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05 June 2020

Subject: Appeal FAC156/2019 CN82516

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN82516 for afforestation of 13.69 ha at Bardanstown, Co. Westmeath was refused by the Department of Agriculture, Food and the Marine on 22nd May 2019.

Hearing

A hearing of appeal FAC156/2019 was held by the Forestry Appeals Committee on 4th February 2020

FAC Members:	Mr. Des Johnson (Chairperson), Mr. Pat Coman, Mr. James Conway, Mr. Vincent Upton
Secretary to the FAC:	Ms. Ruth Kinehan
Appellant/Applicant:	[REDACTED]
Appellant's Rep.:	[REDACTED]
DAFM Rep.:	Mr. Rory Greene, Mr. Colin Gallagher

Decision

Having regard to the evidence before it and the following considerations, the FAC has decided to cancel the decision of the Minister regarding licence CN82516.

The decision relates to a licence application for afforestation of 13.69 ha of what is described as improved, agricultural land at Bardanstown, Co. Westmeath. Of this area 2.05 ha will be comprised of retained habitat and unplanted setbacks. Planting of 85% Norway spruce and 15% broadleaves is proposed with site preparation through mounding and ripping. The use of 250kg/ha of granulated rock phosphate fertiliser and herbicide weed control at establishment is proposed. The site is not considered landscape sensitive. There are existing hedgerows on site which would be retained and a 20 metre setback from the River Inny to the east of the lands is proposed, as well as 10 metre setback from the public road. It is also noted that a recorded monument adjoins the site and setbacks would be provided. An ESB line also crosses part of the site that will remain unplanted.

The refusal letter stated that the reasons for refusal were

- Environmental Considerations,
- Landscape Considerations,
- A portion of the land contains calcareous soils, flooding areas, and unproductive land per the land types document.

An additional letter is also attached to the refusal letter that provides context for the refusal and also notes archaeological concerns. This letter refers to concerns regarding nature conservation including in relation to the existing habitats and species on site, the riparian area, the movement of flora and fauna and noted the presence of calcareous soils in a section of the site. It is noted that the forest cover in the townland is 28% and there are concerns for loss of existing habitat. A further DAFM submission was made that provided background to the decision and information on the environment and forests generally, some of which was not specific to the proposal.

A first party appeal was submitted against the decision. The notice of appeal stated that the area is improved agricultural land that had been neglected for a number of years but agricultural practices would continue if the application is refused. They suggest that the afforestation licence provides for greater protection regarding the use of inputs and management practices than would be provided otherwise under agriculture and that the existing hedgerows would be retained. They suggest that the forest will provide a dynamic habitat that will also support flora and fauna and that a 50 metre unplanted strip could be maintained close to the river. A further submission was made that noted that the applicant did not have an opportunity to engage with the DAFM during the assessment phase, that the majority of the site is mineral soil, that a 5m hedgerow setback would be provided and that the Applicant is open to amending their species choice including employing native species.

The responses from the NPWS and County Council were received after the decision was issued and the FAC notes that these submissions could not therefore be taken into account in the decision-making process by the DAFM, however, they were provided to the FAC. Both referral bodies raised similar issues to those expressed by the DAFM and reinforced the need for detailed considerations to be undertaken in assessing the proposal. Nonetheless, neither body objected to the proposal with the NPWS requesting the exclusion of some sections and alterations to the planting schedule, in addition to adherence to standard forestry guidelines.

The application was considered by a DAFM archaeologist who recommended attaching specific conditions to the licence including the exclusion of some areas, provision of access and monitoring of works but did not recommend refusal of the application as a whole. The recorded monument sits outside of the proposal and the FAC notes that the recommendations would provide for protection of the monument and monitoring of operations.

The DAFM suggested that the application is in a floodplain area and it was also noted by the County Council that the eastern section was subject to a 1 in 100 and 1 in 1,000 flood risk. Based on floodinfo.ie, provided by the OPW, there are areas prone to flooding in the proposal site but the majority of the application does not fall within such a designation. While part of the application may have some probability of flooding the associated risks would need to be considered and the majority of the site appears to be sited outside of a flood risk area.

It was noted that lack of productivity was also a reason for the refusal but this was disputed by the Applicant. It was noted at the oral hearing that the DAFM had not examined adjacent forests to

compare productivity levels. The FAC considers that if a comparable forest was available, as suggested, then this consideration should have been undertaken as it provides a natural productivity test. The area of calcareous soils appears to relate to spoil from river dredging and could itself be readily excluded if required.

In relation to the drainage of the site the DAFM suggested that on such sites, direct connection with the waterbody could be allowed under the Environmental Requirements for Afforestation and that this would lead to a risk of sedimentation and nutrient enrichment, and suggested that drainage of existing plantations, in close proximity to the proposed site, are direct to the River. Page 38 of the Environmental Requirements for Afforestation states in relation to aquatic setbacks

An exception applies to flat difficult-to-drain sites, where it may be necessary to link drains directly into the aquatic zone or an existing drain, provided it can be assured (based on site factors and / or sediment traps and other safeguards) that sediment and nutrients will not enter the aquatic zone.

Thus, direct connection is only acceptable when associated with measures necessary to avoid sedimentation and nutrient enrichment. The Biomap provided with the application states that a 20 metre buffer will be provided adjacent to the watercourse and the FAC considered that this should have been considered when assessing the proposal.

The DAFM refers to the Rural Development Regulations in their decision-making but this relates to decisions under the Forestry Programme and related schemes which are not directly relevant to the licensing decision made under the Forestry Act 2014, which is the decision under appeal and being considered by the FAC.

The Appellant submitted an amended Biomap of the project which did not form part of the original application on which the decision was made. The FAC will not comment on it other than to make the observation that measures implemented to reduce possible impacts on protected Natura 2000 sites could not be taken into account at the screening stage for appropriate assessment.

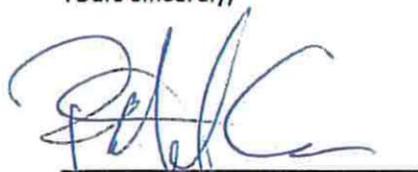
Regarding concerns of cumulative effects of the proposal, the DAFM was correct to take this into consideration in its assessment. However, it is not clear whether the exclusion of certain habitats on site as requested by the NPWS or changes in proposal design would sufficiently address this and the FAC is of the opinion that there is not sufficient information on file to fully consider this issue. While the DAFM noted that certain habitats and species were present when the inspection was undertaken this would not in itself represent a full or complete assessment of the land as a habitat for these species or their use of it for nesting and foraging or the significance of changes in land use or forest design. The FAC noted that the proposed planting lies some 3.5km downstream along the watercourse from the Lough Iron SPA and within the foraging range of species that are qualifying interests of this designated site. The FAC noted that the DAFM would not have fully considered the provisions of the Habitats and EIA Directives before making its decision as this was a refusal. If the DAFM considers that it does not have adequate information which would enable it to determine whether, based on best scientific knowledge, the proposed development alone or in combination with other projects would not give rise to the likelihood of significant effects on a Natura 2000 site, or cumulatively with other projects and land uses would not be likely to give rise to significant effects on the environment, it should request further information including, if considered appropriate, the submission of an NIS and/or EIAR.

Given that the land is enclosed, agricultural land with no designations, and noting the responses from referral bodies and the information provided, the FAC considers that, while also acknowledging the

DAFM's concerns with regard to the proposal, there is not sufficient information available at present to conclude that the proposal represents a significant adverse impact on the environment or nature conservation or that it would not be acceptable in terms of Good Forestry Practice after sufficient assessment and amendment if required. In addition, the approval or licensing decision should have been based on the powers provided to the DAFM under the Forestry Act 2014 and Forestry Regulations 2017 and not on rules or Regulations related to the Forestry Programme or related funding schemes unless these are expressly adopted for this purpose.

The FAC is not a licensing authority and the cancellation of this decision does not represent the granting of a licence. A licence can only be granted by the Minister when all of the relevant statutory obligations are met, including those related to the Habitats and EIA Directives. It should be noted that this decision of the FAC should not be interpreted as a pre-judgement of future assessments or decisions of the DAFM, or the FAC if relevant. Before making its decision, the FAC considered all of the information submitted with the application, the processing of the application by the DAFM, the grounds of appeal and any submissions received.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Pat Coman', written over a horizontal line.

Pat Coman On Behalf of the Forestry Appeals Committee