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5th October 2021.

Subject: Appeals FAC 067/2021 and 068/2021 regarding licence CN86847

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 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN86847 is for the afforestation of 5.11 hectares including 1410 metres of fencing at Leckan, Co. Leitrim which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 1st March 2021 subject to a number of standard conditions including condition no 5 to retain all hedgerows, - adhere to forestry & water quality guidelines, - all guidelines to apply.

Hearing

A hearing of appeal 067/2021 including 068/2021 was held by a division of the FAC on the 6th September 2021. The FAC members in attendance at the hearing were Mr. Myles Mac Donncadha (Chairperson), Mr. Iain Douglas and Mr Derek Daly.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal and all submissions received, and, in particular, the following considerations, the FAC has decided to aside and remit the decision of the Minister regarding licence CN86847.

Licence

The licence pertains to the afforestation in relation to an area of 5.11 hectares at Leckan, Co. Leitrim. The application also provides for 1,410 metres of fencing. Documentation submitted includes site notice, environmental and operational details and mapping including a fencing map and biomaps. The site is divided into three plots and the species to be planted as approved include a range of broadleaf species.

Documentation on file refers to the site refers to the predominant soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate. The project area is

crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush.

The project site would appear to lie in two river sub-basins; Woodford (Cavan)_10 WFD to the south and southeast of the project area, the status of which is unassigned; and the Blackwater (Newtowngore)_020 WFD to the north and northeast of the project area the status of which is good.

The licence application was referred to An Taisce who responded and Leitrim County Council who did not. An Taisce in their submission refer to

- Protecting biodiversity associated with High Nature Value Farming The need to protect farming systems in Europe of greatest biodiversity value or ‘High Nature Value (HNV) farming’ has been embraced at an EU level and it is recognised that the conservation of HNV farming is essential if the EU is to meet its 2020 biodiversity targets.
- Based on their observation they believe that there is a high probability that the site in question supports habitats and/or species which would qualify this area as High Nature Value farmland. An Taisce call on the Forestry Service to ensure that an Ecological Assessment is carried out to ensure that afforestation does not take place in contravention of EU regulation No 807/2014.

Three submissions were made to DAFM including submissions from the appellants.

The assessment of the licence application by DAFM included a desk and field assessment as indicated in the Statement of Facts (SoF) to the FAC. In relation to Appropriate Assessment screening as indicated in the Inspector’s Certification 3 Natura sites were identified within 15 kilometres Cuilcagh - Anierin Uplands SAC 000584; Lough Oughter And Associated Loughs SAC 000007 and Lough Oughter SPA 004049 which were all screened out due as the project is not directly connected with or necessary to the management of any European Site. Furthermore, it was stated that DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on these European sites.

An in-combination report was prepared with a date of the 24th February 2021 focusing on the general vicinity of the project area in the River Sub-Basins Blackwater (Newtowngore)_020 and Woodford (Cavan)_10 and examined areas in both counties Leitrim and Cavan. Section 1.1.5 indicates a high number of afforestation projects in the area. Section 2.1 of the Statement indicates that “the project lies in a rural landscape in Leckan, Co. Leitrim in the River Sub-Basin’s Blackwater (Newtowngore)_020 and Woodford (Cavan)_010. The River Sub-Basins Blackwater (Newtowngore)_020 and Woodford (Cavan)_010 have approximately 19% and 16% forest cover, both of which are higher than the national average of 11%. At 5.11 hectares the project is considered small in scale”. The Statement concludes that DAFM excludes the likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on European Sites.

Appeal

There are two appeals against the decision to grant the licence.

Appeal in relation to 067/2021 refers to;

- The appellant has grave concerns in relation to Inspector Certification, that it was only desk assessed and warranted a field inspection.
- The right of way is not registered and access is not guaranteed.
- The level of forest cover is higher than stated in the certification.
- Reference is made to a folio number and that part of these lands should have had a separate folio number which calls into question the validity and accuracy of the application and the biomap presented.
- The location of the proposed development is within the Zone of Influence of sites designated under European Law. As such and in accordance with Article 6(3) of the EU Habitat's Directive (Council Directive 92/43/EEC) regarding Appropriate Assessment.
- Articles 6(3) and 6(4) of the Habitats Directive sets out the decision-making tests for plans or projects affecting Natura 2000 sites. Article 6(3) establishes the requirement for Appropriate Assessment: "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. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the 5 competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."
- The EPA should have been contacted in relation to this application as this waterbody has not been assigned a status. Reference is made to the JR case and the 3rd cycle updates do not indicate any updated status for this waterbody.
- The lands are HNV and should not be planted.

The appeal in relation to 068/2021 refers to;

- The appellant lives and had lands adjoining the project.
- The project will impact on his holding in a manner similar to other existing forestry adjoining his holding through loss of light and productivity of his lands.
- Reference is made to damage to his lands from existing forestry.
- Reference is made to the right of way to the project lands and that he has maintained this right of way which is not capable of taking the machinery.
- The right of way is not owned by the applicant.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. In relation to DAFM position on EIA outputs they state that the figures were correct as of 28th June 2021. Figures used at certification stage were incorrect. EIA % forest cover figures are indicative only and can never be 100% accurate. Forest cover can change due to natural or human induced factors and as such these figures will only form part of the DAFM decision on EIA assessment. The key is that the inspector has full view of the forest cover via lforis

and a field inspection. Townland boundaries are also available on Iforis for the inspector to assess forest cover. The changes in figures presented will not change the EIA determination. The Statement from Inspectorate indicates that the District Inspector carried out a field inspection and desk audit on this application and the Inspector offers confirmation that all criteria and guidelines were fully adhered to and approval is in order.

In addressing the grounds of appeal, the FAC considered the requirements of the Habitats and EIA 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 appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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 Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation which involve 50 hectares or more and 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 is for the afforestation of 5.11 hectares which is substantially sub threshold for mandatory EIA as set in Irish Regulations. The DAFM recorded a consideration of the proposal across a series of criteria including the Project Description, Existing Land Use, Cumulative effect and extent of project, Soil, Water and Landscape. The DAFM also recorded a separate Appropriate Assessment and recorded information provided by the Applicant in relation to the scale, nature and location of the proposal. Having regard to the record of the decision and the submitted grounds, and the nature, scale and location of the proposal, the FAC is satisfied that the DAFM did not err in its decision concerning EIA.

The FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the afforestation of 5.11 hectares. Having examined the documentation submitted, the FAC has identified the same three sites as the DAFM within 15km from the proposal. The FAC considered the nature, scale and location of the proposal, the Natura sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined. The proposed works are located outside of any European site and there is no evidence of a pathway of effects to a European site. Neither is there evidence of protected habitats or species on the site. The FAC is therefore satisfied, having regard to the record of the decision, that no a serious or significant error was made in the decision regarding Appropriate Assessment screening.

In relation to other matters arising in the grounds of appeal the FAC noted that the appellant raised concerns in relation to Inspector Certification; that it was only desk assessed and warranted a field inspection. In relation to this, the assessment of the licence application by DAFM included a desk and field assessment on the 18th February 2021 as in indicated in the Statement of Facts (SoF) to the FAC. In relation to the references to the Inspector's Certification the FAC noted the reference to S/A in the certification for questions to 11, 18 and 19 and that a more definitive response as this section of the Certification as an assessment to determine EIA requirement would be appropriate but does not constitute a significant error considering the overall processing and assessment of the proposal including the fact that an Appropriate Assessment was undertaken and included assessment of the nature, scale and location of the proposal. It is also noted that reference is made to the high level of forestry cover in the area and that this is not reflected in the certification. It is however noted that the in-combination report does reflect a higher than national average of afforestation in the area and the proposal is for deciduous woodland on a site which aerial mapping would indicate has a degree of scrub woodland.

In relation to the right of way to the project referred to in both appeals it was noted by the FAC that mapping of the area does indicate a track leading to the site from the public road. The FAC are not in a position to adjudicate on legal entitlements on ownership or use of this track but would note that a granting of a licence does not confer any entitlements to such a right or the suitability of the track in question for use in bringing materials to and from the site.

In relation to the issue of a folio number and that part of these lands should have had a separate folio number which calls into question the validity and accuracy of the application and the biomap presented, the FAC examined mapping and documentation in relation to folio numbers and an examination would appear to indicate that part of the project area proposed is within another landownership. The documentation as submitted does not indicate the listing or consent of any ownership of these lands as provided for in the Forestry Regulations or Forestry Standards Manual and this is a significant error.

In relation to the site having a High Nature Value (HNV) and should not be planted. It is noted as already stated that the project is for deciduous species planting and that Leitrim County Council although the project was referred to them has not referred to this issue. The FAC has noted from viewing mapping that the site has a level of biodiversity reflected in the current scale of scrub wooded areas on the site which should be retained and that the additional deciduous species planting proposed will further assist this mix and diversity of species. The FAC noted however that the details submitted do not indicate the position in relation to retention of the scrub area and this should be clarified and included in as a condition of any licence.

In relation to potential hydrological impacts on Natura 2000 sites and on water quality generally it is noted that the specific works provide for pit planting with minimal drainage works for the avoidance of run off. This project site would appear to lie between two River Sub-Basins; River Sub-Basin Woodford (Cavan)_10 WFD to the south and southeast of the project area the status: of which is unassigned and in terms of risk is indicated as under review and River Sub-Basin Blackwater (Newtowngore)_020 WFD to the north and northeast of the project area the status of which is good and in terms of risk is indicated as not at risk. The FAC note that the issue of potential effects and impacts on aquatic zones and watercourses is assessed in the documentation. The FAC has examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area. It is noted that in the grounds of appeal reference is made to referral to the EPA and in relation to this matter, the FAC had regard to the fact that the Minister for Agriculture, Food and the Marine is the competent authority for afforestation licences in Ireland, while also considering the requirements placed on the Minister under the Forestry Act 2014 and Forestry Regulations 2017 in relation to their decision making. Having examined the issue the FAC has taken in account the nature and scale of the project considered that the proposal will have no effect on the waterbodies arising from the planting proposed and compliance with forestry standards as specified in the conditions.

In relation to the project impacting on an appellant's holding in a manner similar to other existing forestry adjoining his holding through loss of light and productivity of his lands it is noted that the current project is for deciduous woodland and while the FAC is not indicating that no potential impact arises the scale of impact will be less than that of commercial conifer woodland and that forestry in particular of the type proposed is considered as an enhancement to the environment. It is also noted that forestry regulations and standards provide for setback from common boundaries which is provided for in the project.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal. As outlined in this letter, the FAC is satisfied that a number of errors were made in making the decision at the assessment stages. The FAC is thus setting aside and remitting the decision of the Minister regarding licence CN86847 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to clarify the issue of ownership of all of the lands delineated to constitute this project and where lands are in other ownership that consent is given by the owner for this project and also to clarify and set out measures in relation to the retention of existing scrub woodland on the site before a new decision is made.

Yours sincerely,

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

Derek Daly On Behalf of the Forestry Appeals Committee