



15<sup>th</sup> March 2023.

**Subject:** Appeal FAC 159/2022 regarding TFL00765722

Dear

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 159/2022 was held remotely by the FAC on 16<sup>th</sup> 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 set aside and remit the decision of the Minister regarding licence TFL00765722.

#### **Background**

A felling licence (TFL00765722) for 55.73 hectares at Ballynahown, County Laois was issued by the DAFM on 10<sup>th</sup> October 2022. The licence decision pertains to thinning and felling over a period of ten years (2022 to 2032) as indicated on the application documentation. The forest comprises a variety of conifer and broadleaf species. The application provides for; 1.72 ha of Thinning Additional Broadleaves and Thinning Sycamore. 15.29 ha of Thinning Douglas Fir and Thinning Japanese Larch. 0.81 ha of Thinning Pedunculate oak. 21.19 ha of Clearfell Japanese Larch, Clearfell Sitka spruce, Thinning Japanese Larch and Thinning Sitka spruce. 6.36 ha of Thinning Japanese Larch and Thinning Sitka spruce. 3.19 ha of Thinning Norway spruce. .85 ha of Thinning Sycamore. 1.4 ha of Thinning Norway spruce. 4.92 ha of

Thinning Norway spruce. The soil type is described in the documentation as podzols and the slope is considered flat to moderate. The project area is crossed by / adjoins an aquatic zone(s).

Application documentation submitted included an application form, general mapping and a harvest plan with associated mapping shown as uploaded on the Forestry licence Viewer (FLV) on the 25/01/2022.

The site is within the within the River Sub-Basin Silver (Kilcormac)\_020 River Waterbody WFD of the Lower Shannon (Brosna) Catchment Suir, for which the EPA records the status as good and in terms of risk is indicated as at risk. The significant pressures are stated to be agriculture and hydromorphology.

### **DAFM Assessment**

The application was subject to desk assessment by the DAFM.

The application was referred to Laois County Council on the 01/02/2022 who in a response indicated the site is within NHA Clonaslee Eskers and Derry Bog (Site Code 00859) and that the site is not within a scenic area.

The application was referred to the National Parks and Wildlife Service (NPWS) on the 01/02/2022 who responded on the 14/03/2022. The response indicated that the application site adjoins the Clonaslee Eskers and Derry Bog Special Area of Conservation (SAC) (Site Code: 000859), that the adjoining part of the Clonaslee Eskers and Derry Bog contains mature broadleaf trees of Sessile Oak and Birch and that it is imperative that the integrity of the Clonaslee Eskers and Derry Bog SAC remains intact and no felling of trees or access through the woodland should be permitted. The NPWS submission also states that the thinning and clear-fell site contains remnants of old field boundaries in the form of hedgerows, and mature trees and these trees should remain in-situ and undisturbed. The response also refers to a number of streams flowing through the proposed site and states that it is therefore within an aquatic zone with these streams forming tributaries of the Silver River and all appropriate measures should be incorporated into the clear-felling programme, in adherence with Forest Service guidelines, to ensure the potential for runoff and resultant deterioration of the receiving waters quality is eliminated.

The DAFM prepared an Appropriate Assessment Report (AAR) dated 19/8/2022 shown as uploaded on the FLV on the 26/08/2022. This AAR refers to *an Appropriate Assessment Screening Determination where it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on the following European Site(s), or uncertainty exists in this regard: the Clonaslee Eskers and Derry Bog SAC IE000859*. The AAR assessed the qualifying interests and the potential for the project itself (i.e. alone) to have an adverse effect on the integrity of the screened in European Site. An AA Determination in section 7 concluded that the proposed thinning, clearfell and reforestation project under TFL00765722, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site(s) listed above. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects on these European site(s) and it was deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.

The DAFM prepared an Appropriate Assessment Determination (AAD) dated 05/10/2022 shown as uploaded on the FLV on the 10/10/2022. The AAD refers to six screened out European Sites Slieve Bloom Mountains SPA IE0004160; Slieve Bloom Mountains SAC IE0000412; River Barrow And River Nore SAC IE0002162; Charleville Wood SAC IE0000571; Island Fen SAC IE0002236 and the River Shannon Callows SAC IE0000216 and states reasons for screening them out. The AAD refers to the one screened in site Clonaslee Eskers and Derry Bog SAC IE0000859 stating as a reason due to possible effect due to the location of the project within the Natura site. The AAD outlines mitigation measures in section 4 and that the conditions along with strict adherence to the guidance cited, will eliminate pathways of impact of significance to European site.

An In-Combination Statement completed on the: 17/08/2022 by the DAFM and marked as uploaded on the FLV on the same date concluded; *therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects. 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 adverse effect on the integrity of 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 adverse effect on the integrity of the above European Site(s).*

DAFM also prepared an Assessment to Determine EIA Requirement dated 10/10/2022 and marked as uploaded on the FLV on the same date which 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 10//10/2022 and marked as uploaded on the FLV on the same date recommended permission with conditions.

The decision to grant the licence issued on the 21/03/2022 subject to conditions which included conditions requiring adherence to published guidelines relating to forestry and also a condition requiring adherence to mitigations set out in the AAD.

### **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 Forest Appeal Committee has distinct sets of legal tasks when it deals with an appeal.

Referring to Environmental Impact Assessment the grounds contend it (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 refers 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 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.

In relation to other grounds of appeal and specific to public consultation the response states the AAR in relation to this licence application was uploaded to the FLV on 26/08/2022 and that the application was sent for 2nd Public Consultation on 31/08/2022-30/09/2022. The AAD is stated as being completed on 05/10/2022 and uploaded on the 10/10/2022 when the decision was advertised. The DAFM also state that at this time, as per the new policy, the Assessment for EIA Requirement was uploaded. The DAFM statement to the FAC also set out that the Assessment for EIA Requirement had been carried out much earlier in the process but was not published until decision stage and that it was decided by the Inspector during the above assessment that an EIA was not required.

It is indicated that all Natura sites were reviewed and referred to Ecology for assessment with a screen out recommendation from Ecology. It is also stated that 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.

It is further stated in relation to In-combination Assessment that the in-combination document collates all the relevant information for the past 5 years and In-combination reports assess the environmental impact of a project at a sub-basin level. In relation to Environmental Impact Assessment the 3 year forest estimate relates to question 4 of the *Assessment to Determine EIA Requirement* and *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.* It is also noted that 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*.

In a response which was circulated to all parties the appellant commented why only the last 5 years as the Environmental Impact Assessment directive is 1987 and the Birds Directive is dated 1979. No responses were received following the circulation of the appellant's response.

### **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 in the grounds of appeal 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 TFL00765722. 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 55.73 hectares of commercial 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 Report (AAR) dated 19/8/2022 which refers to *an Appropriate Assessment Screening Determination where it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on the following European Site(s), or uncertainty exists in this regard: the Clonaslee Eskers and Derry Bog SAC IE0000859*. The AAR assessed the qualifying interests of the Clonaslee Eskers and Derry Bog SAC IE0000859 and the potential for the project itself (i.e. alone) to have an adverse effect on the integrity of the screened in European Site(s), was identified on a precautionary basis with site-specific measures identified to prevent or mitigate against such effects which are outlined. An AA Determination in section 7 concluded that the proposed thinning, clearfell and reforestation project under TFL00765722, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects and it was deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.

The DAFM also recorded an Appropriate Assessment Determination (AAD) which refers to six screened-out European Sites Slieve Bloom Mountains SPA IE0004160; Slieve Bloom Mountains SAC IE0000412; River Barrow And River Nore SAC IE0002162; Charleville Wood SAC IE0000571; Island Fen SAC IE0002236 and the River Shannon Callows SAC IE0000216 and states reasons for screening them out. The AAD refers to the one screened in site Clonaslee Eskers and Derry Bog SAC IE0000859 stating as a reason due to possible effect due to the location of the project within the Natura site. The AAD outlines mitigation measures in section 4 and that the conditions in combination, along with strict adherence to the guidance cited, will eliminate pathways of impact of significance to European site. The AAD also indicates that in combination effects were assessed prior to meeting this determination and stating *“the mitigations outlined will ensure that the proposed project will not represent a source and, as such, there is no potential for the project to contribute to any significant cumulative effects, when considered in combination with other plans and projects. Therefore, DAFM deems that the proposed project, when considered in-combination with other plans and projects, will not give rise to the possibility of significant effects on any European site”*.

The FAC, however, noted that the AAD refers to undertaking a screening for Appropriate Assessment and in section 3 in undertaking the Appropriate Assessment, among documentation that was taken into account there is reference to the AA Screening Report and Determination for this project. In this regard having viewed the documentation on the FLV the FAC has established that no Appropriate Assessment Screening Determination, as referred to in the AAS and AAD, is uploaded on the FLV and which it appears informed subsequent stages of the AA process. The public were therefore not informed or had an opportunity to consider the initial screening which informed the AAS and AAD and neither did the FAC have an opportunity to consider this initial screening. The FAC considers this to be a serious error and although the DAFM may have had sufficient information available to it to inform the decision making process in this case, the information as uploaded to the FLV is not sufficient to enable the FAC to undertake and conclude a satisfactory analysis and assessment of the licence in relation to the Appropriate Assessment that 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 possibility that the proposed Thinning, Felling and Reforestation project TFL00765722, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Clonaslee Eskers and Derry Bog SAC IE0000859. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects'.*

As already stated also in relation to in combination in the AAD the DAFM deemed that the proposed project, when considered in-combination with other plans and projects, will not give rise to the possibility of significant effects on any European site.

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 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 relation to the matters raised in the grounds of appeal reference is made to the WFD. In relation to WFD and 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 Silver (Kilcormac)\_020 River Waterbody WFD of the Lower Shannon (Brosna) Catchment Suir, for which the EPA records the status as good and in terms of risk is indicated as at risk. Agriculture and hydromorphology were identified as significant pressures and forestry was not identified as a pressure in the River Sub-Basin during the third WFD cycle (August 2021). The FAC finds that the Silver (Kilcormac)\_020 has a status assigned to it.

The FAC notes that in relation to the issue of water quality the NPWS stated in their response that the application site adjoins the Clonaslee Eskers and Derry Bog Special Area of Conservation (SAC) (Site Code: 000859) and the response also refers to a number of streams flowing through the proposed site and all appropriate measures should be incorporated into the clear-felling programme, in adherence with Forest Service guidelines, to ensure the potential for runoff and resultant deterioration of the receiving waters quality is eliminated. The AAD outlined conditions in relation to protecting the qualifying interests of the Clonaslee Eskers and Derry Bog SAC and in relation to the protection of water quality including conditions to mitigate against siltation and sedimentation pathways to adjacent aquatic zones, exclusion zones in relation to aquatic zones and water hotspots, the application of best practice during the construction period, conditions in relation to the location of timber landing bays, appropriate sediment trapping measures installed and maintained both during and following operations to prevent runoff of silt and sediment, conditions addressing the crossing of drains and other matters. The measures outlined in the AAD were included in the conditions of the licence. The FAC noted that the conditions of the licence in addition required compliance with Departmental guidelines and requirements of the Forestry and Water Quality Guidelines. The FAC consider that the issue of water quality was addressed in the assessment of the project and that the development will not have adverse effects on receiving waters.

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 TFL00765722. The FAC is therefore setting aside and remitting the decision regarding licence TFL00765722 to the Minister to carry out an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects before a new decision is made.

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee