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23rd November 2021

Subject: Appeal FAC 093/2021 regarding licence CN84879

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 and Hearing

Licence CN84879 for afforestation of 4.73 ha at Greaghrevagh More Glebe, Co. Leitrim, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 4th May 2021. A hearing of appeal FAC 093/2021 was held by a division of the FAC on 14th September 2021. The FAC members in attendance at the hearing were Mr. Des Johnson (Chairperson), Mr. Luke Sweetman and Mr. Seamus Neely. The secretary to the FAC was Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the grounds of appeal, and all submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision regarding licence CN84879.

The licence decision in this case pertains to the afforestation of lands on a stated site area of 4.73 ha at Greaghrevagh More Glebe, Co. Leitrim. The proposal is for a GPC mixture of Sitka spruce and broadleaves and the approval as issued is for 85% Sitka spruce and 15% broadleaves. The land is described in the Appropriate Assessment (AA) screening documentation (contained in the Inspector's Certification on file) as having a slope which is predominantly flat to moderate (0 to 15%), as having a soil type that is predominantly podzolic and has vegetation comprising grass / rush. The project is made up of two main plots – one (southeastern plot) is in the sub-basin of the Yellow (Ballinamore)_020 and that waterbody has an unassigned status in the EPA 2013-18 Water Framework Assessment period. The second (northwestern plot) is in the sub-basin of the Yellow (Ballinamore)_010 and that waterbody has a moderate status assigned to it in the EPA 2013-18 Water Framework Assessment period.

The application was not referred to any of the referral bodies. The Inspector's Certification noted that the application was desk assessed (the DAFM statement to the FAC contained an entry that the site was field assessed on 8/11/2019) that the site is not acid sensitive, is not within a Fresh Water Pearl Mussel (FWPM) zone or catchment, is not sensitive to fisheries, is not within a hen harrier zone, nor within a NPWS referral zone and there is said to be no archaeological sites or features on the project lands. The site is not within an NHA, pNHA, SAC, SPA or National Park nor within a Prime Scenic Area as per the County Development Plan and there are no 'other' high amenity considerations. Drainage is not required, and road access is provided. Slit Planting is proposed, ground preparation is to be by woody weed removal and mounding and standard stocking is to apply. No fertilizer is to be applied and manual herbicide control is proposed (years 1 & 2). There is said to be approximately 25.8% forest cover within 5kms of the project, and approximately 28.67% forest cover within the same townland. It is stated that there is no impact on any Way-Marked Way, no impact on any densely populated area, and that the area is not commonly used by the general public for recreation.

Appropriate Assessment

The DAFM carried out a stage 1 AA Screening and identified one European site (Cuilcagh - Anierin Uplands SAC 000584) within 15km of the proposal. This European site was screened out and the reasons for the screening conclusions reached are set out in the documentation contained within the Inspector's report on file. An undated In-Combination report is to be found on file. It sets out that various online planning systems and datasets (including DAFM's own internal records) were consulted on the 19/04/2021 in relation to other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin's Yellow (Ballinamore)_010 and Yellow (Ballinamore)_020. It lists two planning approvals from the County Council website and a licence from the EPA website. It also lists objectives relating to Natura 2000 sites set out within Leitrim County Development Plan 2015-2021 that were consulted and lists data from DAFM's internal records which identified various forestry-related projects (either submitted and still under evaluation, with valid licences / approval in place or completed and approved) in the general vicinity of the project including private and Coillte projects. The Report includes an In-Combination Statement but does not include the date that the statement was completed. The Report sets out that the DAFM excludes the likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on the screened European sites in relation to CN84879.

The Appeal

There is one appeal against the decision to approve the licence in this case. The full grounds of appeal are to be found on file and have been fully considered by the FAC. These grounds are summarised below:

- Submits that the approval is not consistent with the requirements of Article 4 of the Water Framework Directive and cites the matter of the unassigned status of Yellow (Ballinamore)_020,
- References Judgement 740/2018,
- Contends that there has been 271 ha of afforestation within 5km of the project in 5 years and queries some of the answers on EIA screening as a consequence,

- Highlights difference in EIA screening forest cover figure and Waterbody figures in In-Combination report,
- Queries the 'no' answer for Q11 in Inspector's documentation and raises impacts on beautiful views,
- Submits that the local branch of the Irish Farmers Association (IFA) called for a moratorium on new afforestation in the County and cites this as evidence of local concerns,
- Submits that any error in the data or the Inspector's response to the EIA screening questions invalidates the determination reached by the Inspector

DAFM Statement to the FAC

The DAFM provided a statement to the FAC in respect of appeal FAC 093/2020. The statement includes confirmation regarding the processing of the application to the requirements of the law and procedures and sets out the various processing dates relating to same. It includes a response to the appeal. In relation to the grounds that the proposal will not adhere to the requirements under the WFD the statement sets out that the DAFM disagrees with this submission and goes on to state that the site does not have a hydrological connection to any watercourse connected to the Yellow River catchment. It also sets out that the location, type, and characteristics of the potential impact of the project applied for were considered by the Department in the assessment of the afforestation proposal for EIA requirement form as completed by DAFM and recorded on IFORIS. The statement includes a paragraph setting out that there were no errors made in the EIA assessment when making a decision on this case and that all answered questions were deemed acceptable to the certifying inspector. It states that EIA data on percentage forest cover are indicative and can never be 100% accurate, that the inspector is required to use his judgement and in this case that it was not deemed to be an issue and approval was warranted.

Consideration by the FAC

The FAC held a hearing of the above appeal on the 14th September 2021 and having considered the submitted grounds of appeal, the documentation on file, submissions made and including the Statement of Facts made by the DAFM to it decided to seek clarification from the DAFM by email dated 15th September 2021 as per the wording below shown in italics;

"The Forestry Appeals Committee (FAC) is currently considering an appeal (FAC 093/2021) against afforestation licence CN84879 and convened a Hearing on the 14th September 2021 in this regard.

The licence under appeal is for the afforestation of 4.73 ha at Greaghrevagh More Glebe, Co. Leitrim. There is evidence that this general area already has significant existing forest. The FAC has received a Statement of Facts from Department of Agriculture, Food and the Marine (DAFM) in relation to the appeal. However, in order to facilitate the FAC adjudicating the appeal you are requested to provide further information in the form of responses to the following queries:

1. *The In-Combination report on file for licence CN84879 indicates that the various sources of information to inform a consideration of other plans and projects in the general vicinity of the project in the Yellow(Ballinamore)_010 and the Yellow(Ballinamore)_020 were consulted on 19/04/2021. However, there is no date inserted indicating as to when the report was completed - DAFM is requested to supply the date of completion of this In-Combination report.*
2. *The FAC notes that the final three paragraphs of the In-Combination statement as included in the In-Combination report in relation to this licence are highlighted in yellow. The DAFM is requested to indicate whether there is any significance to this highlight being included.*
3. *In the Inspector's Certification document before the FAC (the 2nd and "final" version), under the section titled Assessment to Determine EIA Requirement, Q4 and Q5 provide figures for the cumulative afforestation in the immediate vicinity of CN84879. Please provide a full list of the projects included in the tabulation of these figures.*
4. *Q12 in the Inspector's Certification states that the approximate percentage of forest cover currently in the underlying waterbody (or waterbodies) (in this case Yellow (Ballinamore)_020 and Yellow(Ballinamore)_010) is 8.53%. The In-Combination Report states that the percentage forest cover in the general vicinity of the project area in the River Sub-Basin Yellow(Ballinamore)_010 is 44% and in the Yellow(Ballinamore)_020 is 16%. Please provide an explanation as to how these figures are calculated and the apparent discrepancy between those at Q12 in the Assessment to Determine EIA Requirement and those in the In-Combination report.*
5. *In relation to the In-Combination Report, there are a considerable number of forestry projects listed as being licenced in the Yellow(Ballinamore)_010 and the Yellow(Ballinamore)_020 River Sub-Basins from 2017-2021 (with reference in the In-Combination Statement as projects from the past 5 years). Please elaborate on how the potential for these projects to contribute to an in-combination effect on Natura 2000 sites has been assessed.*

The FAC requests that you respond within 21 days of this request. Otherwise, the FAC may proceed to decide the appeal."

The DAFM responded by email dated 11/10/2021 and confirmed that the In-Combination report was completed on 22/4/21, that there is no significance to the final three paragraphs of the In-Combination statement (as included in the In-Combination report) in relation to this licence being highlighted in yellow, that to identify individual contract numbers relating to the outputs for Q4 & Q5 (as requested by the FAC) presents a considerable IT undertaking that could not be fulfilled at this time, and that a check of the apparent discrepancy between the percentage forest cover shown at Q12 in the Assessment to Determine EIA Requirement and that shown in the In-Combination report has indicated an error for the percentage forest cover in the waterbody. The reply went on to state that this figure is however only indicative and is not used as an absolute figure in determining the outcome of the EIA assessment and that the figures are computer generated. In response to the query from the FAC asking the DAFM to elaborate on how the potential for the forestry projects listed in the In-Combination report to contribute to an In-combination effect on Natura 2000 sites has been assessed the response set out that *'the basic premise here is that each of these projects, where licensed, has gone through its own assessment process, including AA Screening and if necessary, Appropriate Assessment. Given our focus on ensuring that (in the context of screening) there is no likelihood of a significant effect arising from this project on its own (and in-*

combination), or that (in the context of Appropriate Assessment) there is no possibility of an adverse effect arising from this project on its own (and in combination), there is no potential for any of these projects to contribute to an in-combination effect on Natura 2000 sites'

In the interest of fair procedures, a copy of the further information request as issued by the FAC to DAFM and the response thereto was circulated to the parties to this appeal and a period up to 9th November 2021 was afforded to the parties to make observations on the documents circulated. In the event no submissions were received by the FAC on this occasion.

