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14th April 2021

Subject: Appeals FAC319/2020, FAC322/2020, FAC323/2020 regarding licence CN86088

Dear [REDACTED]

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

Background

Licence CN86088 is for the afforestation of 18.67 hectares at Fingreagh Upper, Co. Leitrim which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 4th June 2020.

Hearing

An oral hearing of appeals FAC 319/2020; 322/2020 and 323/2020 was held by the FAC on 31st March 2021.

In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr Seamus Neely, Mr Vincent Upton, Mr. Derek Daly.

Secretary to the FAC: Ms. Marie Dobbyn.

DAFM Representatives: Ms. Mary Coogan, Mr. Martin Regan.

Appellants: [REDACTED]
[REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN86088.

Licence.

The licence pertains to the afforestation of 18.67 hectares at Fingreagh Upper, County Leitrim. The site has a watercourse in close proximity to a large section of the western boundary and there is also a roadway in close proximity to this boundary. 15.87 hectares of Sitka spruce are proposed to be planted with broadleaves on the remaining 2.8 hectares. The Inspector's Certification report in relation to the

project and site refers to *"this project comprises 18.67 hectares of afforestation. The predominant soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush"*.

No referral to statutory bodies was made in relation to the licence application.

An Appropriate Assessment (AA) screening was carried out and is recorded on the file. The screening considered 3 sites within 15km and that there was no need to expand this radius in this case and other plans and projects considered are recorded. The European sites considered were Boleybrack Mountain SAC 002032; Cuilcagh - Anierin Uplands SAC and Lough Gill SAC 001976. The proposal's potential in-combination effect was also assessed. The overall conclusion was to screen out all sites concluding no possibility of a significant effect on any Natura site, and that Appropriate Assessment was not required for a number of stated reasons which included, the location of the project within a separate water body catchment to that containing the Natura site, no upstream connection to another Natura Site and the position of the project area downstream from another Natura site, and therefore the subsequent lack of any hydrological connection to the sites. The record also contains a consideration of the proposal across a range of criteria and a determination that the proposal should not be subject to the Environmental Impact Assessment process.

The licence was issued on the 4th June 2020 subject to standard conditions.

Appeal.

There are three appeals against the decision.

The grounds of the appeals in summary refer to;

- Failure to comply with Forest Regulations
- A specific reference in this regard to being contrary to Forestry Regulations as no site notice was visible and submitting that the appellant was made aware of the Licence application by a neighbour.
- Information does not comply with EU EIA Directive.
- The decision is flawed as it is based on inaccurate / deficient information and is therefore invalid.
- The approval is contrary to Forestry Service commitments to protection of the environment and biodiversity. Proposal will therefore result in species loss and loss of biodiversity.
- The cumulative impact of forestry in the immediate and the wider general area.
- Percentage of forest cover as stated is inaccurate.
- Inadequate screening for EIA.
- Box ticking in the documentation assessing the licence is misleading and questionable.
- Access to the site is unclear.
- Lands are of High Nature Value (HNV) and should not be planted.
- Reference to a landslide on the 28th June 2020 at a location indicated on an accompanying map.
- Impacts on and damage to the local environment.

In a statement to the FAC, in regard to the granted licence the DAFM states that the decision was issued in accordance with the DAFM procedures, SI 191/2017 and the Forestry Act. It also states that DAFM is satisfied that all criteria as outlined in the standards and procedures have been adhered to in making the decision on the application. The statement from the Forestry Inspectorate indicates that the District Inspector carried out both a desk audit and field inspection and reviewed submission/appeal and is satisfied that all criteria referred to above have been fully adhered to and approval is in order.

An oral hearing was held of which all parties were notified and representatives of the appellants, the DAFM and FAC sat remotely. During the Oral Hearing the appellants in FAC 319/2020 and FAC323/2020 indicated that they could not continue participation due to technical difficulties and the appellant of 319/2020 did not make a submission. The DAFM presented an overview of their processing of the licence and the screening assessment undertaken; confirmed that a desk and field assessment was undertaken and that any licence would require all guidelines to be followed.

At the hearing the appellants referred to inadequacies and shortcomings in the documentation submitted with the licence application. Reference was made to over a third of hedgerows not indicated on the drawings; to the presence of a nearby watercourse; to the possibility that this watercourse was a nursery for juvenile trout; the issue of road access which was considered inadequate and the ownership of the lands which would provide access was also raised. Reference was made to a recent landslide in the area at the 'Dawn of Hope' Bridge and the consequent impacts on neighbouring lands and watercourses and potential impact on Lough Allen. It was contended that Appropriate Assessment was necessary and that there was hydrological connection to all three SACs referred to in the AA screening. There was no provision for fire setbacks. Reference was made to the current high levels of forestry in the area and that in the townland in which the project is proposed 60 of the 109 hectares are planted in forestry and there are also high levels in nearby areas with the impact on loss of population and decline in the social fabric of the area. Reference was made to the issue of the site notice and whether it was located on the subject site. It was indicated that the Inspector's Certification does not accurately reflect the level and scale of forestry in the area. The issue of loss of biodiversity was raised and the consequent impact on wildlife. Reference was also made to impact on fisheries and on watercourses in the area.

After submissions were made, the FAC and appellants raised issues relating to the issue of forest cover in the area and the scale and percentage of forestry with particular reference to the data stated in the Inspector's Certification; the issue of the site notice and access to the site; the issue of hydrological connections from the site and to Lough Allen; why no referrals were deemed necessary to the county council and fisheries agencies, the position in relation to watercourses on the site and the recent landslide in the area. The question of whether hedgerows were indicated in the submitted documentation was correct was raised; planting in the location of hedgerows and the sensitivity of the area in relation to capacity for forestry were also raised. These issues were addressed by the DAFM to the satisfaction of the FAC.

In addressing the appeals, the FAC, in the first instance examined the procedures followed by the DAFM which concluded that EIA is not required in this case. Afforestation is a class of development to which the Annex II of the EU EIA Directive applies and where the proposed development is sub-threshold, a screening or a preliminary examination in respect of EIA is required. The decision under appeal relates to afforestation of 18.67 hectares, as part of a forestry operation which is significantly sub-threshold for mandatory assessment under Irish Regulations (S.I. 191 of 2017) which set a threshold requirement for such mandatory assessment at 50 hectares. In the assessment of the licence the DAFM carried out an assessment of the project under a range of criteria including cumulative effects, water, soils, species, ecology and visual impacts concluding EIA was not required.

In considering this conclusion the FAC noted that as a standalone project the project which is the subject of this appeal is significantly sub-threshold for mandatory assessment under Irish Regulations (S.I. 191 of 2017). It was, however, noted that appeal submissions refer to the level and scale of forestry in the townland of Fingreagh Upper and the general area citing that in the townland of Fingreagh Upper 60 of the 109 hectares are planted in forestry and the current project would increase this by an additional 18 hectares. Reference was also made to the Inspector's Certification to the level of existing forest cover stated in the Certification. In this regard the FAC in particular considered the section of the Inspector's Determination to determine EIA requirement and the responses in assessing cumulative effect and extent of project which are outlined in Q6 to Q9 inclusive. In response to Q6 the approximate percentage of forest cover at present in the applications townland is indicated as 21.69% and in Q8 the approximate percentage of forest cover at present within 5 kilometres is indicated as 23.67%. The current levels of forest cover were acknowledged by the DAFM to be in excess of the percentages stated in the certification at the oral hearing.

In relation to the assessment of potential cumulative effect the FAC also noted that the In Combination statement in section 1.1.5 outlines a large number of forestry projects described as being in the general vicinity of the project. There is nothing to indicate that there are applications directly related to the current proposed project in terms of an identifiable cumulative effect. However, based on the submissions made by the appellants in the grounds and as elaborated at the Oral Hearing; the responses made by the DAFM to the FAC and appellants at the Oral Hearing and the evidence of the existence of forest cover on aerial online imagery in the general vicinity of the proposed project it is evident to the FAC that the extent and scale of forestry is significantly higher than that presented in the assessment by the DAFM in determining cumulative effect and that this represents an error in the making of the decision. The FAC, therefore, has concluded that the Minister amend the record to quantify the accurate level of forest cover in the area and, having regard to this information should undertake 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.

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 or projects, having regard to the conservation objectives of that designated site.

In considering the appeal the FAC examined the AA screening undertaken by the DAFM. The FAC examined publicly available information from the Environmental Protection Agency (EPA) and NPWS and identified the same three sites as the DAFM within 15km from the proposal, Boleybrack Mountain SAC 002032; Cuilcagh - Anierin Uplands SAC and Lough Gill SAC 001976. The FAC is satisfied that there was no need to extend the radius in this case.

The boundary of Boleybrack Mountain SAC lies c.1.7km to the northeast at its closest point. While the SAC is not located in a different catchment it lies in an upstream direction and the marked watercourse to the west of the proposed planting rises outside of the SAC boundary according to data provided by the EPA and there is no evidence of a direct hydrological connection to the SAC. This SAC has been designated for the conservation of a number of terrestrial habitats. The boundary of Cuilcagh - Anierin Uplands SAC lies c.7.6km to the east and situated in a separate subcatchment to the proposal with no direct hydrological connection. The closest boundary of Lough Gill SAC is c.10.7km to the northwest and this SAC is situated in the Sligo Bay Catchment while the proposal is located in the Upper Shannon (25A) Catchment. The land on which the tree planting would occur is described as improved agricultural land on a mineral soil with grass, grass/rush vegetation type and a network of hedgerows.

The FAC considered the nature, scale and location of the proposal, the European sites identified and their conservation objectives and the reasons for screening out for Stage 2 Appropriate Assessment provided by DAFM. The DAFM considered each site in turn and provided the reasons for screening out all the sites for Appropriate Assessment. Details of other plans and projects were also examined by the DAFM concluding that the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions and the DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites.

The FAC is not satisfied that the DAFM made a serious or series of errors in their AA screening and concurs with the conclusions reached in relation to hydrological connectivity and an absence of a pathway of effects from the proposal to a European site.

In relation to general hydrological connections the site is adjoined by the Diffagher_010 River Waterbody to the west and for which the status is recorded as good and in terms of risk is indicated as not at risk for the period 2013-2018. It is noted that the watercourse in the vicinity of the site has a hydrological connection to Lough Allen. It was indicated in submissions that the risk of landslides similar to a recent event in the area presents a risk to the adjoining watercourse and waterbodies downstream. The DAFM responded to this issue at the oral hearing referring to the project site as relatively flat and that this reduces the likelihood of a landslide occurring on the project site. The FAC notes that the project area is mineral in nature and slope is predominantly flat to moderate (<15%) and does not have steep gradient. Operational and unplanted setbacks from watercourses are a requirement of the licence conditions as are a number of criteria outlined in the Forestry and Water Quality Guidelines. In addition,

the proposal would maintain existing hedgerows on site. The FAC is not satisfied based on the information available to it, that the project as proposed will impact on any Natura sites or receiving waters.

In relation to the issue of access to the site it is indicated by the appellants that the project site does not have direct access to the public road network. The documentation as submitted does not conclusively indicate direct access to a road but the boundary does adjoin or is contiguous to an existing public road in a number of places. It is noted that any decision to grant a licence does not in itself confer any recognition of the presence of such an access or a right to access a public road or the right to carry out the project in the absence of a legally available right of access and that it is a matter for the applicant to secure this.

The grounds contend that the application did not comply with the requirements of the Forestry Regulations or the EU EIA Directive but no specific examples, other than in relation to the site notice, or evidence was provided. Regulation 5 of the Forestry Regulations 2017 (SI 191 of 2017) addresses the requirement of afforestation applications. Regulation 5(1) requires the submission of personal details of the applicant and no evidence has been provided to the FAC that the submitted information was lacking. Regulation 5(2) includes the mapping and other requirements of applications. The record provided to the FAC includes a number of maps that outline the boundary of the lands to be planted and show public roads in the area, hedgerows and an aquatic zone to the west. No evidence of wayleaves on the land was submitted and the FAC could not identify any on publicly available information. There are no recorded monuments on the lands while a townland boundary follows the watercourse to the west and a setback would be implemented. The application provides a written description of the proposal and the surrounding area. The FAC noted that the proposal is outside of any areas designated for conservation and has not been classified for visual amenity or considered to have a low capacity to accommodate forestry in the County Development Plan. The FAC also queried the setback from the dwelling to the west of the proposal. The DAFM submitted that a 60 metre unplanted setback would be required from the dwelling and that the conditions require the planting of broadleaf trees next to this setback. The FAC also noted that mature trees form part of the immediate landscape and considered the forest design to be acceptable in this regard. Documentation was submitted as part of the licence application indicating a copy of the public notice and a photograph of the notice. Its location was identified on the Biomap submitted. It is however noted that appellants have questioned the location of the notice and whether it was located on the project lands. The FAC is not in a position to validate the location of the site notice but there is also no actual evidence presented to conclude whether the notice was on the project lands or not other than the photograph and map submitted by the Applicant. The FAC is not satisfied that an error was made in the making of the decision in regards to the acceptance of application information.

In relation to the issue of biodiversity it is noted that the proposed development provides for the planting of 2.8 hectares of broadleaves on an overall site of 18.67 hectares. The conditions of the licence also require the retention of existing hedgerows and broadleaves on the site and setbacks are proposed from hedgerows, watercourses and a dwelling. The appellants have questioned whether the bio map accurately reflects the current level of hedgerows on the site and the DAFM indicated based on the documentation and a field inspection that the bio map largely reflects the current level of hedgerows on the site. Based on a review of the documentation and examination of aerial imagery and the requirement as set out in the conditions and Forestry Guidelines in relation to good silvicultural and environmental practice the FAC is satisfied that a diverse species mix will be planted and the existing hedgerows will be retained. However, the FAC noted that adherence to the Environmental Requirements for Afforestation (DAFM, 2016) has not been explicitly included in the conditions and that the lack of clarity on this issue represents an error.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that a significant error was made in making the decision regarding licence CN86088 and is setting aside and remitting the decision back to the Minister to accurately assess the level of forest cover relevant to the application and to undertake 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. In addition, should approval be granted it should include an additional condition to adhere with the Environmental Requirements for Afforestation (DAFM, 2016).

Yours sincerely,



Derek Daly On Behalf of the Forestry Appeals Committee

