



16th March 2022

Subject: Appeal FAC135/2021 in relation to afforestation licence CN89137

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 14 A (1) of the Agriculture Appeals Act 2001, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Afforestation licence CN89137 was issued by the Department of Agriculture, Food, and the Marine (DAFM) on 08/10/2021.

Hearing

A hearing of appeal FAC135/2021 was convened by the FAC on the 19/01/2022. In attendance:

FAC Members - Mr Des Johnson (Chairperson), Mr Seamus Neely & Mr Luke Sweetman

FAC Secretary - Mr Michael Ryan

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to set aside and remit the decision to grant CN89137.

This licence is for the afforestation of 6.92ha at Tullaghans, Co. Leitrim. The application site is bounded by existing coniferous forestry to the north-west. The proposal is in two plots; Plot 1 is 2.93ha of native broadleaves. Plot 2 is 3.99ha with 85% Sitka spruce and 15% Additional Broadleaves. The Site Details Report states that there are mineral & peat soils on site, the project area is enclosed land, is exposed/moderately exposed, with a south/west aspect, and there is "adequate site access". The existing vegetation type is listed as Grass and Grass/Rush. The information supplied by the applicant states that Plot 2 will be mounded with invert mounding in Plot 1. Slit planting will be used and the site requires no fertilisers, firebreaks or additional drainage. Herbicide will be used in year 1 alongside manual vegetation control. The operational details on the licence state that road access is required.

The proposal is in the Diffagher_010 River Sub-Basin. The Diffagher_010 Waterbody was assigned 'Good' status and deemed to be 'Not at Risk' under the Environmental Protection Agency (EPA) 2013-2018 reporting period. There are no EPA-mapped waterbodies within or directly adjacent to the project area. However, the EPA-mapped Killadiskert Stream (Order 1), rises c.190m to the north-east of the proposal and flows south at c.150m from the proposal at its nearest point. A document submitted by the applicant titled "Additional Environmental Considerations" states there is a relevant watercourse along

the proposal's northern and western boundary and therefore Plot 1, which includes a 10m unplanted setback, will be invert mounded and planted as native woodland with native scrub retained. The applicant states that there are two well-vegetated agricultural drains leading into the RWC and these will have silt traps installed.

The DAFM completed an "Assessment to Determine EIA Requirement" which states that the application was field, and desk assessed, and the project area is free of shell marl or highly calcareous soils, not within an area of high nutrient sensitivity, not acid sensitive or sensitive for fisheries, not within, or within 3km upstream of a European or national designation site, and there are no populations of the Fresh Water Pearl Mussel likely to be affected by the proposed development. This document also states that the project area does not contain an archaeological site or feature with intensive public usage, does not contain or adjoin a listed archaeological site or monument, archaeological area, zones of archaeological amenity or World Heritage Sites, is not within a prime scenic area in the County Development Plan or within an area listed in the Inventory of Outstanding Natural Landscapes or in a Landscape Conservation Area but is within "other High Amenity Landscape", and there will be no impact on areas commonly used by the general public for recreation or a Way-Marked Way. The EIA assessment states there is 19.9% forest cover in the underlying waterbody with 29.95% at present within 5km.

The DAFM completed an Appropriate Assessment (AA) Screening Report which screened out three European sites within 15km of the proposal for the following reasons:

- **Boleybrack Mountain SAC, Cuilcagh - Anierin Uplands SAC:**
 - The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection.
 - The absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site.
 - Other factors, distance
- **Lough Gill SAC:**
 - The location of the project area within a separate waterbody catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection. Upper Shannon 26a.

The DAFM completed an In-Combination Statement on 05/10/2021 in relation to other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Diffagher_010. The In-Combination Statement states, *inter alia*, that 20 afforestation licences totalling c.127ha had been issued from 2017-2020 and 11 forest roads licences had been issued from 2018 – 2020 totalling 4520m. The statement includes a figure of approximately 36% for percentage forest cover within the River Sub-Basin Diffagher_010. The statement concludes that the "DAFM deems that this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura site(s) listed above."

The application was referred to the National Parks & Wildlife Service (NPWS) who responded stating they had "no comment to make on this application". They included an appendix with more general points of relevance.

The licence was issued on 08/10/2021 with conditions 1-4 relatively standard and additional conditions related to (i) adherence to the Environmental Requirements for Afforestation (ERA) and the Forestry

Standards Manual, (ii) minimum unplanted setbacks, and (iii) a requirement to liaise with Leitrim County Council prior to any work

Grounds of Appeal

There is one appeal against the licence (FAC135/2021). The grounds of appeal were considered in full by the FAC and the following is a summary of the issues raised:

1. The appellant contacted DAFM 18/10/2021 enquiring if any afforestation licences in Tullaghans Townland and requesting electronic files relating to the Townland or application. DAFM indicated that there are no afforestation applications for this Townland. There were none visible on Forestry Licence Viewer (FLV) on 17/10/2021. The appellant contacted DAFM on 19/10/2021 seeking confirmation that no afforestation applications exist for Tullaghans and had not received a reply from DAFM 20/10/21.
2. The appellant disputes the legality of any recent awarded licence for afforestation in Tullaghans as no application licence details were displayed or accessible to public view or scrutiny on the DAFM's FLV for the allotted time. The FLV did not show the application on the afforestation layer during the period of the appeal. The appellant was informed on 20/10/21 of the Contract Number (CN89137) of the case. Searching the FLV for that number revealed the application but it did not appear on the afforestation layer of the FLV. The appellant had been left with "inadequate time to construct my appeal."
3. The cumulative impacts of afforestation in the area.
4. Loss, disruption and disconnect of species rich grasslands and wetland mosaics.
5. Loss and negative impacts on Red Listed species such as Snipe, Meadow pipit, and other scarce or habitat restricted species such as Reed Bunting and loss of breeding habitats for habitat-restricted summer breeding migrant birds.
6. Loss of direct habitat and connectivity of meta-habitat for EU protected species, Marsh Fritillary Butterfly.
7. Loss of essential foraging habitat for critically endangered breeding Hen Harriers which utilise the SAC lands nearby.
8. Loss and degradation of important habitats for pollinator species and red listed invertebrates.
9. The proposed afforestation will contribute to and be a cause and driver of biodiversity loss.
10. The existing afforestation across the hillsides had already caused significant long-term damage and loss of upland unimproved habitats and loss and depletion of habitat-dependent species.
11. Causing negative impacts on the local community and is not socially acceptable.
12. Negative impact on cultural and historic landscape and scenic views.
13. Undermines and negatively impacts on local and community efforts to sustainable traditional farming and tourism efforts, aspirations, and long-term goals.

14. The afforestation will create and be the cause of net carbon emissions.
15. "I have not had any response or communication from Forest Service on my inquiry regarding possible afforestation applications in the Townland of Tullaghans."
16. The application does not comply with Forestry Regulations of 2017 (5)(2) in data submitted. The vegetation types submitted are incorrect with omissions on Bog Cotton, Furze, Heather, Sedges, and Molinia which do occur on the lands and have not been disclosed. There are historic and cultural pre-famine dwellings, infields, and paths within the site lands, and these have not been disclosed or indicated.

DAFM Response

The DAFM provided a written response to the grounds of appeal in the form of a Statement of Facts to the FAC. The response is in two parts with comments from administration and Inspectorate staff responding to the relevant grounds of appeal. The DAFM response was considered in full by the FAC and the following is a summary:

Administration response

In relation to points 1 & 15 – it is stated that* emailed Forestry Info on 18/10/2021 to say that there was nothing on the viewer for an application in Tullaghans, Co. Leitrim. The FLV was searched using the Townland Tullaghans and one Contract Number was found but CN89137 was not displayed. An email response was sent to the appellant that day. The appellant replied on 19/10/2021 asking for confirmation that there was no other application in this townland. The FLV was searched again using Tullaghans Townland and CN89137 still did not appear. IFORIS was then searched using Tullaghans Townland and CN89137 was found. When the FLV was searched using "CN89137" the application was found. This issue was raised with IT. The appellant was informed by email on 20/10/2021 that there was an additional contract in Tullaghans Townland and CN89137 could be found on the FLV if searched for by Contract Number. The appellant responded on 21/10/2021 and was informed by response on 22/10/2021 to say that the IT department had been informed of the issue and a fix was being developed. The issue has since been rectified and CN89137 shows up when searched for by Townland.

Regarding point 2: the DAFM contend that the relevant information was available on the viewer, albeit one had to search using "CN89137" rather than the Townland name. The DAFM submit that the decision issued on 08/10/2021 and was advertised on the DAFM website on the reports dated 11/10/2021, 13/10/2021, 15/10/2021, 18/10/2021, 20/10/2021 and 22/10/2021 advising that the latest date to appeal was 22/10/2021.

District Inspector's response:

- Points 3 through 6 - Site was referred to the NPWS who had no comment to make on the application. No data provided to support the use of the site by red listed species cited.
- Point 7 - No data to suggest that breeding Hen Harrier use this site, Hen Harrier not a qualifying interest for Boleybrack SAC. The closest Hen Harrier red zone or SPA is over 50km from the application.
- Points 8, 9 & 10 - The application incorporates approximately 40% native woodland as well as additional broadleaf planting setbacks and open areas, all of which are beneficial to the long-term biodiversity value of the site.
- Points 10 through 13 – The application is "Outside areas classed as areas of High Visual Amenity or Areas of Outstanding Natural Beauty in Leitrim CDP 2015-2021" however is split between

Leitrim County Council's capacity to accommodate forestry: between high (approx. 60%) in the southern portion of the application and low (approx. 40%) in the northern portion. Remaining points relate to national afforestation policy.

- Point 14 - Application is predominately mineral based soil with small areas of peaty gley with water hotspots areas where the drainage is poor these areas are specifically excluded through setbacks, research has shown afforestation on mineral soils sequesters carbon.
- Point 16 - This appears to relate to the site details report. The site is predominantly Grass/Rush in nature. Bog cotton and Heather are not present on site and were not observed during inspection. Sedges and Molinia may occur in some areas but were not noted during the inspection. Furze is not widespread and occurs mainly in the scrub area specifically mapped on the Biomap. A footpath and structure are on the historical maps of the site however on inspection no historical upstanding structures, laneways or paths were noted. The mapped pathway runs along a hedgerow and is no longer visible if present, hedgerows are to be retained with a 5m setback as per 2.5.4 ERA. No archaeological sites are present within 200m.

Additional Submission

The appellant made an additional submission to the FAC, responding to the DAFM's Statement of Facts. The submission contains screenshots, maps and photographs as supporting evidence and generally elaborates on the issues raised in the grounds of appeal. The submission contends, *inter alia*, that the photographs are indicative of the habitats, species richness/diversity, and the unimproved High Nature Value grasslands and features on the site. The submission includes photographs and maps showing alleged archaeological features on site and states these should be referred to the Forest Service Archaeologist and that Article 5(2) of the Forestry Regulations (2017) requires "(v) Archaeological sites or features..." to be clearly shown in the application.

The submission was circulated to the applicant, the DAFM and the NPWS for their response. The NPWS responded stating "the Department does not have any observation or comment to make in relation to the appeal referral." The applicant outlined that they "feel that the site layout and species mix proposed and subsequently approved (58% GPC3 Commercial, 42% Native Woodland) was in line with the strategy of the 'right tree in the right place for the right reasons' and appropriate to the site in question. A further area of owned lands (0.5ha approx.) was left out of the application altogether as we deemed it to be of high biodiversity and landscape value."

The DAFM responded in two parts with submissions from the Forest Service's Head of Ecology and Senior Archaeologist:

Ecology Response

The Ecology response states that "three European sites were identified within 15km of CN89137, and these were screened out by the District Inspector. Following a field inspection by the District Inspector (03/09/2021) a revised biodiversity map was requested to map all hedgerows and a water hotspot identified on site (coordinates were provided). The file was not referred to Ecology prior to granting of approval but the following should be noted:

- National Parks and Wildlife Service, referral response dated 1st October 2021, had no specific comments in relation to CN89137.
- Plot 1 adjoins the aquatic zone and is a native woodland establishment plot. It also includes an area of scrub and a wet area hotspot, both of which are identified and will be retained (no planting)
- In relation to the Hen Harrier. There are no Special Protection Areas within 15km of CN89137. According to data available to the Forest Service from National Parks and Wildlife Service in relation to hen harrier, CN89137 is within the current distribution of Hen Harrier (Article 12

report) but it is not within a red zone (High Likelihood Nesting Area) or within one of the important non-designated hen harrier areas (layer available is the most up to date and was created after the HH National Survey in 2015).

- CN89137 is not within a current curlew breeding site (which includes a 1km buffer around the site) nor is it within a curlew former breeding site (which includes a 350/250m buffer). The nearest record for a curlew breeding site is a former curlew breeding site which is over 2.5km away from CN89137.
- As per iFORIS layers – the application area was not part of the Irish Semi-Natural Grasslands Survey nor are there records for small white orchid onsite.”

Archaeology Response

The Archaeology response states that it is written “with regard to the Notice of Appeal submitted to the Forestry Appeals Committee (FAC) on 20th October 2021 for this case, the Appellant’s Grounds and Statement set out therein as they pertain to archaeology and cultural heritage features, and the request from the FAC to DAFM *inter alia* for a statement showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed.” The response identifies the relevant grounds of appeal as the following:

“a) At Point 12 has generally referred to ... [a] Negative impact on cultural and historic landscape and scenic views; and

b) At Point 15 specifically stated ... There are historic and cultural pre famine dwellings, infields and paths within the site lands and these have not been disclosed or indicated [and the failure to do so rendered the application] not in compliance with the Forestry Regulations of 2017(5).”

The Archaeology response states that “having read the Appellant’s Grounds and Statement as they pertain to archaeology and cultural heritage features and considered the points raised therein, I am of the view that –

a) There is nothing that would warrant a revision of the archaeological or vernacular architectural conditions already applicable to the Licence; and

b) The assertion that the failure to map any discernible surviving remnants of the small rectangular structure, the foot path, the dwelling house, and/or the infield represents a breach of the statutory requirements for applications per Regulation 5(2)(a) of the Forestry Regulations 2017 (SI. No. 191 of 2017) is not valid.”

The response submits that “The nearest Recorded Monument/SMR site - a sweathouse (RMP No. LE 018-063) is some 300m distant to the SSE from the project boundary. As such the application did not meet the criteria for referral for a first instance screening by the DAFM in-house Archaeology Team.” The response states that “DAFM does not consider the term ‘archaeological sites or feature’ to include non-designated buildings or structures or related features of built heritage interest, including vernacular architectural heritage of more recent date. Regarding the presence of ‘historic and cultural’ pre-famine dwellings, infields and paths within the project site, the report states “there are four such features recorded on the OSI 25 inch to 1 mile scale map (which date from 1897 to 1913 AD) covering the area of the project site. These are a small rectangular structure, a foot path, a dwelling house, and an ‘infield.’ However, the more recent 1:5,000 scale imagery of field boundaries produced by the OSI, along with the most recent aerial photography of the site from 2020, would suggest that these features (with the exception of the ‘infield’) have been substantially if not entirely removed in the interim.” The response

accepts that there may be discernible surviving elements of the features on site but contends that, if there are, then by default the standard condition attached at the beginning of the Licence conditions means the setbacks set out in Table 5, page 26, of the Environmental Requirements for Afforestation for designated and non-designated built heritage buildings and structures are applicable to any discernible surviving remnants of the small rectangular structure, the foot path, and the dwelling house.

The report highlights that in, this particular case, the area of the 'infield' and the site of the 'dwelling house' were mapped on the Biodiversity Maps submitted as a distinct ABE / Open Space area, to be retained unplanted due *inter alia* to the existing presence of a cover of Birch and Willow scrub. The report contends that these two features have been indirectly mapped by the Applicant and constitute 'other features which may be relevant to the application' per Regulation 5(2)(a).

Considerations of the FAC

The FAC convened a Hearing on the 19/01/2021 to consider appeal FAC135/2021. The FAC had regard, in the first instance, to the grounds related to the DAFM's advertisement of the licence. The FAC noted that the forestry section of the www.gov.ie website states that the FLV is "an online tool that provides information on forestry licence applications." The same section also states that "Documentation will be made available for applications received from 11th January 2021." The application for the licence under appeal was received by the DAFM on 22/06/2021. The FAC noted that the FLV's search function allows for users to search by "Address" or by "Licence". There is also an option to review recent applications. The FAC noted that the DAFM accept that an IT issue prevented the appellant (and other FLV users) from viewing documentation relating to CN89137 by searching the FLV by Townland name; functionality which has since been restored. The FAC observed that neither the appellant nor the DAFM have confirmed whether CN89137 was available to view using the Recent Applications tab. The FAC also noted the DAFM's submission that that the decision issued on 08/10/2021 and was viewable if searched for by licence number. The DAFM submitted that the decision was also advertised on their website in numerous reports between the 11/10/2021 – 22/10/2021 advising that the latest date to appeal was 22/10/2021. The remit of the FAC is to decide whether the DAFM made a serious or significant error, or series of errors, in the making of their decision to issue CN89137 and whether that decision complied with fair procedures. Based on the evidence before it, the FAC considers that fair procedures were not complied with in relation to the general public as CN89137 was not viewable to FLV users who may have searched for forestry projects by the "Address" (e.g., Townland) rather than using the specific licence number.

The FAC considered the grounds relating to the cumulative impact of afforestation in the area. The FAC noted that the proposal was assessed by the DAFM to determine the requirement for EIA and recorded in a document titled *Assessment to Determine EIA Requirement*. The DAFM considered the nature and scale of the proposal and its potential to have an impact on the environment across a range of criteria including an assessment of potential effects on water quality, designated sites, protected species, archaeological and landscape considerations, and the amount of existing forest cover which is stated to be 29.95% within 5km, with 19.9% "in the underlining waterbody (or waterbodies)."

The DAFM also considered the proposal's potential to have a significant effect on European sites both individually and cumulatively, in combination with other plans and projects. As detailed above, the DAFM completed an AA Screening which screened out three European sites within 15km of the proposed project with reasons given. The DAFM In-Combination Statement states that 20 afforestation licences totalling c.127ha had been issued from 2017-2020 and 11 forest roads licences had been issued from 2018 – 2020 totalling 4520m. The statement includes a figure of approximately 36% for percentage forest cover within the River Sub-Basin Diffagher_010. The FAC noted that this is almost twice the amount of existing forest cover recorded in the *Assessment to Determine EIA Requirement*. In the

circumstances of this case, where there is substantial existing forest cover in the surrounding area and given the amount of licenced afforestation and forest road projects recorded in the In-Combination Statement, the FAC concluded that in proceeding to make a determination regarding the requirement for an EIA in the absence of a documented reconciliation of the apparent differences in the values for percentage forest cover, the DAFM made a significant error in the processing of the application for CN89137 with regard to the requirements of the EIA Directive.

The FAC considered the appellant's contentions relating to the Hen Harrier. The FAC noted the appellant's statement indicating the importance of the Leitrim uplands to the species based on breeding Hen Harrier distribution data from 2010. The FAC noted the statement from the DAFM confirming that the proposal is within the current distribution of Hen Harrier (based on information supplied to them by the NPWS) but is not within a Red Zone (High Likelihood Nesting Area) or within one of the important non-designated Hen Harrier areas, based on the "most up to date" IFORIS layer that was created after the Hen Harrier National Survey in 2015 referenced by the appellant. The FAC also noted that there are no Special Protection Areas within 15km of the proposal. Based on the evidence before it, the FAC is not satisfied that the DAFM made a serious or significant error in relation to Hen Harrier.

The FAC considered the appellant's grounds and additional submission as they relate to the cumulative impact of afforestation in the area on the various species and habitats listed therein. The appellant also references the cumulative impact on the wider landscape, cultural impacts, carbon emissions, and impacts on the local community. Based on the information before it, the FAC is not satisfied that the appellant has substantiated their claims with convincing evidence in relation to these issues.

The FAC considered the appellant's contention regarding the legality of the DAFM's decision to issue CN89137 based on purported deficiencies in their assessment of the archaeological features within the site. The FAC noted that the District Inspector stated that the proposal site does not contain an archaeological site or feature with intensive public usage and does not contain or adjoin a listed archaeological site or monument, archaeological area, zones of archaeological amenity or World Heritage Sites. The FAC also noted the response from the DAFM's Archaeologist outlining the DAFM's approach to applications which include features such as those highlighted by the appellant. The FAC is cognisant that the licence conditions require adherence to the Environmental Requirements for Afforestation which include required setbacks for both designated and non-designated built heritage buildings and structures which would apply to any discernible surviving remnants of the small rectangular structure, the foot path, and the dwelling house. Based on the information before it, the FAC is not satisfied that the DAFM made a serious or significant error in relation to the archaeological assessment of the application.

Based on the information before it, the FAC concluded that the DAFM made significant errors, relating to the advertisement of the application and the EIA screening undertaken in assessing the application. In these circumstances, the FAC decided to set aside and remit the decision regarding licence CN89137 to the Minister to re-advertise the application on the FLV in accordance with Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) and to carry out and record a new assessment to determine the requirement for EIA and, subject to the outcome of that determination, to require the submission of an EIAR, if appropriate, before the making of a new decision.

Yours sincerely,

Luke Sweetman on Behalf of the Forestry Appeals Committee