



4th August 2023

Subject: Appeal FAC091/2022 against licence decision CN88531

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 (Minister). 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 FAC091/2022 was held remotely by the FAC on 13th July 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC: Ms. Vanessa Healy

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 CN88531. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to a licence granted for the afforestation of 7.5 hectares at Carrowduff, Co. Clare. The proposal is divided into two plots; the larger plot of 7.22 hectares would be planted with Sitka spruce and additional broadleaves and the smaller plot of 0.28 hectares would be planted as native woodland comprised of Scots pine, sessile oak, downy birch and other broadleaf species. Site preparation would be through mounding and drainage with slit planting. No fertiliser is proposed and weed control would be manual and with herbicide in year 1. Stock fencing of 670 metres would be undertaken.

The site is described as enclosed agricultural land with a mineral soil and a grass rush vegetation type and that adequate access is in place. The application was subject to desk and field assessment by the Department of Agriculture, Food and the Marine (DAFM).

The application included operational and environmental information and a series of maps. A biomap was submitted that shows the outline of the lands and the two plots and marks a number of features, including hedgerows and a water course to the north of the lands. Two site notices are also marked on the map and an "existing onsite track" is marked leading to a minor public road. A number of houses are also marked. The map states that there would be setbacks from hedgerows (5 metres), the aquatic zone (10 metre mineral, 20 metre peat) and the external boundary (4 metres).

A submission was made on 20th October 2021 stating to be from the residents of Carrowduff and Milltown Malbay and objected to the application on a number of grounds in relation to impacts on the local community and environment. The Appellant made a submission on 29th March 2022 submitting that a fire had recently broken out in a field adjacent to the proposal and submitted a number of photos.

The application was referred to Clare County Council which provided a response on 27th October 2021 requesting that the afforestation should not commence until MD Roads Engineer has been consulted, a map showing the location of the site entrance has been submitted and agreed, and the County Council be indemnified against damage to the Local and Regional Road Network, and that no tree planting take place within 15 metres of the public road.

The application was also referred to the National Parks and Wildlife Service on 21st February 2022 which responded on 10th March 2022. This stated that the site is approximately 2.7 km from Carrowmore Point to Spanish Point and Islands Special Area of Conservation (SAC) (Site Code: 001021) and Mid-Clare Coast Special Protection Area (SPA) (Site Code: 004182) and contains watercourses and that the Forest Service must ensure that the proposal will not impact on water quality in the European sites. The referral further advises that environmental documents and requirements must be adhered with and that the Department of Housing, Local Government and Heritage be provided with a copy of any further information and the decision. The submission also included an appendix of more general points.

The DAFM sent a letter to the Applicant on 23rd December 2021 stating that the biomap submitted was incomplete with reference to hedgerows and watercourses and that the site notice was not located properly. It was stated that the biomap had to be resubmitted and the site notice reinstalled and that the application should be submitted after the notification period had elapsed.

The file includes further site notices dated 12.01.2022 and photos of a site notice at a public road. An amended biomap was also submitted which marked relevant watercourses on the land. Photos of a site notice dated 23rd September 2021 are also on file.

The DAFM recorded a screening for Appropriate Assessment under the requirements of the Forestry Regulations 2017 and the EU Habitats Directive. This recorded the details of the operations and the wider location and included a number of maps of the area. It records five sites within 15 km of the proposal, Mid-Clare Coast SPA IE0004182, Carrowmore Point to Spanish Point and Islands SAC IE0001021, Carrowmore Dunes SAC IE0002250, Inagh River Estuary SAC IE0000036, and Cliffs of Moher

SPA IE0004005. Each site is considered in turn with its qualifying interests and a screening conclusion is recorded. Three sites are screened in to proceed to Appropriate Assessment, Mid-Clare Coast SPA IE000418, Carrowmore Point to Spanish Point and Islands SAC IE0001021, and Carrowmore Dunes SAC IE0002250 on the basis of a hydrological connection from the proposal being present. The other two sites are screened out.

An Appropriate Assessment Report was prepared which considered each qualifying interest and conservation objective in more detail and records specific impacts and mitigation measures. It is recorded that no measures were required in relation to the species and habitat interests of Carrowmore Point to Spanish Point and Islands SAC IE0001021 and Carrowmore Dunes SAC IE0002250 and reasons are provided. A number of water quality measures are specified in relation to the SPA. An Appropriate Assessment Determination is also recorded that concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The record also includes a consideration of the proposal across a series of criteria and it is recorded that the proposal was not required to be subjected to the EIA process.

The licence was granted on 19th July 2022 subject to conditions, including adherence with the measures identified in the Appropriate Assessment Determination.

Appeal

There is one third party appeal against the decision to grant the licence and the Notice of Appeal and full grounds have been provided to the parties. In summary, the grounds contend that the decision does not comply with a number of the provisions of the Forestry Standards Manual. The grounds also contend that access to the site from a public road is not adequate and refer to the nature of the road and access point and trucks employed for hauling timber. Reference is also made to a submission from the County Council and the requests contained therein and to a lack of consultation with local residents.

The grounds further contend that the forest would impact on one of the most scenic parts of the County and that no consultation occurred with the houses that would be impacted. Furthermore, it is submitted that the application states that no firebreak is required but that a number of fires had occurred in the area in recent years which were covered in the media. The grounds again refer to a lack of consultation. The notice was accompanied by the submission from the County Council, the biomap and photographs, including of the site notice.

Minister's Statement

The DAFM provided a statement, dated 16th February 2023, in response to the appeal that outlined the stages and processing of the application and submitted that the decision was made in keeping with DAFM procedures, the Forestry Act 2014 and the Forestry Regulations 2017. It is submitted that the application was subject to two periods of public consultation. It is submitted that the application was considered in detail alongside the further information and submissions made and that the DAFM had required the site notice to be erected in the correct location.

The DAFM state that there is adequate access to the site for the establishment phase of the forest and that further permission may be required at the harvesting phase. In relation to consultation it is submitted that a site notice was erected at the entrance and included the details regarding the view the proposal details. It is submitted that there would be no burning permitted in the afforested area and that burning is sometimes used as an agricultural management tool. It is submitted that the area is comprised of and surrounded by green agricultural land which greatly neutralises the risk of fire and that the closest building is an unused cottage at 60 metre and the closest dwelling is 86 metres away.

Further Submissions

The Applicant made a submission on 16th August 2022 in which they submitted that they had rented the lands in recent years but have become increasingly interested in tackling climate change and biodiversity. They submitted adequate access is in place and they have moved a number of large pieces of agricultural machinery to the site without issue. They also submitted that there is 35 metres of road frontage and referred to the maps submitted with the application. They further submitted that they had considered planting 15 hectares but that they reduced the application to 7.5 hectares having regard to their neighbours. They submitted that the Appellant's dwelling is 110 metres from the proposal to the northeast and will be fronted by 5 rows of broadleaves. It was submitted that the initial site notice had been located on the Applicant's own land as they were concerned about encroaching but that they moved it to the public road when requested. It was submitted that they are not aware of a fire in March 2022 on their or adjoining properties and that they were in their residence at the time. They also submitted that their forester had never witnessed a forest fire in an enclosed parcel such as in the proposal in their 35 years and that the surrounding grass and rush lands do not constitute a fire risk.

The Appellant made a further submission on 13th March 2023 which included a response to the DAFMs statement and elaborated on a number of their grounds. They also submitted that Sitka spruce should be considered an invasive species and suggested that works had been undertaken on the lands. The letter was accompanied by a number of photos stated to show the state of the public road and the lands and clearfelled forests in the vicinity.

The Applicant made a submission on 3rd April 2023 in which it was submitted that they were guided and assisted by their forester and have not undertaken any forestry work on the site. They submitted that some agricultural work had been undertaken before the deadline to prepare and repair their lands for the new season. They submitted that that a clear view of the sea and Mountain will continue to exist, that there is no risk of fire and that the closest building is a disused cottage and the closest dwelling is 87 metres. They submit that there is 35 metres of road frontage and adequate access is in place and that

they do not envisage any difficulties with access in the short or long term. They also outline their activity in maintaining the environment in their local area. The Applicant's forester also made a submission.

The DAFM made a submission on 5th April 2023 submitting that the DAFM had required the placing of the site notice in the correct location and referred to the related letter. It is submitted that the road is currently potholed but had never been used for forestry purposes. It is submitted that access to the site is possible although awkward due to the sharp angle of the public road to the entrance but that vehicles would be very slow moving and that a departure or relaxation of the Technical Standards for Forestry Road Entrances may be required for harvesting purposes and that this will require a separate licence application. It is submitted any burning operations or hedge pruning must be carried out in accordance with the law and that there is no forestry on the site at present.

All submissions were circulated to the parties.

Considerations of the FAC

The FAC considered in the first instance the grounds raised in relation to access to the lands. The grounds refer specifically to 5.3.2 of the Forestry Standards Manual 2015 and the nature of the access to the public road. In particular, the sharp angle from the public road to the access track and the nature of forestry harvesting. Reference is also made to the submission from the County Council and a copy of this letter was included. The application identifies an existing access track into the lands from the public road. The application also stated that access to the lands was in place and the Applicant subsequently submitted that they own the field crossed by the track which includes 35 metres of road frontage and that they have moved multiple pieces of heavy agricultural machinery into the lands without issue. The DAFM submitted that the access is appropriate for the planting of the lands but that the access would require upgrading should felling take place.

The decision before the FAC relates to the afforestation licence granted by the Minister for Agriculture, Food and the Marine. Should the forest owner seek to create or widen an access to the public road this would require a separate application. While the FAC can not speculate on the outcome of such an application were it made, the FAC is satisfied that there is no evidence before it that the forest owner would be precluded from making such an application. In particular the FAC notes the ownership of the lands up to the public road including those not subject to planting and the extent of road frontage in place. The FAC also noted the current use of the lands and the submission from the Applicant regarding the movement of agricultural machinery onto the lands. The FAC is satisfied that access to the lands was clearly identified in the application and that this access could facilitate the afforestation of the lands.

The management of the public road network falls to the local authority and there is a requirement on the Minister to refer any application for the creation or widening of an access to the public road if made. The FAC is satisfied that the access to the lands was clearly identified in the application and is suitable for the planting of the lands and that the issuing of the licence would not restrict the local authority in employing its powers in relation to the public road network.

The Appellant expresses concern regarding nuisance and the impact of traffic associated with the proposal. The lands are currently in agricultural use and would be subject to the movement of machinery in keeping with normal agricultural practices. The planting of the lands would likely involve a single machine operating over a limited period to prepare the lands after which there would be an extended period in which the only likely access of the lands would be cars for inspection and management purposes. During road construction or felling operations were they to occur the lands would be accessed by heavy machinery which would see an increase in traffic but this would again be for a limited period and subject to licence.

In relation to public consultation, Part 6 of the Forestry Regulations 2017 addresses Consultation. The FAC noted that the DAFM had contacted the Applicant to inform them that the site notice was not erected in the correct location and that they were required to place the site notice in a manner that adhered to the Forestry Regulations 2017 and to make a new application. The DAFM and the Applicant submitted that this was done and the file includes copies of two sets of site notices and photos of erected site notices and revised maps. The Appellant and other parties had made submissions on the application and the DAFM stated that these were considered in the making of the decision. The FAC is satisfied that this was in keeping with the requirements of the Forestry Regulations 2017.

The grounds of appeal refer to 6.4.2 of the Forestry Standards Manual 2015 which predate the Forestry Regulations 2017. This section states that *"Forest developers should liaise with the owners of neighbouring properties, to resolve in advance any potential concerns."* The FAC consider this text to be of an advisory nature and does not create an obligation on an Applicant to directly contact neighbouring land owners. The requirements of the Forestry Regulations 2017, which postdate the Standards, include the erection of a site notice in a specific manner and for the Minister to have regard to submissions made on the application. The FAC is satisfied that this was undertaken in this case.

The grounds also refer to the statement in the application that no firebreak was required and referred to a fire that had occurred in a hedgerow during agricultural operations. The Applicant submitted that they are not aware of a fire occurring on the lands and that their Forester considered the lands to be at low risk of fire. The Forestry Standards Manual describes a firebreak as a 6 metre wide fuel free zone. The FAC understands that firebreaks are generally employed for sections of forest at potential risk of fire or to separate forests from areas that pose a fire risk, such as uplands areas of gorse or heather particularly those subject to prescribed burning. Fire breaks are generally employed for the protection of the forest from fire spreading into them from adjoining lands.

In this instance, the lands to be established are of a relatively small farm scale on improved agricultural land comprised of wet grassland on mineral soil and surrounded by pasture. The FAC does not consider that a firebreak in such circumstances would be required to comply with good forestry practice. A setback of 60 metres from dwellings is required in all cases, except with agreement of the dwelling owner, and in this case there are dwellings described by the Appellant as some 100 metres from the boundary. A derelict cottage owned by the Applicant is situated some 60 metres from the boundary. The plot is also well setback from the public road. The Appellant submits that a fire broke out in the area in

the past and spread across dry ground and hedgerows. However, this demonstrates that fires can occur on different land types. While the risk of fire can obviously never be completely excluded, the area in question would not be associated with a high fire risk such that a fire break would be considered necessary and the FAC is not satisfied that a serious or significant error occurred in the making of the decision in relation to these grounds.

The FAC considered the Appellant's contention that the planting would have a direct impact on dwellings. The lands to be planted are situated to the northwest and at a remove of some 100 metres from the Appellant's house. It is a requirement of conditions on the licence that no planting take place within 60 metres of dwellings but it appears that no dwellings are situated within 60 metres of the proposal. Given the substantial distance from the dwelling and the orientation the FAC does not consider that any direct effects on light in a dwelling would arise. The forest will be visible from the Appellant's dwelling but will be situated at a remove and separated by existing hedgerows and a setback from a relevant watercourse that borders the site. The lands are described as not lying in a high amenity landscape and situated in an agricultural landscape with a mixture of farm land and forest. The County Council did not raise concerns regarding the landscape. However, as noted below the FAC is satisfied that a number of errors were made in the reasons provided in the DAFM screening for Appropriate Assessment and Environmental Impact Assessment, including in its reasons recorded in relation to impacts on landscape.

The Appellant made a number of general references to impacts on the environment. While they submit that Sitka spruce should be considered an invasive species, this species has not been so classified. The FAC considered the screenings undertaken and recorded in relation to the requirements of the EU Habitats and EIA Directives. The file includes a number of documents that relate to a screening for Appropriate Assessment undertaken to assess possible significant effects on European sites. The screening documents include the following text,

It is concluded that there is no likelihood of the proposed Afforestation project CN88531 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 there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in extension the Appropriate Assessment of the impact of such effects on the integrity of the European site. As stated on the record, it appears that the incorrect test was employed at the screening stage in that only significant effects that might arise from the project itself were considered. For this reason, the FAC considers that the screening should be undertaken again.

The record also includes a document entitled Assessment for EIA Requirement. Annex II of the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) identifies classes of development for which Member States may set thresholds or criteria for requiring environmental impact assessment. This includes “initial afforestation and deforestation for the purpose of conversion to another type of land use” and road construction. The Forestry Regulations 2017, SI 191 of 2017, require that afforestation of 50 hectares or more be subject to an Environmental Impact Assessment (EIA). Afforestation of less than the threshold of 50 hectares but which the Minister considers likely to have significant effects on the environment, taking into account the criteria set out in Schedule 3, must also be subject to EIA. The proposal in this case is 7.5 hectares and significantly below the threshold for mandatory EIA.

When making an application for a forest licence, an applicant must provide the information in Schedule 1 of the Forestry Regulations 2017. This includes a physical description of the whole project and location; a description of the aspects of the environment likely to be significantly affected and a description of any likely significant effects on the environment from the expected residues, emissions, and waste where relevant and the use of natural resources, to the extent of the information available on such effects. This information must take account of the criteria identified in Schedule 3 of the Forestry Regulations 2017.

The application includes details of the proposed operations and a series of maps including detailed maps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects.

The screening document relies on guidelines that have been replaced by the Environmental Requirements for Afforestation (DAFM) according to that document. This includes a reference to Landscape Guidelines, about which concerns were raised in the appeal. Neither were these guidelines attached as conditions of the licence. The reliance on these documents in the determination constitutes a serious error.

The FAC noted that the following is recorded,

Is the site within an area designated as potentially acid sensitive by the Forest Service? If yes, insert comment in comment box – Yes

However, no comments or further reasons are recorded in relation to this question or for any other purpose.

The section dealing with *Designated and non designated Habitat Recommendation* states that there was no recommendation for *Adherence to Forest Service Guidelines* or *Supplementary operational conditions* while this was required as part of the AA process. In addition there is a reference to an *Ecological Survey*

and Report while this does not appear to have been undertaken outside of the AA process. The FAC considers that the reasons for the Minister to determine that an EIA is not required need to be provided and in the absence of a narrative or clear reference to the purpose of these responses that a series of errors occurred in this regard.

In addition, while the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the EIA Determination, which itself only refers to forestry projects. 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, it would be clearer if an explicit reference to the characterisation of existing and approved projects was included in the EIA Determination and the consideration of likely significant effects on the environment.

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 CN88531 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake new screenings for Appropriate Assessment and Environmental Impact Assessment before a new decision is made.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee