



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

24 June 2021

Subject: Appeal FAC 772/2020 & 773/2020 in relation to licence CN83763

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence CN83763.

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 CN83763 for afforestation of 4.88 hectares(ha) at Drummellihy, Co. Clare was granted by the Department of Agriculture, Food and the Marine (DAFM) on 3rd September 2020.

Hearing

An oral hearing of appeals FAC 772/2020 & 773/2020 in relation to licence CN83763, of which all parties were notified, was held by a division of the FAC on 10th May 2021. In attendance:

FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely & Mr. Derek Daly
Appellant (FAC 772/2020):	[REDACTED]
Appellant (FAC 773/2020):	Not present
Applicant / Representative(s):	[REDACTED]
Department Representative(s):	[REDACTED]
Secretary to the FAC:	Ms. Heather Goodwin

Decision

The Forestry Appeals Committee considered all of the documentation on the file, including application details, processing of the application by DAFM, the notice of appeal, and all submissions received including at oral hearing, before deciding to affirm the decision of the Minister to grant this licence (Reference CN83763).

The licence pertains to afforestation of 4.88ha of enclosed land in Drummellihy, Co. Clare. It consists of one block of land with proposed species comprising Sitka Spruce (85%) and Additional Broadleaves (15%). Ground preparation is to be by mounding and the planting method is to be angle notch. No fertiliser is to be applied and herbicide control is proposed in years 0, 1, 2 and 3.

The DAFM Inspector Certification document describes the predominant soil type underlying the project area as predominantly podzolic in nature, the slope is predominantly flat to moderate (<15%), the project area is crossed by / adjoins an aquatic zone(s) and the vegetation type(s) within the project area includes grass and rush.

The proposal area is in within the Mal Bay WFD Catchment (28) and Kiltumper Stream_SC_010. The biomap on file identifies a watercourse running along the northern boundary of the site, indicating it to be

380m in length. From reviewing publicly available maps and data, this watercourse is part of the Creagh_030 river waterbody, which has a good WFD status (2013 – '18).

The DAFM desk and field inspected the application and referred it to the NPWS. The NPWS replied with a number of observations and recommendations, these included references to the site being within the Creagh River FPM catchment, is adjacent to the Creagh river, and is less than 500m from a population of Freshwater Pearl Mussel (FPM). It strongly recommended that the buffer along the Creagh river be increased to a minimum of 25m and that only broadleaf trees be planted. It referenced the site is approximately 2km from Carrowmore Dunes SAC and 1km from White strand, Carrowmore Marsh pNHA and that guidelines should be adhered to. DAFM Archaeology identified that the nearest Recorded Monument is a large ringfort, some 90m north of the proposed development, with an intervening pasture field and the Creagh river. Adherence to standard archaeological conditions was proposed.

A stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, is documented as part of the DAFM Inspector's Certification document. This screening listed seven European sites within 15km of the proposal, these being; Carrowmore Dunes SAC 002250, Carrowmore Point To Spanish Point And Islands SAC 001021, Kilkee Reefs SAC 002264, Lower River Shannon SAC 002165, Mid-Clare Coast SPA 004182, River Shannon and River Fergus Estuaries SPA 004077 and Tullaher Lough And Bog SAC 002343, and there was no reason to extend this radius in this case. The sites were considered in turn with reasons given for screening out each site.

