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8th October 2021

Subject: Appeal FAC 074/2021 relating to Licence CN87521

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.

Licence.

The licence is for 4.92 Ha of GPC 3 afforestation at Kilmacsherwell, Co. Leitrim. The application was submitted to the DAFM on the 22/10/2020. One third-party submission was received on the licence application. The Department of Agriculture, Food and the Marine (DAFM) approved the licence on the 09/03/2021 with a number of conditions, including a specific condition requiring the planting of 10 rows of broadleaved species between the Ballinamore Canal setback and conifer species.

There is one appeal against the decision to grant the licence.

Forestry Appeals Committee.

The appeal was considered by at the sitting of the FAC held on 15/09/2021. The FAC Members present were; Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton and Mr. Iain Douglas. At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM.

Decision.

Having regard to the evidence before it, in particular the record of the decision by the DAFM, the notice and grounds of appeal, the SoF from the DAFM and the considerations set out hereunder, the FAC has decided that the decision of the Minister licence reference CN87521 should be set aside and remitted to the Minister to request from the DAFM further consideration of the possible or potential impact of the proposal on the WFD River water body Adhacashlaun_030 in the in the context of the judgement made by Ms. Justice Hyland on 15 January 2021 Case No. 2018 740 JR.

Background.

The SoF provided by the DAFM dated 16/07/2021 indicates that a both a desk and field inspection were carried out on the proposed afforestation. The final Inspector's Certification Report (with a spatial run

dated 05/03/2021) describes the soil type underlying the project area as predominantly podzolic in nature, with a predominantly flat to moderate (<15%) slope and that the project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise wet grass land, hedgerows and scrub. The certification states the area of afforestation to be 5.11 Ha. The approved area stated on the licence is 4.92 Ha. as per the applicant's documentation.

The report notes that there is one Natura 2000 site located within 15Km of the proposed afforestation, the Cuilcagh-Anierin Uplands SAC (Site Code 000584) and records an Appropriate Assessment (AA) screening decision to screen out the application on the basis that; the location of the project area is downstream from the Natura site, and the consequent lack of any hydrological connection; the project is 6.4 km from SAC and will have no effect on any of the Qualifying Interest(s) (QIs) of the SAC.

The report is accompanied by an in-combination assessment carried out by the DAFM dated 14/12/2020 which concludes that the project itself, i.e. individually, was deemed not to have an effect on certain European Site(s), as it does not represent a source, or if so, no pathway exists. Consequently, the DAFM deems that there is no potential for the project to contribute to any effects on the same European Site(s), when considered in-combination with other plans and projects.

The Inspector's Certification Report also contains an assessment of the environmental factors relating to the proposed afforestation in order to determine whether the proposed afforestation requires an Environmental Impact Assessment Report (EIAR) and concludes that it is not necessary to subject the proposed afforestation to EIA.

The licence application was referred to Leitrim County Council on 29/12/2020 which replied on 20/01/2021 stating that it had no objection to the proposed afforestation and included 14 conditions relating to contacting the council and arrangements for maintenance and repair of the local road system.

Appeal.

There was one appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

1. That the soil underlying the site is peat, not mineral soil as stated on the application.
2. That the site comprises unimproved wet grassland and is listed by the NPWS as lowland meadows and that such lowland meadow is an important habitat for curlew.
3. That the Ballinamore Canal is an important habitat for Otter, Kingfisher Water Bat which will be impacted by this forestry plantation on riverside lands.
4. That the townland has High Nature Value (HNV) score and that no consideration was given to the fact that the afforestation will result in habitat loss.
5. That the project is located in the Water Framework Directive (WFD) river waterbody Adhacashlaun_30 the status of which is unassigned and makes reference to the Case 2018-740 JR (Sweetman V ABP).
6. That the fact that the site adjoins Shannon-Erne Waterway has not been considered in the EIA Screening.
7. That access to the site is not assured.
8. That the local road infrastructure not suitable for haulage of timber.

Hearing.

At the hearing the FAC had before it a Statement of Fact (SoF) dated 16/07/2021 confirming the administrative details of licence application CN87521 as outlined above and states that the DAFM was

satisfied that all criteria in its standards and procedures had been adhered to in making the decision on this licence application.

The FAC also had before it a SoF by the DAFM Forestry Inspectorate dated 15/07/2021. The statement submitted that the relevant AA procedure in operation at the time was applied, that Standard Operating Procedures were applied, and that a field inspection and desk audit was carried out and addressed the grounds of appeal.

Consideration by the FAC.

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the Forest Service, and other on-line services.

Aerial photography including that submitted with the application show the land it is proposed to plant is agricultural grassland. The site is in one plot and a derelict dwelling has been excluded from the licence application. The site is bounded on the north-west by the Ballinamore Canal and on the remaining site boundaries by agricultural grassland.

Soil types on the site, identified through EPA mapping, are Surface water Gleys and Groundwater Gleys, which are generally an acid, deep, poorly drained mineral soils and cutaway peat (Basin peat).

The site lies within the Erne WFD Catchment and the Yellow [Ballinamore]_SC_010 Sub catchment.

According to EPA mapping the nearest identified waterbody to the site is the Adhacashlaun_30 (The Ballinamore Canal) which adjoins the site on its north-west boundary and flows from north-east to south-west. The WFD Assessment of this river waterbody is that its status is unassigned and will be reviewed under the WFD 3rd Cycle.

The underlying Ground Water body is the Newtown-Ballyconnell IEGBNI_NW_G_031 and is Not at Risk.

The proposed afforestation is not within a Natura 2000 site nor is it required for the management of a Natura 2000 site. The FAC has confirmed that the only Natura2000 site identified as being within 15km of the site is that contained in the Inspector's Certification, the Cuilcagh-Anierin Uplands SAC (Site Code 000584).

The FAC noted that DAFM completed and recorded a screening for Appropriate Assessment (AA) that determined that the proposal itself and in-combination with other plans and projects would not impact on a Natura 2000 site.

The FAC noted that the DAFM recorded a consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale and location of the proposal.

The Ballinamore Canal (Shannon/Erne Waterway) is classified as being of High Visual Amenity in Leitrim County Development Plan 2015-2021 and the FAC notes that the canal forms part of the site boundary.

In addressing the grounds of appeal, the FAC considered the following matters;

Soils on the Site.

The FAC noted that the site was inspected in the field on 17/12/2020 and that the soils on the site were assessed during that inspection and found to be surface water gleys (a mineral soil) on the elevated parts of the site and peaty gleys of a high mineral nature on the low lying areas. The FAC is satisfied that the DAFM has not erred in this regard.

Habitat on the Site.

This ground of appeal contends that the habitat on the site is unimproved wet grassland and listed on the NPWS maps as lowland meadows and that such lowland meadows are an important habitat for the curlew. A review of the mapping Irish Semi-Natural Grassland Survey 2013 on the NPWS website does not show Kilmacsherwell or adjoining townlands as lowland meadows. It is not possible to identify townlands in the more recent NPWS mapping in the "The Status of EU Protected Habitats and Species in Ireland Volume 2: Habitat Assessments" 2019. The FAC noted that the site was inspected in the field and that the dominant vegetation on the site is rush dominated grassland. The applicant's pre-approval report includes bracken/briar and furze in the site vegetation cover. The vegetation on site would indicate that the land has not been managed in the recent past and the Inspector notes the heavy sward of rush has resulted in a low diversity of plant species. The Forestry Inspector's SoF dated 15/07/2021 indicates that the proposed afforestation is not within a Curlew buffer and that the closest Curlew nesting/breeding area is 3.5km distant. The FAC is satisfied that the DAFM has not erred in this regard.

Protected Species.

The grounds of appeal contend that the Ballinamore Canal is an important habitat for Otter, Kingfisher and Water Bat (Daubenton's Bat) (*Myotis daubentonii*) and that they will be impacted upon by the proposed afforestation. The FAC noted that it is a requirement set out in the DAFM document *Forests & Water* 2018 that there is an unplanted water setback from aquatic zones. The FAC noted that the DAFM Guidelines require existing trees and hedgerows to be retained with a 3 metre unplanted setback. In addition, a condition of the licence requires the planting of a minimum of 10 rows of mixed broadleaf species (Oak/Birch/Rowan/Hazel etc) between conifers and canal set back area. The FAC further noted that; the appellant had adduced no evidence that any of the protected species mentioned Otter, Kingfisher or Water Bat is present on the site or would be adversely impacted by the proposal; the proposed afforestation area is not within 15km of an SAC with otter as a qualifying interest and that site was inspected and no evidence of otter was found. The FAC is satisfied that the DAFM has not erred in this regard.

High Nature Value (HNV) Farmland

The FAC noted that High Nature Value (HNV) farmland, according to Teagasc "is typically characterised by low-intensity farming associated with high biodiversity and species of conservation concern". The record shows that a DAFM inspector visited the site and recorded the dominant vegetation throughout the area of the proposed afforestation as being rush dominated grassland and that the rushes are high and have not been cut in many years. The heavy sward of rush has resulted in a low diversity of plant species which is not indicative of a High Nature Value area. The FAC noted that no evidence was adduced by the appellant to the contrary and the FAC is not satisfied that the DAFM evaluation of this particular site contained an error.

Water Framework Directive.

This ground of appeal contends that the Minister cannot issue a licence for this proposal because of the provisions of the judgement of Ms. Justice Hyland in the case 2018-740 JR Sweetman v An Bord Pleanala (the Hyland Judgement) delivered in January 2021 regarding the unassigned status of a WFD water body. In considering this ground of appeal, the FAC had regard to the Forestry Inspector's Statement of Fact dated 15/07/2021 which, while it deals with measures to protect the water quality of the canal, does not address the specific ground of appeal which is, that the licence should not have been issued having regard to the Hyland judgement. The FAC confirmed that the status of WFD River Waterbody Adhacashlaun_30 is unassigned and subject to review under the WFD 3rd Cycle. The FAC noted that while no drainage is proposed on the site, historical mapping and aerial photography show drains throughout the site some of which appear to connect to the Ballinamore Canal.

Having regard to the Hyland Judgment, and to the fact that there is direct connectivity between the project lands and the Adhacashlaun_30 arising from its immediate adjacency to the project, the FAC is not satisfied that, based on the information before it, it can be reasonably concluded that the proposed development as licenced could not have any impact on this 'unassigned' waterbody. The FAC considered this to be a significant error in the making of the decision to grant the licence and that the licence should be remitted for consideration of possible or potential impact on a surface waterbody in light of the Hyland Judgment.

The Shannon-Erne Waterway was not considered in the EIA Screening.

The FAC noted that question 28 of the Assessment to Determine EIA Requirement in the Inspector's Certification makes reference to the design of the forest (and any additional design improvements recommended) being sufficient to prevent any significant impact on the landscape compliance with the Forestry and the Landscape Guidelines. The FAC noted the Inspector's response was to condition the planting of a minimum of 10 rows of mixed broadleaf species (Oak/Birch/Rowan/Hazel etc) to be planted between conifers and canal set back area which will maintain the visual amenity of the canal. The FAC noted the response of Leitrim County Council did not object to the proposal. The FAC is satisfied that the DAFM has not erred in this regard.

Access.

The FAC noted that there is on file, submitted by the applicant, a statutory declaration signed by the personal representative of the registered owner of the land that there is a right of way to this site from the public road. The FAC is not in a position to adjudicate on legal entitlements on ownership or use of this road but noted that a granting of a licence does not confer any entitlements to such a right or the suitability of the road in question for use in bringing materials to and from the site. The appellant has adduced no evidence that there is a dispute about access to the site. The FAC considers that there is no convincing evidence that the DAFM has erred in its consideration on access to the site.

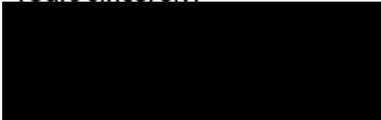
That the local road infrastructure not suitable for haulage of timber.

The FAC noted that the licence application was referred to Leitrim County Council on 29/12/2020 which stated that it had no objection to the proposed afforestation subject to a number of conditions relating maintenance and repair of the local road system. Responsibility for the management of the public road network falls to the relevant authorities. FAC is satisfied that the DAFM has not erred in this regard.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001(as amended) the FAC is satisfied that a series of errors was made in the making of the decision regarding licence CN87521 and that the licence should be set aside and remitted to the Minister for DAFM to undertake a new Assessment to Determine EIA Requirement and to re-evaluate and provide further evidence through further analysis, or site inspection or both as is required regarding the possible or potential impact on the WFD River Waterbody Adhacashlaun_30 before a new decision is made.

Yours sincerely,



Iain Douglas,
On Behalf of the Forestry Appeals Committee