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11 February 2021

Subject: Appeal FAC 339/2019 regarding licence CN84222

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine (DAFM) in respect of an Afforestation licence CN84222. 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 the parties to the appeal.

Background

The Afforestation licence CN84222 was granted by the Department on 31 October 2019.

Hearing

A hearing of appeal 339/2019 was conducted by the FAC on 7 December 2020.

FAC Members: Mr Myles Mac Donncadha (Chairperson), Ms Claire Kennedy and Mr. James Conway.

Decision

The Forestry Appeals Committee considered all of the documentation on the file, including application details, processing of the application by DAFM, and the grounds of appeal and has decided to affirm the decision of the Minister regarding licence CN84222.

The proposal is for afforestation of 21.34 hectares of enclosed agricultural land with a species composition of Sitka spruce (12.7 hectares), Norway spruce (2.41 hectares), Birch (5.75 hectares) and Rowan (0.48 hectares) at Lisgillock Glebe, Co Leitrim. Ground preparation would include woody weed removal and mounding and the planting method would be angle notch. Provision is being sought for the applicant to resort to herbicide control, if needed, in years 0 to 4. The application identifies the predominant soil type as mineral. The slope is predominantly steep (15% to 30%) and is crossed by an extensive network of hedgerows. The proposal area is in Cloone (Lough Rinn)_SC_010 and Upper Shannon WFD_Catchment 26C and the river waterbody Cloone_010 which has a good WFD status (2013-2018).

DAFM referred the license to Leitrim County Council and An Taisce for consultation. Leitrim Council responded indicating that they had no objection to make on the application but drew attention to the need for all necessary consents should a private laneway be used to gain access to the public road. They also said that the land lies in an area of High Capacity for Forestry. There

is no response on file from An Taisce. Following referral, the DAFM archeologist stated the site contained one Recorded Monument, a ringfort, but also identified other features that may be of archeological significance, including reference to the relative sensitivity of the eastern and southeastern portions of the site. Specific additional conditions in this regard were recommended to be attached to the licence.

On 29 October 2019 DAFM carried out a field inspection and subsequently compiled an AA Screening for all Natura 2000 sites within 15km of the project and recorded conclusions for each of the three sites identified to assess if the activity, individually or in combination with other plans or projects, was likely to have a significant effect on the conservation objectives or qualifying interests of these sites. The screening determined that an Appropriate Assessment was not required, giving reasons for screening out each of the sites.

The licence was approved on 31 October 2019, together with standard licence conditions and additional conditions including those related to establishing a right of way and those recommended by the archeologist.

There is a single appeal against the decision to grant the licence. The grounds of appeal broadly refer to –

- EIA Screening not adequate – mentioning the site is within 15km and hydrologically connected to a number of Nationally designated sites which have not been referenced, and levels of forest cover in the underlying waterbody and within 5km;
- The approval / licence does not show evidence of having made consideration of many of the issues raised in their submission;
- Breach of Condition 36 of the State Aid Decision;
- Decision is not consistent with Condition 40 of the State Aid Decision;
- Potential Breach of Article 12 (1) of the Habitats Directive.

In a statement to the FAC, DAFM responded to the grounds of appeal stating that the decision to issue the licence was in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. DAFM stated that all nature designations are assessed as part of the application process by the DAFM. This includes Natura 2000 sites and national designations such as NHAs and pNHAs. Standard mitigation measures as outlined in the Environmental Requirements for Afforestation are applied to mitigate against any potential impacts on NHAs or pNHAs. This would include water setbacks to ensure the protection of water quality. The Department stated that the appellant makes an assumption regarding the response to Q.4 in the Iforis EIA screening. This is merely a pre-populated parameter that provides the certifying inspector with a value of afforestation in a 500 m radius. It does not indicate that a procedural threshold has been passed. Forest cover in the townland is given as 22.38%, this is not excessive by any measure considering the rural nature of the site and the details of the application including design and species choices. Forest cover in the waterbody catchment is given as 16.5%, again the inspector does not see this as excessive considering the project plan, design and robust requirements set out in the Environmental Requirement for Afforestation. The inspector has also recommended inspection at payment stage to ensure all standards and guidelines are adhered to.

The DAFM statement goes on to explain that the pre-populated data in Q4-9 & Q12 & 13 are provided to give the certifying inspector an idea of forestry at the landscape level. There are no thresholds as each application must be evaluated on its own merits and type. Iforix data as outlined forms part of that evaluation process and it gives the inspector valuable information in order to assess the application from an EIA point of view. The inspector is certain that there is no requirement for EIA in this application and he has followed all standard operating procedures in assessing this application. The site was field assessed by the district inspector who has been trained in habitat identification. These lands are not considered high nature value farmland. The farm has been farmed extensively with cattle and the ground was heavily poached during the day of inspection. Dominant vegetation is rush. All scrub and hedgerows must be maintained during establishment works.

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU 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 (nor clear-felling) 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 Regulations, in relation to forestry licence applications, require the compliance with the EIA process 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 proposed afforestation is significantly less than the 50 Hectares for which Environmental Impact Assessment would be mandatory according to the Irish regulations.

The DAFM assessment considered the application across a range of criteria, including water, archaeology, designated areas, social, landscape and cumulative effects, and determined that the project should not be the of EIA. The FAC consulted publicly available information from the NPWS and EPA and identified the nearest European site, Lough Oughter And Associated Loughs SAC 000007, to be at a direct distance of c12.4km from the proposal area and in a separate WFD subcatchment and WFD catchment. The proposal area does adjoin on its eastern boundary an aquatic zone, Black Lough, and this lough appears to drain south to Lough Cam and then south westerly before reaching Lough Sallagh pNHA at a direct distance of c10.7km and then Lough Errew pNHA, then Lough Rinn pNHA, followed by Rinn River NHA at a direct distance of c15.8km and then Lough Forbes Complex SAC at a direct distance of c22.5km. Having regard to the record of the decision and the submitted grounds and the nature, scale and location of the proposal (including the county development plan categorisation of the area as being of High Capacity for forestry) the FAC is satisfied that the proposal would not result in any likelihood of significant effects on the environment and that the DAFM did not err in the decision regarding EIA.

The FAC also considered the appellants grounds that the DAFM does not show evidence of having made consideration of many issues raised in their submission to the Department. Evidence presented by DAFM shows two submissions were received prior to the issuing of the licence and of correspondence issued to the appellant informing him the assessment of the application had been completed, that his views expressed in correspondence were considered and following consultation with statutory bodies outlined the outcome of the process. DAFM received a response from Leitrim County Council from their referral of the application to them and sought and received an archeological review on the proposal. DAFM issued a licence subject to conditions, these conditions included additional silvicultural and environmental condition and specific archeological conditions and for the required right of way to be established. The FAC is satisfied that DAFM considered all submissions in their decision making and that the DAFM had sufficient information before them to make the decision. It should be noted that, while the DAFM must consider the submissions received, it is not obliged to respond in writing on a point-by-point basis to each issue raised in submissions.

In relation to the issues raised regarding the breach of condition 36 of the State Aid decision and the decision not being consistent with Condition 40 of the State Aid, the FAC considers that issues related to grant aid are outside its remit.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 Appropriate Assessment screening, and found three European sites within 15 km of the proposal area and that there was no reason to extend the zone of influence in this case. The sites identified were Cuilcagh - Anierin Uplands SAC 000584, Lough Oughter And Associated Loughs SAC 000007, and Lough Oughter SPA 004049. The DAFM considered each site in turn and listed the associated qualifying interests and conservation objectives and the reasons for their screening conclusions. The FAC consulted publicly available information from the NPWS and EPA and identified the same three sites and notes that they are in separate WFD subcatchments and catchments to that of the proposal area, with the SPA at some distance from the site. The DAFM also undertook an in-combination assessment of the proposal, recording a consideration of other plans and projects, including forestry and non-forestry projects, and concluded there is no potential for the project, to contribute to any such effects on any European site when considered in combination with other plans and projects.

In the grounds of appeal, the appellant contends there is no evidence of an assessment for the presence of Annex IV species under the Habitats Directive and contends the site is a potential habitat for bats and otter. The DAFM undertook a desk and field inspection and considered the application across a range of criteria, and determined that the project was not required to undergo the EIA process nor go for Appropriate Assessment. No evidence was provided to the FAC of the presence of any protected habitats or species on the proposal area, and the FAC does not consider that there is any evidence before it that this proposal would result in a significant effect on species in the area.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that no serious or significant error or a series of errors was made in making the decision, that the DAFM had sufficient information before it to make the decision and that the licence conditions are acceptable in this case.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours sincerely

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Ms. Claire Kennedy (on behalf of the FAC)