



18th April 2023

Subject: Appeal FAC 147/2021 relating to Licence CN84647

Dear

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 14A (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.

DECISION.

Having regard to the evidence before it, including the Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the notice and grounds of appeal and the Statements of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN84647.

THE LICENCE.

Licence CN84647 is for 8.62 Ha. of GPC 3 afforestation the townland of Drumbar, Co. Cavan, and was submitted to the DAFM on the 21st of August 2019. A decision approving the licence was issued on the 10th of December 2021 with conditions including compliance with DAFM Technical Standards, retention of all trees/hedgerows on site, and adherence to the mitigation measures in the Appropriate Assessment Determination.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC held on the 28th of March 2023 considered the appeal and the processing of the licence as it relates to the decision to issue the licence on the 10th of December 2021. The FAC members present were: Mr. John Evans (Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas. Secretary to the FAC: Mr. Michael Ryan.

BACKGROUND.

The proposal consists of the planting of 8.62 Ha. of GPC 3 forestry in two plots. A Site Plots Pre-Approval form states that Plot 1 will be Sitka spruce and birch and that Plot 2 is a bio plot. The lands are located some 1.7 Km south-east of the town of Swanlinbar and the land use in the area is agriculture.

The licence was not referred to any statutory body or the local authority within this jurisdiction but was referred to the Northern Ireland Department of Communities, Fermanagh and Omagh District Council and the Northern Ireland Department of Agriculture, Environment and Rural Affairs. Only the Northern Ireland Department of Communities responded stating that it was "satisfied that the

proposed afforestation at this location does not pose an adverse impact in relation to any of our recorded heritage assets in this area of the border region.”

The application documents included a Bio Diversity/ Operational Map, a Location Map, a Site Notice, a photograph of the Site Notice in Situ, a Fencing map, an Appropriate Assessment Pre-Screening Report. A Natura Impact Statement (NIS) and a geology report were requested and submitted by the applicant.

On the DAFM file there is an Inspector’s Certification Report; an Inspector’s Appropriate Assessment Screening Report (AASR), the latest dated the 10th of December 2021; an Inspector’s Assessment to Determine EIA Requirement; an Appropriate Assessment Screening Determination (AASD) dated the 6th of October 2020, and an Appropriate Assessment Determination (AAD) dated the 5th of November 2021 both prepared by the DAFM Ecology Section; and an In-combination Statement.

The District Inspector’s AASR of the 10th of December 2021 determined that the Cuilcagh - Anierin Uplands SAC (Site Code 000584) and Lough Oughter and Associated Loughs SAC (Site Code 000007) being sites within our jurisdiction within 15k of the site should be screened out on the basis of the position of the project area being downstream from the Natura sites, and the subsequent lack of any hydrological connection and the findings of DAFM Ecology AAD.

The DAFM Ecology AASD identified 6 Natura 2000 Sites within 15km, Cuilcagh - Anierin Uplands SAC (Site Code 000584), Lough Oughter and Associated Loughs SAC (Site Code 000007), Upper Lough Erne SPA (Site Code UK9020071), Upper Lough Erne SAC (Site Code UK0016614), Moninea Bog SAC (Site Code UK00030212) and Cladagh-Swanlinbar River SAC (Site Code UK0030116). Only Cladagh-Swanlinbar River SAC was screened in and progressed to Appropriate Assessment Stage 2 (NIS).

Following the assessment of the NIS the DAFM Ecology AAD screened in Upper Lough Erne SAC (Site Code UK0016614) and Cladagh-Swanlinbar River SAC (Site Code UK0030116) and determined that the project, when considered in combination with other plans and projects, would not give rise to any adverse effect on the integrity of the European Site subject of the AAD.

The Inspector’s Certification Report dated the 31st of August 2021 recommends that the licence be approved subject to three conditions; the carrying out and completion of the afforestation in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual, retention of all existing trees and hedgerows within the site, and compliance with the conditions in the AAD.

The Inspector’s Assessment to Determine EIA Requirement dated the 31st of August 2021 concludes that the proposed afforestation is not required to undergo EIA.

The licence was subject of both a Desk and Field Inspection. The Field Inspection took place on the 13th of November 2019.

There were three third-party submissions on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application.

The grounds of appeal are summarised as follows:

1. The Appropriate Assessment Determination.
 - The appeal questions the precision & findings of the AAD with regard to; (i) scientific evidence for the mitigation measures in the AAD, (ii) the clarity of the heavy rainfall mitigation measure, (iii) impact on the Freshwater Pearl Mussel.
 - The River Sub-basin has not been afforded a WFD status therefore DAFM cannot determine Water Quality and therefore compliance with Article 4.1 of the WFD.
2. The In-Combination Assessment.
 - Forestry in Northern Ireland which is part of the sub-basin where the project is located has not been included in the projects listed for the In-Combination Assessment.
3. Environmental Impact Assessment
 - The Inspector's "No" response to trans-frontier impact in the EIA determination is not sustainable as the DAFM did not refer to forestry in its consultations with Northern Ireland bodies.
4. Natura Impact Statement.
 - Annex 1 Wet Heath Habitat has not been properly surveyed in NIS.

In Supplemental Observations on the DAFM Statement of Fact & the Ecologist's response to the Grounds of Appeal the appellant submits that:

- The DAFM is trying to disconnect the development from the SAC.
- Compliance with rainfall condition is left the developer to implement and monitor and is therefore contrary to the findings of CJEU Case C-461/17.
- The rainfall mitigation in the licence is not strict enough as there is no methodology for monitoring.
- The appeal relates to hydrological connection to the SAC, not nutrient buffering.

CONSIDERATION BY THE FAC.

The FAC, at the sitting of the FAC on the 28th of March 2023, had before it the full DAFM record of the decision, the notice, and grounds of appeal and the SoF provided by the DAFM and all materials on file. Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal, dated the 23rd of January 2023, confirms the administrative details of the licence application, and indicates that the licence application was desk assessed and that a field assessment was carried out on the 13th of November 2019. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on this licence application. The SoF includes a statement dated the 11th of April 2023 from the District Forestry Inspector confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contains a response by the DAFM ecologist to the grounds set out in the appeal.

GROUND OF APPEAL

The Appropriate Assessment Determination.

The FAC considered the grounds of appeal that question the precision & findings of the AAD with regard to (i) scientific evidence for the mitigation measures in the AAD, (ii) the clarity of the heavy rainfall mitigation measure, (iii) impact on the Freshwater Pearl Mussel and (iv) the Water Framework Directive (WFD).

With regard to the appellant's ground of appeal that there was no scientific evidence for the mitigation measures in the AAD, the FAC noted the ecologist's response in the DAFM SoF and that

the AAD contained scientific reference material as footnotes on page 3 of the AAD and that page 9 of the AAD is a list of scientific references including numerous DAFM Guidelines and Standards regarding forestry publications best practice.

With regard to the appellant's ground regarding the clarity of the heavy rainfall mitigation measure, the mitigation measure refers to the Met Éireann website as the source of forecasting rainfall. The FAC noted that mitigation measure requires the applicant to consult the Met Éireann website for forecast information, it is stated on the Met Éireann website that weather forecasts are based on the Harmonie model which is modelled on a 2.5 km grid. The FAC considers the Met Éireann forecasting system to be sufficiently robust for the purposes employed in the AAD in the overall context of the range of mitigation measures and conditions stated and the nature, scale and location of the proposal.

The grounds of appeal submit that changes in hydrological flow of the Cladagh Swanlinbar River SAC may impact on the Freshwater Pearl Mussel in the SAC was not considered adequately. The FAC noted that the NIS states that "*No drainage will be established*" and the ecologist's response in the DAFM SoF, particularly that relevant watercourse is located slightly upslope of the proposed application so that the majority of the drainage on site is not towards this relevant watercourse, and that the AAD contained mitigation measures for the protection of the aquatic zone, including that "*Mound drains are not to connect with relevant watercourses*".

With regard to the ground of appeal that the licence approval is not consistent with the Water Framework Directive, the FAC noted that River Sub-Basins (RSBs) are not allocated a water quality status by the EPA and that the Hyland judgement deals solely with surface waters. The FAC further noted that the only surface waters in proximity to the site is EPA River Waterbody Swanlinbar River (UKGBNI1NW363604054), located at its closest point circa 45m east of Plot 1 and is allocated Moderate Status 2013-2018 and is At Risk in the 3rd cycle, while Forestry is not identified as a pressure on this river waterbody.

The FAC is not satisfied that the DAFM has erred regarding these grounds of appeal.

The FAC noted that the DAFM AAD screened in Upper Lough Erne SAC (UK0016614) on the basis that there is potential for disturbance resulting from forestry related activities on the Otter, a Qualifying Interest (QI) of the site. The FAC understands that when the potential for effects on a QI are identified the project must proceed to Appropriate Assessment Stage 2. The FAC considers that the assessment of effects on this QI set out in bullet point 2 of the last paragraph of page 6 of the AAD does not constitute an adequate Appropriate Assessment Stage 2 and that this represents a serious error in the processing of the licence application.

The In-Combination Assessment.

In considering the ground of appeal that the In-combination Assessment is deficient because projects in the Northern Ireland part of the Swanlinbar River sub-basin have not been included in the projects listed the FAC noted the ecologist's response in the DAFM SoF and that the relevant government department in Northern Ireland, the Department of Agriculture, Environment and Rural Affairs had been afforded an opportunity to make observations but had not responded.

The FAC noted that the conclusion of the In-combination Statement in the AAD states.

It is concluded that there is no possibility that the proposed Afforestation project CN84647, with mitigation measures set out in Section 4, will itself, i.e., individually, giving rise to an adverse effect on the integrity of the following European Sites and their

associated Qualifying Interests / Special Conservation Interests and Conservation Objectives:

- *Upper Lough Erne SAC (UK0016614) 8*
- *Cladagh-Swanlinbar River SAC (UK0030116)*

Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in the assessment of the impact of such effects of the project itself and in-combination with other plans and projects on the integrity of the European site. As stated on the record it appears to the FAC that other plans and projects were only considered after the assessment on the integrity of the project was completed, which would appear to the FAC not to be in keeping with the requirements of Article 6(3) and the Forestry Regulations 2017. The FAC considers this to be a serious error as it suggests that the determination undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other plans and projects result in a significant effect on a European site. The FAC therefore considers that this determination should be undertaken again to consider whether the project in-combination with other plans and projects has the potential to result in a significant effect on a European site.

Assessment to Determine EIA Requirement.

In considering the ground of appeal that the Assessment to Determine EIA Requirement contains errors, the FAC noted that the appeal only makes reference to the “No” response to the question on the likelihood of significant trans-frontier impacts and that the DAFM did not refer specifically to the proximity of the afforestation to the Natura 2000 sites when referring the licence application to statutory authorities in Northern Ireland. The FAC had regard to the fact the final Assessment to Determine EIA Requirement of the 10th of December 2021 was prepared after the AAD of the 5th of November 2021 had found no significant impact on the Natura 2000 sites in Northern Ireland and therefore DAFM had sufficient evidence to support the “No” response. The FAC also noted that the consultees in NI were provided the required documentation as set out in the Forestry Regulations 2017 (as amended). While the FAC is of the view the assessment for EIA requirement could be clearer if reliance on the in-combination statement prepared as part of Appropriate Assessment process was made explicit, the DAFM is entitled to rely on a complete reading of the file in this regard. The FAC is not satisfied that an error was made on this matter.

Natura Impact Statement.

In considering the ground of appeal that Annex 1 Wet Heath Habitat has not been properly surveyed in NIS, the FAC noted that the site was evaluated independently by the DAFM ecologist who, taking the monitoring criteria within Perrin, P.M., *et al.* (2014) into account, concluded that the areas of wet heath identified were not of high conservation value Annex I habitat because of the isolated and patchy nature of wet heath, the agricultural use for grazing over the years in surrounding habitat and presence of exposed rock and invading scrub. The FAC is not satisfied that an error was made on this matter.

Supplemental Observations on the DAFM Statement of Fact & the Ecologist’s response to the Grounds of Appeal.

The supplemental observations on the grounds of appeal regarding (i) DAFM trying to disconnect the development from the SAC, (ii) that the in-combination aspect has not been properly evaluated and

(iii) that the appeal relates to hydrological connection to the SAC, not nutrient buffering, are addressed in the FAC considerations above.

The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. The matters raised in the supplemental observations on the grounds of appeal regarding (i) compliance with rainfall condition being left to the developer to implement and monitor, (ii) the licence conditions are not sufficiently robust to ensure that licence will be complied with, and (iii) the DAFM processes regarding cross-border information, are a matter for the DAFM and are outside the remit of the FAC.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal (as supplemented) and the Statement of Fact submitted by the DAFM. In accordance with Section 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a serious or significant error or series of errors was made in the making of the decision regarding licence CN84647. The FAC is thus, setting aside the decision of the Minister and remitting it to require the DAFM to carry out of a new Appropriate Assessment of the project to include Upper Lough Erne SAC (UK0016614) and a new Appropriate Assessment Determination to consider whether the project in combination with other plans and projects has the potential to result in a significant effect on a European site in accordance with Article 6(3) of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee