



An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

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28th September 2021

Subject: Appeal FAC 047/2021 in relation to licence CN86739

Dear [REDACTED]

I refer to an appeal made to the Forestry Appeals Committee (FAC) in relation to this decision by the Minister for Agriculture, Food and the Marine (DAFM). 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 the parties to the appeal.

Background

Licence CN86739 for afforestation of 29 hectares(ha) at Greenhall, Knockmeale Co. Tipperary was granted by the DAFM on 2nd February 2021.

Hearing

A hearing of appeal FAC 047/2021 was held by a division of the FAC on 19th July 2021. In attendance: FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. Seamus Neely, Mr. Derek Daly & Mr. James Conway

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant this licence CN86739.

Additional Background

The licence pertains to afforestation of one block of enclosed land of 29ha, with species proposed as Sitka Spruce (85%) and Additional Broadleaves (15%). The proposal included the planting method to be angle notch. No fertiliser is proposed and herbicide control is proposed in years 0 & 1.

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The proposal area is within both the Kilmastulla_040 River Sub Basin and Newport (Tipperary)_030 River Sub Basin. The Kilmastulla_040 river waterbody has a moderate WFD status (2013-2018). The Newport (Tipperary)_030 river waterbody has a good WFD status (2013-2018). Both are in the Lower Shannon WFD Catchment (25D) while the Kilmastulla_040 is in the Shannon Lower_SC_080 and the Newport (Tipperary)_030 is in the Newport (Tipperary)_SC_010.

The DAFM referred the application externally to the Shannon Regional Fisheries Board, NPWS, and Tipperary County Council. A response was received from IFI and NPWS, with IFI stating they had no objection in principle to the application and provided recommendations, the NPWS provided an appendix with general observations and separately the following site specific recommendations;

- 1. The site is upstream of the Lower River Shannon Special Area of Conservation (SAC) (Site Code 002165) and therefore the Forest Service whilst carrying out Appropriate Assessment screening must ensure that the activity will not have a significant negative impact on the SAC downstream.*
- 2. All mitigation proposed for biodiversity is strictly adhered to.*

No response is on file from Tipperary County Council.

The DAFM's Inspector Certification document described the site details as this project comprises 29 hectares of afforestation, the predominant soil type underlining the project area is predominantly podzols in nature, the slope is predominantly steep (15% to 30%), the project area is crossed by / adjoins an aquatic zone(s) and the vegetation type(s) within the project area comprise pasture.

The DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found ten European sites (Bolingbrook Hill SAC 002124, Clare Glen SAC 000930, Glenstal Wood SAC 001432, Keeper Hill SAC 001197, Lough Derg (Shannon) SPA 004058, Lower River Shannon SAC 002165, Silvermine Mountains SAC 000939, Silvermines Mountains West SAC 002258, Slieve Bernagh Bog SAC 002312 and Slievefelim to Silvermines Mountains SPA 004165) within 15km of the proposal and that there was no reason to extend this radius in this case. The sites were considered with their qualifying interests and the reasons for the screening conclusions were provided. Two of the European sites proceeded to stage 2 Appropriate Assessment; Lower River Shannon SAC 002165 and Slievefelim to Silvermines Mountains SPA 004165. Mitigation measures were proposed for Lower River Shannon SAC (002165), while none were deemed to be required for Slievefelim to Silvermines Mountains SPA 004165. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The DAFM also considered the environmental effects of the proposal across a range of criteria and determined that the project was not required to undergo the EIA process. The licence issued on 2nd February 2021 subject to conditions, including the following additional conditions;

- Implement all the mitigation measures as outlined in the Appropriate Assessment Determination by Jean Hamilton senior ecologist dated 25/01/2020.,*
- Landscape areas adjacent to building/dwellings buffers with slow growing broad leaf species at wide spacing for a further 20m.,*
- Dwelling Houses/Buildings Setback 60m,*

- All guidelines to apply

Grounds of Appeal and Statements of Fact

The decision to grant the licence is subject to one appeal. The grounds of appeal outline that:

Firstly I received no communication about this licence. I have many genuine concerns. My family home is adjacent to this land. This is a huge forestry if goes ahead, the entire farm views from the back of my house will be destroyed, and sunlight/natural light will be gone. I live in rented accommodation and my intention is to return to my family home and renovate property. If this goes ahead I will be surrounded by trees and that will present a fire risk to my home. Also TV and Internet will be severely restricted. Also there are curlews and cuckoos which can be clearly heard at back of property and has been this way since my childhood. A nest of curlews recently stopped a recent afforestation from going ahead right across the road from my house (Bally....). Can you please seriously consider my appeal, as if this afforestation goes ahead it will severely impact my plans to return home.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with DAFM procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act. The statement also stated that:

The licence application CN86739 was field and desk inspected on 07/08/2020 and at least 1 other input by DI until approval was recommended 01/02/2021. The required referrals to NPWS etc and the screening-in of the application for stage 2 AA was based upon F.S. AA procedures and Guidance. An AA report, AA screening verification leading to an AA Determination were carried out outlining the mitigation measures required to protect the integrity of the relevant Natura 2000 sites by Jean Hamilton Senior Ecologist (Fehily Timoney) dated 25/01/2021 and mitigation and guidance measures included as condition of approval. An in-combination/cumulative analysis was also carried out as part of the exercise by the ecological unit and any effect on Natura sites ruled out. A condition of licence included a landscaping element emphasising the setback and planting of slow growing broadleaves thereafter. All DAFM procedures and standards were adhered to in making the decision to recommend approval.