An Appropriate Assessment Report outlined as prepared by MKO, on behalf of DAFM, dated 16th June 2020 is also on file. It includes a verification of the Appropriate Assessment screening completed by the District Inspector (DI). It recorded the DI having screened out the Carrowmore Dunes SAC 002250, Carrowmore Point To Spanish Point And Islands SAC 001021, Tullaher Lough And Bog SAC 002343, Lower River Shannon SAC 002165 and Kilkee Reefs SAC 002264. It recorded the DI as screening in the Mid-Clare Coast SPA 004182 and River Shannon and River Fergus Estuaries SPA 004077. It upheld the DI's recommendation in five of the cases but not with regard to Carrowmore Dunes SAC 002250 and River Shannon and River Fergus Estuaries SPA 004077 (screening in the former and screening out the later). The rationale given for screening in the Carrowmore Dunes SAC is given as: *This European Site is located 2.3km to the west of the proposed afforestation site. Hydrological connectivity exists between the application site and this SAC, via the Creagh River which flows along the northern site boundary. A potential pathway for effect was identified in the form of deterioration in water quality as a result of sedimentation and hydrocarbon pollution during forestry activities and the site is considered to be within the likely Zone of Impact.* The rationale given for screening out the River Shannon and River Fergus Estuaries SPA 004077 is given as: *There is no hydrological connectivity between the application site and this SPA. This SPA is located within a separate hydrological catchment to the proposed application site and therefore impacts on the listed aquatic SCI species/ habitats can be ruled out. Impacts on all of the listed SCI species can be ruled out due to the distance from the proposed works area and the absence of a complete source pathway-receptor chain for impact and the in-combination assessment on file for this project (see CONTACTS dated 12/02/2020).* Site specific measures to mitigate against impacts with regard to the two screened in sites, Carrowmore Dunes SAC 002250 and Mid-Clare Coast SPA 004182, were proposed. An in-combination assessment was included as part of this document too, with online planning systems said to be reviewed some on 16/3/20 and internal DAFM records said to be reviewed on week of 27/5/20.

A standalone possible in-combination effects document is also on file, with the proposal's potential to contribute to in-combination effects on European sites considered with other plans and projects in the vicinity of the site listed, with websites and records said to be reviewed on the week of 16/6/20.

An Appropriate Assessment Determination is also on file, outlined as being completed on 2nd September 2020 by DAFM, in which it outlined the documentation it considered in undertaking the Appropriate Assessment, this list included the Appropriate Assessment Report prepared by MKO and commissioned by DAFM and the updated in-combination assessment (referring to the 16/6/20). It then set out the following:

It is considered that the Appropriate Assessment Report compiled by the external planning and environmental consultants MKO contains a fair and reasonable examination, evaluation and analysis of the likely significant effects of the activity on the environment and adequately and accurately identifies, describes and assesses those effects except in relation to the following points:

- 1. There are populations of Freshwater Pearl Mussel present less than 500m downstream of the proposed development, which the Appropriate Assessment Report has failed to take into consideration. The water setback has been extended to reflect this, as well as the addition of other relevant mitigation as per the Forestry and Freshwater Pearl Mussel Requirements (DAFM, 2008).*
- 2. The Review report states that silt fences will be used along drains. Water will not be discharged directly into the relevant watercourses and appropriate setbacks will be implemented as per best forestry practice*

Having regard to this assessment, it is considered that the activity, if managed, operated and controlled in accordance specific conditions to be attached to the licence (if issued), will not result in the contravention of any relevant environmental quality standards or cause environmental pollution.

In its determination it included the following:

Specific mitigation required:

- A 'water setback', a minimum of 20 metres in width shall be installed adjoining the aquatic zone in Plot 1.*
- Five rows of native broadleaf trees shall be planted along the water setback. These must be pit planted / invert mounded as per the Forestry and Freshwater Pearl Mussel Requirements.*
- A 'water setback', a minimum of 5 metres in width shall be installed adjoining the relevant watercourse in Plot 1 and treated in accordance with the requirements set out in the Environmental Requirements for Afforestation.*
- No operations during periods of heavy rainfall or immediately afterwards.*
- There will be no woody weed removal within 50 m of an aquatic zone or 20 m of a relevant watercourse.*

It ultimately concluded:

Therefore, the Department of Agriculture, Food & the Marine has determined, pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

For the purposes of 42(16) of S.I.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any European Site.

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 DAFM approved the application on 3rd September 2020 with conditions, including the additional environmental and silvicultural conditions:

- Install Fesh (sic) Water Pearl Mussel setbacks along the river. Instal (sic) a 20m aquatic setback and then 5 rows of pit planted broadleaves consisting primarily of willow,*
- Adhere to the mitigation measures detailed in the attached Appropriate Assessment Determination,*
- Ensure that dwelling setbacks are correctly mapped before form 2 submission.,*
- Dwelling Houses/Buildings Setback 60m,*
- All guidelines to apply.*

There are two appeals against the decision. The grounds of appeal 772/2020 broadly are; the proposal area is directly around our home; bought our home in 2016 with a view to it becoming our family home and with the reasonable expectation and affirmation from the vendor that the land around it would only be

used for farming; obstruct the amazing scenery and view from our home, create a blockage of natural light, which will only get worse over the years as the trees grown to full height; impact on the use of mobile phone and broadband in the home, both a necessity for work; devalue our home by up to 25% according to an auctioneer (a valuation certificate was enclosed) and if we need to relocate because of the stress this afforestation will cause, will be unable to do so without considerable hardship and loss of value; and impact on mental health. The grounds of appeal 773/2020 broadly are; not an appropriate location for forestry, it would be an isolated pocket of forestry, there is no forestry on that side of the road, it would have a negative impact on the residences, possibly it could be scaled back to compromise if approved.

The DAFM responded to the grounds of appeal stating that the licence application had been processed according to their procedures, SI 191 of 2017 and the Forestry Act 2014. It was submitted that: *This Form 1 Afforestation Application was field inspected on the 4th, July, 2019. It is a site typical of the surrounding area, occupied by grass rush vegetation with a wet mineral soil. The site is sloping down to the North, towards the river and away from the public road and Dwelling at the South Eastern corner of the site. The Dwelling is therefore at a higher elevation than the proposed lands and the lands are situated to the North of the dwelling. With the inclusion of a 60m dwelling setback, I deemed that the planting as proposed is appropriate and complies with the requirements in the Forest Service publication: "Environmental Requirements for Afforestation", specifically section "2.8 Environmental setbacks", Table 5, page 27 of said document. Other environmental setbacks were also specified i.e. along the river. Some additional broadleaved planting could be carried out along the dwelling setback for enhance the site aesthetics. It was further submitted that a submission was responded to and that; At that time I also deemed the proposed afforestation to be appropriate and in compliance with the rules governing the scheme.*

At the oral hearing, the DAFM opened by summarising their approach to processing the application and issuing the licence, they also described the site as being relatively flat, that there is a river along the northern boundary, that there is a setback of 60m from the house referred to in appeal 772/2020 and that the proposal area is below the level of this house. The appellant in attendance (re 772/2020) submitted that they are on an elevated site but not on a hill and that when the trees grow they will block everything to the back of their house and they are dissatisfied with the proposed afforestation and mentioned that their neighbours across the road have appealed also. The applicant's representative submitted that only 4.88ha is being planted out of 5.9ha owned by the applicant and that the required setbacks will reduce the actual area further, but accepted that some of the appellant's view will be impaired in years to come. The DAFM submitted in response to questions from the FAC that the recognised FPM catchment in the area is not an SAC for the species, but that a 20m setback from the river has been imposed and with 5 rows of broadleaves along side this. DAFM submitted that the effect of these safeguards will mean there are no conifers within 25m of the river and that this is appropriate considering it is a relatively flat site also. The DAFM further proposed that it is not reasonable to plant all broadleaves as the trees would suffer from exposure and that no conifers within 25m of the river was adequate protection and that the application conformed with scheme rules. The DAFM in response to FAC queries on the answers on the Assessment to Determine EIA Requirement, submitted that Q.29, *Is this proposed area within 3km upstream of a European or national designation including SACs, cSACs, SPAs, iSPAs, NHAs, pNHAs Nature Reserves and National Parks?* was answered n/a as the Carrowmore Dunes SAC was screened out after Appropriate Assessment and while considering the presence of the White strand, Carrowmore Marsh pNHA considered that it too could be screened it out given the conclusion on the SAC. in relation to the answer to Q.40, *Comments and issues from the general public and non-governmental bodies were received and examined?* was a mistake, that it should have been yes rather than no. The applicant's representative submitted that growing hardwoods in this area in Co. Clare would be a challenge, but suggested that some of the required amount of hardwoods to be planted could be used in a way to consider the appellant's concerns regarding the visual impact of the proposed plantation. The appellant submitted that the area to the north west of his house represented their most important view and questioned if the amount of broadleaves could be increased here. The oral hearing concluded with the applicant's representative expressing a willingness to discuss with the applicant the possibility of a revised proposal to minimise the visual impact of the proposed afforestation on the appellant in attendance.

The FAC received a response from the applicant's representative on 17th May 2021 which included a map outlining a broadleaf area to the south west of the proposal area, of 0.4ha (1000 Birch/alder mix) and a total broadleaf content of 15% of the total, and correspondence between the applicant's representative and each of the applicant, appellant and DAFM forestry inspector with them indicating acceptance of the revised proposal.

In addressing the grounds of appeal, the FAC considered, in the first instance, the EIA Directive and the Habitats 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 a licence for the afforestation of an area of 4.88 hectares, so is significantly sub-threshold for mandatory environmental impact assessment (EIA), as set in Irish Regulations. 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. The FAC noted the submission by the DAFM representative at oral hearing in response to questions posed by the FAC in relation to a number of questions on the '*Assessment to Determine EIA Requirement*'. The area lies outside of any conservation area and the DAFM completed a screening for Appropriate Assessment, found seven European sites within 15km of the proposal and there was no reason to extend this radius in this case, and undertook an Appropriate Assessment for two European sites, Carrowmore Dunes SAC 002250 and Mid-Clare Coast SPA 004182, proposed mitigation, which are included in the licence conditions and determined no adverse effect on the integrity of any SAC or SPA. The proposal is for afforestation of 4.88ha with species of Sitka Spruce (85%) and Additional Broadleaves (15%) of enclosed land. The DAFM referred the application to NPWS, who provided a response, and for archaeological review within DAFM, which lead to an archaeological report. One submission from the public was also received, with a consideration of it by the DAFM forestry inspector recorded on file. Having regard to the record of the decision and the submitted grounds and the nature, scale and location of the proposal, the FAC is not satisfied that a serious error or a series of errors was made in relation to the EIA considerations in the making of the decision regarding Appropriate Assessment and concurs with the conclusions provided.

In considering the remaining grounds of appeal, the FAC considered the submissions at oral hearing and the submission received on 17th May 2021 from the applicant's representative which included a map outlining a broadleaf area to the south west of the proposal area of 0.4ha in size. While comprised of only birch and alder the total broadleaf content of 15% for the proposal area will not be exceeded. The area of the proposed block is the same area referred to by the appellant as being the most important in terms of his view from his house in regard to the proposal area. The FAC noted the acceptance of this revised species layout of the proposal area by the applicant, the appellant that attended the oral hearing (and whose house adjoins the proposal area) and the DAFM in correspondence provided to the FAC in the submission of 17th May 2021 also. The FAC noted the revised proposal still includes 15% additional broadleaf species and 85% Sitka Spruce and in accordance with GPC 3. The FAC also received a response directly from the DAFM, having provided the submission of 17th May 2021 to them for information and any observations. The DAFM responded indicating their satisfaction with the compromise proposed and an opinion that this change in the application does not represent a change that will increase the potential of any adverse impacts to water quality or any Natura 2000 sites.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received including at the oral hearing. The FAC is not satisfied that a serious or

significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedure. However in considering the grounds of appeal, the FAC noted the appellants' concerns regarding visual impact, particularly those of appeal 772/2020, and support the use of some of the additional broadleaves species to be planted as part of the licence in the south west part of the proposal area as proposed in the submission from the applicant's representative on 17th May 2021 and which was accompanied by written evidence of agreement from the applicant, the appellant who attended the oral hearing and the DAFM. The FAC in deciding to affirm the decision, considered that the Department may wish to re-issue the licence decision with the revised map as appropriate.

Yours sincerely,

A large black rectangular redaction box covering the signature of James Conway.

James Conway (on behalf of the Forestry Appeals Committee)