



25th April 2023.

Subject: Appeal FAC 160/2022 regarding TFL00780922

To whom it may concern,

I refer to the appeal 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 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 160/2022 was held remotely by the FAC on 2nd February 2023.

In attendance

FAC Members: Mr John Evans (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

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 set aside and remit the decision of the Minister regarding licence TFL00780922

Background

A felling licence (TFL00780922) for 47.07 hectares and replanting over a total of 14 parcels at Modranstown, Irishtown, County Westmeath was issued by the DAFM on 7th October 2022. The licence decision pertains to thinning and felling in three thinning operations over a period of ten years as indicated on the application documentation. The forest comprises a variety of conifer and broadleaf species with a predominance of Norway Spruce. The soil type is described in the documentation as podzols and the slope is considered flat to moderate. The vegetation type(s) within the project area comprise Mixed High Forest, grass, hedgerows and light scrub. There is a transmission line bisecting the project area. There is one significant watercourse referred to as Irishtown River traversing the site. There are also several archaeological features (Ringforts) on and off site.

Application documentation submitted included a felling submission report, general mapping and a harvest plan with associated mapping shown as uploaded on the Forestry licence Viewer (FLV) on the 16/02/2022 and 07/10/2022.

The site is within the River Sub-Basin Inny_090, for which the EPA records the status as good and in terms of risk is indicated as not at risk.

DAFM Assessment

The application was subject to desk assessment by the DAFM.

The application was referred to Westmeath County Council on the 07/10/2022 who in a response dated 16/03/2022 refer to matters relating to Appropriate Assessment (AA) and that potential Natura sites with potential connection to the project area be assessed, potential impacts in relation to archaeology be assessed and every measure be implemented to protect water quality.

The application was referred to the National Parks and Wildlife Service (NPWS) on the 07/10/2022 who in response did not indicate any objection.

The application was referred to the DAFM archaeologist who in a response dated the 26/02/2022 recommended conditions to be included in any licence issued.

The DAFM prepared an Appropriate Assessment Screening Report completed by the District Inspector (DI) on the 05/10/2022 and dated 07/10/2022 and uploaded on FLV on the 07/10/2022 which concluded Appropriate Assessment was required in relation to one European site Lough Ree SAC 000440. This is greater than 15 km from the project area and was considered for screening due to being hydrologically connected to the project site. The remaining European sites within 15 km of the site Ballymore Fen SAC 002313, Garriskil Bog SAC 000679, Scragh Bog SAC 000692, Garriskil Bog SPA 004102, Glen Lough SPA 004045, Lough Derravaragh SPA 004043, Lough Ennell SAC 000685, Lough Ennell SPA 004044, Lough Iron SPA 004046, Lough Owel SAC 000688 and Lough Owel SPA 004047 were screened out.

An Appropriate Assessment Screening Report & Determination completed by an ecologist dated 12/09/2022 and uploaded on the FLV on the 07/10/2022 identifies the same sites as the Appropriate Assessment Screening Report. All sites including Lough Ree SAC 000440 were ruled out / screened out with the determination that 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. An In-Combination Statement was completed on the 09/09/2022 by the DAFM and uploaded on the FLV on the 07/10/2022. The Statement concluded that

“there is no likelihood of the proposed Felling and Reforestation project TFL00780922 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. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s)".

DAFM also prepared an Assessment to Determine EIA Requirement dated the 07/10/2022 uploaded on the FLV on same date. In relation to water, it is noted by the FAC that the response to the question "*Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value?*" is answered as "N/A". The assessment concludes that on the basis of this examination this application should not be subject to the EIA process. An Inspector's Certification Report dated 10/10/2022 and marked as uploaded on the FLV on the same date recommends permission be granted with conditions.

The decision to grant the licence issued on the 07/10/2022 subject to conditions which included conditions requiring adherence to published guidelines relating to forestry and also a condition requiring adherence to conditions specified in the archaeological report.

Appeal

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

The grounds of appeal submit that the Forest Service failed in its obligations under the Birds, Habitats, Environmental Impact Assessment and Water Framework Directives. It is contended that the FAC has distinct sets of legal tasks when it deals with an appeal.

Referring to Environmental Impact Assessment the grounds contend the FAC must assess the requirement for the development to be subjected to Environmental Impact Assessment, according to the Environmental Impact Assessment Directive and the case law of the CJEU. The grounds refer in this regard to projects referred to in ARTICLE 4(2) (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use and that land use which has been converted without Environmental Impact Assessment must be assessed as unforested and that the cumulative assessment cannot in law be limited to five or three years.

It is submitted that the FAC is a competent authority having responsibilities under the Habitats Directive., and must carry out a screening for Appropriate Assessment and reference is made to Kelly -v- An Bord Pleanála [2014] IEI-IC 400 (25 July 2014), CJEU decision In Case C-323/17 and CJEU Case 258/11 in this regard.

It is submitted that the development must be assessed for compliance with the requirements of the Water Framework Directive.

It is submitted that where (sic) there is an application for replanting the decision must show that the original planting was pre legislation or in total compliance with the legislation.

Reference is made to ARTICLE 6 of DIRECTIVE 2011/92/EU and that the time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) 2011/92/EU shall not be shorter than 30 days.

DAFM Statement

The DAFM provided a response, in two parts, on the 15/11/2022 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 and addresses the grounds of appeal. It is indicated that An Environmental Impact Assessment was deemed to be not required and therefore was not carried out.

The response from the DI indicated that *"the site was screened in and referred to Ecology for assessment. I have received the screen out recommendation from Ecology in the form of an appropriate assessment screening determination (AASD). All relevant authorities were notified, and their responses were reviewed and considered. The application was approved in accordance with the Standards for Felling and Reforestation Guidelines"*.

