



21<sup>st</sup> December 2022

Subject: Appeal FAC 089/2022 in relation to licence CN85314 at Flughanagh, County Leitrim

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (MAFM). 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.

#### **Background**

This project was initially submitted on the 20<sup>th</sup> November 2019 and was before the FAC on the 27<sup>th</sup> October 2021 where a decision was made to set aside and remit the licence. The application was readvertised for a second public consultation on the 25<sup>th</sup> May 2022 and an afforestation licence CN85314 for 11.41 hectares at Flughanagh, County Leitrim was issued by the DAFM on the 18<sup>th</sup> July 2022.

#### **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. Appeal FAC089/2022 was considered remotely at a meeting of the FAC on the 30<sup>th</sup> November 2022.

In attendance:

FAC Members: Mr. Myles Mac Donnacha (Chairperson), Mr. Derek Daly.

Secretariat 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 CN85314. The reasons for this decision are set out hereunder.

#### **Background**

The licence decisions pertains to afforestation covering an overall area of 11.41 hectares. The site is irregular in configuration with 9.7 hectares proposed to be planted in Sitka Spruce and 1.71 hectarea with broadleaves. The site comprises two plots separated by an electricity transmission line with the site

predominantly located to the east of the transmission line where a plot is indicated as 11.42 hectares and a plot to the west of the transmission is c.0.3 hectares. The application records that the ground preparation would include woody weed removal and mounding, having angle notch planting, that 350kg Granulated Rock Phosphate would be applied, and that herbicide weed control is proposed for years 1 and 2.

The soil type underlying the project area is described as predominantly podzolic in nature and the slope flat to moderate. The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush. There is a major watercourse the Cashel Stream adjoining the northern boundary.

The application was initially accompanied by mapping including location and fencing maps and a biodiversity/operation map and public notices which are uploaded onto the Forest Licence Viewer. An NIS with a completion date stated as 12<sup>th</sup> September 2020 was submitted by the applicant and is uploaded on the Forestry Licence Viewer.

The application was resubmitted and revised mapping including a biodiversity map with a stated completion date of the 1<sup>st</sup> June 2022 was submitted and recorded on the Forestry Licence Viewer with that date. The application was subject to desk and field inspection by the DAFM.

The application was referred to Leitrim County Council on 11/12/2020 and An Taisce on 10/12/2020. The Leitrim County Council response 08/01/2020 outlines conditions in the event of the licence being granted. The An Taisce response dated 16/12/2019 refers to issues relating to AA in relation to Lough Gill SAC IE0001976 with particular reference to the otter and also to High Status Sites referring in particular to the High status of the water body in the context of the WFD. Two third party submissions were received objecting to the project.

The application was referred to a Department of Agriculture, Food and the Marine (DAFM) Archaeologist which recommends in a report dated 19/02/2019 conditions and includes maps as part of the report.

An Appropriate Assessment Screening Report and Determination (AASR) dated 27/06/2022 and which is uploaded on the Forestry Licence Viewer identifies nine Natura sites and six sites Boleybrack Mountain SAC IE0002032; Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC IE0000627; Lough Arrow SAC IE0001673; Lough Arrow SPA IE0004050; Union Wood SAC IE0000638 and Unshin River SAC IE0001898 were screened out. Three sites were screened in Ben Bulbin, Gleniff and Glenade Complex SAC IE0000623; Lough Gill SAC IE0001976 and Sligo-Leitrim Uplands SPA IE0004187.

Appendix 1 of the AASR is an In-Combination Report for the proposed afforestation which is dated 13/05/2022. The statement concludes *that there is no likelihood of the proposed afforestation project CN85314 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main*

*body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).*

An Appropriate Assessment Determination (AAD) dated 27/06/2022 and which is uploaded on the Forestry Licence Viewer includes a chronology of the licence including the previous decision of the FAC, a Review of Pre-screening and the NIS. In the Pre-screening the site Ben Bulben, Gleniff And Glenade Complex SAC was screened out, however, DAFM AASD screened this site in, due to the QI Lutra lutra (Otter) [1355] as this is a mobile species, and the separation distance between the project site and the SAC is less than the possible foraging distance of this QI. Additionally, it indicated there is a hydrological connection between the project site and the SAC that may be used for commuting by the species. It is also indicated that although the NIS dated 12/09/2020 did not address the Ben Bulben, Gleniff and Glenade Complex SAC was included in the current DAFM AA process for the reasons as outlined above in the AASD relating to the otter. The Conservation Objectives mitigation table for this SAC is indicated in Appendix 2 of the current document. The European sites included in the NIS were Lough Gill SAC and Sligo/Leitrim Uplands SPA and mitigation measures were proposed to avoid adverse effects on the integrity of these European Sites. These mitigation measures are incorporated into new DAFM proposed measures, which are detailed in Section 4 of the AAD. Reference is made to a Revised Bio Map submitted 01/06/2022 having all hedgerows shown, the two steep fields to the east of Plot 1 (see NIS) and all Aquatic Zones and Relevant Watercourses as being properly marked in.

It is indicated that the AA Determination dated 27/06/2022 is a response to FAC outcome in that the AA is completely re-done, including screening stage, review of NIS and production of AA Determination with revised Bio Map and Mitigations where necessary. A discrepancy between the initial Application and the NIS in the amount of fertiliser to be used is addressed: a statement from the Registered Forester states that the rate to be applied will be as specified in the NIS, and application will be in accordance with DAFM policy. There is a new In-combination statement outlined in Appendix 3 of the AAD.

Section 4 of the AAD outlines mitigation measures and concludes with an AA Determination *that the project is not located within or adjacent to a European site. Three sites were screened in, however, the details of the proposed works and mitigations described above will ensure that the project will not adversely impact the integrity of this European site. These details will protect habitats, and, as such, protect the Special Conservation Interests. In combination effects were assessed prior to meeting this determination (see Appendix 3). The mitigations outlined above will ensure that the proposed project will not represent a source and, as such, there is no potential for the project to contribute to any significant cumulative effects, when considered in combination with other plans and projects. Therefore, DAFM deems that the proposed project, when considered in-combination with other plans and projects, will not*

*give rise to the possibility of significant effects on any European site and that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.*

The record includes an Assessment to Determine EIA Requirement dated the 18<sup>th</sup> July 2022 and Inspector's Certification Report from the same date recommending approval subject to conditions which, in addition to those relating to grant aid, included adherence with the Appropriate Assessment measures and the archaeological report.

### **Appeal**

There is one third party appeal and the full Notice of Appeal and grounds have been provided to all parties.

In summary the grounds contend that there was undue process referring to delay in public issuing of the licence and thus narrowing the appeal period for the public; there was a public participation failure in relation to the additional public consultation period to consider AA and there was no direct notification in relation to this matter after making an initial submission.

It is submitted that the application is legally flawed. In this regard, reference is made to mapping deficiencies in that aquatic zoned areas are incorrectly mapped; the maps are deficient in relation to indicating hedgerows which was acknowledged in the original submission but the public were not informed and able to comment on the revised mapping; cultural features referencing townland boundaries are not identified and flood risk is not identified.

It is submitted and reference is made to errors in the previous FAC decision referring to information submitted with the application and post application and that an application must be legally compliant before the application is received.

Reference is made to the conditions of the licence and in relation to condition no 2 that it cannot be understood by a lay person and this refers to the availability and readily accessibility of standards and manual in relation to forestry and the ongoing periodic update of these documents as there is no consolidated version available.

It is submitted that the licence conditions are not consistent with the reasons set out and reference is made to setbacks from hedgerows and inconsistencies in how this will apply. There is also an absence of a record of existing trees so how will a condition to retain existing trees be adhered to. The issue of hedgerow crossing points is also referred to.

It is submitted that there is no reasoning why requirements of Leitrim County Council were not applied. Reference is also made to the An Taisce submission or evidence that it was considered.

It is submitted that there are issues in relation to the access which is considered inadequate and the whole stage of forestry including haulage roads and felling must be considered and form part of the EIA screening process.

It is submitted that there are no details in relation to woody weed removal.

It is submitted that the EIA Screening process is flawed using a tick box process with no adequate reasoning given.

The grounds make reference to the issue of cumulative process, the reasoning in relation to this and also to the previous licence application and its consideration by the FAC.

There is reference to ecological and environmental considerations, to the issue of High Nature Value Farmlands, to the need to protect farming systems and protection of sensitive habitats and there is inadequate setback from hedgerows. Reference is made to Annex IV species and their protection and this is not adequately addressed. Reference in this regard is made to the bat species. Reference is made to impact on the landscape.

Reference is made to issues of protection of water quality with a lack of distinctive evidence of how this will occur or reasoning with reference to the location of compounds and fuel storage areas within the exclusion zone.

It is submitted that the AA system is flawed, the mitigation measures in the AAD are not written with sufficient precision and are inconsistent with other conditions in the licence which require adherence with standards referencing the environmental standards and forestry manual.

It is submitted that no siltation and sediment and risk assessment report was undertaken to inform mitigation. Reference is made to imprecise details in relation periods of heavy rainfall.

Reference is made to the impact on species in particular the otter and peregrine falcon species and the assessment of impacts on these species.

Reference is made to in-combination and issues of deficiency of the process as carried out.

It submitted that the operability of the project is questioned if the archaeological conditions are complied with.

The right tree in the right place is advocated.

#### **DAFM Statement**

The DAFM provided a response to the grounds of appeal which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the

grounds of appeal. In relation to publishing, it is submitted that the details of the decision were uploaded onto the website and parties informed of the decision on the day of the licence decision. In relation to second advertisement of the licence the onus is on other parties to keep themselves informed.

DAFM submits that it does not consider mapping is deficient and hedgerows, water features and aquatic features are shown. It is also submitted that the conditions are clear and well reasoned. It is acknowledged that Leitrim County Council requested to be informed but there was no objection to the development. It is submitted that there is adequate access as per section 5.3.2 of the Forestry Standards Manual and woody weed removal is a standard operation in afforestation. In relation to crossing points these relate to future operations and felling and extraction has further licencing requirements.

Specifically in relation to ecology, reference is made to the revised bio map; that the conditions in the AAD are consistent and ensure no adverse effect and woody weed is required to be removed by condition. The conditions are therefore not inconsistent and the mitigations ensure no adverse impacts. There was a response in relation to issues raised in relation to hedgerows, bats and otters which were addressed in the assessment of the licence. In a response to the issue of the AA being flawed it is submitted that the AA process was carried out in accordance with policy and the measures carried out are outlined. It is also stated that the An Taisce's submission was considered. It is submitted that the hedgerow crossing points were identified and referred to in the mitigation measures of the AAD.

There is also a response from the archaeologist which in effect supports the decision to grant the licence.

#### **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 in the first instance whether the application should have been addressed in the context of the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). The FAC considered that 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, or a class of development related to the proposal under appeal, are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) of Annex II). The Irish Forestry Regulations 2017, 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 threshold where the Minister considers such development would be likely to have significant effects on the environment.

The decision before the FAC relates to the afforestation of an area of 11.41 hectares which is substantially below the 50 hectare threshold. The Minister concluded that the proposal was not required to proceed to EIA and provided a summary of reasons in the document Assessment for EIA Requirement. The FAC understands from this document that it is to be read in conjunction with the file and specific references are made to information in the application, submissions and referrals made, and referrals to the DAFM Ecologist and Archaeologist. The FAC would understand that the main reasons for the Minister's decision not to proceed to EIA are to be read across these documents in addition to the summary document. However, the screening relies on Guidelines for Water Quality, Archaeology and Landscape which have not been attached as conditions of the licence and have been replaced by the Environmental Requirements for Afforestation, according to that document. While the same operational measures are generally enforced this introduces a lack of clarity into the procedure. In addition, while the application provided detailed maps of the area and the DAFM recorded a comprehensive characterisation of other plans and projects in the area, the Assessment document only refers to forestry projects. While it might be reasonable to understand that the plans and projects detailed by the DAFM were considered as part of the screening, this should be specified more clearly. The FAC is satisfied that serious errors were made in the screening for EIA and concluded that a new screening should be undertaken in line with the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

The grounds contend that there was undue process referring to delay in public issuing of the licence and thus narrowing the appeal period for the public; there was a public participation failure in relation to the additional public consultation period to consider AA and there was no direct notification in relation to this matter after making an initial submission. In the DAFM response in relation to publishing, it is submitted that the details of the decision were uploaded onto the website and parties informed of the decision on the day of the licence decision. In relation to second advertisement of the licence the onus is on other parties to keep themselves informed.

In considering this the Forestry Licence Viewer records the decision as being published on the 18th July 2022 while the decision was also published separately on the DAFM website. On the face of the record the decision was published on the Forestry Licence Viewer on the same date that it issued and the appeal does not provide any evidence to contradict this. The Forestry Licence Viewer also records the bio diversity / operational map on the 1<sup>st</sup> June 2022 and a record of the AA Screening Determination and AAD in advance of the decision and that there is no requirement to directly notify parties of the uploading of documentation. The FAC does not consider that DAFM has erred or considered to be unreasonable particularly as the application and related documentation, including the Appropriate Assessment Determination, had been published for a period of time before the decision was made or that the period for appeal had been narrowed.

Regarding access to the public road, it is clear from the application and associated mapping that the forests lie across privately owned farmland with an access to the public road. The route to the public road clearly marked on the revised biodiversity and operational Harvest map.

The FAC considered the grounds that related to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

There is in the AAD prepared by DAFM a review of licence withdrawal, appeals and FAC outcome on a previous appeal on these lands in particular on the issue of AA. 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 and furthermore that the said information as uploaded to the Forestry Licence Viewer was sufficient to enable analysis, including GIS analysis. The revised biodiversity/operational map includes the identification of existing hedgerows, tracks and roads, including the crossing points on the aquatic zones/watercourses and provision of silt traps relevant to the application. The FAC considers that it is in keeping with good practice to provide some discretion for the operators to choose the location of silt traps to reflect the specific localised circumstances and that the conditions on the licence include criteria that must be met in locating silt traps that can be relied upon in the specification of the licence. Hedgerows are marked on the maps and must be retained. In this regard the FAC noted reference in the grounds to the maps are deficient but has offered no evidence that the revised mapping is deficient.

The FAC noted that the DAFM recorded an Appropriate Assessment Screening Report & Determination dated the 21/04/2022 which identifies and examines nine Natura sites and did not err in this regard. Six sites Boleybrack Mountain SAC IE0002032; Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC IE0000627; Lough Arrow SAC IE0001673; Lough Arrow SPA IE0004050; Union Wood SAC IE0000638 and Unshin River SAC IE0001898 were screened out and reasons provided. Three sites were screened in Ben Bulbin, Gleniff and Glenade Complex SAC IE0000623; Lough Gill SAC IE0001976 and Sligo-Leitrim Uplands SPA IE0004187. Specifically, the Ben Bulbin, Gleniff And Glenade Complex SAC was screened out in pre-screening, however, DAFM AASD screened this site in, due to the Qualifying Interest QI *Lutra lutra* (Otter) [1355] as this is a mobile species, and the separation distance between the project site and the SAC is less than the possible foraging distance of this QI. Additionally, it indicated there is a hydrological connection between the project site and the SAC that may be used for commuting. The FAC are satisfied that the screening process did not err and the reasons are correctly stated.



Other plans and projects are recorded which were considered in-combination with the proposal. In considering other plans and projects the DAFM recorded the following in the screening, *It is concluded that there is no likelihood of the proposed afforestation project CN85314 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).*

The FAC considered this to be an error as it suggests that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which, in-combination with other plans and projects, might result in a significant effect.

In relation to the Appropriate Assessment undertaken the DAFM record the following, *It is concluded that there is no possibility that the proposed afforestation project CN85314, 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: ➤ Ben Bulbin, Gleniff and Glenade Complex SAC IE0000623. ➤ Lough Gill SAC IE0001976. ➤ Sligo-Leitrim Uplands SPA IE0004187. 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 the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that other plans and projects were only considered in this Appropriate Assessment after a conclusion had been made that the project itself would not have an adverse effect on the integrity of the site concerned which the FAC would consider to not be in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

In relation to the otter species referred to in the grounds of appeal, it is recorded that the Ben Bulbin, Gleniff And Glenade Complex SAC was screened out in pre-screening, however, DAFM AASD screened this site in, due to the QI Otter as this is a mobile species, and the separation distance between the project site and the SAC is less than the possible foraging distance of this QI. Additionally, it indicated there is a hydrological connection between the project site and the SAC that may be used by the species.

The AAD specifically addresses the Otter species and outlines specific mitigation measures to be included in any decision to grant the licence. The FAC do not consider that DAFM erred in the AAD and similarly the Peregrine Falcon species was also assessed in the AAD mitigation measures as outlined. The FAC consider that the grounds provide no factual evidence to contradict the AA undertaken. The measures include specified setbacks and restrictions on operations in relation to water quality and disturbance.

In relation to licence conditions, the FAC consider it to be common practice that licensees and their agents be required to follow good practices standards as a condition of a licence. There are extensive measures to address the protection of water quality. There is provision specifically in relation to setback and the retention of existing trees and hedgerows and provisions of setbacks and these are referred to in the AAD.

Having regard to the nature, scale and location of the works as licenced, the FAC consider that the measures specified as conditions on the licence, including the AA, are sufficient to ensure that the good status of the waterbodies would be protected and not decline and that the long-term outcome may well improve given the measures that would be implemented as part of the proposal.

It is submitted in the grounds of appeal that the operability of the project is questioned if the archaeological conditions are complied with but the appellant has not offered any evidence that the measures as assessed and conditioned by the DAFM archaeologist do not address the requirements of protection of archaeological features and sites. It is noted that the conditions of Leitrim County Council as indicated in the grounds of appeal but the FAC also noted that there was no objection to the project and it would be desirable that the conditions were included in a grant of any licence.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence CN85314. The FAC is therefore setting aside and remitting the decision regarding licence CN85314 to the Minister to carry out a new screening and Appropriate Assessment of the proposal itself and in combination with other plans or projects for the reasons outlined and also that a new EIA screening should be undertaken in line with the requirements of the Forestry Regulations 2017 and the EU EIA Directive before a new decision is made.

Yours sincerely,

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Derek Daly, On Behalf of the Forestry Appeals Committee