



22<sup>nd</sup> December 2022

**Subject:** Appeal FAC 141/2022 relating to Licence CN90125

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food, and the Marine. The FAC established in accordance with Section 14A (1) of the Agriculture Appeals Act 2001 (as amended) has now completed an examination of the facts and evidence provided by all parties to the appeal.

**DECISION.**

Having regard to the evidence before it, including the Department of Agriculture, Food and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN90125.

**THE LICENCE.**

Licence CN90125 is for 5.96 Ha. of GPC 3 afforestation in the townlands of Rannatruffaun East and Knocknacappul, Co. Sligo, and was submitted to the DAFM on the 17<sup>th</sup> of January 2022. On the 12<sup>th</sup> of September 2022 a decision approving the licence was issued with conditions including adherence to conditions in the archaeology report attached to the decision and retention of all trees & hedgerows on the site.

**FORESTRY APPEALS COMMITTEE.**

A sitting of the FAC held on the 30<sup>th</sup> of November 2022 considered the current appeal and the processing of the licence as it relates to the decision to issue the licence on the 12<sup>th</sup> of September 2022. The FAC members present were: Mr. M. Mac Donncadha (Deputy Chairperson), Mr. V. Upton, Mr. D. Daly and Mr. I. Douglas. Secretary to the FAC: Ms. V. Healy.

**BACKGROUND.**

The proposal consists of the planting of 5.96 Ha. of forestry, in three plots at Rannatruffaun East and Knocknacappul, Co. Sligo. Plot 2 is separated from Plots 1 & 3 by existing forestry, the same forestry adjoins Plots 1. Plot 3 adjoins a public road.

The public file recording the processing of the application by the DAFM is available on the DAFM Forestry Licence Viewer (FLV). Only those documents relevant to the appeal under consideration are referred to below.

The Inspector's Appropriate Assessment Screening (AAS) Report dated the 9<sup>th</sup> of September 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 does not adjoin an aquatic zone(s). The

vegetation type(s) within the project area comprise improved grassland with some areas dominated by bracken.

The licence was referred to Inland Fisheries Ireland on the 9<sup>th</sup> of February 2022 and no response was received. The licence also referred to the DAFM archaeologist who reported on the 29<sup>th</sup> of July 2022 proposing archaeological conditions for the licence which were confirmed by the National Monuments Service on the 11<sup>th</sup> of August 2022.

The AAS considered five sites within 15km and that there was no need to extend that distance in this case. The European sites considered were Bricklieve Mountains and Keishcorran SAC (Site Code 001656); Lough Arrow SAC (Site Code 001673); Lough Arrow SPA (Site Code 004050); Lough Gill SAC (Site Code 001976) and Unshin River SAC (Site Code 001898). The overall conclusion was to screen out all sites, concluding that there was an absence of any significant relevant watercourse(s) within or adjoining the project area and additionally in the case of Lough Gill SAC, distance from the site of the afforestation.

The DAFM prepared an In-combination Statement on the 8<sup>th</sup> of September 2022 on the proposal's potential to impact on the five Natura 2000 sites in combination with other plans and projects. The In-combination Statement concludes that the proposed afforestation, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed in the AA Screening.

The proposed afforestation was Desk Assessed and Field Inspected following the licence application.

An Inspector's Certification Report dated the 9<sup>th</sup> of September 2022 is on file.

An Assessment to Determine EIA Requirement was carried out, dated the 9<sup>th</sup> of September 2022, that 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 APPEAL.**

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

The grounds of appeal are summarised as follows:

1. The lands adjoin the family home and the proposed planting will block natural light to that property.
2. The appellant is unaware of the proposed tree species to be planted and is concerned that they will be non-native species.
3. The appellant is concerned that the tree species will affect soil conditions in the area and their property in particular.
4. The appellant is concerned that the planting will affect the drainage in the area and their property in particular.
5. If the licence is granted the appellant requests the standard residential setback is increased so as not to affect natural light to their property.

#### **DAFM STATEMENT OF FACT.**

The Statement of Fact (SoF) provided by the DAFM for the appeal and dated the 18<sup>th</sup> of October 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed and that a field assessment was carried out on the 6<sup>th</sup> of September 2022. 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 4<sup>th</sup> of October 2022 from the Forestry Inspector confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a response to the grounds set out in the appeal.

#### **CONSIDERATION BY THE FAC.**

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.

#### ***Appropriate Assessment.***

##### Screening for Appropriate Assessment

In considering the appeal the FAC examined the AAS undertaken by the DAFM. The FAC identified the same five sites as being within 15km from the proposal as the DAFM: Bricklieve Mountains and Keishcorran SAC; Lough Arrow SAC; Lough Arrow SPA; Lough Gill SAC; Unshin River SAC (Site Code 001898). The FAC is satisfied that there was no need to extend the 15 Km distance in this case.

The FAC considered the nature, scale and location of the proposal, the European sites identified and their conservation objectives and noted that the DAFM considered each site in turn and that all sites were screened out for the reason that there was an absence of any significant relevant watercourse(s) within or adjoining the project area and additionally for Lough Arrow SPA, distance. The FAC noted that the DAFM concluded that Stage 2 AA was not required.

##### In-combination Statement.

The FAC considered the In-Combination Report dated 08/09/2022 and noted that the conclusion of the AA In-combination Statement states

*“It is concluded that there is no likelihood of the proposed afforestation project CN90125 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.”*

The FAC understands 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.

### **Assessment to Determine EIA Requirement.**

#### Assessment to Determine EIA Requirement.

In considering the appeal the FAC considered in the first instance, the completeness of the Assessment to Determine EIA Requirement dated the 9<sup>th</sup> of September 2022. In considering this aspect of the DAFM file, the FAC notes 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 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 decision under appeal relates to a licence for afforestation of 5.96 Ha which is sub-threshold for mandatory EIA as set out in Irish Regulations.

The FAC noted that the Assessment to Determine Environmental Impact Assessment (EIA) Requirement was carried out in advance of making the decision to grant the licence subject of this appeal, 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.

Article 4(5) (b) of the EIA Directive states, in relation to a sub-threshold Determination that,

*“where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.”*

Regulation 21 requires the Minister to provide reasons for their decisions in relation to applications for licences.

The FAC understands that the record of the decision, including the maps and Appropriate Assessment, and in particular the Assessment for EIA Requirement determination and licence provide these reasons. Furthermore, the FAC understands that such reasons and information should allow members of the public to check whether an adequate screening for EIA was carried out, and to enable interested parties to decide whether to appeal against the decision.

The FAC noted that in the Assessment to Determine Environmental Impact Assessment (EIA) Requirement it is stated that the application and its associated operations threaten the achievement of ‘good ecological status’ recovery objective set for the underlying waterbody or waterbodies under the WFD River Basin Management Plan, however no reasons are provided for this finding and the licence was issued. This appears to be in contradiction to the obligation of the Minister to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive as interpreted in Case C-461/13 of the Court of Justice of the European Union unless a derogation is granted. This appears to the FAC to be a serious and significant error.

Among the criteria to be considered in the EIA screening is the cumulation of the project with other plans and projects, both in relation to the characterisation of the project and in terms of likely significant impacts. While the Minister recorded a separate characterisation of plans and projects in the area for Appropriate Assessment, this is not explicitly cross-referenced in the Determination of the Assessment to Determine Environmental Impact Assessment (EIA) Requirement which itself only refers to forestry projects. While the FAC considers it reasonable that the record as a whole should be considered and that the reasons for not considering that the proposal is likely to have a significant effect on the environment might be found in separate documents, it would be clearer if an explicit reference to existing and approved projects was included.

The FAC noted that in the Assessment to Determine Environmental Impact Assessment (EIA) Requirement the Inspector records a response of "S/A" (applicant self-assessment) to the question "Is the site within an area of high nutrient sensitivity?". While the FAC is of the opinion that a number of these considerations would be made based on information provided by the Applicant, the DAFM, in fulfilling its obligations, should have recorded their own consideration of the matter and, if appropriate, recorded the source of the self-assessment referred to.

The FAC noted that the Assessment for EIA Requirement refers to a number of individual Departmental Guidelines; the Forestry & Water Quality Guidelines, the Forestry & Archaeology Guidelines, the Forestry & the Landscape Guidelines and that the "Environmental Requirements for Afforestation" 2016 have replaced those measures relating to afforestation contained within those and other Departmental Guidelines, (Note, however, that these guidelines still apply to other Forest Service regulated activities, as specified in any approval, consent or licence issued.) it appears to the FAC that both the individual guidelines and the Environmental Requirements for Afforestation 2016 contain many of the same requirements and most if not all of the main operational requirements, the reliance on the individual guidelines in the Assessment for EIA Requirement is technically an error and introduces confusion into the screening process and represents an error although not necessarily one of a significant nature.

The FAC concluded that a series of serious and significant errors had been made in the screening for EIA and that the decision should be set aside and remitted to address this matter through the undertaking of a new screening for EIA in line with the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

#### ***Water Framework Directive (WFD).***

EPA mapping shows the site lying within Catchment Upper Shannon 26A. The relevant sub catchment is Feorish[Ballyfarnon]\_SC-10Owengar[Leitrim]\_SC\_010. Forestry is not identified as a pressure in this part of the sub-catchment. The closest WFD River water body, located approximately 315m from this site, is the Feorish[Ballyfarnon]\_SC-10 which was of Good Status in the 2013-2018 period and Not at Risk in the 3<sup>rd</sup> cycle, forestry is not identified as a pressure. The underlying Ground Water body is the Geevagh IE\_SH\_G\_105 which was of Good Status 2013-2018 in the 2013-2018 period and is At Risk in the 3<sup>rd</sup> cycle. As noted previously, the Minister recorded that the proposal might threaten the WFD objectives and the FAC considered the granting of the licence in such a situation to be a serious error.

#### **Sligo County Development Plan 2017-2023.**

The site is located in an area classified as an "Area of Normal Rural Landscape" in Sligo County Development Plan 2017-2023.

## **Grounds of Appeal**

### Impact on natural light.

This ground of appeal contends that the lands adjoining the proposed planting are the appellant's family home and the trees will block natural light to that property. The FAC noted that the Inspector's SoF identifies that *"The proposed project area lies 75m southwest of the neighbouring property."*, the FAC has taken that to mean southeast (as opposed to southwest) and that the property is the appellant's dwellinghouse (the licence includes proposed planting southwest of the dwellinghouse but at a greater distance of ca. 160m). The FAC also noted that the northwest boundary of Plot 3 adjoining the appellant's property is comprised of a hedgerow and is shown as such on the biomap submitted with the application.

The FAC noted that the Environmental Requirements for Afforestation 2016 state that planting is to be set back a minimum of 60m from dwellinghouses and 5m from hedgerows and that adherence to those requirements is a condition of the Licence. Given that the distance from the dwelling to the proposed planting exceeds the minimum specified in the Environmental Requirements for Afforestation 2016 the FAC does not consider that the DAFM has erred regarding this ground of appeal.

### Non-native species

This ground of appeal contends that the appellant is unaware of the proposed tree species to be planted and is concerned that they will be non-native species. The FAC noted that the site plots report which is available to the public on the DAFM Forest Licence Viewer (FLV) states that the proposed planting is Sitka spruce with additional broadleaves on all three plots and that the proposal, as applied for, is for the planting of a commercial forest. The FAC does not consider that the DAFM has erred regarding this ground of appeal.

### Impact on soil conditions & drainage.

These grounds of appeal contends that the tree species will affect soil conditions and drainage in the area and the appellant's property in particular. The FAC noted that the publicly available mapping by the EPA show the lands to be in agricultural use and the soils on the site and surrounding area are primarily well drained mineral and alluvial soils. The FAC also noted that planting will be by mounding and slit planting and that no drainage is proposed for the site and that adherence to Environmental Requirements for Afforestation 2016 (which includes drainage) is a condition of the Licence. The FAC does not consider that the DAFM has erred regarding these grounds of appeal.

### Increased setback

This ground of appeal requests that if the licence is granted the standard residential setback is increased so as not to affect natural light to their property. The FAC is satisfied that, having regard to the distance from the appellant's dwelling to the site boundary of the proposed planting, the presence of a hedgerow on that boundary which will be retained and the setback of the planting from that hedgerow, an increase in the setbacks required by the Environmental Requirements for Afforestation 2016 is not required in this instance.

## **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 decision should be set-aside and remitted for the Minister to carry out a new screening for EIA and a new Appropriate Assessment Screening (and Appropriate Assessment and Environmental Impact Assessment if required) before a new decision is made. The AA Screening should consider the potential for significant

effects to arise from the afforestation application itself and in-combination with other plans and projects.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

