



1st February 2023

Subject: Appeal FAC120/2022 in relation to licence TFL00577420

Dear Sir/Madam,

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. Appeal FAC120/2022 was considered at a meeting of the FAC on the 11th January 2023. In attendance:

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

Secretariat to the FAC: Ms. Vanessa Healy.

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 TFL00577420. The reasons for this decision are set out hereunder.

Background

The licence decision pertains to an application to clearfell forest across six plots covering an overall area of 64.09 hectares. The application set out that the clearfelling would span the period 2021 to 2025. The site is irregular in configuration with many of the plots not immediately contiguous and with road frontage. The woodland comprises 100% Sitka spruce WD4 100% with the harvest plan documentation indicating replanting with 90% Sitka spruce and 10% broadleaves.

The application was submitted on the 5th November 2020 and was desk assessed. The application was accompanied by mapping including location maps, harvest plans which included a associated mapping

indicating internal harvesting routes, public road access, watercourses and archaeological features which were uploaded on the Forestry Licence Viewer (FLV).

An Appropriate Assessment Pre-Screening Report with a completion date of the 14th January 2021 was submitted by the applicant uploaded to the FLV and showing a published date as being the 10th May 2021. This report identified one Natura Site (Cuilcagh - Anierin Uplands SAC (000584)) within 15 km and it is indicated that the proposed Clearfell and Reforestation site is located entirely outside the boundary of the European Site and that there is no potential for direct effects on the Qualifying Interests of the SAC. The report also refers to the site having poorly drained fine loamy drift with siliceous stones (Kilrush) and poorly drained peat on a subsoil of limestone till (Carboniferous) and undifferentiated Alluvium and that the site sits on a Regionally Important Aquifer-Karstified (conduit) and is close to a Locally Important Bedrock Aquifer (to the south east) which is only Moderately Productive in Local Zones. Other documentation refers to the slope on the site as considered moderate.

The application was referred to Leitrim County Council and the National Parks and Wildlife Service (NPWS) on 08/12/2020. Leitrim County Council in a response indicated the site is located in an area of high forestry capacity and low landscape sensitivity. Conditions are recommended in relation to the project relating to consultation with the district engineer and a traffic management plan. The NPWS response indicated no comment and submitted a form with general observations on forestry licencing.

The application was referred to a Department of Agriculture, Food and the Marine (DAFM) Archaeologist who in a report dated the 11th April 2022 recommended conditions.

In the DAFM assessment of the licence there was an initial Appropriate Assessment Screening Report & Determination (AASRD) dated 07/06/2022 which identified three European Sites. These are (Cuilcagh Anierin Uplands SAC IE0000584 some 9.5km distant, Ballykenny-Fisherstown Bog SPA IE0004101 which is outside of 15km from the project and is hydrologically connected and Lough Forbes Complex SAC IE0001818 which is outside of 15km from the project and is hydrologically connected. In an Assessment for Potential Significant Effects on European sites Cuilcagh - Anierin Uplands SAC IE0000584 was screened out due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise. Ballykenny-Fisherstown Bog SPA IE0004101 was also screened out due to the separation distance between the Natura site and the project and Lough Forbes Complex SAC IE0001818 was screened in due to possible effect due to the direct hydrological connectivity between the project area and this SAC with the conclusion that Appropriate Assessment (AA) is required.

An Ecology Report was also prepared by DAFM which was uploaded on the FLV showing a publication date of the 29th June 2022. This report recommends Karst measures indicating that;
“During ecological scanning for this project, it was noted the area had a high likelihood of karstic features being encountered. Historic records of karst were noted <3km from the project area and the underlying geology is composed of limestone.

In relation to karstic features, the following mitigation is recommended:

A. A minimum 15m exclusion zone will be implemented from any encountered Karsts with a revision of road routing where necessary. All relevant drainage diversion measures will be set out to minimise the risks to encountered Karsts. Karst setback boundaries will be clearly demarcated and broadleaves re-planted surrounding them upon reforestation. Reason: In the interest of the protection of soil stability and water quality”.

A subsequent Appropriate Assessment Screening Report & Determination signed off on 29/06/2022 further ecologically reviewed the proposal and Lough Forbes Complex SAC IE0001818 was screened out and determined that there is no possibility of the clearfell and reforestation project (TFL00577420) having any significant effect, either individually or in combination with other plans or projects, on any of the three European sites.

The DAFM assessment also includes an In-Combination Report and Statement completed on the 26/05/2022. This report included the following passage;

“It is concluded that there is no likelihood of the proposed felling and reforestation project TFL00577420 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 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)”.

The record includes an Inspector's Certification Report dated the 3rd August 2022 uploaded on the FLV on the same date which recommends approval with conditions.

A decision to approve and the licence was initially issued on the 3rd August 2022 subject to conditions which included conditions in relation to setbacks, archaeology and an appendix 1 (which refers to Leitrim County Council), provisions in relation to the curlew and also in relation to karst. This licence was however suspended owing to an outage on the FLV and a subsequent licence was issued on the 12th August 2022 which was uploaded to FLV on the same date. The conditions which had been included as an appendix 1 on the initial licence issue of the 3rd August 2022 are not specifically stated as conditions on the licence issued on 12th August 2022 with just a reference to appendix 1.

Appeal

There is one third party appeal against the issue of the licence and the full Notice of Appeal and grounds have been provided to all parties. In summary the grounds indicate that the appellant owns a farm adjoining the project and contend a mismanagement of the existing plantation referring to fallen trees onto his lands damaging fencing giving rise to ESB outages, the contamination of water resulting from blocked drains and the total disregard to water quality, fencing, hedgerows and wildlife. Photos are submitted with the appeal and FAC is requested to view the conditions on the ground.

