



10th August 2023.

Subject: Appeal FAC 140/2022 regarding CN80638

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 ("the Act"), 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 140/2022 was held remotely by the FAC on 04/05/2023.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson), Mr. Iain Douglas, & Mr. Luke Sweetman
Secretary to the FAC: Ms Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, the Statement of Fact (SoF) provided by the DAFM, 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 CN80638.

Background

An afforestation licence for 12.77ha in 5 plots at Tullylackan more, Co. Leitrim was issued by the DAFM on 12/09/2022. The licence also provides for fencing of 1,500m in length.

A previous decision of the Minister to grant a licence for this application had been made on the 10/07/2019. This was appealed to the FAC who set the decision aside and remitted the application back to the Minister. In the interests of clarity and for the avoidance of doubt, this decision letter considers only matters relating to appeal 140/2022, and the FAC has based this decision with reference only to those documents relevant to the Minister's decision to grant the licence issued on the 12/09/2022.

The licence issued on the 12/09/2022 is for 5 plots. Two of these are to be unplanted bio plots. Two further plots are predominantly Sitka Spruce with Additional Broadleaves. These four plots are to the east of a small local road. The final and smallest plot is to the west of the local road and is to include

Pedunculate oak and Birch. The file relating to the application was provided to the FAC by the Forest Service of DAFM and is not available on the Forest Licence Viewer (FLV). The materials on file indicate that the site is ca. 2km from the border between Counties Leitrim and Cavan and ca. 8km north west of Ballinamore.

Documentation on file (in particular the Appropriate Assessment Screening Report bearing a date 10/02/2023 and referring to an Inspection Certification Report of the 05/09/2022) describes the predominant soil type underlining the project area as podzolic in nature, the slope as predominantly flat to moderate (<15%), and that the project area is crossed by / adjoins an aquatic zone(s). Vegetation type(s) within the project area are stated to comprise Grass/rush. The site can also be seen to be ca. 1km from the Cuilcagh – Anierin Uplands Special Area of Conservation (SAC) [0584].

An In-combination statement on file states that the site is within the Yellow (Ballinamore)_010 river sub basin. The FAC noted that publicly available map data provided by the EPA indicate that the Yellow (Ballinamore)_010 has a “Good” status and is listed as “Not at Risk”. However, the data download service provided by the EPA shows data uploaded in August 2022 gives the Yellow (Ballinamore)_010 (Water body code IE_NW_36Y010200) as having an ecological status of “Moderate” and a risk status of “At Risk” with Forestry identified as a significant pressure¹.

There are a number of other documents on file, as discussed below where relevant to this appeal. All files were reviewed by the FAC to determine their relevance to the appeal at hand and to assess the processing of the application with respect to fair procedures and adherence to the principle of sincere cooperation with EU law. Of note are a series of Requests for Supporting Documentation letters issued by the DAFM to the applicant and various responses accompanied by iterations of the proposal design including biodiversity and operational maps. Connected to these is a letter on file dated the 07/03/2019 from the applicant’s representatives to the DAFM outlining proposed changes to the original proposal with respect to species composition and areas of biodiversity. This letter references a briefing on those proposed changes to a Senior Planner at Leitrim County Council. Also of note are two in-situ photographs of site notices that are on file dated the 20/02/2018 and the 31/01/2018, and an undated Landscape Plan.

Submissions and referrals.

There were four third party submissions arising from the application for the licence on file.

A member of the public made a submission on the 09/03/2018 referencing the potential impacts of forestry on the community with reference to the environment, society and biodiversity. National policy in relation to forestry and forestry investment is criticised.

A further member of the public made a submission on the 13/03/2018 requesting application documentation and stating that Hen Harrier and other bird species are present in the locality.

A final member of the public made two submissions, both on the 11/04/2018. In the first reference is made to Hen Harrier in the locality, the presence of another application immediately adjoining the project site, and issues that may consequently arise. The submission queries the term *woody weed*

¹ See <https://gis.epa.ie/GetData/Download>

removal and makes suggestions in relation to the protection of hedgerows. The second submission from the same member of the public highlights potential risks arising from Japanese Knotweed, the potential lack of biodiversity value of particular plots, and highlights the presence of recently afforested sites in the context of requirement for Environmental Impact Assessment (EIA). The suitability of the proposed planting mix is also queried.

The application was referred to An Taisce on the 09/03/2018 and a response was received on the 26/03/2018. In summary, this notes that the “proposed application lies Cuilcagh Aneierin Uplands SAC/pNHA (000584)” (sic), and highlights the requirement for an Appropriate Assessment of the application with reference to the SAC and various species. Reference is also made to the WFD status of the Yellow River as being moderate, the requirements of that Directive, and the consequent need for a water setback of 15m taking account of the slope on the site. Reference is also made to the County Leitrim Development Plan, cumulative impacts with respect to specific other forestry projects, and possible constraints that may be required with respect to the use of fertilisers and herbicides.

The application was also referred to the Planning Department of Leitrim County Council on the 09/03/2018. A response was received on the 21/03/2018. This notes that the project documentation gives differing values for the area to be afforested, and that it is unclear whether the proposal includes the provision of new vehicular access points to the public road network. The project is stated to be within an area with low capacity to accommodate forestry and high visual amenity, and attention is drawn to aspects of the County Leitrim Development Plan with regard to certain landscapes. The letter concludes by noting the County Council’s objection to the proposal.

A further response from Leitrim County Council is also on file dated 03/05/2019. While acknowledging that the proposed project is in lands that are in a transitional between an area to the north identified as having a high capacity under the Country Leitrim Development Plan, and also acknowledging that the applicant had provided the DAFM with a revised planting scheme favouring native species the response reaffirms the County Council objection to the proposal on the basis of its location in a low-capacity area for afforestation. The response states that the County Council does not distinguish between deciduous and coniferous planting, and that this was made clear in discussions with the applicant’s agent.

The file was also referred to an Archaeologist of the Forest Service, and their observations are on file in a letter dated the 01/06/2018. This notes that the afforestation is contiguous to a recorded monument (a sweatouse), and that a cluster of farmhouses and other buildings that may be intact, together with the remnants of an historic lime kiln. The letter recommends conditions which include the exclusion of specified areas of the application as noted on an accompanying map, a fenced exclusion zone around the monument of 20m, a prohibition on the excavation of deep drains within 30m of the recorded monument, respect for or establishment of pedestrian access to the monument, and unplanted setbacks from the other features noted.

As noted above, there were a series of information requests sent by the DAFM to the applicant, and these resulted in a number of iterations of Biodiversity/Operational maps. The application was also the subject of an appeal to the FAC who issued a decision on the 29/01/2021, following which a revised Bio Map dated the 16/12/2021 can be seen on file. This shows the location of a site notice on the public road located between the two southernmost plots, a site access point at a separate point which can be

seen to be reached via a forest road which meets the public road at a location separate to where the site notice is located, the location of scrub, the location of an aquatic zone and associated setbacks, road setbacks, the public road, an overhead power line, the location of a site compound/fuel storage, the location of an archaeological feature, the direction of mound drains and location of silt traps, a utilised building setback, and an area of other set back in the vicinity of the archaeological feature.

DAFM Assessment

The application was subject to a desk and two field assessments, with the field assessments having taken place on the 13/07/2018 and the 26/09/2019, per the Statement of Fact (SoF) provided by DAFM.

An Appropriate Assessment Screening Report is on file which makes reference to a Certification date of 05/09/2022 and bears the date 10/02/2023. This notes two European sites within 15km of the project site, and screens both out the basis of the position of the project area being downstream from the Natura site, and the subsequent lack of any hydrological connection. This screening report also relies on a reference to an *"in-combination assessment attached to this AA Screening"*, and asserts that this demonstrates that *"there is no likelihood of the project itself (i.e. Individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects"*.

