



14th July 2023

Subject: Appeal FAC 075/2022 regarding licence CN83687

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the decision by the Department of Agriculture, Food and the Marine (DAFM) on 20th June 2022 to suspend licence CN83687. The FAC, established in accordance with Section 14 A (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.

Background and Hearing

Licence CN83687 relating to the afforestation of 5.99 ha at Cloonshannagh, Co. Roscommon was issued by the DAFM on 7th March 2022. The decision under appeal to the FAC is the decision issued by DAFM on 20th June 2022 to suspend licence CN83687. Appeal FAC 075/2022 was initially considered during a sitting of the FAC on 23rd January 2023 following which it was considered necessary to schedule an Oral Hearing in order to properly and fairly determine the appeal. Following the initial consideration of the appeal by the FAC on 23rd January 2023 a request for further information was issued by the FAC to the DAFM's Forest Service to which there was no reply. Below is set out the content of the said request.

'Dear FSU,

The above appeal was heard recently by the FAC. A request has been made by the committee as follows;

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The decision to suspend afforestation approval CN83687 appears to have been made on foot of advice received by DAFM that there are Curlew in close proximity to the site; this is the focus of the appeal and sole issue under consideration by the FAC. Given the lack of information on file and to serve the interests of fair procedure in this case further information is now required. This includes the form, source and content of advice received by DAFM regarding the curlew in relation to this site; the follow-up activity that has taken place since the suspension, including any reports and recommendations; and the expected timeframe to resolve the issue. Depending on the success of this query the FAC may still call an Oral Hearing in this case.'

An Oral Hearing of this appeal was held by the FAC on 18th May 2023 - In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Luke Sweetman and Mr. Derek Daly.

Secretary to the FAC: Ms. Vanessa Healy.

Appellant:

DAFM Representatives: Mr. Seppi Hona, and Ms. Mary Coogan.

Decision

Having regard to the evidence before it, including the processing by the DAFM, the notice of appeal, submissions received and in particular, the following considerations, the FAC has decided to allow the appeal and set aside the decision to suspend licence CN83687.

Appeal

There is one first party appeal (FAC 075/2022) against the decision to suspend the licence in this case. The grounds of appeal, which are to be found in full on file, are set out in the notice of appeal form and an appendix to it and in the main relate to the basis for the suspension of the licence. The following is a summary of same.

- Reference is made to the Curlew conservation programme which commenced in 2017 and that nine geographical areas were identified,
- Submission that the nearest of the areas to the project being Lough Ree,
- Submission that the output of the Curlew Task force are recommendations,
- Submission that the reference to the need for a buffer zone of significantly greater than 1km from a nesting curlew is not a very definitive distance,
- Submission that the project area is over 4km from the geographical map of Lough Ree protection area and therefore significantly greater than 1km from it,
- Submission that until such time as more legal regulations are in place to protect the curlew, all lands cannot be held up from forestry planting, based on a Landowner saying he is trying to encourage the curlew to breed,
- Submission that since the Forestry Licence was applied for that appellants neighbour had time to apply for whatever funding is being made available to encourage Farmers to manage their land in a way that will increase the breeding of the curlew and they are now holding this against the appellant for planting the lands which have a sale agreed to a Forestry Company.

Statement to the FAC from DAFM

The DAFM provided a statement (SOF) to the FAC dated 24th November 2022. It set out that the licence was suspended by DAFM on 20th June 2022 and that the reason for the suspension was that DAFM was advised that there are curlew in close proximity to the site. The SOF goes on to provide details regarding the processing of the application to issue the licence including in relation to referrals, replies received by the DAFM, submission received, and the assessments carried out by the DAFM. It indicates that the licence was suspended pending review of Curlew in proximity to the site.

Oral Hearing

At the Oral Hearing the DAFM Representatives provided an overview of the relevant dates regarding the processing of the application to issue the licence CN83687 and also set out that around the end of May 2022 that the DAFM inspector had a call from the applicant's forester indicating that there may be curlew on site. The Representative also submitted that when the DAFM became aware that there was a nest site location within 1km of the land subject to licence CN83687 then the lands subject to licence CN83687 needed to be checked for suitability for foraging by curlew. The DAFM Representatives advised that it had got a notification from the National Parks and Wildlife Service (NPWS) and as there already was a financial approval for the site that DAFM had no choice but to suspend the licence.

The Appellant addressed the hearing and contextualised his grounds of appeal. He pointed out that there had been an Appropriate Assessment screening of the site done during the processing of the licence application and that no impact on curlew was identified in same. He referenced the downward trend in curlew numbers nationally and welcomed the appointment of a curlew officer while mentioning that it was a bit late for this site. He mentioned that he feels that it's not just forestry that impacts on curlew but that it is a product of modern farming. He sets out that his 6 ha approximately is adjacent to circa 500 ha of land that is being rewilded. He indicated that he had examined the documents on the FLV relating to his licence, its suspension, and his appeal and that much of the information provided to the hearing by the DAFM Representative is not to be found there.

In response to a query from the FAC relating to whether the further information request issued by it to the DAFM in January 2023 had been answered the DAFM Representative confirmed that there was no response to same as the DAFM hadn't followed up on it after its referral to the District Inspector. It was indicated by the DAFM that the NPWS did not want certain information in this case released. In response to a query from the FAC as to what the implications of a project site being within 1km of a nesting area are, the DAFM Representative indicated that in the officer's experience, anything (licence applications) within 1km would be refused. In response to a query from the FAC as to what the next steps in this case would be the DAFM Representative indicated that internal consultation would be required but that the licence would likely be revoked. In response to a further query from the FAC as to whether there was an awareness if any assessments had been carried out by DAFM / NPWS on the lands regarding curlew, whether any monitoring was ongoing by the NPWS, and whether any update was expected from the NPWS, the DAFM Representative was not in a position to answer this. The DAFM Representative did update the hearing on the protected status afforded to curlew. In response to a query from the FAC in relation to the happenings, post the issue of the licence, that led to its suspension the DAFM Representative indicated that the NPWS had contacted a member of the inspectorate team locally, having received information of the presence of curlew located within c.500m of the licenced area and of an active Curlew nesting site and that this contact was followed by a contact from the forester. The FAC queried whether there was scope for the DAFM to contact the NPWS in relation to checking the current status of the curlew site at issue and the DAFM stated that there was.

The Appellant expressed disappointment that his afforestation licence had been suspended for so long and he was only now being told that the information which informed its suspension had been provided by the NPWS. The Appellant indicated that he was amazed that this (suspension) has been ongoing since June 2022 and that it would seem no one has completed any additional surveying of the site in the interim. He also indicated an intention to seek compensation.

Post Appeal Correspondence

Following the oral hearing held by the FAC on 18th May 2023 the FAC wrote to the Forest Service, DAFM by email dated 19th May 2023 seeking additional information including restating some of the queries raised by it at the oral hearing. The text of the said further information request is set out below.

'The Forestry Appeals Committee (FAC) is currently considering an appeal (FAC075/2022) against the decision by the Department of Agriculture, Food and the Marine (DAFM) to suspend afforestation licence CN83687 and convened an Oral Hearing on the 18th May 2023 in this regard. This licence was suspended on the 20th June 2022 and in the suspension letter, the applicant was informed that "the site must be reviewed for Curlew".'

At the Oral Hearing of appeal ref. 075/2022, a DAFM representative stated, inter alia, that afforestation licence CN83687 was suspended following communication received by the DAFM from the National Parks & Wildlife Service (NPWS) confirming that the project site for CN83687 was located within c.500m of an active Curlew nesting site. In order to facilitate the FAC's consideration of this appeal, and in accordance with Section 14(B)(7)(b) of the Agriculture Appeals Act 2001, as amended by the Forestry (Miscellaneous Provisions) Act 2020, please provide the following information:

- i) Does a written record exist of the confirmation received by DAFM from the NPWS regarding the proximity of a Curlew nesting site to the project site for CN83687?*

If such a record exists, please provide a copy of same to the FAC in your response to this request.

- ii) Has there been any inspection of the relevant Curlew nesting site by the NPWS in the intervening period (June 2022 – May 2023) to determine the current status of the Curlew nesting site?*

If such an inspection took place, please confirm the current status of the Curlew nesting site, e.g., is the site considered active or a 'historical' nesting site.

Given the passage of time since the suspension of CN83687, and the subsequent appeal to the FAC, the FAC requests that this further information request be treated as urgent and the information requested above be provided to the FAC within 21 days of the date of this request.'

The DAFM by correspondence to the FAC dated 29th May 2023 provided a response to item i) in the request to it and indicated that in relation to item ii) that it is not in a position to answer for NPWS or

request them to carry out additional surveys. The content of the DAFM response was summarised in a correspondence to the appellant as set out below.

'09th June 2023

Subject: Appeal to the Forestry Appeals Committee

Dear [REDACTED],

The FAC has received a response to its recent request for additional information from the Forest Service, Department of Agriculture, Food and the Marine (DAFM) which the FAC sought in the context of considering your appeal against the DAFM decision to suspend licence CN83687.

In the response to point (i) in the information request, ie

(Does a written record exist of the confirmation received by DAFM from the NPWS regarding the proximity of a Curlew nesting site to the project site for CN83687? a. If such a record exists, please provide a copy of same to the FAC in your response to this request)

the DAFM has provided the FAC with a copy of correspondence between the National Parks and Wildlife Service and the DAFM dated 22nd May 2022. A copy of an excerpt from same is shown in italics below with some text (relating to the exact location of the nesting) redacted.

"NPWS Regional staff recently confirmed the presence of breeding Curlew in the townland of Cloonshannagh, Co. Roscommon This record came about as a result of information received from a member of the public, who claimed there are two pairs in this general area and had contacted NPWS as they became aware of an afforestation licence application in the area.

In early May, local NPWS determined the presence of breeding Curlew in the area, at the following Coordinates: REDACTED . According to my central database, there are no recent records (i.e. since 2015) of breeding Curlew in this general area (although it seems Curlew may have been recorded here pre-2015). Thus, it is likely that any afforestation licence applications in this area would not have been flagged under the Forest Service's existing Curlew protocol.

I understand, from my colleagues that an afforestation licence CN83687 has been granted in this area. Is it possible that the presence of breeding Curlew in this area could be considered with regard to this licence application, e.g. that the Curlew protocol might apply here? I also note that NPWS Regional staff have stated that, according to the NPWS referral tracking system, this licence application was not referred to NPWS for comment/consideration.

This may or may not be possible at this stage of the licencing operation but it is worth flagging given the

low number of remaining Curlew breeding pairs in Ireland and the range of existing conservation measures.

In the response to point (ii) in the information request the DAFM has stated that it is not in a position to answer for NPWS or request them to carry out additional surveys.

Any observation you wish to make to the FAC in relation to the DAFM response as outlined above should be forwarded to the FAC as soon as possible and by the latest within 21 days of the date of this email.

Kind regards,

The appellant made a subsequent submission which was received by the FAC on 15th June 2023 in which the appellant set out a detailed timeframe 'of events' from the first National Survey for curlew in 2015 to the 26th May 2023. The said submission made reference to information that the appellant had drawn from copies of correspondence between the FAC and the DAFM that had been provided to him in the context of considering his appeal wherein he stated that '*Having reviewed the sequence of events my forestry application was held hostage due to lack of communication and absence of proper protocol and procedures in this matter*'. A copy of this further submission was provided to the DAFM.

Consideration of the appeal by the FAC

In examining the grounds of appeal, the FAC concluded that as the decision under appeal in this case is the decision by the DAFM to suspend licence CN83687 then the appeal consideration has no reach back into the original decision to issue licence CN83687.

The FAC finds that the DAFM by letter dated 20th June 2022 informed the licensee (appellant in this case) of the suspension of afforestation licence and technical approval (reference CN83687) wherein it is stated:

'As you are aware your application for an Afforestation Licence CN83687 was approved on 07/03/2022 and a licence issued In accordance with Section 7 (2) b of the Forestry Act 2014, we must now suspend your licence for the following reason: we have been advised that there are Curlew in close proximity to the site.

No work can be undertaken in relation to CN83687 and the licence must now be suspended and the site must be reviewed for Curlew.

We will inform you when the licence has been re-instated'.

The FAC finds no other documentation or records on the file as provided to it by the DAFM (including on the Forestry Licence Viewer) relating to the making of the decision to suspend the licence or an indication of the procedures followed, or analysis carried out to inform the decision. Neither does the FAC find a record or a plan or process that is to be followed to address the site review for Curlew as referenced in the notification to the licensee regarding the suspension of the licence. While information has been

provided to the FAC by DAFM in the course of the consideration of this appeal that sets out circumstances that led to the decision to suspend the licence, there is no record of the consideration of these circumstances by the DAFM, available to the FAC from the file, by way note or report prior to or at the time the decision to suspend the licence issued.

The FAC concluded that due to the absence of such a record, or of the inclusion in the notification of the suspension of the licence of further detail regarding the basis and analysis that led to the decision, that the said decision was made without complying with fair procedure.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, submissions made, the SOF submitted by the DAFM, and post appeal submissions. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that the decision to suspend the licence CN83687 was made without complying with fair procedure and is thus allowing the appeal and setting aside the decision to suspend licence CN83687.

Yours sincerely,


Seamus Neely, On Behalf of the Forestry Appeals Committee