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28 September 2021

Subject: Appeal FAC 842/2020, FAC843/2020, FAC 844/2020 regarding licence CN85139

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 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 CN85139 for afforestation of 17.33 hectares in Gortinessy, Co. Donegal was approved by the Department of Agriculture, Food and the Marine (DAFM) on 22 October 2020.

Hearing

A non-oral hearing of appeals FAC 842/2020, 843/2020 and 844/2020 of which all parties were notified, was held by a division of the FAC on 5 July 2021.

In attendance

FAC Members: Des Johnson (Chairperson), Myles McDonagh and Derek Daly
Secretary to the FAC: Michael Ryan

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, and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference CN 85139).

The proposal is for afforestation on a stated site area of 17.34ha at Gortinessy, Pettigo, Co. Donegal. The proposed stock is 85% Sitka spruce and 15% Broadleaves. Soils are stated to be mineral, and the site exposed and with a southerly aspect.

The Inspector's certification states that the application was field and desk assessed. The project site is not prone to flooding and is free of shell marl or highly calcareous soils. The site is not designated as potentially acid sensitive, but the area is sensitive to fisheries. It is not within a Freshwater Pearl Mussel catchment and not in the catchment area of Local Authority designated water scheme, and

not within NHA, pNHA, SAC, SPA or National Park. There are no archaeological features or monuments on the lands. This is not within a Prime Scenic Area as per the County Development Plan and there are no high amenity considerations. Mounding is proposed with slit planting. No drainage is required. Manual herbicide control is proposed in year 1. Soils are stated to be predominantly podzols and the slope is predominantly flat to moderate. The project lands are crossed by/adjoin an aquatic zone. The approximate percentage forest cover in the townland is 16.78%, the approximate percentage forest cover within 5km is 17.11%, and the approximate percentage forest cover in the underlying waterbody is 2.16%. There are seven Natura 2000 sites within a 15km radius and all are screened out for Stage 2 Appropriate Assessment in the Inspector's Certification document.

The DAFM referred the application to Inland Fisheries Ireland (IFI). In response, the IFI recommended adherence to Environmental Requirements for Afforestation, plus

- Adhere to the requirements of Forestry and Water Quality Guidelines
- Planting method to be most suitable option to minimise ground disturbance and potential surface water impact
- Triple silt traps to be provided at strategic locations along surface water channels
- Existing ground vegetation and drains should remain untouched as far as practical, particularly in the buffer zone
- Fertiliser application to be kept to a minimum required and either manually or mechanically applied
- Machinery must not cross directly through any on-site watercourse
- Strict and full adherence to all relevant operational manuals required.

A Natura Impact Statement (NIS) was submitted, prepared by Saoirse O'Donoghue, Consultant Ecologist. This states that the site elevation is 90 -100m OD. It also states that Water Framework Directive quality data are 'unassigned' for the Termon River. An Appropriate Assessment screening is carried out and the following sites are screened out for Stage 2 Appropriate Assessment - River Finn SAC (5019m), Tamur Bog SAC (6243m), Dunragh Loughs/Pettigo Plateau SAC (8195m), Lough Golagh and Breesy SAC (13817m), Lough Derg (Donegal) SPA (5068m), and Pettigo Plateau Nature Reserve (8686m). Screened in for Stage 2 Appropriate Assessment is the Lough Nageage SAC. The qualifying interest (White-clawed Crayfish) and conservation objectives are listed and there is an examination of the potential for adverse effects. Mitigation measures are recommended.

A report entitled 'Appropriate Assessment Screening and Determination', prepared by a Senior Ecologist, Fehily Timoney & Co on behalf of the Minister for Agriculture, Food and the Marine is dated 05.10.2020. This records that the soils in the southern area is mostly cutover peats. The northern area is surface water gleys and groundwater gleys (deep poorly drained material). The slope in the southern area is flat and the northern area has steep slopes of 18% with an easterly aspect. Vegetation is mainly semi-improved grassland. Some hedgerows exist along some field edges and depositing lowland watercourse. The Termon River runs along the southern boundary. The majority of the site is within the Termon River (Pettigo) River Sub-Basin. The north-western area of the site lies within the Sessiaghkeelta_010 River Sub-Basin. The site is hydrologically connected to Nageague Bog SAC, but is downstream. The following sites are screened out for Stage 2 Appropriate Assessment with specific reasons given - Lough Negeage SAC, Dunragh Loughs/Pettigo Plateau SAC,

Lough Golagh and Breesy Hill SAC, Tamur Bog SAC, River Finn SAC, Lough Derg (Donegal) SPA, and Pettigo Plateau Nature Reserve SPA. Lough Negeage SAC is screened in for Stage 2 Appropriate Assessment for reason that there is direct hydrological connection via the Termon River and potential impacts on the qualifying interest – White-clawed Crayfish - that has been located in close proximity, immediately upstream and downstream. In-combination projects considered include non-forestry - dwellings, domestic extensions, and agricultural sheds/buildings, and forestry – afforestation (2), forest roads (3), private felling (1), Coillte felling (9). The River Sub-Basin Sessiaghkeelta_010 has c.30% forest cover and the River Sub-Basin Termon River (Pettigo) has c.11% forest cover.

An Appropriate Assessment Determination (AAD) was prepared by Fehily Timoney & Co, on behalf of the Minister for Agriculture, Food and the Marine, dated 06.10.2020. This confirms the Appropriate Assessment Screening conclusion. The AAD states that the NIS contains a fair and reasonable examination, evaluation and analysis of likely significant effects, and adequately identifies, describes and assesses these effects with the following specific exception:

- Proposed mitigation of 15m setback along the aquatic zone should be 20m, as the site is underlain by peat soils.

The AAD concludes that the proposed development individually, or in combination with other plans or projects will not adversely affect the integrity of any of the European sites, having regard to their conservation objectives, provided site-specific mitigation measures apply:

- 20m setback along aquatic zones
- 5 rows of pit-planted broadleaves adjacent to the setback. No planting to encroach into the 20m wide water setback
- Vary planting along the edge of the setback to avoid artificial lines
- Water setback to be widened at various points along its length to include adjoining wet hollows and other low-lying areas
- Minimum 5m setback along all relevant watercourses
- All hedgerows and treelines to be retained
- No modification of relevant watercourses and no direct discharge of site drainage to relevant watercourses
- Sediment traps to be located throughout the site
- All drainage channels to taper out before entering water setback
- No use of pesticides/herbicides within 20m of the aquatic zone or relevant watercourse. No siting of chemicals within 50m of an aquatic zone or relevant watercourse
- GRP to be used only as required and at greater than 20m from relevant watercourses.

The AAD concludes that, based on objective information, no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

Approval issued on 22.10.2020. It is subject to standard conditions with the following additional conditions:

- Plant as per revised species map dated 19.12.2020, and plant the narrow area in Plot 1 and west of the ESB line with Native Broadleaves
- Adhere strictly to Ecologist's AAD measures attached
- Adhere to forestry and water quality guidelines
- All guidelines to apply.

There are 3 appeals against the decision to grant the licence. The grounds of appeal are common to all and are summarised as follows:

- The appellant was not furnished with all of the relevant documentation requested, and which is necessary to assess if all of the appropriate procedures were carried out
- The Minister failed to comply with all relevant Forestry Regulations and Guideline Directives
- In the Appropriate Assessment screening the threat to the White Clawed Crayfish is recognised but ignored
- A Report is attached on 'Ecological Interest of Gortinessy Farm'. These lands are unimproved pastures and High Nature Value (HNV). The proposed development would be detrimental to the habitats and ecology of the farm in a time of Biodiversity crisis
- The subject lands straddle the River Termon which is the boundary between the Republic of Ireland and Northern Ireland. Were all relevant agencies contacted.

An enclosure to the grounds is a report titled 'Ecological Interest at Gortinessy Farm' by Patrick McGurn, B Agr(Hons), MSc, PhD. The report addresses the Location, Vegetation, the Termon River, White-Clawed Crayfish, Birdlife. The report concludes that a full ecological survey of the farm should be completed prior to any changes in management and the effects of management changes on the White-Clawed Crayfish identified.

In response, the DAFM state that the site was inspected and the proposal desk audited. All criteria were strictly adhered to and approval is in order.

A Hearing of the appeal was convened on 05.07.2021 and considered all of the documentation before it, including the written grounds of appeal and the DAFM response.

The appellants contend that there was a failure to comply with all relevant Forestry Regulations and Guideline Directives. There is no elaboration on this contention. The proposal for afforestation is on a stated site area of 17.34ha, and this is a class of development covered by the Environmental Impact Assessment (EIA) Directive and transposing Regulations. The proposal is significantly sub-threshold for mandatory EIA as per the transposing Regulations, but there is a requirement to screen the proposal to determine if EIA is required. The FAC noted that the DAFM had carried out an 'Assessment to Determine EIA Requirement', examining a broad range of information relating to project description, including existing land use, cumulative effects, water, soil, Freshwater Pearl Mussel, archaeology, landscape, designated habitats, social factors and trans-frontier. The FAC concluded that the DAFM had sufficient information before it in regard to the description of the proposal, the location, and the type and characteristics of potential impacts arising. Based on the information before it, the FAC found no reason to conclude that a significant or serious error occurred in the screening for EIA and that the conclusion that EIA is not required in this case to be

incorrect. In regard to the requirements of the Habitats Directive, the FAC noted that the applicant had submitted a NIS, and that consultancy reports addressing screening for Appropriate Assessment and AAD had been prepared for the DAFM prior to the making of its decision. The FAC noted that the AAD included an examination of the NIS and concluded that it contained a fair and reasonable examination, evaluation and analysis of likely significant effects, and adequately identifies, describes and assesses these effects with one specified exception. The FAC noted that the screening exercise in the NIS and also in the Appropriate Assessment Report and Determination prepared on behalf of the DAFM, and which were considered before the decision was made to grant the licence, considered Natura 2000 sites within a 15km radius in this jurisdiction. The FAC noted that there are designated sites within Northern Ireland – Pettigo Plateau, and Largalinn SAC – but these are at a significant separation and not hydrologically connected. Based on the information before it, the FAC found no reason to conclude that a serious or significant error had been made in the making of the decision in respect of this issue.

The FAC noted that part of the proposed site adjoins the Termon River (waterbody code UKGBNI1NW363604064) which forms the border along a section of its length in proximity to the project site. The Water Framework Directive (WFD) status of this river in EPA data sources in the Republic of Ireland is stated to be ‘unassigned’, whereas the Water Information Request Viewer of Northern Ireland Environment Agency lists the WFD status of this waterbody as ‘Moderate’ in 2015 and ‘Good’ in 2018. The FAC noted that the revised Bio Map shows a direct connection from the project lands to the Termon River. Having regard to the High Court (Hyland J.) judgment in *Sweetman v An Bord Pleanála* (2021) IEHC 16, delivered in January 2021, and to the fact that there is direct connectivity between the project lands and the Termon River waterbody, the FAC is not satisfied that, based on the information before it, it can be reasonably concluded that the proposed development would not have an impact on an ‘unassigned’ waterbody. The FAC considered this to be a significant error in the making of the decision to grant the licence.

The appellant contends that the Appropriate Assessment screening recognised the threat to the White-clawed Crayfish but ignored it. Having regard to the procedures followed by the DAFM in regard to the Stage 2 Appropriate Assessment carried out leading to the AAD, the FAC finds no reason to conclude that there was a significant or serious error in the making of the decision in respect of this issue.

The appellant submits a Report on the ‘Ecological Interest of Gortinessy Farm’ and contends that the proposed development would be detrimental to habitats and the ecology of the farm, but does not specify the habitats or ecology. The FAC concluded that the proposed development would give rise to change of land use and the replacement of existing habitats with new habitats. The FAC noted that it is Government policy to promote afforestation. Based on the information before it, the FAC found no reason to conclude that the DAFM made a significant or serious error in relation to this issue.

The FAC concluded that the Minister made significant errors in the making of the decision to grant the licence by not conclusively establishing that the proposed development would not have an impact on an unassigned WFD waterbody. In deciding to set aside and remit the decision, the FAC concluded that the Minister should reassess the potential for the proposed development to have an impact on the Termon River WFD waterbody, having regard to the ‘Hyland’ High Court judgment previously referred to, before making a new decision in respect of CN 85139.

Yours sincerely



Des Johnson on behalf of the Forestry Appeals Committee