



28th September 2022

Subject: Appeal FAC029/2022 against licence decision CN85792

Dear I

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 FAC029/2022 was held remotely by the FAC on 14th September 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 CN85792. The reasons for this decision are set out hereunder.

Background

The licence decision relates to an application to afforest 6.09 hectares at Drumaragh, Leitrim. The planting would take place across three plots with plots 1 and 3 to comprise conifer high forest and plot 2 mixed high forest. The land is described as having a mineral soil and being enclosed agricultural land and is not exposed with a grass, grass rush vegetation type. All plots would be comprised of Sitka spruce and broadleaves at different mixture rates. The application includes site and operational details and a series of maps. The proposal includes 80 metres of fencing. The application records that the ground preparation would include mounding with no additional drainage, slit planting, no use of fertiliser,

manual weed control and herbicide in year 2, and that road access is provided. The application includes other notes under environmental considerations,

EPA Stream marked A - B will have a 10m buffer setback with Additional

Broadleaves planted for another 10m to introduce a riparian area to the site.

The area that the site is within is classed as outside areas classed as areas of high visual amenity of outstanding natural beauty

The site is within Leitrim capacity to accommodate forestry classed as high in Leitrim CDP 2015-2021

The records include a photo of the site notice and an erected site notice and the Biomap provided with the application marks the location of the site notice. The application was field inspected on 01/06/21 and the inspectors report notes that the site notice was displayed in marked location. There are no submissions or referrals recorded on the application. The AA screening identified one European site within 15km (Cuilcaigh Anierin SAC) which was screened out for the reason that the position of the project area is downstream from the Natura site, and there is a subsequent lack of any hydrological connection. The record includes other plans and projects considered in combination with the proposal. The decision to approve the licence application was issued on 16th March 2022 with conditions.

Appeal

There is one third party appeal against the granting of the licence and the full grounds of appeal and response from the DAFM have been provided to the parties and a brief summary follows.

The grounds of appeal submit that the DAFM failed to make the records of the application available on the FLV (*the FAC understands this to be the Forestry Licence Viewer maintained by the DAFM*) and that the records were not available to at least one third party on request.

The grounds submit that the application was incomplete as it has not identified the external hedgerow boundaries and one internal boundary and is not compliant with Section 5(2) of the Forestry Regulations. It is submitted that the hedgerow setback is not defined leading to uncertainty over the operational details and that hedgerows are identified as being 4 metres in width. It is submitted that a minimum of 7 metres is required to ensure that they are not degraded by shading and reference is made to a BIOFOREST Report. It is submitted that access to the site from public road L3453 is unclear and that no public roads are marked on the BioMap and this is another error.

It is submitted that the In-combination statement identifies the River Sub-Basin Adhacashlaun_030 as having approximately 14% forest cover and that there is a significant discrepancy between this figure and the 5.41% figure in the EIA Screening for the underlying waterbody. It is submitted that the discrepancy is exacerbated when it is considered that in the RSB (*the FAC understands this to be River Sub Basin*) waterbody ADHACASHLAUN_030 has not been assigned a status and reference is made to a Judgement in Case 740/2018 in relation to the refusal of authorisation for an individual project where it may cause a deterioration of the status of the 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 Water Framework Directive. Quotes are also included and attributed to the Hyland Judgement.

It is submitted that “That is the case with this felling licence. It is hydrologically connected to an EPA mapped water body and there are requirements relating to water quality included in the licence.” Reference is made to the details of the site and AA (the FAC understands this to be Appropriate Assessment) Screening and the licence conditions. It is submitted that the question is “does this project have the potential to impact on water quality” and that the answer is yes and that the Hyland Judgement applies.

It is submitted that the percentage of forest cover in the immediate vicinity of the project is very high and that the EIA screening figure of 37.4 ha within 500 metre radius is highly misleading and it is submitted that the extent of afforestation within a 500 metre buffer is well in excess of 50 hectares and that it has all been established since 1993 (during the period of the existence of the EIA Directive). Reference is also made to possible afforestation “in the pipeline”.

