



07/11/2022

Subject: Appeal FAC044/2022 in relation to afforestation licence CN87712

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.

Hearing & Decision

The FAC considered appeal FAC044/2022 during a sitting of the FAC on the 17/08/2022. In attendance:

FAC Members – Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman

FAC Secretary – Mr. Michael Ryan

The FAC considered all of the documentation on the file, including application details, processing of the application by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, and all other submissions, before deciding to set aside and remit the Minister's decision to grant CN87712.

Background

The licence under appeal was issued by the DAFM on 08/04/2022 and is for the afforestation of 4.24ha in Knock, Glenaknockane, Co. Cork. The proposed development consists of three plots: Plot 1 is 2.77ha of Sitka spruce (85%) & ADB (15%). Plot 3 (0.52ha) and Plot 4 (0.95ha) are both Native Woodland Establishment (NWE) plots.

Site Details

The *Site Details Report* on the DAFM's Forestry Licence Viewer (FLV) states the soils on-site are mineral soils, the site is "not exposed" with an easterly/neutral aspect. Ordnance Survey Ireland's Geohive Map Viewer indicates the elevation is c.270m for plots 3 & 4 rising to c.310m for Plot 1. The proposal is on enclosed land, has existing vegetation cover of grass, grass/rush, and there is "adequate site access".

The proposal is located along the R579 in the Boggeragh Mountains, c.16km south-west of Mallow, Co. Cork. Plot 1 is west of the R579 and is bound to the west and south by existing Coillte-owned mature coniferous forest. Plot 1 is located across the R579 from a house and includes a "Dwellings & other utilised buildings" setback. Plots 3 & 4 are c.260m to the north of Plot 1 and lie to the east of the R579. A 10-20Kv power line runs north to south between plots 3 & 4. Adjoining plots 3 & 4 to the north is a 16.52ha NWE site which was approved in January 2021 and is now 'Planted' as per the FLV.

The proposal is in the Blackwater[Munster]_SC_070 Sub-Catchment and the Glen (Banteer)_010 River Sub-Basin. The Glen (Banteer)_010 is a High-Status Objective waterbody which currently has a 'High' water quality status and deemed to be 'Not at Risk' under the WFD Cycle 2 assessment. As per the Bio Map, a watercourse runs along the eastern boundary of Plot 4. The Environmental Protection Agency (EPA) online map lists this as an order 1 stream named Glenaknockane. This stream flows roughly north for c.500m before joining the Glen [Banteer], which forms part of the Blackwater River (Cork/Waterford) SAC. This SAC is c.1.8km downstream from Plot 4 and is within the Munster Blackwater Margaritifera SAC Catchment. The Ground waterbody underlying the proposal is the Glenville IE_SW_G_037 which was assigned 'Good' status under the GW 2013-2018 assessment period and its WFD risk status is under review.

Operational Details

Appendix A of the Approval Letter lists the operational details. The Appropriate Assessment (AA) Screening Report provides additional information regarding which plots will receive drainage/fertiliser:

- Drainage is required in Plot 1 but not in Plots 3 & 4. No firebreaks are required.
- Ground Rock Phosphate is to be applied at 250kg/ha in Plot 1 only.
- Ground Preparation is woody weed removal and mounding. Mound drains will be created in Plot 1 with inverted scrap mounding only in plots 3 & 4.
- Manual weed control will be used alongside herbicide application in Yr0 – Yr3.

DAFM Assessment to Determine EIA Requirement

The DAFM completed an "Assessment to Determine EIA Requirement", dated 08/04/2022, which considered the proposal's potential impact on the environment across a range of criteria before concluding that the application should not be subject to the EIA process. The DAFM Inspector indicated that the application should be referred to the Forest Service Ecologist. The assessment included the following information:

- The approximate % of forest cover currently in the "underlining waterbody (or waterbodies)" is recorded as 14.11%
- In response to "Based on the extent of forestry as outlined above, is the cumulative effect of this application likely to have a significant impact?" The recorded answer is "N/A".

The EIA assessment notes that a submission was received on the application. The assessment concludes that the application should not be subject to the EIA process.

DAFM AA Process

The FLV contains an AA Screening Report & Determination (AASRD), dated 14/02/2022, prepared by a DAFM Ecologist. The proposed project is described, and the soils on-site are listed as "Acid Brown Earths, Brown Podzolics (84%), Lithosols, Regosols (15%), Podzols (Peaty), Lithosols and Peats (1%) (Source: Teagasc EPA Soil & Subsoil Mapping)". Two European sites within 15km of the proposal were screened for AA:

Mullaghanish to Musheramore Mountains SPA was screened out for AA due to the separation distance of 9.1 km which is outside the core foraging range for the Qualifying Interests (QIs), Hen Harrier, and the unsuitability of the habitats within the project area.

Blackwater River (Cork-Waterford) SAC was screened in for AA due to "Possible effect due to hydrological connectivity between project and the European Site. The project is located ca. 1.9km upstream of the European Site".

AA Report

An AA Report, dated 14/02/2022, was prepared by a DAFM Ecologist and includes an in-combination assessment. The In-Combination Statement states that the proposed project, which, at 4.24ha is considered small in scale, is within the River Sub-Basin Glen (Banteer)_010, which has approximately 49% forest cover. The AA Report considers the QIs of the Blackwater River (Cork-Waterford) SAC, their Conservation Objectives, and the potential for adverse impact resulting from the proposed project. Where potential adverse impact is identified, mitigation measures are prescribed. Mitigation measures listed are largely related to the prevention of deterioration in water quality from forestry operations. The Report finds that the proposed project itself (i.e., individually) will have no adverse effect on the integrity of any European Site(s), in view of its conservation objectives. The In-Combination Statement deems that the proposed project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of the Blackwater River (Cork-Waterford) SAC.

AA Determination

An AA Determination, dated 25/03/2022, was made by a DAFM Ecologist. This document states that the Minister has carried out the AA of “potential impacts on the likely significant effects of the activity / project” on the Blackwater River (Cork-Waterford) SAC and has made certain that the proposed project individually, or in combination with other plans or projects, will not adversely affect the integrity of the Blackwater River (Cork-Waterford) SAC, having regard to its Conservation Objectives, and will not affect the preservation of this site at favourable conservation status, if carried out and completed in accordance with the mitigation measures contained in the AA Report.

Referrals

On the 03/02/2021, the DAFM referred the application to the South-Western Regional Fisheries Board/Inland Fisheries Ireland (IFI), the National Parks & Wildlife Service (NPWS), and Cork County Council. Only IFI replied, on the 22/02/2021, stating they had “no objections to the proposed development providing forestry establishment is in compliance with the Forestry & Water Quality Guidelines for non-sensitive waters.” IFI referenced drainage works and aerial fertilisation and suggested certain restrictions around these operations. They also requested that broadleaves be planted (as per an attached diagram) where there is no bankside cover.

The application was also referred to a DAFM Archaeologist. The archaeologist’s response states that “Plots 3 and 4—are contiguous to the marked location of a Recorded Monument; a Standing Stone (CO049-001), located some 30m to the southeast and 20m to the south of the Plot boundaries respectively.” Specific conditions were prescribed to be attached to any approval letter and adhered to during the proposed afforestation works.

Submission

The application documents on the FLV includes one submission document dated 21/12/2021. The copy of the submission available on the FLV is redacted but the issues covered therein largely reflect the grounds of appeal and make reference *inter alia* to the contamination of a well adjacent to the proposed project area due to slurry spreading. The DAFM’s Assessment to Determine EIA Requirement document includes a comment from the DAFM Inspector noting that there is a “submission on project.”

Licence

The approval letter was issued on the 08/04/2021 and conditions 1-4 are relatively standard. Condition 5 requires compliance with the following;

- i) The Environmental Requirements for Afforestation and the Forestry Standards Manual,
- ii) The specific conditions outlined in the attached AA Determination,
- iii) The specific conditions in the attached archaeological report.

Grounds of Appeal

There is one appeal against the licence (FAC044/2022). The grounds of appeal were considered in full by the FAC and the following is a summary of the issues raised:

- "Irrigation" in Plot 1, referencing slurry contamination of a well in the past. States new well drilled and includes documentary evidence from drilling company as well as lab samples, correspondence with Cork County Council, and insurance company.
- References use of fertiliser in Plot 1.
- Queries who is responsible party in future, the issuing body or landowner?
- States "to ensure water quality in future" assessment of well needs to be carried out - queries who funds this.
- Asks "if water quality is affected by disruption to the land and using chemical fertilisers, can you confirm if this is a potential health hazard for members of nearby household".
- States the DAFM is negligent as it has not acknowledged the impact of Plot 1 or instructed the Registered Forester to prevent any "irrigation issues".
- References Environmental Requirements for Afforestation 2016 and states that environmental setbacks should have been considered.
- Requests commitment to 60m setback from farm building and that this be included in updated map.
- Regarding retention of hedgerows – submits that existing hedgerow trees are dangerous to road users.
- States public road setback in plots adjoining R579 should be included in maps provided.

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 DAFM Administration response states that "the decision was issued in accordance with our procedures, S.I 191/2017 and the 2014 Forestry Act." The Statement from the Forestry Inspectorate states the AA screening procedures at the time of processing were followed (v.05Nov19). The District Inspector states that:

1. As per Forestry Standards Manual the setback distances in relation to wells and boreholes is 30m and this is encompassed in the 60m dwelling setback.
2. The farm building described is not an associated building to the dwelling house, it is 70m south from the curtilage of the dwelling house. As such it has a minimum setback of 10m from the outer wall, as per circular 12/2016. A public road and public road setback provide c.20m setback from this building.
3. "The recommendation for approval was carried out in accordance with procedures, S.I 191/2017 and the 2014 Forestry Act."

Further Information

On the 22/08/2022, the FAC wrote to the appellant stating that the grounds of appeal refer to a private well which would be at risk of pollution as a result of the proposed afforestation works, specifically due

to soil disturbance and the application of fertiliser and herbicide in Plot 1 of the proposed plantation. The FAC requested that the appellant submit “an annotated map showing the location of the private well to which you refer.” The appellant responded on the 28/08/2022 and noted that the plot labels on the FLV did not correspond to those on the Bio Map. The appellant included maps showing the locations of two wells; a “household well” located to the rear (eastern side) of the dwelling house from which Plot 1 contains a dwelling setback, and a “farm well” located at the northern end of the farm building located c.80m to the south of the dwelling house. This farm building is understood by the FAC to be the same building referred to by the appellant in the grounds of appeal.

FAC Considerations

DAFM Processing of Application

The FAC considered the DAFM’s processing of the application prior to deciding to issue afforestation licence CN87712. The FAC noted that, as outlined above, a DAFM Ecologist completed an AA Screening which resulted in the Blackwater River (Cork-Waterford) SAC being screened in for AA. The same Ecologist produced an AA Report, which included an In-Combination Statement. The In-Combination Statement recorded the approximate percentage of forest cover in the Glen (Banteer)_010 River Sub-Basin as 49%. The DAFM subsequently made an AA Determination, which included mitigation measures prescribed in the AA Report, and concluded that the proposed project, either individually or in combination with other plans or projects, would not adversely affect the integrity of the Blackwater River (Cork-Waterford) SAC. The FAC noted that the DAFM completed an assessment to determine the requirement for EIA. This EIA assessment recorded the approximate percentage of forest cover currently in the “underlining waterbody (or waterbodies)” as 14.11%. Additionally, in response to the question “Based on the extent of forestry as outlined above, is the cumulative effect of this application likely to have a significant impact?” The recorded answer is “N/A”. The DAFM did not provide any commentary or rationalisation for the apparent considerable discrepancy between the values for approximate percentage forest cover in the In-Combination Statement and the section of the EIA assessment considering potential cumulative impacts. The FAC considered this to be a significant error in the DAFM’s consideration of the application, particularly given the High status of the Glen (Banteer)_010 waterbody, the proximity of the (albeit relatively small) proposal to the Blackwater River (Cork-Waterford) SAC, and the proposal’s location within the Munster Blackwater Margaritifera SAC Catchment.

FAC Consideration of the Grounds of Appeal

Drainage

The FAC considered the appellant’s submissions regarding the “irrigation” in Plot 1. Irrigation is defined as the practice of supplying land with water so that crops and plants will grow. The FAC understood the appellant’s submissions regarding irrigation to relate to the *drainage* of Plot 1, particularly in the context of the land sloping down towards the dwelling house and associated well (as confirmed following the hearing by the appellant on their annotated map). The grounds of appeal also reference Plot 2. The FAC observed that there is no Plot 2 included on the afforestation licence. However, Plot 2 is included on the Bio Map and comprises a 60m dwelling setback.

The FAC observed that Licence Condition 2 requires that “the afforestation project and all associated operations shall be carried out and completed in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars).” Section 9 of the Forestry Standards Manual 2015 (FSM) sets out the requirements for drainage operations at afforestation stage, stating that “extreme care is required when designing a

drainage system and sediment control measures on steeper slopes with erodible soils, due to the potential for increased water velocity and the heightened risk of erosion and runoff, and subsequent sedimentation of receiving watercourses..." Section 9 outlines the appropriate ways in which to design a drainage system so as to control sediment mobilisation by minimising flow rate and flow volume, including the use of silt traps, installation of collector drains, and consideration of the contours of the land. The FAC did not consider that the DAFM made an error in relation to the proposed drainage operations.

Setbacks

The FAC considered the grounds related to operational setbacks from a well. The FAC noted that the FSM states in part 6.5.10 *Points of Water Abstraction* that "the setback distance in relation to pump houses and substantial tank-type reservoirs is 30 metres (i.e., as for dwelling houses and associated buildings, without the need to obtain the owner's consent). A 30-metre setback also applies to wells and boreholes. Applicants and Registered Foresters must ensure that the location of any water abstraction points within the proposed area is clearly marked on the Biodiversity Map."

The Environmental Requirements for Afforestation 2016 (ERA) state in Table 5 that the minimum water setback for a drinking water abstraction point is 20m. In the circumstances where the FSM and the ERA require different setbacks, the FAC considered that the greater distance (30m) should apply.

The FAC reviewed the Bio Map on the FLV which shows a 60m dwelling setback which will be bounded by 10m of broadleaf planting. The FAC considered that, given the location of the private household well indicated in the appellant's annotated map, the effective setback between the first row of planted (broadleaf) trees and the private household well is approximately 70m. The FAC considered that this is more than the minimum setback of 30m required by the FSM and as such did not consider that the DAFM made in error regarding setback distance from the private household well.

The FAC noted that the appellant, in submitting an annotated map at the FAC's request, included a second well, the *farm well*. Based on the evidence before the FAC, it does not appear that the appellant had notified the DAFM of the presence of this well either by a submission at the application stage, or in their grounds of appeal. The FAC reviewed the Bio Map and noted that there will be a 10m road setback bounded by 10m of broadleaf planting adjacent to the farm well. The FAC used the EPA online mapping tool to estimate that this well is located approximately 20m from where the first row of broadleaf trees is to be planted. The FAC considered that 20m is in accordance with the drinking water abstraction point setback required by the ERA. However, as outlined above, the FSM requires a 30m setback from such wells and the FAC considered that this greater setback should be applied in this instance.

Pesticides & Fertiliser Application

The FAC considered the appellant's grounds regarding the application of pesticides (including herbicides) and fertiliser. The FAC noted that the ERA sets out, in section 3.7.3, the regulatory requirements for the application of pesticides (including herbicides). The FAC noted that Section 5.1 of the FSM - *Land for Afforestation* - states that "land must be capable of growing to full rotation, a commercial timber crop of Sitka spruce (*Picea sitchensis*) of Yield Class 14 or greater, based on one standard application of phosphorus at establishment". One standard application of phosphorus is defined as "350 kg Granulated Rock Phosphate (GRP) / ha at the time of planting." The FAC observed that the licence approves the application of 250kgs/ha of GRP at afforestation stage. The FAC considered this to be a standard approach to establishing a GPC3 plantation on this site type. In the FAC's view it would be atypical for a GPC3 plantation of this nature to require more than one application of fertiliser and that, if additional fertiliser were required, this would be assessed and applied in accordance with the requirements of

Section 11 of the FSM. Based on the evidence before it, the FAC concluded that the DAFM did not err in their approval of CN87712 in relation to the application of pesticides (including herbicides) and fertiliser.

Additional Setbacks

The FAC considered the appellant's submission that a 60m setback should apply to the farm building to the south of the dwelling house and that this should be included on an updated Bio Map. The FAC considered the building at issue to be a roofed farm building, outside of the curtilage of the dwelling house, and as such, found that the 10m roofed farm building setback prescribed in Table 5 of the ERA should apply. The FAC noted the DAFM's contention that a public road and public road setback provide c.20m setback from this building. The FAC concluded that the DAFM did not make an error in relation to this issue.

The appellant submitted that the public road setback in the plots adjoining R579 should be included in maps provided. The FAC found that a public road setback is included in the Bio Map, dated 19/11/2020, available on the FLV.

Hedgerows

The appellant contends that the landowner's hedgerows are in need of maintenance as they are a danger to road users. The FAC noted that the Roads Act 1993 requires owners or occupiers of land to take all reasonable steps to ensure that trees or other vegetation on their land are not a hazard to persons using a public road. The FAC considered that the issuing of an afforestation licence by the DAFM does not remove or negate any other statutory requirement incumbent upon the applicant.

Other Grounds

The appellant submitted a number of grounds querying who the responsible party may be in the event of future deleterious impacts on the water quality of the private well(s) opposite Plot 1. The FAC did not consider these to be grounds relating to the DAFM's decision to grant afforestation licence CN87712. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. Based on the information before the FAC, the DAFM had considered the submission made on the licence application, as evidenced by the Inspector's comment in the EIA assessment, which raised the issues of potential impact on the well opposite Plot 1. The DAFM prescribed licence Condition 2 which requires adherence to the FSM and ERA, which deal with planting/cultivation setbacks as well as restrictions and requirements regarding the use of pesticides (including herbicides) and fertiliser, as detailed above. Having reviewed the information before it, including the information on the FLV, the grounds of appeal (with supporting documentation), and the DAFM's statement in response to the appeal, the FAC could find no significant error or series of errors in the DAFM's decision to issue CN87712 in relation to these issues raised in the grounds of appeal nor that the decision was made without complying with fair procedures.

Conclusion

Based on the evidence before it, as outlined above, the FAC concluded that the DAFM made a significant error in their consideration of the potential cumulative impact of the proposed afforestation project, specifically in relation to the approximate percentage of forest cover in the underlying waterbody. In these circumstances, the FAC decided to set aside and remit the decision regarding licence CN87712 to the Minister to carry out and record a new assessment to determine the requirement for EIA and a new assessment of the proposal's potential to contribute to a cumulative adverse effect on the Blackwater River (Cork-Waterford) SAC in combination with other plans and projects. The FAC also considered that the DAFM should require an updated Bio Map to be submitted by the applicant, showing the 30m

setback from the farm well, and that this updated map should be considered by the DAFM in their assessment to determine the requirement for EIA, before making a new decision.

Yours sincerely,

Luke Sweetman on Behalf of the Forestry Appeals Committee



An Coiste um Achomhairc

Foraioiseachta

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