



21<sup>st</sup> December 2022

**Subject:** Appeal FAC 131/2022 against licence decision CN91127

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 131/2022 was held remotely by the FAC on 14<sup>th</sup> December 2022. In attendance:

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

#### **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 CN91127. The reasons for this decision are set out hereunder.

#### **Background**

The licence decision under appeal pertains to the afforestation of 4.12 hectares at Knockranny, Co. Cavan. The application describes the land as enclosed, moderately exposed agricultural land with a Grass, Grass / Rush vegetation type and on a mineral, peat soil. The application also sets out that the claimed area does not include areas of biodiversity enhancement (ABE) greater than 15%. Site access is described as being adequate and the site is described as not prone to flooding. The pre-approval submission shows the proposed planting as common alder 2.06 ha, pedunculate oak 0.84 ha, additional broadleaves 0.41 ha and rowan 0.82 ha. The application includes a map that shows the site location, biodiversity maps, a fencing map and operational details in the form of the applicant's pre-approval submission report.

The biodiversity map shows the public road, hedgerows, a utilised building, a watercourse, watercourse setback, the invert mounding direction and indicates that there would be no mound drains. The location of the site notice is also shown. The proposal includes 830 metres of deer fencing. The application records that the ground preparation would include woody weed removal and invert mounding with no additional drainage. Slit planting is to be used, no fertiliser is to be applied, and there will be manual weed control. There is a submission of objection dated 22<sup>nd</sup> August 2022 to be found on file.

There is an Appropriate Assessment (AA) screening on the record dated 10/08/2022. This AA screening identified three European sites within 15km (Corratirrim SAC 000979, Cuilcagh - Anierin Uplands SAC 000584, & Lough Oughter And Associated Loughs SAC 000007). All three sites were screened out and reasons for the screening conclusion reached are recorded on the file. The record includes other plans and projects considered in combination with the proposal.

An In-Combination report / statement which is recorded as having been completed on 10/08/2022 includes the following passage;

*'It is concluded that there is no likelihood of the proposed Afforestation project CN91127 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 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 desk assessed. The licence was issued on 07/09/2022 subject to conditions.

## **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 appeal FAC 131/2022 submit;

- In relation to Appropriate Assessment: Submission that the Appropriate Assessment is flawed as it fails to identify SAC UK 0030116–Cladagh(Swanlinbar) River and that the proposed afforestation site is in the river basin catchment.
- In relation to In-Combination Assessment: Submission that the In-Combination assessment is deficient because it has not considered projects existing longer than three years. The absence of an answer to a question regarding applications five years ago is also referenced.

- In relation to Environmental Impact Assessment: Submission that the EIA screening contains errors, references that the said screening did not consider comments and issues from the general public and non-governmental bodies and references that the appellant had made a submission on the application.

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 submitted on 11/07/2022, was advertised on 03/08/2022, that there were no referrals made, that one submission had been received, and a summary commentary is included on the Appropriate Assessment screening. It is stated that the application was desk assessed, and that the decision issued on 07/09/2022.

Following notification of the hearing of the appeal in this case and the circulation of the DAFM statement to the parties, the Appellant made a further submission commenting on the DAFM response relating to the appeal. This further submission was circulated to the DAFM and the applicant in advance of the hearing date.

#### **Considerations of the Forestry Appeals Committee**

The FAC considered the grounds in the appeal in relation to EIA screening and related matters. The FAC finds that the Assessment to Determine EIA Requirement as uploaded to the Forestry Licence Viewer shows that it was Certified on 10/08/2022. The FAC also finds that the application was advertised on 03/08/2022 and that this advertisement date was only seven days before the certification of the Assessment to Determine EIA requirement. In this connection the FAC noted the DAFM statement to it wherein it sets out;

*'The submission by Save West Cavan was received and considered (as stated on Approval letter sent to objectors). A response was entered (on 6/9/22) into the text box 'Inspectors Comments' which is located directly beneath the Objections table/box on IFORIS Inspectors certification page.*

*The response to EIA screening question 40, Comments and issues from the general public and non – governmental bodies were received and examined, should have and was thought to have read Yes'.*

The FAC examined the documentation available to it including the Inspectors certification page as referenced in the DAFM statement to the FAC and was unable to find the entry in the text box 'Inspectors Comments' which was said to be located directly beneath the Objections table/box on IFORIS Inspector's certification page. The FAC is of the view that the absence of these records on the documents made available to it represents a serious error in the processing of the application that was not addressed in the DAFM's deliberations, nor was it resolved in the record of the decision. The FAC also considered that the certification of the Assessment to Determine EIA Requirement some seven days after the advertisement of the application by the DAFM represents a further serious error as it occurred before the time had elapsed for the receipt of submissions from the public in relation to the application, consideration of which is recorded as forming part of the procedure. Based on the statement from the DAFM it appears that the



determination that was made available to the public was not the final version and was incomplete as not all main reasons were recorded. The grounds note that one question in relation to applications 5 years ago is not answered and this appears to reflect the document that was published on the FLV. The FAC also noted that a response in relation to whether the application might require a further application of fertiliser is recorded as S/A which the FAC understands to be self-assessed. The licence does not provide for the application of fertiliser and it is not clear what is being referred to in this response. The FAC considers while the Minister should rely on information provided by the Applicant it is for the Minister to make the determination. 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. These represent further errors. The FAC has, therefore, concluded that a screening for EIA should be undertaken again to address these matters and to record the Minister's main reasons in determining whether or not the proposal is likely to have significant effects on the environment. The FAC would understand that such a screening is required to adhere to the requirements laid out in the Forestry Regulations 2017 and the EU EIA Directive.

The FAC considered the grounds of appeal relating to Appropriate Assessment and related matters. No Appropriate Assessment was undertaken in this instance. The FAC finds that the DAFM recorded an Appropriate Assessment (AA) screening report dated 10/08/2022 and that this AA screening identified three European sites within 15km (Corratirrim SAC 000979, Cuilcagh - Anierin Uplands SAC 000584, & Lough Oughter And Associated Loughs SAC 000007). All three sites were screened out and reasons for the screening conclusion reached are recorded. The FAC noted and considered the submission made by the DAFM in its statement to the FAC in relation to the grounds in the appeal relating to Appropriate Assessment wherein it sets out;

*'During the Appropriate Assessment Screening The Cladagh River SAC(NI) was identified and considered via IFORIS and EPA maps. Unfortunately, the EIA spatial cannot list Natura sites outside Ireland. As I cover some of the border counties, I check for any potential effect to NI Natura sites as well as ROI Natura sites.*

*The Cladagh River SAC (NI) is 5km from proposed afforestation area with no connecting rivers/streams. The proposed afforestation area and the Cladagh river SAC (NI) are separated by a county road, mature forest and agricultural land. The proposed Afforestation is a Native Woodland Establishment (Alder/Oak/Rowan) with no drainage, fertiliser or herbicide to apply. The proposed Afforestation operations will not have any effect on the Qualifying interest of the Cladagh River SAC (NI).*

*Other SACs were also identified and have been recorded on IFORIS'.*

While acknowledging this information from the DAFM, the FAC concluded that the reliance on information as part of an Appropriate Assessment screening exercise without documenting same represents a serious error in the processing of the application. The FAC also finds that the DAFM record includes other plans and projects considered in combination with the proposal and that an In-Combination report / statement, which is recorded as having been completed 10/08/2022, includes the following passage;

*'It is concluded that there is no likelihood of the proposed Afforestation project CN91127 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 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. The FAC considers the conclusion stated above to be an error as it suggests that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which in-combination with other plans and projects could result in a significant effect on a European site. The FAC would also understand that after concluding that the project itself would not have a significant effect on a European site, the DAFM should also consider other plans and projects and determine whether the project in-combination with other plans could have a significant effect.

The FAC finds that the project in this case is situated within the River Sub-Basin Swanlinbar\_020 and that the status of the waterbody is GOOD and is NOT at Risk. The proposal is of a small scale and involves the planting of native woodland on agricultural land with limited operations and inputs as recorded. The FAC is satisfied that the Minister's determination that the proposal would not threaten the objectives of the Water Framework Directive is correct.

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 CN91127 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new screening for EIA in line with the requirements of the Forestry Regulations 2017 and the EU EIA Directive and to carry out a new Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

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Seamus Neely, On Behalf of the Forestry Appeals Committee

