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18 June 2021

Subject: Appeal FAC 752/2020 regarding licence CN86372

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 14A (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 CN86372 for afforestation of 10.18ha, in Dromtrasna (Collins), Co Limerick was approved by the Department of Agriculture, Food and the Marine (DAFM) on 2 September 2020.

Hearing

An oral hearing of appeal FAC 752/2020 of which all parties were notified, was held by a division of the FAC on 15 June 2021.

In attendance

FAC Members:	Des Johnson (Chairperson), Donal Maguire, Luke Sweetman and Dan Molloy
Secretary to the FAC:	Michael Ryan
Appellants:	[REDACTED]
Applicant:	[REDACTED]
DAFM Representatives:	Mary Coogan and Michael O'Brien

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to grant this licence (Reference CN 86372).

The proposal is for the afforestation of a stated area of 11.18ha and 660m of fencing at Dromtrasna (Collins), Co, Limerick. There are eight plots in total. Plots 1, 2 and 5 are to be planted with 85% Sitka spruce and 15% Broadleaves. Plots 3, 4 and 7 are Biodiversity plots. Plot 8 (0.06ha) is to be planted

with Oak, Hazel and other Broadleaves. Mounding is proposed and pit and slit planting. No fertilisers are proposed, and no drainage is required. Herbicide control is proposed for years 1 and 3. Soils are stated to be mineral. The site is exposed and at an elevation of 150 – 170m with a northerly aspect. Access is available.

The DAFM referred the application to Limerick County Council and the National Parks and Wildlife Service (NPWS). There is no response from the County Council recorded. The NPWS state that the site is upstream of the Lower River Shannon SAC. Appropriate Assessment screening should ensure that the proposed works would not have a significant negative impact on the water quality of the SAC. Aquatic buffers, silt traps etc. should be considered. All hedgerows should be retained for nesting birds. An Appendix of 'General Points' is attached.

The Inspector's certification states that the application was both desk and field assessed. The site is not prone to flooding. It is free from shell marl and highly calcareous soils. The site is not acid sensitive, not sensitive to fisheries and not within a Freshwater Pearl Mussel 6km zone or within a Freshwater Pearl Mussel catchment. There are no archaeological sites or monuments. This is not a prime Scenic area as per the County Development Plan, and there are no high amenity landscape considerations. The site is not within an area of high nutrient sensitivity, not in a densely populated area, and not in an area commonly used for public recreation. Soils are predominantly podzols, the slope is predominantly flat to moderate and there is no aquatic zone within or adjoining the site. The certification screens out any requirement for Environmental Impact Assessment (EIA). In screening for Appropriate Assessment, Natura 2000 sites within a radius of 15km are examined. There are three such designated sites and all are screened out for the requirement for Stage 2 Appropriate Assessment. The Lower River Shannon is screened out for reason that the project lands are within a separate water body catchment with no hydrological connection, the Moanveanlagh Bog SAC for reason of the unsuitability of the project lands for use by any species listed as a qualifying interest, and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA for reason of the unsuitability of the project lands for use by any species listed as a qualifying interest of the designated site, and other factors such as the DAFM Bird Table. It is noted that the certification states that there is approximately 9.43% forest cover in the townland, and approximately 1.74% forest cover in the underlying waterbody. An In-combination report, dated 31.08.2020, lists non-forestry developments as 2 dwellings, and forestry related projects (since 2016) as afforestation (4), forest roads (1), and private felling (3). The project lands are in a rural landscape in the River Sub-Basin Allaghaun_040.

The DAFM requested further information dated 26.05.2020. This requests the removal of High Forest areas less than 0.1ha, as these are not eligible as Areas of Biodiversity Enhancement (ABEs) under the scheme.

The licence issued on 02.09.2020. It is subject to standard conditions plus additional conditions relating to the following:

- GPC 3 broadleaf component must consist of rows of Downy birch and Pedunculate oak planted along the edge of the plantation
- GPC 9 planting mixture must be pit planted and consist of Pedunculate oak (30%), Scot's pine (30%), Downy birch (15%), Rowan (15%), Holly (10%)
- Adhere to forest biodiversity and environmental guidelines

- Public road setback, Broadleaves 10m, Conifers (20m)
- All guidelines to apply.

