



12 April 2023.

Subject: Appeals FAC 149,150 and 152 of 2022 regarding TFL00198118

Dear,

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). 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 appeals.

Hearing

Having regard to the particular circumstances of the appeals, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeals. A hearing of the above appeals was held remotely by the FAC on 16th February 2023.

In attendance

FAC Members: Seamus Neely (Chairperson), Mr Donal Maguire, Mr. Derek Daly & Mr. Luke Sweetman

Secretary to the FAC: Ms. Vanessa Healy

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 TFL00198118.

Background

The proposal at Quivvy, Co. Cavan comprises three thinnings over ten years of an un-thinned 43-year-old Sitka spruce plantation of 2.78 ha in size in one contiguous block. The site is flat to moderately sloped and the soils are podzolic in nature. The lands are accessed via right of way. The project area does not fall within any designated Natura 2000 site but is immediately adjacent to Lough Oughter and Associated Loughs SAC (Site code 000007), approximately 13kms from Kilroosky Lough Cluster SAC (site code 001786) and 7.6 kms from Lough Oughter Complex SPA (site code 004049) in the Republic of Ireland and within 500m of

Upper Lough Erne SAC (site code UK0016614), 6.8 kms from Moninea Bog SAC (site code UK0030212) and 11.6kms from Magheraveely Marl Loughs SAC (site code UK0016621). The site lies within the Erne Catchment (ID 36) and the sub-catchment of Erne_SC_040 (id 36_22). The relevant waterbodies were classed as having ‘good’ status in the latest WFP reporting period.

Previous case history

It should be noted that this Application for a Felling licence has already been the subject of a previous appeal to the FAC. It was heard at an Oral Hearing on the 18th of January 2021. The FAC’s decision at that time was to ‘*Set aside and Remit*’ the file back to DAFM, so that a new Appropriate Assessment (AA) Screening could be carried out, as the screening supplied was deficient in a number of respects. The FAC also recommended that the width of any vehicles involved in the thinning operations be restricted to no more than 2metres, in an attempt to address the concerns of the appellants concerning the access to the forest. All issues to do with the chronology of the process and appropriate consultation with other bodies, up to that point in time, were dealt with at that time and will not be rehearsed again in this decision letter.

Revised DAFM Assessment

The DAFM carried out a revised AA Screening Report and Determination (AARD), which is on file dated 23/08/22, they stated that, “*Combined with the project details and site characteristics summarised above, there is sufficient information within the application and available from elsewhere to form a sound judgement regarding the likelihood of the project having a significant effect on a European site*”.

Eight protected Natura 2000 sites were identified as being within 15km’s of the development. Of these six were screened out and reasons are set out on the file. These were:

Upper Lough Erne SAC UK0016614.

Moninea Bog SAC UK0030212.

Lough Oughter Complex SPA IE0004049.

Magheraveely Marl Loughs SAC UK0016621.

Slieve Beagh-Mullaghfad-LisnaskeaSPA UK9020302.

Kilroosky Lough Cluster SAC IE0001786.

DAFM made the following statement concerning this application vis a vis these protected sites,

*“Determination under Section 42(16) of S.I. No. 477 of 2011
For the purpose of compliance with Section 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), as the project will not have any significant effect, alone or in combination with other plans and projects, on the European Sites listed above, DAFM also determines that the project will not adversely affect the integrity of these European Sites”.*

Two Natura 2000 sites were screened in and subjected to stage 2 Appropriate Assessment; these were:

Lough Oughter And Associated Loughs SAC IE0000007, and,

Upper Lough Erne SPA UK9020071

Following AA screening by the District Inspector, set out in the AARD, an ecological review was completed by an expert ecologist on the 08/09/2022. The ecologist did not uphold the District Inspector's screening determination regarding Lough Oughter and Associated Loughs SAC and Upper Lough Erne SPA. The ecologist provided the rationale for their screening determination in Appendix C of the AARD. As a result, all the European Sites were screened out by the DAFM expert ecologist and DAFM recorded the following statement on the AARD report.

“Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), I have determined that there is no possibility of the thinning project (TFL00198118) having any significant effect, either individually or in combination with other plans or projects, on any of the European site(s) listed below, for the reasons set out in the Screening Report”.

An In-Combination Report dated 19/08/22 is set out in the file. In it the following conclusion is recorded, *“It is concluded that there is no likelihood of the proposed Felling project TFL00198118 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project”.*

DAFM also prepared an Assessment to Determine EIA Requirement dated 12/09/2022, which is on file and concludes that on the basis of this examination this application should not be subject to the EIA process and an Inspector's Certification Report dated 12/09/2022 is on file recommending that permission be granted with the conditions arising from the AARD included in the licence.

Licence decision

When this licence originally issued on 14/09/2022, the notices of decision were not issued, in error. When this error was noticed by DAFM on 26/09/2022, the licence was suspended to ensure that all parties that had made submissions had the requisite 14 days to submit a notice of appeal, in accordance with the provisions of the Forestry Appeals Committee Regulations 2020 (S.I. No. 418 of 2020 as amended by S.I No. 353 of 2021). The licence was re-issued on 27/09/2022 and all notices of decision were sent out to the relevant parties. Inter alia, the following special conditions were attached to the licence, in accordance with the AARD.

- The felling project and all associated operations shall be carried out and completed in accordance with the measures set out in the Standards for Felling & Reforestation, the Felling & Reforestation Policy and, if reforestation is involved, the Environmental Requirements for Afforestation, as these apply to that operation.
- Timber extraction shall utilise vehicles/trailers no more than 2m wide and trailers should have high sides to safely contain logs.

Appeal

There are three appeals against the decision to issue the licence and a brief summary of same is included below. The full grounds of all of the appeals were considered by the FAC and are to be found on file.

The grounds of appeal relate principally to use by the applicant of a right of way to access the forest, part of which is a narrow laneway. This right of way passes by a single dwelling inhabited by one or more of the appellants. That dwelling is situated very close to the carriageway of the laneway in question. The laneway is approximately 2.2m in width and has a surface of chip and tar. Specific concerns of the appellants relate to the possibility of damage to the structural integrity of the dwelling, to the roadway and its drains and culverts, to local archaeological heritage and to possible safety hazards arising from the transport of the timber resulting from the thinning operations.

DAFM Statement

The DAFM provided a response to the grounds of appeal which was provided to the other parties. In summary, the statement provides an overview of the processing of the application, addresses the grounds of appeal and states that the shortcomings in AA, highlighted by the previous FAC process had been rectified. Inter alia, they noted that:

“...this Application for a Felling licence has already been heard at an Oral Hearing on the 18th January 2021. The FAC ‘Set aside and Remitted’ the file and requested that a new AA Screening be carried out and that the width of vehicles be restricted to 2m.

All issues pertaining to the Right of Way outside the Forest are not within the remit of the Forest Service. The Right of Way is a private issue to be addressed by the individuals legally involved with the Right of way.

The proposed harvesting operations have been assessed for any potential environmental impacts. The Forest Service Inspector assessed the proposed harvesting operations using IFORIS and EPA data. An Ecologist field inspected and carried out an Appropriate Assessment Screening Determination.

This application was referred to NPWS, any concerns were addressed by the Appropriate Assessment Screening Report and it does not need to be referred again to NPWS.”

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats 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 decision before the FAC relates to the thinning of 2.78 hectares of commercial managed forest. The FAC concluded that 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 not covered by national regulations (S.I. No. 191 of 2017) and that screening for significant effects under the EIA Directive

was not required in this case. As such, the FAC concluded that there is no breach of the provisions of the EIA Directive in relation to the activity permitted in this case.

The FAC considered the appraisal of the licence application relating to AA. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to AA of its implications for the site, in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 requires the Minister to screen and to undertake an AA in relation to specific applications.

The FAC examined the record and statement from the DAFM and the information as uploaded to the Forestry Licence Viewer (FLV) to inform the general public as to the content of the application including that relating to AA. The DAFM recorded an AARD dated the 23/08/22, which is on the file. In that report the expert DAFM ecologist recorded the following statement.

“Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 595 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), I have determined that there is no possibility of the thinning project (TFL00198118) having any significant effect, either individually or in combination with other plans or projects, on any of the European site(s) listed below, for the reasons set out in the Screening Report.”

The FAC noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement was prepared in relation to the project. The statement includes the following:

“It is concluded that there is no likelihood of the proposed Felling project TFL00198118 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and projects.”

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the AA of the implications of the project and such effects on the European site, having regard to the conservation objectives of the sites concerned. On the face of it this would seem to be an error on the part of

the DAFM. However, the statement from the expert DAFM ecologist contained in the AARD, and set out above, clearly states that the necessary consideration was in fact given and formed part of the deliberative process. In this instance, the FAC takes the view that the statement in the AARD, from an expert ecologist, supersedes the inadequate albeit 'standard' wording of the 'In-combination' Report and is satisfied that the required consideration did in fact take place. As such, the FAC concluded that there was no breach of the provisions of the Birds and Habitats Directive in relation to the activity permitted in this case.

In relation to the grounds concerning the narrow laneway, the FAC considers that the licence condition limiting the maximum width of vehicles involved in the felling operations to 2 metres, substantively addresses the concerns of the appellants concerning possible damage to their property or to the roadway. That condition rules out the use of any large harvesting, forwarding or haulage vehicles and will effectively confine the applicant to felling with manual chainsaws and removal of the felled material in small, relatively light, slow-moving loads, unlikely to significantly impact on the structure of the roadway or to seriously discommode the other users of the right of way.

The other material grounds submitted by the appellants, such as impact on heritage, consultation with NPWS and 'harvesting by stealth' were, in the view of the FAC, adequately dealt with in the DAFM response to the appeals.

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 concluded that no serious or significant error or series of errors were made in the making of the decision in respect of licence TFL00198118. The FAC is therefore affirming the Minister's decision regarding licence TFL00198118 in line with Article 14B of the Agricultural Appeals Act 2001. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely,

Donal Maguire on behalf of the forestry Appeals Committee