Framework Directive according to EPA data. The FAC does not consider that there is any evidence that should the afforestation have occurred at the time specified by the Appellant that any significant effects on the environment would have occurred.

As such, the FAC concluded that it did not consider that there was a requirement for the DAFM to undertake a screening for Environmental Impact Assessment or to undertake an Environmental Impact Assessment under the Forestry Regulations 2017 or that the decision had involved a breach of the

provisions of the EIA Directive. The Forestry Appeals Committee is not satisfied that an error was made in the making of the decision in relation to these grounds of appeal.

The FAC considered the contention in the grounds that the DAFM failed due process in that the licence was not published on the same day as it issued. In this connection the FAC finds that the DAFM statement sets out that the licence issued on the 6th May 2022 (Friday) and was advertised on 9th May 2022 (Monday). The FAC noted that the advertising of the licence occurred on what was effectively the next working day after its issue and concluded that this in itself did not constitute a failure of due process or a failure of fair procedures by the DAFM. The requirements regarding the submission of an appeal including the period in which an appeal can be made to the FAC are set out in the Agriculture Appeals Act 2001, as amended, and the Forestry Appeals Committee Regulations 2020, with which the FAC must comply.

The FAC considered the contention in the grounds of appeal that the DAFM failed to fully support the licencing process by failure to display on the FLV certain documents and cited the absence of an application form, a screening for EIA, Appropriate Assessment screening and AA records and a NIS. The FAC noted the requirements of Part 6 of the Forestry Regulations 2017 which provides for public consultation although it does not appear to specifically require publication on a website. However, the FAC also noted that the DAFM website provides procedures for public consultation which states that,

"...Application documentation for applications received from 11th January 2020, will be made available in the FLV, when that application is advertised and open for public consultation."

The application date in this case is recorded as the 19th January 2022. The FAC considers, therefore, that the public would reasonably expect the application documentation (including documentation such as an Appropriate Assessment screening) to be made available on the FLV. The FAC further considered the DAFM statement to it in relation to this licence application wherein it states that no EIA or AA was deemed necessary, that a NIS was not submitted with the application and therefore could not be put on the FLV. The FAC finds that the FLV has displayed application documentation submitted by the applicant in relation to TFL00757121. The FAC notes the submission from the DAFM that a NIS was not submitted with the application and that a screening to determine the requirement for EIA was not undertaken in relation to this application. The FAC noted that details of the application were provided on the FLV including extensive details of the operations and maps. The FAC concluded that the DAFM did not make an error in the processing of the application in relation to these matters.

The FAC noted that the DAFM statement to it confirmed that an Appropriate Assessment was not required in this case while confirming that a screening for Appropriate Assessment had been undertaken but that this document had not been made available to the public through the Forestry Licence Viewer. The FAC considered this was not in keeping with DAFM procedures as published on the website of the DAFM and that it represented a serious error in the making of the decision in this case.

The FAC considered the grounds of appeal at number 3 wherein it makes the contention that the licence conditions are not sufficiently precise to ensure the intended protection. The FAC noted the content of

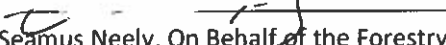
the DAFM statement to it in this connection wherein it sets out that the licence conditions considered as part of a felling application are widely accepted, and that the Department has a duty to ensure that the licence conditions, namely inspection of the site's protective measures, are met. It states that the provision of the timings of such inspections are not practicable. It states that the conditions regarding watercourses are well known and used extensively around the country and that the Department stands over them and the document, 'Standards for Felling and Reforestation'. Regarding the condition that relates to the "Miners way" the FAC did consider that this condition appeared to be of a general nature and that the wording might be considered an error in itself. However, the application includes that advance notice and safety signage will be erected and the Standards for Felling and Reforestation also require that signage be erected and sections of forest must be closed off if used for recreation during the operations. Therefore, the FAC did not consider that this error was of a serious or significant nature.

In relation to the DAFM funding research on sediment control measures in forestry, the FAC considers it entirely appropriate for such measures to undergo regular and ongoing review and research and that it could not be concluded that such a process would suggest that the measures were deficient in relation to the decision under appeal.

The FAC concluded that the Appellant has not provided compelling evidence to it that the DAFM has made an error in relation to these matters. Neither is the FAC satisfied that the Licence conditions are not written with sufficient precision or clarity regarding their requirements such that they will result in non-compliance of the project with the overall environmental regulatory framework. The FAC considers the licence conditions to reflect published standards of good forestry practice. The FAC is therefore not satisfied that a serious or significant error or a series of errors was made in making the decision as it relates to this ground of appeal.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is satisfied that a serious error was made in making the decision in this case. The FAC is, thus, setting aside and remitting the decision to the Minister regarding licence TFL00757121 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to publish the application documents, including the screening for Appropriate Assessment, on the Forestry Licence Viewer in keeping with their published procedures before a new decision is made.

Yours sincerely,


Seamus Neely, On Behalf of the Forestry Appeals Committee