Further grounds relate to the recorded views in relation to forest cover in the locality, water quality, and landscape. It is also submitted that the Local Authority was not consulted. It is submitted that the Determination cannot be relied upon for stated reasons.

It is submitted that the AA Screening does not provide the necessary certainty required by such a determination based on the reasons provided and the QI (the FAC understands this to be Qualifying Interest) of Cuilcaigh Anierin SAC. The Appellant requests an oral hearing of the appeal.

DAFM Statement

A response was provided on behalf of the Minister for Agriculture, Food and the Marine. This outlines the procedure adopted by the DAFM in processing the application and the related dates and the final decision. It is submitted that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. The statement further submits that the public road is clearly shown on aerial imagery on the supplied biomap, which also shows the location of the site notice, and that this was considered acceptable by the Minister. It is submitted that hedgerows are also clearly shown and marked and that a site inspection was conducted on 01/06/2021. It is submitted that the applicant is in full ownership of lands bordering the application area which extends to the public road.

It is submitted that the DAFM accepts that there is a discrepancy between the EIA waterbody forest cover figure and that in the in-combination and that these percentages are indicative only and can never be 100% accurate. It is submitted that the Inspector is required to use their judgement and that in this case it was not deemed to be an issue and that the difference did not impact the EIA screening process or final decision.

It is submitted that ADHACASHLAUN_030 has been assigned a water status by the EPA and that the project does not jeopardise the potential attainment or retention of a “good” status. It is submitted that the project does not propose the use of fertiliser and must adhere with the Environmental

Requirements for Afforestation and Forestry Standards Manual. The statement also submits details of setbacks and operations.

It is submitted that no submissions were received on the application and that there were no objections or appeals from anyone living in the vicinity of the site. It is further submitted that it is unclear from the appeal if anyone from the appellant organisation lives close to the site or if they represent anyone living in the area. It is submitted that there are no houses evident in the vicinity of the proposal and that the DAFM maintain that forest cover is not an issue here.

It is submitted that the DAFM is the competent authority regarding the issuing of forestry licences and that the AA screening process followed standard operating procedures. The DAFM also requested an oral hearing of the appeal.

Considerations

In relation to the placing of the documents on the DAFM maintained Forestry Licence Viewer, the FAC does not consider that this matter is addressed in sufficient detail in the statement provided other than it being submitted that the licence was issued in accordance with the DAFM procedures. The FAC noted the requirements of Part 6 of the Forestry Regulations 2017 which provides for public consultation although it does not appear to specifically require publication on a website. However, the DAFM website provides procedures for public consultation¹ and states that,

"...Application documentation for applications received from 11th January, 2020, will be made available in the FLV, when that application is advertised and open for public consultation."

The application date in this case is recorded as 29th January 2020. The FAC consider, therefore, that the public would reasonably expect the application documentation to be made available on the FLV and that the failure for this to occur constitutes a significant error in the making of the decision.

The FAC considered the matter of inconsistencies in the forest cover areas in the underlying waterbody as recorded in the *Assessment to Determine EIA Requirement* and the river sub-basin in a separate in-combination assessment of other plans and projects. While there is a difference in language the DAFM appear to accept that these figures are attempting to measure forest cover in the same area. The error is accepted by the DAFM and it is submitted that this represents a minor error and one that discretion could be employed to resolve.

The FAC is of the view that the difference in this instance represents an error and that the error was not addressed in the DAFMs deliberations, for example in recorded comments. Furthermore, the DAFM does not identify which figure is considered to be the correct representation of forest cover in the locality. While the FAC is of the view that numerical and clerical errors can easily occur that the error in

¹ <https://www.gov.ie/en/publication/e305a-public-consultation-on-licence-applications-for-felling-afforestation-forest-roads-and-aerial-fertilisation/>

this case was of more significance and the difference was not resolved in the record of the decision or in the statement in response to the appeal.