There is a single appeal against the decision to grant the licence. In summary, the grounds contend that there is a breach of Article 2(1) and Article 4(3) of the EIA Directive. A number of criteria in Annex III do not form part of the EIA screening. The Determination in respect of EIA requirement is inadequately reasoned. There is no foundation for the conclusions reached. There is an error in law. No adequate EIA screening has been conducted. There is insufficient evidence of consideration of the potential impact on protected species and habitats. The application details are not complete and accurate. There is no evidence that property owners were directly consulted. ABEs selected do not provide the best opportunity for enhancing biodiversity. The Stage 1 Appropriate Assessment determination is not legally valid. There is hydrological connectivity to an SAC with aquatic interests. The Precautionary Principle should be applied. The Inspector's conclusion conflicts with the NPWS submission. There are insufficient details and clarity in the in-combination information submitted. The licence conditions do not provide for the strict protection of Annex IV species. The licence conditions do not provide for the strict protection of all species of wild birds.

The DAFM response, in summary, is that Annex III criteria, contained in the EIA Directive, are adequately considered. The characteristics, location and the type and characteristics of the potential impacts are considered. In-combination plans or projects were taken into consideration in the determination that EIA was not required. Reasons were given for this conclusion. The qualifying interests of Natura 2000 sites within a 15km radius were reviewed before the decision was taken to allow the proposed development to proceed.

An Oral Hearing was convened on 15 June 2020, and all parties were invited. The FAC sat remotely. The applicant, appellant and the DAFM all participated electronically. The DAFM detailed the procedures followed in the assessment of the application leading to the decision to grant the licence. The application was desk assessed and a field inspection was carried out. Referring to the screening for Appropriate Assessment carried out, the DAFM stated that the field inspection revealed that there are two watercourses on the site, both man-made, and both were dry. Both drain to the adjoining plantation but do not connect to any drainage system within this plantation. There are no EPA watercourses. The project lands were previously developed as a golf course when drains were put in place. The applicant stated that a watercourse on the site was diverted a long time ago and replaced by a drain. This is now heavily vegetated and only contains water following heavy rain. It drains to the adjoining forestry plantation. The DAFM stated that the licence granted does not require the removal of any of the plots shown in the application but does require some sections of proposed tree cover to be removed. The separation distance to the Lower River Shannon SAC is 2.5kms. The appellant stated that his participation at the Oral Hearing was without prejudice to his view that the FAC was not an independent and impartial body. The project lands are hydrologically connected to an SAC, less than 3km upstream. The Inspector's certification contains incorrect information. There is nothing in the application process that provides for the identification of Annex IV species, such as the Otter. Historically, this general area was used by nesting Curlew according to the Bird Atlas of Ireland. The Curlew Task Force had recommended that there should be no distinction made between current and historic nesting sites when assessing potential impacts, and that a buffer of at least 3kms should be applied. Land Direct indicates that there may be a Right of Way running across the site, but this was

not depicted on the Bio Map or established. Areas for Biodiversity Enhancement (ABEs) were chosen for convenience purposes and include setbacks and not because they were the best areas for biodiversity. The application should have been referred to an Ecologist to identify the best areas for ABEs. The Stage 1 Appropriate Assessment determination refers to the absence of a hydrological connection and states that the proposal is within a separate catchment to the Lower River Shannon SAC, but the project lands are within the same River Sub-Basin as this Natura 2000 site. The watercourse on the southern boundary continues to the edge of the adjoining forest and may join with an existing watercourse and then to the SAC. The applicant's representative stated that, in regard to public consultation, site notices had been erected and he was not aware of any submissions being made to the DAFM. There had been extensive consultations with the resident closest to Plot 7, who is supportive of the proposal. The Golf Course was closed around 2008-2010, when it was purchased by the applicant. In response to questions put by the FAC, the appellant stated that he accepted that setbacks were provided for housing, but that these were being provided as biodiversity areas, whereas the real reason for their provision was the protection of residential amenities. The applicant should have gone beyond the provision of a site notice and consulted directly with all relevant residents. The DAFM confirmed the reason for screening out Moanveanlagh Bog SAC stating that the qualifying interests were mainly bog and peat related, whereas the project lands had predominantly podzolic soils. The watercourses to both the north and south of the site were dry at the time of inspection. The inspection confirmed that neither watercourse connected to any drainage network in the adjoining forest. In respect of the Curlew, the DAFM had applied data provided by the NPWS in 2020. This data referred to both current and historic nesting sites and showed the nearest historic Curlew nesting site at 8.5kms with no current nest within 10kms, and a separation distance to the edge of the nearest Hen Harrier Red Zone at 4.5kms. The appellant stated that the NPWS submission clearly is of the view that there is hydrological connectivity to a Natura 2000 site. There was no absolute, conclusive basis for the DAFM conclusion in this regard. The applicant stated that there would be no impact on any watercourse, should the development go ahead.