The FAC considered in the first instance, if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the EIA and Habitats Directives. Regarding Environmental Impact Assessment (EIA) and related matters, 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. The Irish Regulations, 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 proposal as described is for the afforestation of 4.73 ha and is sub-threshold for the mandatory submission of an EIA report. The FAC found that the DAFM assessed the proposal and considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process.

The FAC finds that in the course of its Assessment to Determine EIA Requirement the DAFM recorded at question 12 that the forest cover in the underlying waterbody (or waterbodies) was 8.53%. The FAC further finds that this is at variance with the comparable figures as quoted in the In-Combination assessment report on file wherein it is recorded that the forest cover in the underlying waterbodies is approximately 44% in the general vicinity of the project area in the River Sub-Basin Yellow (Ballinamore)_010 and is approximately 16% in the general vicinity of the project area in the River Sub-Basin Yellow (Ballinamore)_020. The FAC sought clarification from the DAFM in relation to this apparent discrepancy (as referenced above) and noted the response received wherein it stated that there was an error for the percentage forest cover in the waterbody. The FAC concluded that in the particular circumstances of this application, in proceeding to make a determination regarding the requirement for an EIA in the absence of a documented reconciliation of the apparent differences in these forest cover percentages, the DAFM made a serious error in the processing of the application in this case as it related to the EIA Directive.

Regarding AA and related matters, the FAC finds the DAFM carried out an AA Screening and one Natura 2000 site (Cuilcagh - Anierin Uplands SAC 000584) was identified within 15km of the proposal as set out in the Inspectors report on file. This site was screened out and the reasons for the screening conclusions reached are set out in the said report. The FAC finds that an In-Combination report is to be found on file which sets out that in relation to CN84879, the DAFM deems that there is no potential for the project to

contribute to any effects on the same European site, when considered in-combination with other plans and projects. While no completion date was recorded on the In-Combination report on file the FAC noted that the response to the further information issued by it to the DAFM confirms that the In-Combination report was completed on 22/04/2021. The FAC concluded that the absence of a date on the In-Combination report was an error of a minor nature and did not materially affect the report itself or the conclusions reached. The FAC examined publicly available information from the NPWS and EPA and identified the same European site. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, types and characteristics of potential impacts, to determine the likely significant effects of the proposal itself or in combination with other plans or projects on a European site. The FAC considered that the procedures adopted by the DAFM in their assessment are acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding AA in this case and concurs with the conclusions reached.

Regarding contentions raised relating to water quality and related matters, the FAC reviewed the grounds submitted in the appeal and had regard for publicly available mapping, other online resources such as aerial photography and submissions received. The FAC considered the judgment in 2018 740 JR (Sweetman v An Bord Pleanála), the 'Hyland' judgement, which addressed the Water Framework Directive in the context of a development that would impact an unassigned waterbody. The FAC considered the particular details of the proposal under appeal to be fundamentally different to the project at issue in the Hyland judgement. That judgement was in relation to a project with a direct and undisputed impact on an unassigned waterbody (including water abstraction). The evidence before the FAC is that the proposal (CN84879) is for the afforestation of 4.73 ha, made up of planting in two adjacent sub-basins, on land that is described in the Appropriate Assessment screening documentation on file as having a slope which is predominantly flat to moderate (0 to 15%), as having a soil type that is predominantly podzolic and on a site that is not hydrologically connected to any EPA-mapped watercourse. The FAC finds that the proposal area is made up of Plots 1 and 2 (981 and 995) located in the sub-basin YELLOW (BALLINAMORE)_020 which waterbody has an unassigned WFD status in the 2013-18 assessment period and Plot 3 (454) located in the sub-basin YELLOW (BALLINAMORE)_010 which waterbody has a moderate WFD status assigned to it in the 2013-18 assessment period. The FAC noted content in the statement made to it by the DAFM wherein it sets out that *'This site does not have a hydrological connection to any watercourse connected to the yellow river catchment'*. An examination of the EPA mapping confirms that the project area, as located in the sub-basin YELLOW (BALLINAMORE)_020, does not have a watercourse connecting it to the YELLOW (BALLINAMORE)_020 Waterbody. The FAC also finds that the approval as issued by DAFM dated 4th May 2021 included a condition requiring the proposal to adhere to forestry & water quality guidelines. The FAC, in considering all the information available to it is satisfied that the proposal in this case would have no effect on the YELLOW (BALLINAMORE)_020 waterbody. Furthermore, the FAC is satisfied that no serious or significant error or series of errors was made in making the decision as it relates to these grounds of appeal or relating to water quality generally.

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 error was made in the making of the decision relating to licence CN84879 (as it relates to the significant variance in the amount of forest cover recorded for the underlying Waterbody in the Assessment to Determine EIA Requirement and that recorded in the In-Combination assessment report) and is therefore setting aside and remitting the decision regarding this licence (CN84879) to the Minister to carry out and record a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive, before a new decision is made.

Yours sincerely,


On Behalf of the Forestry Appeals Committee

