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08th July 2021

Subject: Appeal FAC 555/2020 regarding licence CN86388

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 CN86388 for afforestation of 5.3ha at Carnaun, Co. Clare was approved by the Department of Agriculture, Food and the Marine (DAFM) on 21st July 2020. An oral hearing of appeal FAC 555/2020, of which all parties were notified, was held by a division of the FAC on 31st May 2021.

In attendance:

FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.
Secretary to the FAC:	Mr. Michael Ryan, Ms Ruth Kinehan (Observer).
Appellant/Applicant:	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 and remit the decision regarding licence CN86388.

The licence decision in this case pertains to the afforestation of 5.3 ha at Carnaun, Co. Clare. The land is described in the Appropriate Assessment screening form as having a soil type which is podzolic in nature, the slope is described as being predominantly flat to moderate (0-15%), the project area is said to be crossed by / adjoins an aquatic zone and the vegetation on the site is described as grass rush. The project is located in the AILLE (CLARE)_020 sub basin and the waterbody AILLE (CLARE)_020 has a poor status assigned to it for the 2013 -2018 assessment period. The proposed species are Sitka spruce (85%) and

Broadleaf (15%). The project was referred to Clare Co. Council who made a response on 16th June 2020 dealing mainly with water quality matters, set out that *'forestry was proposed in this general area in 2012 and 2014 where concern was identified about afforesting land with peat soil'*, and stated that the plots proposed are all primarily on peat, and that drainage systems in place on the sites are potential conduits for sediment and nutrients to access the Aille River. The Council submission recommended that a drainage survey should be undertaken while including some more standard suggestions regarding the protection of water quality. There was one submission made by a member of the public on 11th June 2020.

DAFM Statement to the FAC

The DAFM in a statement to the FAC confirmed that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures that follow in the statement have been adhered to in making a decision on the application. The statement also set out that the site was desk audited initially, that it was deemed that an inspection was required due to the proximity of some of the plots to a public road, which is heavily used by tourists during the summer months and that it appeared from the aerial photography and local knowledge, that some of the areas proposed did not meet the requirements of GPC3 as proposed by virtue of the vegetation present. The statement set out that, during the inspection, the plots were walked and a determination was made regarding the suitability for planting using the Forest Service protocols relating to vegetation indicators, that the plots were also checked in relation to the presence of drains and their condition and that following the exclusion of some of the proposed areas due to inadequate fertility and visual impact, it was deemed that the only plot with a significant waterway was plot 4 which has an aquatic zone along its western boundary which is separated from the proposed planting by a farm track. It states that this flows into the Aille River which in turn flows into the North Atlantic Ocean at a point where there is no Natura 2000 site. It states that the Aille River enters the Ocean at a point which is 1522m South East from the Black Head-Poulsallagh Complex SAC through open water and 846m North from the Cliffs of Moher SPA whose Qualifying Interests (Bird Species) do not forage inland far enough to be affected by the proposal.

Appropriate Assessment Screening

A screening for Appropriate Assessment was undertaken by DAFM as set out in the Inspectors Certification report to be found on file. The screening process identified seven Natura 2000 sites (Ballyteigh (Clare) SAC 000994, Black Head Poulsallagh Complex SAC 000020, Cliffs of Moher SPA 004005, East Burren Complex SAC 001926, Inagh River Estuary SAC 000036, Inisheer Island SAC 001275, and Moneen Mountain SAC 000054) within 15 km of the proposal and did not identify any overlap of the project with any Natura 2000 site. All seven sites were screened out for Appropriate Assessment and reasons for the screening conclusions reached are recorded in the screening report. The approval of the licence issued on 21st July 2020 and included a condition excluding plots 5, 6 and 7.

The Appeal

There is one appeal against the decision to issue the licence (FAC 555/2020). The grounds of appeal include a submission asking on what authority has the FS and the FAC overruled the Judgement of Finlay J, it contends that by requesting further information from the Forest Service, the FSC has actually upheld the appeal, contends that the FSC must make up its mind as to whether (sic) is deciding an appeal or a review, contends that incomplete (sic) decisions should be returned to the FS, attaches a submission document from the NPWS and states that some of it has been superseded by decisions of the CJEU, contends that if the Department is not in a position to make specific comments on a particular referral at the time no inference should be drawn that the Department is satisfied or otherwise with the proposed activity, asks for no reliance to be put on the fact that the NPWS did not make an individual objection, submits that this decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive or the basic guidelines of the NPWS, submits that detailed legal submissions have been made to similar appeals in the past it appears that there is a problem in understanding the legal requirements them, asserts that the test for Appropriate Assessment Screening in Irish and EU law is: it is, merely necessary to determine that there may be such an effect. Rather than to state that it will not have a significant effect. Submits that If the development which is within 15km of a Natura 2000 site it has been screened in, and the appeal also cites / quotes some case law including, Case C-323/17, and Case C-254/19.

The Oral Hearing

At the oral hearing the DAFM representatives updated the FAC regarding the relevant dates in relation to the processing of the application, the approach taken to assessing the proposal including an account of the site inspection, and a rationale for the exclusion of a number of plots from the project. The DAFM representative indicated that in considering the proposal that he established that it was only plot 4 (the northern plot) that had a hydrological connection to the waterbody. In response to questions from the FAC in relation to specific responses recorded on the 'Assessment to Determine EIA Requirement' the DAFM representative asserted that the answer to question 10 regarding the extent of forest cover should have been a Yes instead of the N/A as recorded, that the answer to question 17 regarding whether the proposal and conditions attached to the licenced are sufficient to prevent potential impact to aquatic zones and their 'Q' value should have been a Yes instead of the No as recorded, that the answer to questions 24, 25 and 26 regarding Landscape should have been a No instead of the N/A as recorded, that the answer to question 27 should have been a Yes instead of the N/A as recorded, that the answer to question 28 regarding Landscape should have been a Yes instead of the N/A as recorded, that the answer to question 34 should have been a No instead of the N/A as recorded, and that the answer to question 40 should have been a Yes instead of the N/A as recorded. The DAFM representative, in response to queries from the FAC, provided clarifications with regard to engagement with the applicant in relation to considerations around the exclusion of the plots from the approval, the ocean views referenced as a consideration in this regard, and the approach taken in assessing the potential impacts of the proposal in the context that the existing pressures at this location are from agriculture.

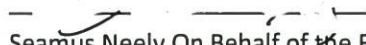
Consideration by the FAC

The FAC, in the first instance, considered the contentions in the grounds of appeal regarding Appropriate Assessment and related matters. The grounds of appeal do not make reference to any specific Natura 2000 site, specific pathways or specific effects of concern. In this case the FAC finds that the DAFM undertook a screening for Appropriate Assessment which identified seven Natura 2000 sites (Ballyteigh (Clare) SAC 000994, Black Head Poulsallagh Complex SAC 000020, Cliffs of Moher SPA 004005, East Burren Complex SAC 001926, Inagh River Estuary SAC 000036, Inisheer Island SAC 001275, and Moneen Mountain SAC 000054) within 15 km of the proposal. All seven sites were examined with their qualifying interests / special conservation interests listed and each of the seven sites were screened out for the purposes of Appropriate Assessment. The FAC finds that the reasons for the screening conclusions reached in respect of each site are provided in the screening documentation on file and that the DAFM also recorded other plans and projects that were considered in combination with the proposal. The FAC examined publicly available information from the NPWS and EPA and identified the same seven Natura 2000 sites. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The FAC considered that the procedures adopted by the DAFM in their assessment are considered to be 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 the grounds of appeal relating to Appropriate Assessment in this case and concurs with the conclusions reached.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds of appeal, the EU EIA Directive sets out in Annex II 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. In this case the FAC finds (having regard to the record on file and the responses provided to it at the oral hearing) that incorrect answers were recorded for questions 10, 17, 24, 25, 26, 27, 28, 31, and 40 on the file record for the 'Assessment to Determine EIA Requirement'. These incorrect answers in the screening record on file at the time of oral hearing, which were relied upon to determine the need for an EIA, is considered by the FAC to be an error in this case. While the correct answers to these questions may have been known to the author of the screening report at the time of the decision, the error is regarded as significant. While noting the submissions made by DAFM at the Oral Hearing, the FAC concluded that a new assessment to determine whether an EIA is required should be undertaken regarding this proposal.

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that an error or series of errors was made in making the decision and is setting aside and remitting the decision regarding licence CN86388 back to the Minister to carry out 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,


Seamus Neely On Behalf of the Forestry Appeals Committee