The DAFM response separately addressed the following points in comments made by a Forestry Inspector Grade II;

In-combination Assessment: *'The in-combination document collates all the relevant information for the past 5 years. Its mentions this several times in the document (section 1.1, 1.5 & 2). In-combination reports assess the environmental impact of a project at a sub-basin level'.*

Environmental Impact Assessment: *'The 3 -year forest estimate relates to question 4 of the Assessment to Determine EIA Requirement: "The current 3-year range provides a basis in time (and a relative metric to compare change across other forest projects) to assess the changes in forest cover within a 500 m radius of the proposed project. This information facilitates the DI in assessing the change in forest cover over time and helps to describe the cumulative effect and extent of forest development in the immediate vicinity of the project."*

This part of the response also states: *'Question 4 is only one of several questions addressed by the DI in their Assessment to Determine EIA Requirement i.e., the answer to this question alone is unlikely to determine the outcome of the Assessment'.*

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.

In considering the grounds of appeal, the FAC considered, in the first instance, the submissions referencing the responsibilities of the FAC. The FAC operates under the Agriculture Appeals Act 2001 as amended and as required by the legislation, is independent and impartial in the performance of its functions. The FAC's consideration of this appeal is in accordance with the provisions of the Forestry (Miscellaneous Provisions) Act, 2020. The FAC considers that several of the grounds as submitted are related to the functioning of the FAC and are not grounds of appeal against the decision of the DAFM to

issue felling licence TFL00780922. The FAC's determination of this appeal is made in accordance with the statutory provisions as set out in Section 14B(13) of the Agriculture Appeals Act 2001, as amended.

The FAC considered the submission in the grounds of appeal relating to the Environmental Impact Assessment (EIA) Directive. 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. Neither afforestation nor deforestation 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 Forestry Regulations 2017 (S.I. 191 of 2017), 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 decision before the FAC relates to the thinning, felling and subsequent replanting of 47.07 hectares of commercially managed forest. The FAC concluded that the felling and replanting 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 Appropriate Assessment. 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 appropriate assessment 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 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and the information as uploaded to the FLV to inform the general public as to the content of the application including that relating to Appropriate Assessment.

The DAFM recorded an Appropriate Assessment Screening Report completed by the District Inspector (DI) on the 05/10/2022 and dated 07/10/2022 and uploaded on FLV on the 07/10/2022 which concluded Appropriate Assessment is required in relation to one European site Lough Ree SAC 000440 which is greater than 15 km from the project area and considered due to being hydrologically connected to the project site. The Appropriate Assessment Screening Report identified a further eleven European sites within 15 km of the site Ballymore Fen SAC 002313, Garriskil Bog SAC 000679, Scragh Bog SAC 000692, Garriskil Bog SPA 004102, Glen Lough SPA 004045, Lough Derravaragh SPA 004043, Lough Ennell SAC

000685, Lough Ennell SPA 004044, Lough Iron SPA 004046, Lough Owel SAC 000688 and Lough Owel SPA 004047 which were screened out.

An Appropriate Assessment Screening Report and Determination completed by an ecologist dated 12/09/2022 and uploaded on the FLV on the 07/10/2022 identifies the same sites as the Appropriate Assessment Screening Report. All sites including Lough Ree SAC 000440 were ruled out / screened out with reasons stated in relation to all twelve sites with the determination that the project will not have any significant effect, alone or in combination with other plans and projects, on the European Sites as listed and DAFM also determines that the project will not adversely affect the integrity of these European Sites.

The FAC examined the record and statement from the DAFM and identified the same twelve Natura sites as DAFM. The FAC considered the record and the reasons stated for screening out of these sites and in relation to the Appropriate Assessment screening no error has occurred.

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 passage,

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project TFL00780922 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. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).'

As already stated also in relation to in combination in the Appropriate Assessment Screening Report and Determination the DAFM deemed that the proposed project will not have any significant effect, alone or in combination with other plans and projects, on the European Sites and also determined that the project will not adversely affect the integrity of these European Sites.

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 Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered and that the In-Combination statement makes reference to 'adverse' effects. The FAC would

consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considered this to be a significant error as it demonstrates that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in combination with other plans and projects might result in a significant effect.

In relation to the matters raised in the grounds of appeal reference is made to the WFD on water quality generally the FAC viewed the information on the EPA website and current EPA mapping and data would indicate the project is within the River Sub-Basin Inny_090, for which the EPA records the status as good and in terms of risk is indicated as not at risk. The FAC noted that the River Sub-Basin Inny_090 has a status assigned to it. Forestry is not identified as a risk or pressure in the sub basin or sub catchment.

The FAC notes that in relation to the issue of water quality that the conditions of the licence in addition required compliance with Departmental guidelines and requirements of the Forestry and Water Quality Guidelines. In the assessment for EIA requirement, the question "Will adherence to water quality guidelines, harvesting guidelines and any condition to be attached to approval, be sufficient to prevent any potential significant impact to aquatic zones and water quality arising from the project?" is answered as "Yes". However, the related question "Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value?" is answered as "N/A". No explanation of this answer is provided in the Inspector's Comments section. The FAC consider the reference in this question to "Q-values" to include consideration of the potential impact of a project on the WFD status of a relevant waterbody such as the Inny_090. The FAC consider that while the issue of water quality was addressed in the assessment of the project there is no evidence on the record of consideration of the requirements of the WFD, and that this constitutes an error in the record of decision making.

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 a serious or significant error or series of errors were made in the making of the decision in respect of licence TFL00780922. The FAC is therefore setting aside and remitting the decision regarding licence TFL00780922 to the Minister to carry out an Assessment to Determine EIA requirement and an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects before a new decision is made.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee

