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22 June 2021

Subject: Appeal FAC 711/2020 & 740/2020 regarding licence CN86664

Dear [REDACTED]

I refer to the 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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

A licence for the afforestation of 15.21ha of land at Grousehall Co Donegal was issued by the Department of Agriculture, Food and the Marine (DAFM) on 1 September 2020.

Hearing

A hearing of appeals FAC 711/2020 and FAC 740/2020 was held by the FAC on 15 June 2021.

In attendance:

FAC Members:	Mr Des Johnson (Chairperson), Mr. Donal Maguire Mr. Luke Sweetman, Mr. Dan Molloy
Secretary to the FAC:	Mr Michael Ryan
DAFM Representatives:	Ms. Mary Coogan & Mr. Martin Reagan
Applicant Representatives:	Not present
Appellant:	FAC 711/2020, [REDACTED] attended FAC 740/2020 [REDACTED] did not attend

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and, in particular, the following considerations, the FAC has decided to affirm the decision of the Minister regarding licence CN86664.

Overview

This project comprises 15.21 hectares of afforestation in Grousehall Co Donegal. The soil type underlying the project area is described as being predominantly highly modified peat and peaty podzols in nature. The slope of the site is predominantly flat to moderate (<15%). The project area adjoins an unnamed stream, which flows south to join the Termon River, which in turn flows into Lower Lough Erne. The vegetation types within the project area are grass and rushes.

The application was referred to Inland Fisheries Ireland (IFI) on the 29/06/2020 and a reply was received on the 03/07/2020. No objection was raised although the response did contain a request that special attention be paid to maintaining good water quality in the adjoining streams through adherence to the DAFM Forestry and Water Quality Guidelines.

Donegal County Council were consulted on the 29/06/2020; they replied on the 08/07/2020 and raised no objection to the proposed development.

The DAFM recorded a screening for Appropriate Assessment and identified that six Natura 2000 sites were located within a 15Km radius of the proposal. These Natura sites were all screened out, the following reasons were recorded on the file.

Dunragh Loughs/Pettigo Plateau SAC 001125, Lough Derg (Donegal) SPA 004057 and Pettigo Plateau Nature Reserve SPA 004099P were screened out because the project area was within a separate water body catchment to that containing the Natura sites, with no upstream connection, and thus there was a subsequent lack of any hydrological connection.

Lough Nageage SAC 002135, River Finn SAC 002301 and Tamur Bog SAC 001992 were screened out because the position of the project area was downstream from the Natura sites, and thus there was a subsequent lack of any hydrological connection.

A consideration of other plans and projects in-combination with the proposal was carried out, dated the 18/08/2020, it reported that the project lies in a rural landscape in Grousehall, Croagh, County Donegal in the River Sub Basin Termon River (Pettigoe). The River Sub Basin Termon River (Pettigoe) has approximately 16% forest cover which is higher than the national average of 11%. At 15.21ha the project was considered medium in scale. Forestry activity including afforestation, forest roading and felling, in the River Sub Basin in the last 5 years were listed and are subject to environmental protection measures. It was noted that a number of developments in the River Sub Basin Termon River (Pettigoe) have been granted planning permission over the last five years and these were listed and are also subject to appropriate environmental protection measures.

The conclusion of the in-combination assessment was that; individually, the project did not represent a source, or if so, had no pathway for an effect on any of the Natura sites listed in the AA screening. Consequently, the DAFM deemed that there was no potential for the project to contribute to any effects, when considered in-combination with other plans and projects. Furthermore, it was considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives.

Additionally, consideration of the proposal across a series of criteria are recorded on the file and the DAFM concluded that the proposal should not be subjected to the EIA process.

There are two appeals against the licence decision, the grounds of FAC 711/2020 are:

1. Breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/52/EU. Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account. A number of criteria set out in Annex III do not form part of the standard FS screening assessment. A Member State exceeds the limits of its discretion under Article 2(1) and 4(2) of the EIA Directive in circumstances where it does not take into account all relevant selection criteria listed in Annex III.
2. The Determination of the Inspector in terms of the Requirement for an EIA is Inadequately reasoned. There is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which Includes errors and unqualified uncertainties) or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application.
3. An adequate EIA screening has not been conducted as there is insufficient evidence of consideration of the potential impact on protected species and habitats.
4. An adequate EIA screening has not been conducted as there is no evidence that the potential impact of this project on a non-designated European Annex I habitat has been adequately considered as part of the approval process.
5. The Areas for Biodiversity Enhancement selected do not provide the best opportunity for enhancing the biodiversity within the forest area. See Circular 10/2009.
6. The Stage 1 AA determination for site 002135 is not legally valid as it is based on an error of fact. An assessment carried out under Article 6 (3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed

works on the protected area concerned. DAFM cannot make a lawful decision to award a licence unless it has reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development will not adversely impact on any European sites in question. Where there are lacunae the precautionary principle applies.

7. There is insufficient detail and clarity in the In-Combination information to enable a definitive position to be reached on the cumulative effect of this project with other plans and projects.
8. Licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.
9. Licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive, prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.
10. Inadequate consideration of the contents of a submission from a member of the public

The grounds of the second appeal FAC 740/2020 are:

- That no legal Appropriate Assessment screening has taken place
- That the accumulation of forest roads in this forest exceeds 2km. Therefore, an Environmental Impact Assessment is required
- That mitigation was applied at screening stage

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. It was submitted that both a desk audit and field inspection were carried out and that all submissions and appeals were reviewed and that all criteria had been fully adhered to and that the approval was in order. The Department additionally submitted that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, were adequately considered within the current procedures. The Department submits that it complied with these requirements by assessing the information submitted by the applicant, which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account the results of the preliminary verifications or assessments of the effects on the environment carried out under the Birds and Habitats Directives and the Water Framework Directive.

An oral hearing of the appeal was held on the 15th of June 2021, of which all parties were notified, and attended by representatives of the DAFM. One appellant was also present and participated. The DAFM outlined their processing of the application and read through their written statement. The DAFM submitted that all criteria and procedures were adhered to, that the site had been field inspected and that the DAFM was satisfied that the particulars of the application were correct. The appellant went through their written grounds of appeal and also raised a number of other issues. *Inter-alia* these included the contention that IFI had raised 'concerns' in their letter to the DAFM concerning possible water quality effects and that the stream near the proposed development had not been assigned a status by the EPA and thus the 'Hyland Case' should apply. The appellant also queried the basis for selection of the areas within the proposed site for biodiversity enhancement and contended that there was hydrological connectivity between the proposed site and some of the Natura 2000 sites within 15km, although he did acknowledge that the connectivity was upstream rather than downstream.

The FAC considered in the first instance the grounds that relate to the Appropriate Assessment of the proposal. The FAC noted that the application includes species and planting details, environmental considerations, maps showing the area to be afforested, the location of the site notice and environmental information as well as aerial imagery and a location map. This includes information regarding the location of the proposal in relation to areas designated for conservation and other environmental information. The maps submitted, included a Biomap, which identifies the location of the proposal and any environmental features proximate to the proposal.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The proposed afforestation project is not situated within any European site and is not directly connected with or necessary to the management of any such site. As noted, the DAFM recorded a screening for Appropriate Assessment that included plans and projects considered in-combination with the proposed afforestation. The FAC considered the range and type of plans and projects considered in-combination with the proposed project and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same six sites within 15km of the proposal. The DAFM had completed each section of its determination and the responses appeared to the FAC to be in keeping with the facts of the matter. The DAFM, at the outset of the hearing did draw the FAC's attention to a number of anomalous responses provided in the electronically completed certification report, the FAC was

satisfied that these were minor clerical errors. The FAC concurs with the conclusions reached in the DAFM screening that the proposal was not required to proceed to Appropriate Assessment under Article 6(3) of the Habitats Directive.

Regarding the issue of Environmental Impact Assessment (EIA) and related matters raised in the grounds, the FAC considered that the EU EIA Directive sets out in Annex II 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. 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.

In this instance the proposal is considered across a number of criteria including the Project Description, Location, Cumulative Effects, the extent of the project. Water, Soil, terrain, slope and other factors were also taken into consideration. The DAFM also completed a screening for Appropriate Assessment and considered other conservation sites and issues. At 15.21ha the proposed afforestation works are significantly sub-threshold for the mandatory submission of an EIA Report. As noted, the proposed afforestation project is outside of any areas designated for nature conservation or landscape preservation. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, and to the type and characteristics of potential impacts arising that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached.

With regard to the ground that the DAFM had applied mitigation during the AA screening, the FAC noted that the appellant educed the DAFM statement *"Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' conservation objectives"*. The FAC is of the view that this is a generic statement by the DAFM and that it does not constitute mitigation, as such, at the AA screening stage of the assessment.

The FAC also considered the ground educed in FAC 740/2020 concerning the length of forest roads within the proposed development. Given that the license was for afforestation, and that the appellant was not present to clarify the reason for raising this ground, the FAC concluded that this appears to represent an error and was not relevant to the considerations at hand.

Following earlier discussions during the course of the hearing, the FAC raised the issue with the Forest Service inspector as to whether or not the areas selected for biodiversity enhancement in this proposed project were the most suitable for that purpose. The inspector assured the FAC that in his professional opinion the areas set aside for biodiversity enhancement were appropriate and correct with regard to this particular proposed development. The FAC's attention was drawn to plot 2, which had the adjoining watercourse, and which had been set aside for biodiversity enhancement. The FAC were satisfied with this response.

During the course of the latter part of the hearing, the question of upstream hydrological connectivity was raised by the appellant. Following queries from the FAC, the Forest Service inspector stated that, while there might be theoretical upstream connectivity, there was, in his view, no actual pathway of effect to the qualifying interests (QI's) of the Natura 2000 sites located upstream of the proposed development. The appellant pointed out that populations of the White-clawed Crayfish (*Austropotamobins pallipes*) were recorded as being present in the water bodies upstream of the proposed development and that this was a protected species.

The FAC considered this issue and noted *inter-alia* that the stream, which provided the hydrological connectivity, theoretical or otherwise, only ran alongside an area being reserved for biodiversity enhancement. On that basis, the FAC were of the view that the proposed development would not have any impact on the stream, either now or in the future, and that the DAFM were correct in their assessment that there was no pathway of effect to the QI's of the Natura 2000 sites either upstream or downstream arising from the proposed development. In arriving at this conclusion, the FAC also took the view that the Hyland judgement concerning 'unassigned' water bodies did not apply in this case, as there would be no effect.

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 not satisfied that a significant or serious error, or series of errors were made and that fair procedures were followed in the making of the decision. The FAC is thus affirming the decision of the Minister regarding licence CN86664 in line with Article 14B of the Agricultural Appeals Act 2001. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely

A large black rectangular redaction box covering the signature of the official.

Donal Maguire *on behalf of the forestry Appeals Committee*