Addressing the written grounds of appeal, the FAC considered, in the first instance, the procedure followed in respect of the provisions of the EIA Directive. The proposed initial afforestation with a change in land use is a class of development to which the EIA Directive and transposing Regulations apply. The proposal is for a stated site area of 11.18ha and is significantly sub-threshold for the purposes of mandatory EIA. However, there is a requirement to screen the proposal to determine if EIA is required. For this purpose, the Directive lists information to be provided by the applicant for the purposes of screening. This information relates to (1) characteristics of the proposed development, (2) the location and (3) the type and characteristics of potential impacts. The appellant contends that a number of criteria listed in the Directive do not form part of the EIA screening, but did not expand on this contention. The FAC examined the information contained in the pre application screening submitted and noted the level of information contained in the Inspector's certification, and concluded that there was adequate information before the DAFM on the characteristics of the proposal, the location and the type and characteristics of potential impacts to enable an objective screening for EIA to be carried out. Furthermore, based on the information before it, the FAC finds no reason to conclude that there was any significant or serious error in the DAFM screening or that the conclusion reached that EIA is not required, is not soundly based and correct.

The appellant referred, in particular, to the basis on which potential impacts on the Curlew were addressed and stated that inadequate consideration may have been given to historic nesting sites. The DAFM stated that this was not correct and that the consideration given was based on 2020 data provided by the NPWS and related to both current and historic nesting sites. This information indicated that the nearest recorded nesting site for the Curlew was 8.5km from the project lands. Based on the information before it, the FAC is satisfied that proper consideration was given to the Curlew and sees no reason to conclude that the proposed development would be likely to have any significant impact on the species.

The appellant contends that there was inadequate consultation with homeowners. The applicant's representative stated that there was extensive consultation with the resident closest to Plot 7 and that a public notice was erected and did not attract submissions. Based on the information before it, the FAC finds no basis for this ground of appeal.

The issue of potential hydrological connectivity is raised. The appellant contends that the NPWS submission is clearly of the view that there is hydrological connectivity to a Natura 2000 site. The DAFM Inspector stated he field inspected the site, examining drains and watercourses, and established that there is no hydrological connection between the project lands and any Natura 2000 site. On this issue, the FAC concluded that there is no convincing evidence before it to indicate that there is a hydrological connection to a Natura 2000 site and that the strength of evidence lies with the DAFM conclusion, following a field inspection, that there is no such hydrological connectivity.

The FAC considered the procedure adopted by the DAFM in screening the proposed development for Appropriate Assessment. The FAC noted that sites within a radius of 15km of the project lands were assessed and, having regard to the nature and scale of the proposed development, found no reason why a wider radius should have been applied. The DAFM considered the qualifying interests for three identified designated sites and the potential for impacts arising from the proposed development. All sites were screened out and reasons given for the screening conclusion for each site. An in-combination report was considered in the making of the decision to grant the licence. Based on the information before it, the FAC is satisfied that the DAFM screening is consistent with the requirements of Article 6(3) of the Habitats Directive, and that the overall screening conclusion is sound.

The appellant contends that the licence conditions do not provide for the strict protection of Annex IV species or provide for the strict protection of all species of wild birds. No information is provided regarding the existence of Annex IV species or species of wild birds on the project lands, or reasons given as to why the proposed development would be likely to have an adverse impact on them. Based on the information before it, the FAC concludes that there is no reason to require additional conditions to be attached to the licence relating to the protection of Annex IV species or species of wild birds in their natural habitat. The appellant contends that the ABEs selected do not provide the best opportunity for enhancing biodiversity and appear to be chosen for reasons of the protection of the owners of residential properties. There is no information before the FAC to indicate that the ABEs are not suitable for the purposes of biodiversity.

At the Oral Hearing, the appellant stated that 'Land Direct' indicates that there may be a Right of Way running across the site, but this was not depicted or established. This issue was not raised in the

written grounds of appeal. Based on the information before it in relation to this issue, the FAC found no reason to conclude that the Minister had erred in the making of the decision to grant the licence. The FAC concluded that there was no significant or serious error or series of errors in the making of the decision to grant the licence and that the decision was made in accordance with fair procedures. In deciding to affirm the decision of the Minister to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry practice.

Yours sincerely

A large black rectangular redaction box covering the signature of Des Johnson.

Des Johnson, on behalf of the Forestry Appeals Committee