Furthermore, in relation to the in-combination consideration, the FAC noted that three versions of this document were recorded and dated 28/06/21, 22/09/21 and 03/03/22 and that each contain a different form of conclusion. The most recent version (03/03/22) contains the following statement, *It is concluded that there is no likelihood of the proposed afforestation project CN85792 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 considers this to be an error as the conclusion does not appear to consider effects that might arise which are not significant themselves but which in-combination with other plans and projects might manifest in a significant effect.

The FAC considers that these errors require that the *Assessment to Determine EIA Requirement* and the *Appropriate Assessment Screening* should be undertaken again to address these matters.

In relation to the reasons provided for the screening out of the SAC. The FAC does not agree with the Appellant's contention that hydrological connectivity should not be considered in relation to terrestrial habitats in all instances. The FAC considers that terrestrial habitats may be impacted by changes to hydrology under certain circumstances. In this instance, the SAC does, in fact, have a number of aquatic habitats as qualifying interests. Furthermore, the screening also notes consideration of the nature and location of the proposal and the distance to the SAC is recorded which is c.9 kilometres. The FAC is satisfied that the reasons provided in the screening are appropriate.

The grounds contend at length that the waterbody Adhachashlaun 30 has not been assigned a status by the EPA for the purposes of the Water Framework Directive (WFD) and that, as a result, no assessment could have been undertaken by the DAFM as to the likely effects of the proposal on the status of the waterbody and the overall goal of attaining Good status and avoiding deterioration . Reference is made to Judicial Review Case 740 2018 in this regard. The FAC considered that the specific details of the decision under appeal differ materially from that considered in the referenced Judicial Review. In particular, there is no direct exploitation of a waterbody proposed and no proxy value has been employed in the decision-making process. It appeared to the FAC that the water quality measures included in the application and licence conditions are standard good practice measures that have a primarily preventative purpose.

The FAC examined publicly available records provided by the EPA² and noted that a status, Good, is assigned to this waterbody for the period 2013-2018 while it had been unassigned for previous cycles.

² https://www.catchments.ie/data/#/waterbody/IE_NW_36A030900?_k=4wsd45

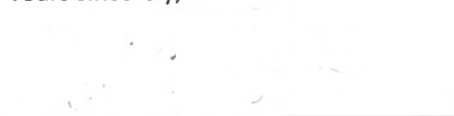
The date of assignment of the status does not appear to be recorded on the publicly available data. The FAC considered whether it should request clarification from the EPA as to the date of assignment but concluded that, having regard to the efficient conduct of appeals, that the new assessment and related conclusions that will be undertaken by the DAFM will address this matter as the waterbody currently has an assigned status.

In relation to the maps provided, the FAC is satisfied that the maps show roads and hedgerows and notes the submission that the Minister for Agriculture, Food and the Marine found them to be acceptable. The FAC further noted that the Applicant is described as owning the land between the proposal and the public road and the application submitted that access is provided. The location of the site notice on the public road is marked on the Biomap. The FAC noted that the lands were inspected by the DAFM. The FAC is satisfied that the applicant has sufficient access to the lands and that the maps and application were sufficient to process and issue the licence.

In relation to referral to the Local Authority, the FAC noted that the lands are described in the application and in the assessment by the DAFM as being outside of a special amenity area. It was further submitted in the application that they lie in an area designated as having a low sensitivity/high capacity to accommodate forestry in the County Development Plan. The FAC examined the publicly available maps provided by the local authority and confirmed these details. The FAC is satisfied that there was no need to make a specific referral to the Local Authority in this instance. A site notice was recorded as being erected in keeping with the requirements of the DAFM and no submissions were made on the proposal. The lands are agricultural in nature and well set back from the public road and no dwellings adjoin the lands. The FAC is not satisfied that an error was made in regard to these grounds.

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 errors was made in making the decision. The FAC is, thus, setting aside and remitting the decision to the Minister regarding licence CN85792 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to undertake an *Assessment to Determine EIA Requirement* and *Appropriate Assessment Screening*, of the proposal itself and in combination with other plans and projects, and to make the application documents available on the Forestry Licence Viewer in keeping with the stated DAFM procedures before a new decision is made.

Yours sincerely,



Vincent Upton, On Behalf of the Forestry Appeals Committee