



17th April 2023.

Subject: Appeal FAC 135/2022 regarding CN87865

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). 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 135/2022 was held remotely by the FAC on 28th February 2023.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson), Mr. Derek Daly & Mr. Iain Douglas.

Secretary to the FAC: Mr Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN87865.

Background

An afforestation licence (CN87865) at Derrylustia, County Leitrim was issued by the DAFM on 8th September 2022. The licence decision pertains to the afforestation of an approved area of 17.11 hectares and fencing with a length of 1,500 metres comprising GPC 3, 85% Sitka Spruce and 15% Additional Broadleaves over a single plot. Originally the proposal was for 18.39 hectares and subsequently revised to 17.11 hectares. The soil type is described in the documentation as podzols and the slope is considered flat to moderate. The project area is crossed by / adjoins an aquatic zone(s) and vegetation is grass/rush.

The application submitted included general mapping, fencing map, bio maps which was subsequently revised following a further information request, site notices, revised access arrangements including an agreement with Coillte to access through their lands. The revised details arose from a request from DAFM dated 11/11/2021 to re-submit a revised species map and bio maps showing the updated area and new proposed access route and to provide a written agreement from Coillte for use of a right of way of the proposed road if approved. (Forest Road Application CN89046)

The site is within the River Waterbody Diffagher_010, the status of which is indicated as moderate and in terms of risk is indicated as at risk.

DAFM Assessment

The application was subject to desk and field assessment by the DAFM.

The application was referred to the DAFM archaeologist who responded with a recommendation for permission with conditions and this recommendation was agreed to by the National Monuments Service to be attached to any grant of a licence.

The DAFM assessment included an Inspector Certification pre-approval report. In relation to AA Screening three Natura sites were identified, Boleybrack Mountain SAC 002030; Cuilcagh-Anierin Uplands SAC 000584 and LoughGill SAC 001796 and all are screened out. An Assessment to Determine EIA Requirement is included in the Inspector's Certification report, which determined EIA not required. The certification recommended permission with conditions which included exclusion areas.

An In-Combination Statement was completed on the: 06/09/2022 by the DAFM. The Statement concluded *"...that there is no likelihood of the proposed Afforestation project CN87865 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 decision to grant the licence issued on the 08/09/2022 subject to conditions which included conditions requiring adherence to published guidelines relating to forestry and also conditions on archaeology, that all existing trees and hedgerows within the site shall be retained and provided for the retention of existing open habitat located ITM 591365, 826398 and existing scrub habitat located ITM 591499, 826237 in the interests of protection of the environment and enhancing the biodiversity value of these habitats.

Appeal

There is one appeal against the decision to refuse the licence and a brief summary of same is included below. The full grounds of appeal were considered by the FAC and are to be found on file.

The grounds of appeal submit that that there was a breach of due process referring specifically to the untimely publication of decision as the licence was issued on the 8th September 2022 and the public were informed on the 9th September 2022 and reference is made to Aarhus Convention in this regard.

The grounds contend that the licence and reasons were not made available to the public within an adequate timeframe and reference is made in this regard to the absence of project information on the Forestry Licence Viewer (FLV).

The grounds contend that no EIA screening information is made available to the public and also that no AA information is made available to the public.

The grounds refer to a request by a member of the public to view records was made on the 9th September 2022 and no response was received.

It is also contended that access to view records was not provided.

An oral hearing is requested.

DAFM Statement

The DAFM provided a response to the grounds of appeal (SOF) which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the grounds of appeal.

Specific to matters raised in the grounds of appeal the SOF refers to the position of the FLV and that all applications received since 11/01/2021 are on the FLV. Applications received prior to that date not requiring an Ecology input are not on the FLV. It is indicated that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act. In relation to untimely publication of decision standard practice was followed and the appellant was informed of the decision on the 8th September 2022, the date the licence was issued.

The SOF also outlines the position regarding providing information to the public, that the appellant was given all the documentation and there are procedures in relation to members of the public obtaining information and members of the public are informed of these and the member of the public who requested the information did not avail of the procedures set out in relation to obtaining information.

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The FAC considered the submission in the grounds of appeal relating to the Environmental Impact Assessment (EIA) Directive. 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 are 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 Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence

applications, require mandatory EIA 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 before the FAC relates to the afforestation of an approved area of 17.11 hectares. This project of the afforestation of 17.11 hectares is substantially below the 50 hectares threshold. An Assessment to Determine EIA Requirement was carried out over a range of criteria and determined that EIA was not required and that screening for significant effects under the EIA Directive was not required in this case.

The FAC however noted that while the Minister recorded a separate characterisation of plans and projects in the area in the In-combination Report carried out as part of the Appropriate Assessment process (as discussed below) and dated the 06/09/2022, this is not explicitly cross-referenced in the EIA Determination. The EIA Determination itself only refers to forestry projects and references a Spatial Run Date of 31/08/2022, i.e. before the In-Combination Report was carried out. While the FAC would consider 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, based on the foregoing it is not apparent if adequate consideration was given to cumulative effects (including non-forestry projects) when making the determination for EIA requirement. The FAC considers this an error in the processing of the application.

The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and identified the same three Natura sites as DAFM, Boleybrack Mountain SAC 002030; Cuilcagh-Anierin Uplands SAC 000584 and Lough Gill SAC 001796. The FAC considered the record and the reasons stated for screening out of these sites and in relation to the Appropriate Assessment screening consider that no error has occurred

The FAC also however noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement was prepared in relation to the project. The statement includes the passage,

"It is concluded that there is no likelihood of the proposed Afforestation project CN87865 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 and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered. The FAC would consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considered this to be a significant error as it suggests that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in-combination with other plans and projects might result in a significant effect.

In relation to the matters raised in the grounds of appeal reference is made to due process referring in specific to untimely publication of decision as the licence was issued on the 8th September 2022 and the public were informed on the 9th September 2022 and reference is made to Aarhus Convention in this regard. The DAFM confirm this in their statement however also noting that the appellant received a copy of the decision and documents on the 8th September 2022. On the face of the record the decision was published and issued to parties on the same day. The DAFM in the response refer to procedures for other parties who were not parties who made submissions prior to the decision to gain access to documents, that the party who requested access to documents was made aware of the procedures and did not pursue the matter further. The appeal does not provide any evidence to contradict this. The FAC do not consider that the DAFM has erred in this regard.

In relation to the Water Framework Directive and effects on water quality generally the FAC viewed the information on the EPA and Irish Catchments websites and current mapping and data which confirmed information contained on the DAFM file that the project is within the River Waterbody Diffagher_010, the status of which is indicated as moderate and in terms of risk is indicated as at risk. The sub basin is within the Subcatchment Owengar[Leitrim]_SC_010 and forestry is not identified as a risk in River Waterbody Diffagher_010. It is also noted that in addition to standard conditions, condition no 5 of the licence set outs specific requirements in relation to setbacks from watercourses for the protection of the environment, in particular the protection of water quality and aquatic ecosystems. The FAC consider that the issue of water quality was addressed in the assessment of the project, that this is reflected in the licence conditions, and that and that the development will not have adverse effects on receiving waters.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence CN87865. The FAC is therefore setting aside and remitting the decision regarding licence CN87865 to the Minister to carry out

a determination for EIA requirement and an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects before a new decision is made.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee