



16th December 2022

Subject: Appeal FAC 026/2022 against licence decision CN88498

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 Marine. 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 the parties to the appeal.

Hearing

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. A hearing of appeal FAC 026/2022 was held remotely by the FAC on 16th November 2022. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly, Mr Iain Douglas & Mr. Vincent Upton
Secretary to the FAC: Ms Vanessa Healy.

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN88498. The reasons for this decision are set out hereunder.

Background

The licence decision under appeal pertains to the afforestation of 10.69 hectares at Drumminshin Glebe & Miltron Glebe, Co. Leitrim. The application describes the land as enclosed agricultural land with a grass rush /sedge rush vegetation type, being exposed and on a mineral soil. The original application documentation shows that plots 1, 2, 5, & 6 would be comprised of 85% Sitka spruce and 15% Birch and that plots 3 and 4 are listed as Bio. Also included is a site location map, Biodiversity Maps, a fencing map and operational details in the form of the applicant's pre-approval submission report. The biodiversity mapping shows the public road, a 10m road setback, hedgerows (1085m), utilized building setback (60m),

ESB line and setbacks, watercourses and setbacks, mound drain direction, temporary watercourse crossings and the location of the site notice. The proposal includes 1760 metres of fencing.

The application records that the ground preparation would include woody weed removal and mounding with no additional drainage, having angle notch planting, that Granulated Rock Phosphate would be applied, and that herbicide weed control is proposed for year 1. A revised Species Map, Current Environment and Habitat Map, Fencing Map (1745 m), and Biodiversity and operational Map are shown on the forestry licence viewer (FLV) as uploaded on 10/01/2022. The Species Map of 10/01/2022 shows planting on plots 1, 2, 4 and 5 (these numbers differ from some of the plot numbers in the original maps) as being 85% Sitka spruce and 15% Birch with Plot 3 shown as 100% Bio. Electricity lines cross the site area and the location of these, and a 20 metre setback is shown on Bio Mapping submitted. The application was not referred to any referral bodies. The record confirms that one submission relating to the application was received on 10/05/2021.

There is an Appropriate Assessment (AA) screening report on the record dated 10/01/2022. This AA screening identified two European sites within 15km (Lough Oughter And Associated Loughs SAC 000007 & Lough Oughter SPA 004049). The Lough Oughter And Associated Loughs SAC was screened in due to 'Direct Hydrological connectivity' and the Lough Oughter SPA was screened out due to 'distance'. The AA screening report of 10/01/2022 concluded that the project should proceed to Appropriate Assessment for the Lough Oughter And Associated Loughs SAC. The online source for the 'Conservation Objectives' for both European Sites is in a document on the forestry licence viewer as uploaded on 12/01/2022 (FLV reference date).

The record shows an Appropriate Assessment Screening Determination (AASD) dated 12/01/2022 described as being for afforestation project CN88498 located at Druminshin Glebe, Co. Leitrim. This screening report contains what it describes as the '*Expert verification of District Inspector's AA Screening Report & Determination in relation to afforestation project CN88498*' and in describing the proposed works it records the project area being divided into 6 plots:

- Plot 1 4.59ha GPC3,
- Plot 2 .81ha GPC3
- Plot 3 .29ha Bio
- Plot 4 .11 ha Bio
- Plot 5 2.71 ha GPC3
- Plot 6 2.14 ha GPC3.

This description of planting for the plots 1 – 6 correlates with the species mix / distribution and fencing mapping as shown on the original proposal but does not accord with the revised species proposal shown on the Forestry Licence Viewer referenced with the date 10/01/2022. This AASD records that there is an aquatic zone running northwards along the eastern boundary of plot 1 towards Laheen Stream_010 circa 730m surface water distance away and that this connects in with Lough Oughter and Associated Loughs SAC 000007 circa 13.1km surface water distance away and with Lough Oughter Complex SPA 004049 a

further circa 4km upstream. It records that there is a relevant watercourse to the south of plots 2-5 which tentatively appears to connect southwards to Cloone_010 and flows to Lough Rynn circa 23km surface water distance away via another WFD sub-catchment. It records that this connection is weak. The screening upholds the screening conclusion of the District Inspector in respect of the Lough Oughter and Associated Loughs SAC and overturns the screening conclusion of the District Inspector in respect of the Lough Oughter Complex SPA on a precautionary basis. The screening determination therefore is that the project must advance to Appropriate Assessment stage in relation to the Lough Oughter and Associated Loughs SAC and the Lough Oughter Complex SPA.

The Report considers other plans and projects and potential for residual impacts and concludes,

'that the proposed afforestation, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the above Screened Out European Sites, and associated Qualifying Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on these Screened Out European sites, when considered in-combination with other plans and projects.'

Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not give rise to adverse effects on the integrity of any European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any of the above Screened Out European Sites. Screened-In European sites will be progressed to, and addressed in, Stage 2 Appropriate Assessment.'

It states that the In-Combination Statement was completed on the 12/01/2022. The record shows that this report was published on 23/09/2022.

The record shows an Appropriate Assessment Report dated 12/01/2022 described as being for afforestation project CN88498 located at Drumminshin Glebe, Co. Leitrim. This report examined the two screened in sites, outlines mitigation measures, and in relation to in-combination concludes that it is deemed that the project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the above European Sites. While this report is dated 12/01/2022 the record shows that it was published on 23/09/2022.

An Appropriate Assessment Determination for afforestation project CN88498 located at Drumminshin Glebe, Co. Leitrim and dated 14/03/2022 is on the record which in section 4 outlines mitigation measures and concludes that the basis for this AA Determination is as follows:

- *'because the project is located entirely outside any European sites and;*
- *though there are hydrological connections, mitigation provided will ensure no potential for impact to integrity of Conservation Objectives for those sites screened-in for AA.*

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), 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’.

The DAFM also recorded a further Appropriate Assessment Screening Report dated 15/03/2022 which identified two European sites within 15km (Lough Oughter And Associated Loughs SAC 000007 & Lough Oughter SPA 004049). Both sites were screened out in this screening report and the reason for screening out the Lough Oughter And Associated Loughs SAC was recorded as ‘Other factors, As per AAD’.

The DAFM recorded a consideration as to whether the proposal should be subject to an EIA. In addition to the previously identified records, this records a consideration of the proposal across a range of criteria and included that the application should not be subject to the EIA process. The record shows that the application was field inspected on 29/04/2021.

The licence was issued on 15/03/2022 subject to conditions. These include a requirement to adhere to the AA Determination dated 14/03/2022.

Appeal

There is one third party appeal against the decision and the full grounds of appeal and submissions received by the FAC have been provided to all parties. The DAFM informed the FAC that the documents required under the Forestry Appeals Committee Regulations 2020 are provided through the forestry licence viewer and the parties were notified of this.

In summary, the grounds of FAC 026/2022 submit;

- There are errors in the Application, stating that the Bio Map as submitted with application was not compliant with Section 5 (2) of the Forestry Regs as external hedgerows weren’t identified, that a historical / cultural feature (Townland boundary) is not shown, that a Right of Way along TD boundary is not shown, states that part of Miltron Glebe is on deep peat while the application states Mineral,
- Area for Biodiversity Enhancement, states that no area for BDE details are shown on Bio Map citing that there is reference for road and dwelling setbacks to be for BDE, submits that the 4m setback for hedgerows is not enough,
- Mapping not consistent, states that the environmental features on the original and revised Bio Maps differ, says project area on bio maps different to that on fencing map, that there are conflicting areas of project, queries if the project has been modified, queries if lands from a quoted folio form part of the project, and states that DAFMs mapping is not consistent with parcels on Land Direct,

- EIA screening is unreliable, states that the determination is made on conflicting data and is therefore unreliable, references variances in forest cover as between EIA screening and In-Combination assessment, raises absence of a commentary when the answer to a question regarding afforestation of 3 years or less within 500m is a yes, mentions that there appears to be a further 15 ha in the system, and submits that 53.84 ha forest cover as recorded is incorrect,
- Semi Natural Grassland, submits that the licence is inconsistent with the RDP and the State Aid Decision, submits that the project is almost exclusively semi natural grasslands and notes that the NPWS was not consulted,
- AA Errors and Issues, mentions that neither the AAD or AAR identifies that part of the site is in Miltron Glebe, submits that the correct model is Source/ Pathway/ Receptor – not direct / indirect impact, submits that some of the Mitigations are not sufficiently clear or precise, queries the inclusion of an ‘advisory’ in the mitigation, submits that there was no site visit by the ecologist and queries the inconsistency of a 3m setback condition in AAR for boundary hedgerows and 4m in the applicant’s submission.

The Appellant requests an oral hearing of the appeal.

The DAFM provided a statement to the FAC in relation to the appeal which was provided to the parties. The statement provided an overview of the processing of the application and the steps and dates involved. It is submitted that the application was advertised on 14/04/21, that there were no referrals made, gave a detail of the Appropriate Assessment Screening, Report and Determination, that the application was field inspected on 29/04/2021, that there was one submission made to the DAFM on the application, that the decision issued on 15/03/2022 and was advertised on 16/03/2022.

The statement also sets out that regarding EIA screening, DAFM would like to point out that a significant error was identified after the decision was made in relation to some of the EIA outputs on iforis forest cover wherein the forest cover in the underlying waterbody was identified at 83% and that this figure is incorrect.

Considerations of the Forestry Appeals Committee

The FAC in the first instance considered the Appellant’s request for an oral hearing of the appeal. 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.

The FAC considered the grounds in the appeal in relation to EIA screening and related matters. The FAC noted the submission in the DAFM statement to it wherein it states that regarding EIA screening, DAFM would like to point out that a significant error was identified after the decision was made in relation to some of the EIA outputs on iforis forest cover wherein the forest cover in the underlying waterbody was identified at 83% and that this figure is incorrect. The FAC is of the view that the differences recorded for the forest cover in this instance represents a serious error and that the error was not addressed in the

DAFM's deliberations nor was it resolved in the record of the decision. The FAC has therefore concluded that the Assessment to Determine EIA should be undertaken again to address this matter. The FAC considered the grounds of appeal that in the Assessment to Determine EIA Requirement there is an absence of a commentary which is required when the answer to the question regarding afforestation of 3 years or less within 500m is a yes. The FAC considered that this matter can be resolved when the new Assessment to Determine EIA is being undertaken. The FAC further noted that the assessment relies on a number of DAFM Guidelines which are not attached as conditions of the licence and appear to have been replaced by the Environmental Requirements for Afforestation which is a condition of the licence. This represents a further error.

The FAC considered the grounds of appeal relating to Appropriate Assessment and related matters. The FAC finds that the DAFM recorded an Appropriate Assessment (AA) screening report dated 10/01/2022 which identified two European sites within 15km (Lough Oughter And Associated Loughs SAC 000007 & Lough Oughter SPA 004049), that the Lough Oughter And Associated Loughs SAC was screened in due to 'Direct Hydrological connectivity' and the Lough Oughter SPA was screened out due to 'distance'. The FAC finds that this screening report of 10/01/2022 concluded that the project should proceed to Appropriate Assessment for the Lough Oughter And Associated Loughs SAC. The FAC also noted that the online source for the 'Conservation Objectives' for both European Sites is in a document on the Forestry Licence Viewer as uploaded 12/01/2022.

The FAC also finds that the record shows an Appropriate Assessment Screening Determination (AASD) dated 12/01/2022 which is described as being for afforestation project CN88498 located at Drumminshin Glebe, Co. Leitrim. The FAC notes that this screening report, contains what it describes as the '*Expert verification of District Inspector's AA Screening Report & Determination ... in relation to afforestation project CN88498*' and described the proposed works area as being divided into 6 plots:

- Plot 1 4.59ha GPC3,
- Plot 2 .81ha GPC3
- Plot 3 .29ha Bio
- Plot 4 .11 ha Bio
- Plot 5 2.71 ha GPC3
- Plot 6 2.14 ha GPC3.

While the Biomap as submitted with the application at the outset does not have plot numbers shown on it the FAC considers that these can easily be identified from the plot numbers that are clearly marked on the accompanying fencing map as originally submitted with the application. The FAC finds that the description of planting for the plots 1 – 6, as recorded in the AASD, correlate with the species mix / distribution map as submitted with the original proposal but not with the revised species proposal dated 10/01/2022. The FAC notes that the main differences in the two sets of maps are that area in plot 4 as shown on the original application map is omitted from the mapping of uploaded 10/01/2022, that the area shown as plot 6 in the original mapping is shown as plot 5 in the mapping uploaded 10/01/2022, and that the area shown as plot 5 in the original mapping is shown as plot 4 (with some reduction at the

western end such that it no longer links with the most western plot) in the mapping uploaded 10/01/2022. The FAC notes that the plot / species mix schedule as included in the licence as issued accords with the original application boundaries and as considered in the AASD, AAR and AAD. The FAC has, based on the record available to it, been unable to establish the status of the revised mapping as submitted and recorded as 10/01/2022 on the Forestry Licence Viewer. Furthermore, it appears that a right of way may be situated at the eastern edge of Plot 5 of the amended species map. The FAC is satisfied that this discrepancy and lack of clarity in the final licence in comparison to the application, including apparent amendments, represents a serious error in the making of the decision.

The FAC finds that the AASD of 12/01/2022 upholds the screening conclusion of the District Inspector in respect of the Lough Oughter and Associated Loughs SAC and overturns the screening conclusion of the District Inspector in respect of the Lough Oughter Complex SPA on a precautionary basis and that the screening determination is that the project must advance to Appropriate Assessment stage in relation to the Lough Oughter and Associated Loughs SAC and the Lough Oughter Complex SPA.

The FAC also finds that the AASD report considers other plans and projects and potential for residual impacts and concludes,

'that the proposed afforestation, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the above Screened Out European Sites, and associated Qualifying Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on these Screened Out European sites, when considered in-combination with other plans and projects.

Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not give rise to adverse effects on the integrity of any European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any of the above Screened Out European Sites. Screened-In European sites will be progressed to, and addressed in, Stage 2 Appropriate Assessment.'

It states that the In-Combination Statement was completed on the 12/01/2022. The record shows that this report was published on 23/09/2022. While the incorrect test is stated in relation to the screening conclusion for screened out sites. As no sites considered in the document were screened out in this instance the FAC does not consider this to be a serious or significant error. All sites considered in the screening proceeded to Appropriate Assessment.

The FAC finds that the record shows an Appropriate Assessment Report (AAR) dated 12/01/2022 described as being for afforestation project CN88498 located at Drumminshin Glebe, Co. Leitrim and that this AAR examined the two screened in sites, outlines mitigation measures, and in relation to in-combination concludes that it is deemed that the project, when considered in combination with other

plans and projects, will not give rise to any adverse effect on the integrity of the above European Sites. While this report is dated 12/01/2022 the record shows that it was published on 23/09/2022.

The FAC noted that the record shows that the AASD and the AAR, although completed on 12/01/2022, are recorded as being published on 23/09/2022 and that being after the issue of the licence in this case. The FAC considered this was not in keeping with DAFM procedures as published on the website of the DAFM and that it represented a serious error in the making of the decision in this case.

The FAC further finds that An Appropriate Assessment Determination (AAD) for afforestation project CN88498 located at Drumminshin Glebe, Co. Leitrim and dated 14/03/2022 is on the record which in section 4 outlines mitigation measures and concludes that the basis for this AA Determination is as follows:

- *'because the project is located entirely outside any European sites and;*
- *though there are hydrological connections, mitigation provided will ensure no potential for impact to integrity of Conservation Objectives for those sites screened-in for AA.*

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), 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'.

In examining the mitigation measures set out in the AAD the FAC finds that in relation to the prevention of silt and sediment run-off from the project area one of the mitigations is set out in an advisory manner wherein it states that;

'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 soils'.

The FAC concluded that the inclusion of mitigation measures in an advisory manner represents an error in the processing of the application as it relates to the Appropriate Assessment process.

The FAC also finds that the DAFM also recorded a further Appropriate Assessment Screening Report dated 15/03/2022 which identified two European sites within 15km (Lough Oughter And Associated Loughs SAC 000007 & Lough Oughter SPA 004049). Both sites were screened out in this screening report and the reason for screening out the Lough Oughter And Associated Loughs SAC was recorded as 'Other factors, As per AAD'. While this may be an administrative / process step necessitated by the record system the FAC is not in a position to be definitive in its view on this matter. This matter can be addressed by the DAFM before a new decision is made on the application. The FAC notes that the AASD, AAR and AAD done for the project records the project area as being at Drumminshin Glebe, Co. Leitrim whereas the project area is located in two townlands namely, Drumminshin Glebe & Miltron Glebe, Leitrim. While the FAC considers

this to be an error it is considered to be of a clerical nature and can be rectified when the fresh Appropriate Assessment process is being conducted.

The FAC considered the grounds in the appeal in relation to the adequacy of the materials submitted with the application. The FAC understands that the DAFM employs a Geographic Information System and spatial datasets as part of its acceptance, processing and assessment of an application as described in the *Forestry Standards Manual* (DAFM, 2015) and *Forests & Water Achieving Objectives under Ireland's River Basin Management Plan 2018-2021* (DAFM, 2018). When making an application for a forest licence, an applicant must provide the information in Schedule 1 of the Forestry Regulations 2017. This includes a physical description of the whole project and location; a description of the aspects of the environment likely to be significantly affected and a description of any likely significant effects on the environment from the expected residues, emissions and waste where relevant and the use of natural resources, to the extent of the information available on such effects. This information must take account of the criteria identified in Schedule 3 of the Forestry Regulations 2017.

The application includes details of the proposed operations and a series of maps including detailed Biomaps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects. In this instance no additional reports were submitted as part of the original application. As referenced earlier in this letter the FAC notes that the Biomap as submitted with the application at the outset does not have plot numbers shown on it. However, the FAC considers that these can easily be identified from the plot numbers that are clearly marked on the accompanying fencing and species maps as originally submitted with the application. The grounds reference that the maps submitted do not show Townland boundaries. In this context the FAC finds that the fencing map submitted with the application has Townland boundaries marked on it. The FAC examined the record and statement from the DAFM and considered that the DAFM had sufficient information available to it to inform the decision-making process in this case and that the information as uploaded to the Forestry Licence Viewer was sufficient to inform the general public as to the content of the application as submitted.

In relation to the grounds in the appeal wherein it is submitted that the licence is inconsistent with the RDP and the State Aid Decision (with conditions 36 and 40 quoted) the FAC finds that while the appellant states that the project is almost exclusively semi natural grasslands that no evidence to substantiate the submission is provided. The FAC notes that the application was field inspected on 21/04/2022 which provided an opportunity for the DAFM to take account of the makeup and nature of the project lands. Decisions on grant aid do not fall within the remit of the FAC as provided for in the Agriculture Appeals Act 2001. The FAC concluded that the appellant did not provide convincing evidence to substantiate the submission made and concluded that it is not satisfied that the DAFM erred in its processing of the application as it relates to this ground in the appeal.

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 series of serious and significant errors was made in the making of the decision in this case. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN88498 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new *Assessment for EIA Requirement*, to carry out a new Appropriate Assessment of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and to clarify the status of the maps (dated 03/12/2021 – 3 no. and 07/12/2021 – 1 no.) submitted by the applicant and as uploaded to the Forestry Licence Viewer in relation to the processing of the application and the issuing of the licence, before a new decision is made.

Yours sincerely,


Seamus Neely, On Behalf of the Forestry Appeals Committee