



29th November 2022

Subject: Appeal FAC 028/2022 relating to Licence CN86363

Dear i

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 full Department of Agriculture, Food and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to allow the appeal and set aside the decision of the Minister regarding licence CN86363.

Licence

Licence CN86363 is for 5.95 Ha. of afforestation GPC 3 (4.19 Ha.) & GPC 10 NWE (1.76 Ha.) in the townlands of Darkvalley, Lisgorman, Socks, Co. Leitrim, and was submitted to the DAFM on the 1st of May 2020. On the 15th of March 2022 the DAFM issued a notice granting the licence with conditions, including: compliance with DAFM Technical Standards, a minimum unplanted setback from the public road of 10m plus planting of 5 rows of broadleaved species, the planting of 5 rows of broadleaved species along the southern and eastern site boundaries, retention of an area of scrub and the planting of 5 rows of broadleaved species, compliance with the mitigation measures set out in the Appropriate Assessment Determination (AAD) and compliance with the conditions set out in the archaeology report.

Forestry Appeals Committee.

The appeal was considered at the sitting of the FAC held on the 16th of November 2022.

The FAC members present were: Mr. S. Neely (Chairperson), Mr. V. Upton, Mr. D. Daly and Mr. I. Douglas.

Secretariat to the FAC Mr. M. Ryan and Ms. V. Healy.

Background

The proposal consists of the planting of 5.95 Ha. of forestry of which 4.91 Ha. is GPC 3 and 1.76 Ha. is GPC 10 NWE in seven plots at Darkvalley, Lisgorman, Socks, County Leitrim. The site has a relevant watercourse which bisects both Plots 2 and 3. Plots 2 and 3 are separated by a high voltage electricity corridor. The Inspector's Appropriate Assessment Screening Report (AASR) Report of 6th

January 2022 indicates that the soil type underlying the project area is predominantly podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush.

There were no referrals to statutory authorities or other referral bodies.

In the AASR of the 6th of January 2022 the Inspector considered 7 sites within 15km and that there was no need to extend that distance in this case. The European sites considered were Arroo Mountain SAC (Site Code 001403), Ben Bulbin, Gleniff & Glenade Complex SAC (Site Code 000623), Boleybrack Mountain SAC (Site Code 002032), Glenade Lough SAC (Site Code 001919), Lough Gill SAC (Site Code 001976), Unshin River SAC (Site Code 001898) and Sligo/Leitrim Uplands SPA (Site Code 004187). The overall conclusion was to screen in Lough Gill SAC for Appropriate Assessment due to direct downstream hydrological connectivity. The remaining six sites were screened out for the reason that the project area was located within a separate water-body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection.

An Appropriate Assessment Screening Determination (AASD) carried out by a consultant ecologist of behalf of the DAFM dated the 12th of January 2022 examined nine Natura Sites. In addition to those in the Inspector's AASR, the ecologist identified Cummeen Strand, Drumcliff Bay (Sligo Bay) SAC (Site Code 000627) and Cummeen Strand SPA (Site Code 004035) as being outside the 15km zone of influence but both having downstream hydrological connection to the project area via Lough Gill. In addition, the ecologist screened in Glenade Lough SAC and Sligo/Leitrim Uplands SPA. The ecologist's AASD required 5 sites to proceed to Appropriate Assessment; (i) Glenade Lough SAC, (ii) Lough Gill SAC, (iii) Sligo/Leitrim Uplands SPA, (iv) Cummeen Strand, Drumcliff Bay (Sligo Bay) SAC and (v) Cummeen Strand SPA.

An Appropriate Assessment Report AAR also dated the 12th of January 2022 and was carried out behalf of the DAFM by the same consultant ecologist. The AAR assessed the potential of the proposed afforestation adversely impact on the Qualifying Interest(s) of the SAC and the Special Conservation Interest(s) of the SPA, in the light of the Conservation Objectives for each of the sites. The AAR identified site-specific measures identified to prevent or mitigate against any adverse effects which were to be included as conditions of the licence including those for Peregrine Falcon and Otter. The AAR concluded, in view of best scientific knowledge and based on objective information, that the proposed project itself (i.e. individually) will have no adverse effect on the integrity of any European Site(s), in view of its conservation objectives.

Section 6 of the AAR addressed the "In-combination Effects" of the proposal and identified a range of plans and projects. The In-combination Statement concludes that the proposed afforestation, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the Natura site subject of the AAR and therefore there is no potential for the proposed works to contribute to any cumulative adverse effects on the European sites, when considered in-combination with other plans and projects, because the project is not located within a European site and mitigation measures proposed will ensure no potential for negative impact on the integrity of the conservation objectives for any European site within the zone of influence.

An Appropriate Assessment Determination (AAD) dated the 14th of March 2022 was made that, based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site given that fact that the project is not located within a European site and the mitigation measures proposed will ensure no potential for negative

impact on the integrity of the conservation objectives for any European site within the zone of influence.

The Inspector's Certification Report dated the 15th of March 2022 recommends that the licence be approved subject to conditions including adherence to the mitigation measures set out in the AAD.

There is an Assessment to Determine EIA Requirement dated the 15th of March 2022 which considered the proposed afforestation across a range of criteria and a determination that the proposal should not be subject to the Environmental Impact Assessment process.

The proposed afforestation was Desk Assessed and was Field Inspected on the 12th of February 2021 and the 14th of February 2022.

The licence application was referred to the DAFM archaeology section which reported on the 10th of November 2020 recommending a number of archaeological conditions to be attached to the licence.

There were two third-party submissions on the licence application.

Appeal

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

The grounds of appeal are summarised as follows:

1. The Biomap submitted with the application is deficient: (i) a wayleave is not shown, (ii) the legend is incorrect, (iii) hedgerows incorrect, (iv) an historical feature (townland boundary) is not identified.
2. The validity of the EIA screening is questioned: (i) there is a large discrepancy between the percentage of forest cover in the EIA screening and the In-combination statement, (ii) the Inspector is not qualified to address the impact of the proposal on the landscape, (iii) the application should have been referred to Leitrim County Council to assess landscape impact, (iv) reference should have been made to the Florence Convention and the Landscape Characterisation in the County Development Plan.
3. The AAR was not available for the public to view during the consultation period specified in the Birds % Natural habitats Regulations 2021 and some the mitigation measures are not precise and leave the conditions open to the interpretation of the licensee.
4. There is no justification provided for the selected Areas for Biodiversity Enhancement and the hedgerow setback of 3m is inadequate for long term viability of the hedgerows.
5. The project area is identified as being "dominated by wet grassland GS4 and therefore should be considered as High Nature Value Grassland and planting of such areas is contrary to state aid provisions.
6. The application should have been referred to the county council or the NPWS due to the sensitivity of the site therefore the integrity of the decision is questioned.

Hearing

At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (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 provided to the FAC

The SoF provided by the DAFM dated the 21st of September 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed and that two field assessments were carried out. 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 included a statement dated the 26th of June 2022 from the Forestry Inspector confirming that the Appropriate Assessment (AA) process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a statement that there a significant error was identified after the decision was made in relation to some of the EIA outputs on Iforis and requests that the licence is remitted for a new EIA screening to be undertaken.

Consideration by FAC.

Appropriate Assessment.

In considering the appeal the FAC examined the Inspector's AASR of 06/01/2022 & 15/03/2022, the DAFM Ecologist's AASD & AAR of 12th of January 2022 and AAD of 14th of March 2022. The FAC considered the nature, scale and location of the proposal, the European sites identified and their conservation objectives and the reasons for proceeding to Stage 2 Appropriate Assessment (the AAR) provided by the DAFM.

The FAC noted that the DAFM considered each site in turn and provided the reasons for screening out all the sites for AA and that details of other plans and projects were also examined by the DAFM concluding that the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions.

The FAC noted that the conclusion of the In-combination Statement states:

"It is concluded that there is no possibility that the proposed afforestation project CN86363, 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....."

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 screening 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.

Environmental Impact Assessment (EIA).

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement dated the 15th of March 2022 in advance of making the decision to grant the licence, the Inspector recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA.

The EU EIA 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 is 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 afforestation of 5.95 Ha is substantially below the 50 Ha. threshold.

The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an Environmental Impact Assessment Report (EIAR) was required having regard to the nature, scale, and location of the proposal. However, the FAC noted that in the Assessment to Determine EIA Requirement the amount of existing forest cover within 5km of the site is stated to be 28.43% and the amount of existing forest cover in the underlying waterbody (or waterbodies) is stated to be 100.2%. The FAC considers this to be a clear and obvious error and concluded that in proceeding to make a determination regarding the requirement for an EIA, in the absence of a documented reconciliation of the apparent differences in the values for percentage forest cover, the DAFM made a significant error in the processing of the application for CN86363 with regard to the requirements of the EIA Directive. The FAC noted the acknowledgement of this error by the DAFM.

The FAC also noted that the figure for the approximate % of forest cover in the application's townland(s) 5 years ago was 3.65% and that the figure for the approximate % of forest cover at present in the applications townland is 22.47% and that the difference between the two figures is not explained.

The FAC noted in the Inspector's Certification that the proposed afforestation is not located in an area of High Visual Amenity in the Leitrim County Development Plan 2015-2021.

Water Framework Directive (WFD).

EPA mapping shows the site lying within Catchment Sligo Bay 35. The relevant sub catchment is Bonet_SC_020 where forestry is not identified as a pressure. The nearest WFD River water body is the Bonet_050 (Skeanada River) which was of Moderate Status between 2013-2018 and is At Risk in the 3rd cycle site. The site is connected to the Bonet_050 (Bonet River) by a relevant watercourse. The underlying Ground Water body is the Killarga IE_WE_G_0055 which was of Good Status between 2013-2018) and is Not at Risk.

FAC Consideration of the Grounds of Appeal.

In the interest of efficiency, the FAC, considered the appeal under the following headings:

Adequacy of the Biomap.

This ground of appeal contends that the Biomap submitted with the licence application is “*legally deficient*” in a number of respects. The FAC noted that under Article 5 of the Forestry Regulations 2017 (as amended), an application for an afforestation licence must be accompanied by an Ordnance Survey map or other map acceptable to the Minister which must show inter-alia; public roads, forest roads, aquatic zones, wayleaves, archaeological sites or features, hedgerows, and any other features which may be relevant to the application. Furthermore, Regulation 5(2)(b) of the Forestry Regulations 2017 require that, *a plot table, which shall accompany the map, detailing the number of each plot, the area of each plot, and the species of trees to be planted in each plot*

The FAC further noted that the requirements for a biodiversity map (Biomap) are set out in Section 18.7 of the Forestry Standards Manual 2015. The FAC are satisfied that the hedgerows of the lands are shown and that the plots would not cross a townland boundary. The application was assessed by an Archaeologist and adherence with the Environmental Requirements for Afforestation was a condition of the licence. The record includes a table of the plots with the associated species and areas. However, the plot numbers are not included on a map with the application. While the plots are identified on the Forestry Licence Viewer the plot numbers do not align with those used in the application and in the absence of a map clearly identifying the plot numbers, the application lacks clarity.

The publicly available mapping on Landdirect.ie shows a right of way running west-to-east through the un-numbered plots adjoining plot no.408 to the south and are not shown on the maps submitted.

The FAC considers the Biomap submitted lacks information required under the Forestry Regulations 2017 (as amended) and the Forestry Standards Manual 2015 and therefore constitutes a serious error in the processing of the licence application and the making of the decision. The FAC considers that the appeal should be allowed and the decision set aside.

EIA Screening.

Data on the percentage of forest cover.

The FAC considered the grounds relating to the data on the percentage of forest cover (see above) and noted that the DAFM has acknowledged errors in its “Assessment to Determine EIA Requirement” regarding the data on the percentage of forest cover.

The DAFM also considered the proposal’s potential to have a significant effect on European sites both individually and in combination with other plans and projects. The In-combination Statement of the 6th of January 2022 indicates that the amount of existing forest cover within the River Sub-Basin Bonet_050 is approximately 27%.

Furthermore, the screening document only specifically records forest cover. While the FAC considers that this document is designed to be read in-combination with the record as a whole which would include the detailed characteristics of other plans and projects, the Minister should ensure that in undertaking a new screening for EIA they should have full regard to the requirements of the Forestry Regulations 2017 including in the provision of reasons. The FAC also noted that the screening relies on Guidelines that were not attached as conditions of the licence. While the relevant operational measures have been incorporated into the *Environmental Requirements for Afforestation*, the FAC considers that this introduces a lack of clarity into the document.

Availability of the Appropriate Assessment Report.

This ground of appeal contends that the AAR was not published on the Forest Licence Viewer (FLV) “until after St Patrick’s Weekend” the FAC has taken this to mean after the weekend of Saturday 19th of March 2022 and was not available to view during the 30-day public consultation period.

The FAC noted the provisions of Regulation 42 as amended by European Union (Birds and Natural Habitats) (Amendment) Regulations 2021 and that the competent authority, when it has determined that an Appropriate Assessment is required, must carry out a public consultation and publish a notice of the proposed plan or project before making a final determination. The documents to be made available to the public are, (i) the screening determination that AA is required, (ii) the Appropriate Assessment itself and (iii) any other information or documentation relevant to the application in the public authority’s possession. The public may make submissions or observations in writing concerning the proposed plan or project to the public authority within 30 days from the date of publication of the notice.

The record shows that the Inspector’s Appropriate Assessment Screening Report (ASSR) dated the 6th of January 2022 determined that AA for was required for one site and that a subsequent Appropriate Assessment Screening Determination (AASD) carried out by a consultant ecologist of behalf of the DAFM dated the 12th of January 2022 determined that AA for was required for five sites. On foot of the second determination AA was carried out on the five sites. The Appropriate Assessment Report (AAR) is also dated the 12th of January 2022. The FAC noted that the record shows both the AASD and the AAR were published on the FLV on the same date, 12th of January 2022. The also record shows that the notice for the consultation required under Regulation 42 of the above was advertised on the 21st of January 2022. Given the date of publication the 30-day period for submissions would have ended on the 19th of February 2022. No submissions were recorded. The final determination, the Appropriate Assessment Determination (AAD) dated the 14th of March 2022 was published on the FLV on the same date and the licence issued on the 15th of March 2022.

The FAC noted that the appellant’s contention that “Notice was published on the 19-1-21 but the AAR was not publicly available during that period.” while the DAFM SoF states that the date of the notice advertising the licence was 20/05/2020 and that the date of the notice advertising the second public consultation was 21/01/2022.

The FAC noted that the appellant has adduced no evidence to substantiate that the required documentation was not available in the 30-day period 21st of January 2022 to 19th of February 2022. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Mitigation Measures.

This ground of appeal contends that some of the mitigation measures set out in the AAD are not sufficiently clear or precise with particular reference to mitigation measures “Do not carry out any works before during or after extreme weather events (orange/red events) or prolonged periods of rainfall where soils are saturated” and “It is advisable to carry out works at drier times of year (May-September) to avoid losses of silt / sediment from use of machinery over wet soil”. The FAC has reviewed the wording of similar mitigation measures for the cessation of works during period of heavy rainfall and has found them to be more detailed and precise. Similarly, case law requires mitigation measures to be unambiguous and the use of “advisable” introduces a degree of discretion not compatible with the need to clear and precise. The FAC considers the lack of clarity and precision in the mitigation measures constitutes a serious error in the processing of the licence application.

Areas for Biodiversity Enhancement.

With regard to the appellant’s view that the areas selected as Areas for Biodiversity Enhancement (ABE) do not represent the best areas for biodiversity enhancement as required by Section 6.2 of the Forestry Standards Manual 2015. The FAC considered this section of the Standards and the related

tables identifying acceptable areas for retention as ABE and the documentation submitted. The FAC noted that the site was inspected on two occasions and no changes to the areas of ABE were required by the Inspector.

The appellant contends that the setback from the hedgerows of 3m specified on the Biomap uploaded 12-Jan-2022 is insufficient and that the BIOFOREST Report recommends a setback of 7m to avoid the forestry suppressing the growth of hedgerows. The FAC noted that the BIOFOREST Report (Biodiversity in Irish Plantation Forests Final Report¹) was a research project under the auspices of the EPA and COFORD and includes a recommendation to “*Retain scrub, hedgerows and other marginal and additional habitats and allow for adequate buffer zones*” and is not part of the DAFM Guidelines and Standards, the FAC also noted that a minimum 5m setback is specified in Section 2.5.4 of the Environmental Requirements for Afforestation 2016. The FAC considered that the Environmental Requirements for Afforestation state that all hedgerows must be retained and

“A habitat setback (5 metres minimum) should also be considered in relation to particular hedgerows on-site, to ensure their continued presence as the surrounding canopy develops. This decision should be informed by the quality of the hedgerow (in terms of its age, species composition and structure), its landscape importance, and other attributes (e.g. whether or not the hedgerow represents a townland boundary or if it is associated with another habitat such as a stream)”

The FAC further noted that the first part of Condition 5 of the licence requires that the afforestation and all associated operations to be carried out and completed in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars). The application has identified hedgerow setbacks in the mapping provided and the FAC considers that where specified in the application these must be of 5 metres minimum in keeping with the *Environmental Requirements for Afforestation* in addition to the retention of all hedgerows. In addition, sections of hedgerows will be included in the setback areas of watercourses, public roads and the ESB corridor as identified in the mapping provided. The FAC is not satisfied that the DAFM has erred in the making of the decision in this matter.

High Nature Value Grassland.

This ground of appeal contends that the site, having been identified as being “*dominated by wet grassland GS4*” in the AAR, should be considered as farmed High Nature Value Grassland and planting of such areas is contrary to state aid provisions. The FAC is not satisfied that the record suggests that the lands might be classified as semi-natural grassland. 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 FAC can address only the grounds of appeal that relate directly to the licence for afforestation under Article 7 of the Forestry Act 2014 and the Forestry Regulations 2017 and does not consider that compliance with Rural Development Programmes or the provisions of State Aid fall within the remit of the FAC itself to determine. The FAC is not satisfied that the DAFM has erred in the making of the decision in this matter.

Licence should have been referred to Leitrim County Council.

This ground of appeal contends that the licence should have been referred to Leitrim County Council to inform the assessment of the impact of the proposal on the landscape. The FAC noted that the

¹ <https://www.epa.ie/publications/research/biodiversity/ERTDI-Report-51.pdf>

publicly available mapping on the Leitrim County Council website² shows the site to be outside of areas classed as areas of High Visual Amenity or Areas of Outstanding Natural Beauty in Leitrim CDP 2015-2021 and that all of the site is classed as having a High Capacity/Low Sensitivity for forestry. The FAC further noted that the DAFM is the competent authority for issuing forestry licences and that referrals to local authorities and other bodies is a matter for the DAFM. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 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. The FAC considers that the errors on the Biomap submitted with the licence application and the provisions of Article 5 of the Forestry Regulations 2017 (as amended) are such that the appeal is allowed and the decision of the Minister is set aside.

Yours sincerely,



Iain Douglas,
On Behalf of the Forestry Appeals Committee

² <https://leitrimcoco.maps.arcgis.com/apps/webappviewer/index.html?id=8645fc340c8d457b99ce71ce20bd79f1>

