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08th July 2021

Subject: Appeals FAC 397/2020, 423/2020, and 447-466/2020 regarding licence CN81048

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

Background and Hearing

Licence CN81048 for afforestation of 8.33 ha at Cragbrien (Gragbrien in the licence as issued) and Killerk West, Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 1st July 2020. An oral hearing of appeals FAC 397/2020, 423/2020, and 447-466/2020, of which all parties were notified, was held by a division of the FAC on 24th May 2021.

In attendance:

FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.

Secretariat to the FAC: Ms. Marie Dobbyn, Ms Ruth Kinehan (Observer).

Appellants / Representatives: [REDACTED] (FAC 397/2020), [REDACTED] (FAC 447/2020), [REDACTED] (FAC 448/2020), [REDACTED] (FAC 449/2020), [REDACTED] (FAC 454/2020), [REDACTED] (FAC 461/2020) and [REDACTED] (FAC 462/2020), [REDACTED] (representing twenty appellants, FAC 447-466).

Applicant / Representative: Not in attendance.

DAFM Representatives: Mr. Kevin Keary and Ms. Mary Coogan.

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 Forestry Appeals Committee (FAC) has decided to set aside the decision of the Minister regarding licence CN81048.

Project Area Description

The licence decision pertains to afforestation of 8.33 ha at Cragbrien and Killerk West, Co. Clare. The Natura Impact Assessment (NIS) submitted by the applicant describes the proposed afforestation as, 'site consists of *a number of relatively small Wet grassland (GS4) and Improved agricultural grassland (GA1) fields. A public road, which had a number of dwelling houses on it, formed the eastern boundary of the site. Mature Conifer plantation (WD4) formed the northern boundary of the site and Scrub (WS1) was recorded to the west of the site. A watercourse flowed through the northern half of the site and also formed part of the western boundary. The site has been grazed by livestock in the recent past. Field boundaries consisted of Hedgerows (WL1), Treelines (WL2) and Stone walls (BL1). A small area of Scrub (WS1) was recorded within the west of the site. Soils across the site consist of poorly drained mineral gleys. The southern and western parts of the site contained Moderate slopes less than 15%, with undulating topography. The north of the site contained a hill with a Steep slope (>15%) adjacent to the watercourse. Existing field Drainage ditches (FW4) were recorded along the roadside boundary and along field divisions. The watercourse which flows through the site had a high flow and mainly consisted of riffle and pool habitat containing cobble and boulders. This watercourse was between 1.0-2.0m wide, categorised as Eroding/upland rivers (FW1) and flowed in a northerly direction, providing connectivity to the River Clareen. The area immediately surrounding the site consists of relatively small fields enclosed by Hedgerows (WL1) and Treelines (WL2).*'

Appeals

There are twenty-two appeals (FAC 397/2020, 423/2020, and 447-466/2020) against the decision to grant a licence in this case. These appeals submitted grounds including those summarised below.

- Grounds of appeal FAC 397/2020 include: Submission that the published details of the application / decision are incorrect and that the Townland 'Gragbrien' does not exist.
- Grounds of appeal FAC 423/2020 include: Submission that the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive.
- Grounds of appeal FAC 447/2020 include: Submission that there was a failure by DAFM to adequately carry out environmental and silvicultural assessments as required by EU and National Legislation, Regulations and procedures, such that the licence concerned cannot be held to have been validly granted, and sets out related elaborations, reference is made to the nature and location of the site, the Natura Impact Assessment, impact on a stream, Appropriate Assessment considerations, Site slope, and adequacy of application content such as the Bio Map, concerns

regarding darkness and blocking of sunlight, submits a destruction of beautiful country and aspect in view, Submits that loss of line of sight to neighbours will lead to feeling of isolation and loss of community, and reference to relative location of walking and cycle route.

- Grounds of appeal FAC 448/2020 - grounds are similar to FAC 447/2020.
- Grounds of appeal FAC 449/2020 include: Submission that there was a failure by DAFM to adequately carry out environmental and silvicultural assessments as required by EU and National Legislation, Regulations and procedures, such that the licence concerned cannot be held to have been validly granted, and sets out related elaborations, reference is made in the grounds to the nature and location of the site, the Natura Impact Assessment, impact on a stream, Appropriate Assessment considerations, Site slope, and adequacy of application content such as the Bio Map, submission that the soil type is unsuitable for forestry and that topography of the site will cause *a threat of soil erosion and negative effect on water quality*.
- Grounds of appeal FAC 450/2020 include: Submission that there was a failure by DAFM to adequately carry out environmental and silvicultural assessments as required by EU and National Legislation, Regulations and procedures, such that the licence concerned cannot be held to have been validly granted, and sets out related elaborations, reference is made in the grounds to the nature and location of the site, the Natura Impact Assessment, impact on a stream, Appropriate Assessment considerations, Site slope, and adequacy of application content such as the Bio Map.
- Grounds of appeal FAC 451/2020 - grounds are similar to FAC 450/2020.
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- Grounds of appeal FAC 461/2020 grounds include: Submission that there was a failure by DAFM to adequately carry out environmental and silvicultural assessments as required by EU and National Legislation, Regulations and procedures, such that the licence concerned cannot be held to have been validly granted, and sets out related elaborations, reference is made in the grounds to the nature and location of the site, the Natura Impact Assessment, impact on a stream, Appropriate Assessment considerations, Site slope, and adequacy of application content such as the Bio Map, submission that land (folio CE4677F) is a recent purchase and that appellant was unaware of proposals included in CN81048 until 'recently', submission that the road to Plots 3 and 4 is the appellant's property in this case, that it is in poor condition and that use of this for forest team access was not anticipated, submission that this road is the access to appellant's house and that heavy traffic will have a detrimental effect on it, submission that the quality of the road is not compatible with use by additional business traffic and that proposed use will make it a danger for appellants family, submission that the junction with the main road is too narrow for

proposed use, submission that the topography makes it unsafe, submission of concerns regarding effect on a stream that runs along the boundary of the appellants property, drains to the Shannon Estuary and provides drinking water for appellants livestock, submission of concerns regarding devaluation of property and impact on views, submission regarding safety and possibility of forest fires, submission regarding potential effect on wildlife, submission regarding potential effect on mental health, and submission that the appellant had offered the applicant a viable alternative for Plots 3 and 4 through lease / purchase.

- Grounds of appeal FAC 462/2020 - grounds are similar to FAC 461/2020.
- Grounds of appeal FAC 463/2020 - grounds are similar to FAC 450/2020.
- Grounds of appeal FAC 464/2020 - grounds are similar to FAC 450/2020.
- Grounds of appeal FAC 465/2020 include: Submission that there was a failure by DAFM to adequately carry out environmental and silvicultural assessments as required by EU and National Legislation, Regulations and procedures, such that the licence concerned cannot be held to have been validly granted, and sets out related elaborations, reference is made in the grounds to the nature and location of the site, the Natura Impact Assessment, impact on a stream, Appropriate Assessment considerations, Site slope, and adequacy of application content such as the Bio Map.
- Grounds of appeal FAC 466/2020 - grounds are similar to FAC 465/2020.

Statement to the FAC from DAFM and the Oral Hearing

In the statements provided to the FAC, the DAFM submitted that the decision was issued in accordance with procedures SI 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures as listed in the statement have been adhered to in making a decision on the application. The statement gave details of the site inspections, that some changes were required to the aquatic buffer zone and fencing proposal, that some dwelling setbacks were inadequate, and referenced a submission made on the application. There was a separate statement provided for each appeal.

At the Oral Hearing the DAFM Representatives provided an overview of the relevant dates regarding the processing of the application and that the application had not been referred to any of the referral bodies in this case. It was further confirmed that the project was field assessed which included walking the site, that there were some problems with the original design submitted for the project, that DAFM noted the concerns of the appellant in the case of FAC 447/2020, and that these were taken into account. The DAFM representative set out that he came up with a suggestion regarding setbacks and that this was taken on board by the applicant. It was also stated that the application was referred to the DAFM ecologist, that an NIS was received by the DAFM, and that mitigations were derived as per the Appropriate Assessment Determination (AAD) made for the project. It was also asserted that the suggestion of the appellant in the case of FAC 447/2020 was implemented. In response to a question from the FAC the DAFM representative confirmed that he had a brief look at the additional materials as submitted from the appellants in the recent days before the hearing. It was noted at this point that neither the applicant or the applicant's representative were in attendance. The appellant in the case of FAC 447/2020 asserted that about 60%

of the first submission he made / the recommendations by him (and as referred to by the DAFM representative) had been taken on board in the revisions to the proposal. The appellant in the case of FAC 397/2020 sought the permission of the Chair to read a statement from appellant FAC 423/2020 and this was done. He also contextualised his ground of appeal and made reference to what he considered as legal obligations of the Forestry Service (DAFM) in assessing the application.

An appellant representative (representing 20 appellants FAC 447- 466/2020) addressed the hearing and indicated that he intended to cover four main areas on behalf of the appellants, these were, (1) The Natura Impact Assessment (NIS), Appropriate Assessment and related matters, (2) Lack of appropriate or adequate access to the site, (3) Hydrology matters and (4) Compliance with procedures, the Bio map and conditions attached to the licence. He contextualised his intended presentation and proceeded to make reference to the Appropriate Assessment Screening document as set out in the Inspectors Certification report. He asserted that Natura Site 3 (Knockanira House SAC 002318) as referenced in same should not have been screened out on the basis that it lies within the 2.5km foraging distance of the bats concerned. He also referenced the screening conclusion reached for site 9 (Poulnagordon Cave (Quin) SAC 000064) and disagreed with same. He raised an entry at page 5 of the Appropriate Assessment Determination report wherein it sets out mitigations to be attached to any licence issued and asserts that these mitigations have not been attached to the licence issued by DAFM (and now under appeal). In relation to site access, he asserted that same is inadequate for the purpose proposed and arising from activities necessary to the afforestation proposed.

In relation to water quality the appellants' representative invited a person in attendance as his support (referred to hereafter on occasion as the contributor) to address the FAC. This contributor made reference to some of the pressures that forestry can cause and that he believed that this was relevant in this case. In response to queries from the FAC in this connection the contributor acknowledged that forestry had not been recognised as a pressure in the area in which this proposal is located and also indicated that he was not aware what the basis is for the risk that arises in neighbouring areas where forestry is recognised as a pressure. He referenced the proximity of the site to three public water supplies, referenced the waterbody's most recent WFD assignment as moderate and asserted that this (waterbody) will be affected as there is a fast-flowing stream through the site. In response to queries from the FAC in relation to the public water supply sources the contributor acknowledged that the direction of flow of surface water from the proposal area in this case was in a south east direction while pointing out that he considered that notwithstanding direction of surface water flow that groundwater can be affected. In closing on this the appellants' representative drew attention to the steepness of the site as described in the application documents. In relation to Bio maps and conditions the appellants' representative asserted that there was confusion as to what the proposal is and what in fact has been approved. He referenced that the NIS described the proposal as being for 'Broadleaf' and that the Bio Maps available on file were not in accordance with that and cited that the approved species map as attached to the licence included for other than broadleaf. There was further presentation by the appellants' representative as to the apparent absence in the licence of mitigations and conditions set out in the NIS and AAD. The appellant in the case of FAC 397/2020 made reference to (DAFM) Forest Service circular (No 5 of 2017) which he asserted sets out that all townlands must be listed in an application and must be spelled correctly. He also emphasised

a reference in the NIS to an area of 9.68ha – which he pointed out was more than what was in the application licence which is the subject of the hearing.

In response to queries from the FAC regarding the spelling used for the townland, in which part of the site is located, the DAFM representative confirmed that this arose due to an error in the DAFM iforis system and that he had brought it to the attention of DAFM. In response to further query, he advised that the quality of the original Biomap was very poor and that the steepness / topography of the site was considered as part of the assessment of the application in this case. In relation to the adequacy of the access he asserted that he felt same was sufficient for the application being considered and that he would have raised same if he felt it wasn't sufficient. There was an emphasis placed at this point by the appellants' representative on the adequacy of the access to the site from the West.

In the event quite a lot of information / documents were provided to the FAC in the days leading up to the hearing (including from the DAFM and on behalf of the majority of the appellants) and while all parties in attendance at the oral hearing had access to these documents at the time of the hearing, the FAC, in the interest of fair procedures, arranged for the circulation of all these (later received materials) to all parties to the appeals (including the applicant) and an opportunity was afforded for the submission of observations on these. This opportunity was taken up by some parties and the FAC having considered the matter further concluded that the content of those observations in this case did not require further circulation.

Considerations by the FAC

The FAC in the first instance considered the contentions in the grounds of appeal in relation to Appropriate Assessment and related matters. In this case the FAC finds that the DAFM carried out an Appropriate Assessment Screening (AAS) which is set out in the Inspectors Certification report. It describes the site as comprising 8.33 hectares and having a soil type underlying the project area which is predominantly podzolic in nature. It describes the slope as predominantly flat to moderate, that the project area is crossed by / adjoins an aquatic zone(s) and that the vegetation type(s) within the project area comprises grass rush. It also sets out that the screening process did not identify any Project area overlaps with European sites and identified eleven sites (Ballyallia Lake SAC 000014, Ballyallia Lough SPA 004041, Knockanira House SAC 002318, Lough Gash Turlough SAC 000051, Lower River Shannon SAC 002165, Newhall and Edenvale Complex SAC002091, Old Domestic Building (Keevagh) SAC002010, Pouladatig Cave SAC 000037, Poulmagordon Cave (Quin) SAC 000064, River Shannon and River Fergus Estuaries SPA 004077, and Toonagh Estate SAC 002247) within 15 km of the project. All sites appear to be screened out in the AAS referenced above. (The FAC notes that the SOF references that three sites were screened in as follows, Lower River Shannon SAC 002165, Knockanira House SAC 002318 and River Shannon and River Fergus Estuaries SPA 004077 and these will be referenced later in this letter). The FAC also finds that a Natura Impact Assessment (NIS) dated 18th April 2020 has been submitted by / on behalf of the applicant. It gives details of the authors, sets out a screening for the same eleven sites as in the DAFM screening, screens in three sites (Lower River Shannon SAC 002165, Knockanira House SAC 002318 and River

Shannon and River Fergus Estuaries SPA 004077), considers potential impacts and mitigations and sets out at section 4 the mitigations proposed for the three screened in sites. There is also an Appropriate Assessment Determination / report on file as completed by DAFM and dated 25th June 2020. It examines the same eleven European sites as the DAFM AAS and the applicant's NIS, screens in the same three European sites as the NIS and sets out specific mitigation to be attached as conditions to the licence (if issued). In this case the FAC finds that there is confusion as to what the makeup of the proposal being assessed is. The Bio maps and original application materials make reference to a GPC3 mixture which contains a substantial portion of Sitka spruce, the approved species map and the species approved listed in the operational proposal details, both attached to the licence issued, are also for a GPC3 mixture with a substantial element of Sitka spruce while the NIS assesses the proposal as being for an entire broadleaf proposal. The FAC considered the implications of the application being assessed using an incorrect spelling of the townland in which part of the proposal is situated and concluded that this was likely to have impaired the accuracy / robustness of results that may have been based on spatial analysis / searches (including those informing the in-combination effect of the proposal) in a circumstance where the spelling of the townland in which part of the site is located was incorrect. The FAC also finds that the mitigations as set out in the DAFM AAD have not been included in the licence. Based on the information available to it, the grounds of appeal, submissions made at the oral hearing and all observations made, the FAC concluded that the errors made by the DAFM in the processing of the application as it related to these grounds of appeal were serious errors.

The FAC considered the grounds of appeal relating to 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 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. The proposal as described is for the afforestation of 8.33ha. The proposal is considerably sub-threshold for the mandatory submission of an EIA report. The FAC found that the DAFM desk and field 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. Regarding contentions raised with regard to the environment, the FAC reviewed the grounds submitted by all parties to the appeal. The FAC considered in particular the implications of the application being assessed using an incorrect spelling of the townland in which part of the proposal is situated, the potential that arose as a consequence, and the impact in particular that this would have on the quality of public consultation and on the accuracy / robustness of results that may have been based on spatial analysis / searches (including those informing the cumulative effect of the proposal) in a circumstance where the spelling of the townland in which part of the site is located was incorrect. The FAC also considered that there was confusion as to what the makeup of the project that was being screened is (ie a GPC3 planting mixture or a planting comprising broadleaf only). Based on the information available to it, the grounds of appeal, submissions made at the oral hearing and all observations made, the FAC concluded that the

errors made by the DAFM in the processing of the application as it related to the grounds of appeal relating to EIA were serious errors.

In relation to the grounds raised regarding access, the FAC considered the grounds submitted, and the elaborations made at oral hearing, and the assertions made by the DAFM representative. The FAC considered that where third party interests arise in the context of ownership, rights of way or intensification of use with regard to access, that issues regarding these are a matter for the owner(s) of the said access and those who have rights of use of it. The FAC is therefore not satisfied that a serious or significant error or a series of errors occurred in the DAFM's consideration of the grounds of appeal relating to access. The FAC considered the contention in the grounds of appeal that the published details of the application / decision are incorrect and that the Townland 'Gragbrien' does not exist. In this context the FAC finds that the location of the project area in this case is described in the vast majority of the documents accompanying and supporting the application (including the NIS and public notice) as being at Gragbrien / Killerk West whereas the location should be Cragbrien / Killerk West. Similarly the FAC finds that the documents on file which record the processing of the application by the DAFM, such as the Appropriate Assessment Determination and licence / approval letter also describe the project as being at Gragbrien / Killerk West whereas the location should be Cragbrien / Killerk West. In this context the FAC considered the implications of the application being assessed using an incorrect spelling of the townland in which part of the proposal is situated and concluded that this was likely to have impaired the accuracy / robustness of any results that may have been based on spatial analysis / searches in a circumstance where the spelling of the townland in which part of the site is located was incorrect. The FAC therefore concluded that a series of errors occurred in the processing of the application by the DAFM as it relates to this ground of appeal.


The FAC considered the grounds in the appeals related to water quality. The afforestation proposed in this application is at Cragbrien and Killerk West, Co. Clare. The project area is in the sub-basin of the CLAREEN (FERGUS)_010 and the waterbody has a moderate status assigned to it in the 2013-18 WFD assessment period. The application documents and the processing by the DAFM confirm the existence of an aquatic zone within the site. Mapping available from public sources such as the EPA confirms this. Forestry is not recorded as a pressure on this waterbody. The FAC considered the specific submission made to it on behalf of the appellants, which it felt focused more on general matters to do with water quality rather than on matters that were specific to this site. For instance, the issue of the pressure caused by forestry on water quality was raised but the FAC finds that forestry is not listed as a pressure at this location and further finds the ground waterbody at this location to be Lissycasey which has a good status for the 2013-18 period. However, a number of errors were identified including that the mitigations set out in the AAD were not included in the licence and these included conditions relating to the protection of water quality. The FAC concluded that these errors were significant and that the DAFM erred in its processing of the application as it relates to this ground of appeal.

The FAC considered the grounds of appeal generally regarding the impact of the development regarding darkness and blocking of sunlight, the submission that the proposal will cause of a destruction of beautiful country and aspect in view, submissions of a loss of line of sight to neighbours, the feeling of isolation and

loss of community that this will cause and a reference to the relative location of a walking and cycle route. The DAFM representative asserted that the setbacks imposed on / included in the proposal together with the requirement to plant broadleaf species in certain places addressed these matters. The FAC noted that there was some confusion as to the precise makeup of the planting to occur in this case and as alluded to earlier in this letter. While the FAC understands the assertions made by the DAFM representative in relation to these grounds, it finds that the lack of clarity in relation to the mixture of species to be planted represents a serious error in the processing of the application and as it relates to these grounds of appeal.

In considering the appeals in this case the FAC had regard to the record of the decision and the submitted grounds of appeal, and all submissions received including at the oral hearing. The FAC concluded that there were significant and serious errors made in the making of the decision to grant the licence, as detailed above, and in these circumstances has decided to set aside the decision of the Minister to grant the licence in the case of CN81048.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