DAFM Statement

The DAFM provided a response to the grounds of appeal which was provided to the other parties. In summary, the response outlines the procedure adopted by the DAFM in processing the application and the related processing dates and the date of the issue of the licence. It is submitted that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. Specifically in relation to matters raised in the grounds of appeal it is indicated that Licence TFL00577420 is a legacy plantation planted in 1990 and is due to be clearfelled in stages over the course of three years. It states that new planting will be required to adhere to setbacks and the legacy of planting in proximity to ESB is now removed which will reduce or eliminate potential future outages to trees staking lines. Replanting is said to require 10% broadleaves and many of the issues raised, it is said, will be resolved by the conditions of the licence.

Consideration of FAC

The FAC considered in the first instance the appraisal of the licence application related 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 considered that the DAFM had sufficient information available to it to inform the decision making process in this case and that the information as uploaded to the Forestry Licence Viewer was sufficient to inform the general public as to the content of the application and furthermore that the said information as uploaded to the Forestry Licence Viewer was sufficient to enable analysis and assessment of the licence.

The DAFM recorded an Appropriate Assessment Screening Report & Determination which identified one Natura site Cuilcagh Anierin Uplands SAC IE0000584 and Cuilcagh Mountain SAC UK0016603 within 15 kilometres and two other sites Ballykenny-Fisherstown Bog SPA IE0004101 and Lough Forbes Complex SAC IE0001818 which are outside of 15km from the project and hydrologically connected. The three sites were assessed, and it was determined after being further reviewed that all sites should be screened out and reasons are provided.

Other plans and projects are recorded which were considered in-combination with the proposal.

In considering other plans and projects the DAFM recorded the following in the screening,

“It is concluded that there is no likelihood of the proposed felling and reforestation project TFL00577420 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”.

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 which the FAC would consider to not be 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 suggests 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 the assessment by DAFM the potential impact on Karst features was identified and was the subject of ecological appraisal and specific recommendations were made including a minimum 15m exclusion zone to be implemented from any encountered Karsts with a revision of road routing where necessary and relevant drainage diversion measures will be set out to minimise the risks to encountered Karsts. The FAC considered these recommendations to be reasonable and appropriate and noted that they formed part of the initial licence issued on the 3rd August 2022 as an appendix 1 and that the subsequent licence which was issued on the 12th August 2022 did not specifically state the conditions of appendix 1 though there is a reference to the appendix. The FAC although not necessarily considering this to be an error would consider that the inclusion of the conditions set out in appendix 1 should be clearly stated as a condition of a licence in relation to this project and that other conditions in appendix 1 relating to the curlew and consultation with the County Council should also have been clearly outlined.

In relation to water quality the project site is located within three river sub basins and the FAC noted that in the Appropriate Assessment Report & Determination, the Adhacashlaun_030 River Sub Basin is indicated having an unassigned status, the Eslin_010 the status of which is stated as moderate and Eslin_020 (33%) the status of which is indicated as good. There is no indication as to when this information was compiled while acknowledging that the date of the original AASRD was 7th June 2022.

The FAC examined the EPA data as at the date of the FAC hearing of appeal FAC 120/2022 and finds that the waterbody Adhacashlaun_030 has a status of which is indicated as good, Eslin_010 has a status which is stated as moderate and Eslin_020 (33%) has a status which is indicated as moderate. The FAC is satisfied the project if carried out in accordance with the conditions and current established forestry practice will not result in an adverse impact on the status of a waterbody and it is noted that replanting will provide for increased setbacks from water features and the current forestry guidelines provide for a range of measures to protect water quality. However, in completing a new screening the DAFM should rely on the most up to date and relevant information.

In relation to the submitted grounds of appeal these largely contend a mismanagement of the existing plantation referring to fallen trees onto his lands damaging fencing, giving rise to ESB outages, the contamination of water owing to blocked drains and the total disregard to water quality, fencing, hedgerows and wildlife. The FAC considered that some of the matters raised in the grounds may be more properly considered civil matters and of a historic nature but that it would consider the grounds from the perspective of the decision to grant the felling licence. DAFM in response do not necessarily dispute the grounds but reference that the plantation is a legacy plantation planted in 1990 and that the replacement planting will be required to adhere to current standards and practice with defined setbacks and also the legacy of planting in proximity to ESB is now removed. Replanting will require 10% broadleaves and many of the issues raised raised will be resolved by the conditions of the licence.

The FAC notes that the conditions require adherence to a range of current guidelines including in relation to water quality, environment, biodiversity, the use of fertiliser, the provision of buffer areas and setbacks from aquatic zones, archaeological features and roads in relation to felling and replanting, There are also guidelines specified in the Forestry Standards Manual in relation to setbacks from transmission lines. Having considered the grounds the FAC consider that the application of current forestry guidelines and practice would address the issues raised in the grounds of appeal. Having regard to the nature, scale and location of the works as licenced, the FAC therefore consider that the measures specified as conditions on the licence are sufficient to ensure that the status of the waterbodies would be protected and not decline and that the long-term outcome may well improve given the measures that would be implemented as part of the proposal.

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 TFL00577420. The FAC is therefore setting aside and remitting the decision regarding licence TFL00577420 to the Minister to carry out a new screening and Appropriate Assessment of the proposal itself and in combination with other plans or projects and to address the specification of conditions in the referenced Appendix 1 before a new decision is made.

Yours sincerely,

Derek Daly, On Behalf of the Forestry Appeals Committee