Consideration by the FAC

In addressing the grounds of appeal, the FAC considered in the first instance, compliance with the EIA Directive. The EU 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. Neither afforestation nor deforestation (nor clear-felling) are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). 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 decision under appeal relates to afforestation of 29 hectares which is sub threshold for the mandatory submission of an EIA as set in Irish Regulations. The grounds of appeal do not outline any specific concerns regarding significant effects on the environment of the proposal. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. This involved a list of 40 questions and all questions were answered, however 8 of the answers (Q. 10, 11, 17, 18, 19, 20, 28 & 36) were recorded as S/A (self assessment). Therefore, it could be considered that there is insufficient determination with regard to cumulative effects, water, soils, protection of Freshwater Pearl Mussel (FPM), landscape and accidents. The FAC having considered all of the evidence before it, is satisfied that a serious or significant error or a series of errors was made by the DAFM in relation to their EIA consideration.

The FAC considered, 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 and projects, having regard to the conservation objectives of that designated site. The DAFM, in this case, undertook a Stage 1 screening, and found ten European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were Bolingbrook Hill SAC 002124, Clare Glen SAC 000930, Glenstal Wood SAC 001432, Keeper Hill SAC 001197, Lough Derg (Shannon) SPA 004058, Lower River Shannon SAC 002165, Silvermine Mountains SAC 000939, Silvermines Mountains West SAC 002258, Slieve Bernagh Bog SAC 002312 and Slievefelim to Silvermines Mountains SPA 004165. The FAC consulted publicly available information from the NPWS and EPA and identified the same sites. In the initial screening by the DAFM Inspector, seven of the sites were screened out and three were screened in for Appropriate Assessment. A DAFM ecologist then undertook an Appropriate Assessment Screening Determination (document signed 25th January 2021) and agreed with the conclusion to screen out those seven sites, but also to screen out Lough Derg (Shannon) SPA 004058, with reasons given and to screen in the other two sites; Lower River Shannon SAC (002165) and Slievefelim to Silvermines Mountains SPA (004165).

An Appropriate Assessment was undertaken and an Appropriate Assessment Report is on file which focused on the two screened in sites; Lower River Shannon SAC (002165) and Slievefelim to Silvermines Mountains SPA (004165). Mitigation measures were proposed for Lower River Shannon SAC (002165), while none were deemed to be required for Slievefelim to Silvermines Mountains SPA 004165. An in-combination effects section was part of the report and this referred to the in-combination assessment included as an appendix to the report, which recorded a consideration of other plans and projects, including forestry and non-forestry projects, on the week of 25th January 2020 and they concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed. In section 7 of the Appropriate Assessment report of 25th January 2021 an Appropriate Assessment Determination is said to be on file; however no such document was made available to the FAC to inform its deliberations and it is unclear whether or not such a file was available at the time of decision making in this case. Implementation of all the mitigation measures

outlined in the Appropriate Assessment Determination was included as an additional condition to the licence approval. The FAC considers the absence of the Appropriate Assessment Determination in the documentation of this decision as a serious error in the processing of the application under Article 6 of the EU Habitats Directive.

The submitted grounds of appeal include a lack of communication with regard to this licence. The DAFM in their statement indicated there were three submissions from the public during the period when the application was being processed and the file shows that the appellant made one of these submissions and that the DAFM acknowledged this correspondence. The biomap on file outlines the location of two site notices on the public road adjoining the proposal areas and images of the site notices in situ are on the file. The FAC finds that while direct contact may not have been made with the appellant by the applicant with regard to the application, the FAC does not find an error in the processing of the application with regard to this ground of appeal.

In relation to the grounds generally regarding the impact of the development on views from the appellant's house, which it is submitted he intends to renovate and live in, and the potential shade caused by the proposed forest, the FAC, find that a setback of 60m from dwelling houses/building is a condition of the licence, which is consistent with the requirement outlined in the DAFM Forestry Standards Manual, November 2015. In addition areas adjacent to building/dwellings are to be landscaped with slow growing broad leaf species at wide spacing for a further 20m. The dwelling referred to by the appellant appears to adjoin to the west of the proposal area and therefore direct impacts on sunlight levels to this house would not be considered to be as significant compared to other orientations. The FAC further noted that the house while not being currently inhabited and renovations are proposed, appears to be a habitable property and considers that the conditions of the licence cited above with regard to setbacks should apply to it, and adequately addressed these matters.

In relation to the grounds raised regarding fire risks the FAC considered the location of the proposal area and licence conditions regarding provision of setbacks in this regard and finds that the requirements of the DAFM Forestry Standards Manual, November 2015, in relation to fire risk have been followed by the DAFM. In relation to the grounds regarding the availability/restriction of TV and Internet services, the FAC does not consider that the DAFM erred in the processing of the application in relation to this ground in the appeal.

In relation to the grounds regarding the audibility of curlews and cuckoos at back of the appellant's property and that afforestation has been stopped in the past for the presence of curlew. The proposal area is largely bounded by grassland, with part adjoining the public road, and does not lie in a conservation area, the closest European sites are the Slievefelim to Silvermines Mountains SPA and the Lower River Shannon SAC, both of which were considered under the Appropriate Assessment undertaken by DAFM. The curlew is not a qualifying interest of either of these sites and the DAFM conducted an Appropriate Assessment screening and stage 2 Assessment with the input of an ecologist and conducted an assessment to determine EIA requirement. The FAC having considered this, does not consider that there is any evidence before it that this proposal would result in a significant effect on these species.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a serious or significant error or a series of errors was made in making the decision and is therefore setting aside and remitting the decision regarding CN86739 to the Minister to carry out and record a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive and to establish as part of the file record the Appropriate Assessment Determination for the project (including the making of a fresh Determination if appropriate and necessary), before a new decision is made in respect of the application.

Yours sincerely,

A black rectangular redaction box covering the signature of Myles Mac Donncadha.

Myles Mac Donncadha, On Behalf of the Forestry Appeals Committee