There are three in-combination reports/assessments on file. The latest of these notes that various planning systems and datasets were considered to identify other plans and projects on the 06/09/2022, focusing on the general vicinity of the project area in the River Sub-Basin Yellow (Ballinamore)_010. An earlier in-combination report is also on file noting a search date of planning systems on the 08/06/2022 but which states that the area focused on was the River Sub-basin Yellow (Ballinamore)_010 and Aghcashlaud_010. All the in-combination reports conclude an in-combination statement, which includes the statement:

It is concluded that there is no likelihood of the proposed Afforestation project CN80638 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.

An Assessment to Determine EIA Requirement is also on file bearing a date of 10/02/2023 and refers to a spatial run date of the 05/09/2020.

No Inspector's certification is on the file provided to the FAC. An afforestation licence was issued by way of an approval letter on the 12/09/2022 for an area of 12.77ha and 1,500m of fencing. This includes a number of standard conditions such as a stay on the commencement of works to allow for an appeal to be made and compliance with various manuals and standards. Operational details, which are to be adhered to, are set out in an appendix including provision for herbicide application in years 1 through 3. Several site-specific conditions are also set out. These include adherence to a landscape plan submitted 16/02/2022; liaison with Leitrim County Council; and a variety of setbacks relating to archaeological features, historic buildings and watercourses.

Appeal and Statement of Fact

There is one third-party appeal against the decision to approve the licence. The full grounds of appeal, which are extensive, were considered in full by the FAC and are to be found on file. The DAFM provided the FAC with a SoF which addressed each of the grounds and featured responses from DAFM administration, the Forestry Inspectorate, and separate letter from a DAFM archaeologist. The SoF was considered in full by the FAC and is to be found on file. For ease of reference, summaries of each of the grounds of appeal and the relevant responses provided in the SoF are provided below. The appellant requested an oral hearing.

1. **Due Process.** That there was failure to follow due process by reason of untimely publication of the decision and non-compliance with Article 2(20) of the Aarhus convention.

DAFM SoF: That the licence was approved on the 12/09/2022 and this was advertised on the 13/09/2022. Letters were issued to parties who had made third party submissions on the 12/09/2022.

2. **Compliance with the Forestry Regulations.** That the application was not legally compliant with Forestry Regulations 5(2) and 11(1) by reason of various mapping deficiencies (public roads, hedgerows, site notice, quality of mapping, and other features [Japanese knotweed, scrub, townland boundary]). The appellant states that all required information must be received at application stage and that where new information is provided the public must be provided with an opportunity to comment. The appellant notes a “no” response in response to “Scrub/Laurel/Rhodo” in the proposed details. The appellant submits that there is no vehicular access at the location of the site notice, and that the access at this location would not be possible.

DAFM SoF: That the revised bio map dated 16/12/2022 clearly shows features required. That no error was made on the site notice location as the licence area borders a public road and this was confirmed via field inspection, and that adequate access is provided as per section 5.3.2 of the Forestry Standards Manual. That the townland boundary follows a natural topographic feature, e.g. the Yellow river and that as such it does not require archaeological protection.

3. **Setbacks for biodiversity enhancement.** That there is an inappropriate use of a required set back as an area for biodiversity enhancement. The appellant makes reference to the Forestry Standards Manual (FSM) and queries an area of open space having trees/scrub and natural regeneration of coniferous trees.

DAFM SoF: That the specified bio areas adhere to scheme rules. That the area indicated as “area 2” is not within the definition of forest. That archaeological conditions including setbacks apply.

4. **Invasive Species.** That there was inadequate assessment of invasive species, with specific reference to the asserted presence on the site of Japanese Knotweed.

DAFM SoF: That the area pictured in materials that accompanied the Notice of Appeal Form is outside the license area and along the adjoining stream at ITM 607363, 816840.

5. **Licence Conditions.** That the licence conditions are inadequate by reason of conditions that are not consistent with the reasons given and not being understandable by the layperson. The appellant submits various issues with licence conditions including adherence to referenced documents, use of point sources to define areas, and inadequate records of features to which conditions apply.

DAFM SoF: That the licence conditions are presented clearly, well-reasoned and follow DAFM standard operating procedures. That the language used is familiar to a forester. That the onus is on the applicant to liaise with the County Council prior to commencement of operations.

6. **Landscape and planning.** That there was inadequate regard for the objections of Leitrim Co. Council, with specific reference to the lands being included in an area High Visual Amenity. The appellant submits that the development is not exempted development where it interferes with the character of a landscape, with reference to the Planning and Development Act.

DAFM SoF: That the Minister for Agriculture, Food and the Marine is the competent authority for the licencing of afforestation. That the project is not situated in open area, is not highly visible, and not in a moorland below 300m. That the project does not adjoin a Natura site. That the project does not impact on woodlands, peatlands or wetlands. That hedgerows are protected in terms of licence.

7. **Woody Weed Removal.** That there is use of an archaic term, Woody Weed Removal, which it is submitted that if allowed to be removed is in conflict with the condition stipulating retention of scrub.

DAFM SoF: That woody weed removal is a standard operation in afforestation sites and agriculture. That all existing trees and hedgerows are to be attained.

8. **EIA Screening.** That there was inadequate EIA screening, by reason of use of checkboxes with no reasoning, the restriction of spatial and temporal criteria, and cumulative effect with a named (CN90557) application.

DAFM SoF: See summary for ground 9.

9. **Ecological/Environmental Assessment.** That there was inadequate ecological/environmental assessment by reason of no regard for the presence of High Nature Value lands (with reference to Regulation (EU) No 1305/2013), inadequate setback for hedgerows, the requirements of Article 12 of the Habitats Directive (Annex IV species), landscape impact, impact on water quality, and inadequate consideration of comments from the public. The appellant makes submissions in relation to the presence of Hen Harrier and Otter. The appellant submits that mitigation for EIA (in respect of water) can only be considered where the mitigation can be assured, that the proposal is in an area stated by the EPA to be at risk and under pressure from Forestry and in a Priority Area for Action under the WFD. The appellant submits that the project is in the Zone of contribution for a Group Water Scheme and this is not identified in the processing of the licence.

DAFM SoF: *That standard EIA screening operation procedures were adhered to and that the 50ha threshold is per application. That the assessment is correct in stating that there will not be cumulative issue. That the issue of High Nature Value land is a policy issue, and that Teagasc maps are not site specific and are on DED level. That the project was field assessed. That applicants are obliged to adhere to the Wildlife Acts. That data regarding Hen Harrier sites are provided to DAFM by NPWS and that no source of the claim of Hen Harrier nesting within 1.2km has been provided.*

10. **Appropriate Assessment.** That the Appropriate Assessment of the project was flawed by reason of an unidentified Natura Site in the AAS that is within 15km of the site (Cuilcagh Mountain SAC UK0016603), use of lack of hydrological connection to an upstream site in order to screen it out, and failure to consider a source/pathway/receptor relationship between an SAC and natural regeneration of the species to be planted, and an inadequate in-combination effects assessment.

DAFM SoF: *That DAFM standard operating procedures for Appropriate Assessment were followed. That the project is entirely outside of, and that there is no hydrological path to Cuilcagh-Anierin Uplands SAC. That no Qualifying Interests of that SAC were noted on inspection.*

11. **Operability of licence.** The appellant queries the operability of licence conditions, with particular reference to the Archaeological Connection.

DAFM SoF: *That no setbacks or site conditions compromise the operability of the licence. That setback conditions relating to archaeological features do not preclude traversing setbacks. That the existing track in place adjacent to an OS marked watercourse which provides access. That the features deemed as requiring archaeological conditions are not designated Recorded monuments, Registered Historic monuments, or National monuments.*

12. **Government Policy.** That approval represents a failure to adhere to the Government's principle of the right tree in the right place.

DAFM SoF: *That DAFM are satisfied that the project has been processed in line with Government Policy.*

Consideration by the FAC

In the first instance the FAC considered whether an Oral Hearing was required noting the request for such a hearing by the appellant. The FAC considered that it had sufficient information before it, and that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. When considering the grounds of appeal, and in particular those relating to Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) for the purposes of the Birds and Habitats Directive, the FAC also considered the processing of the application in the context of adherence to European Law and fair procedures.

Due Process.

The FAC considered the submission in the grounds of appeal that there was a lack of due process arising from the date of advertisement of the decision. The FAC noted the submission from the DAFM in its SoF that the licence was advertised on the next "advertising day" as was the Department's practice, that in any event the licence was available online as soon as the decision was made public, and that members of the public who had made a submission were made aware on the day of the decision, including the appellant. The FAC consider that in the specific case of this licence, the appellant was not significantly disadvantaged and no significant error was made in the processing of the licence in relation to this ground of appeal.

Compliance with the Forestry Regulations

The FAC considered those grounds of appeal that relate to access to the site and the location of the site notice, and had regard to the DAFM SoF which states that the relevant features are visible on a revised bio map dated the 16/12/2022. This is taken by the FAC to be an erroneous reference to the Bio-maps submitted by the applicant dated 16/12/2021. This has several features relevant to the site's operations marked, including an access point which is at a remove from the public road and accessible via what appear to be a network of forest or private roads. This does not appear to be disputed by the appellant who submits that these are Coillte Forest roads which were previously used by the applicant to access a dwelling house. Also marked on the map is the location of a site notice on the public road between the two southern most plots of the project. In the grounds of appeal, the appellant submits that at the location of the site notice, vehicular access is not possible as a result of the road conditions at the location, and that planting is proposed at this location. The appellant also submits that as a result this represents an error in the application by reasons of a failure to locate the site notice at the entrance from the public road to the land to which the application relates, citing what appears to be Regulation 11(1) of the Forestry Regulations of 2017 (SI 191/2017) (though no reference is provided by the appellant). The appellant further submits that the notice at this location was not maintained at this location for the legally required period as it was defaced and not replaced.

The FAC note that there are two site notices with in-situ photographs on file. One of these is recorded in the DAFM files as "CN80638 Photo of site notice in 20.02.2018" and appears to be at the location on the public road referenced by the appellant. A second site notice is recorded in the DAFM file as "CN80638 Photo of Site Notice in Situ 31.01.2018". This appears to be in a different location, on higher ground, and is taken by the FAC to be located at the position where the site notice is recorded on an earlier bio-map associated with the application dated 26/01/2018.

In the circumstances of this appeal, the FAC consider that a complete reading of Regulation 11 of the Forestry Regulations of 2017 (SI 191/2017) is required. The regulation states:

"Site Notice in respect of afforestation and forest road works

11. (1) Where an application involves—

(a) afforestation, or

(b) forest road works

the applicant shall, before the making of the application, erect a notice in a form determined by the Minister, at the entrance from the public road to the land to

which the application relates or, where no entrance exists, at the point where it is proposed to create an entrance, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time.

(2) A notice under paragraph (1) shall—

(a) be clearly legible, affixed on rigid, durable material and secured against damage from bad weather and other causes,

(b) be maintained in position on the land concerned for a period of not less than 5 weeks from the date of the application and shall be renewed or replaced if it is removed or becomes defaced or illegible within that period, and

(c) include details of where further information may be obtained.

(3) Where the Minister considers that the site notice is not sufficient to comply with the requirements of paragraphs (1) and (2) or does not adequately inform the public, the Minister may require the applicant to erect or fix such further site notice or notices in such a manner and in such terms as he or she may determine.”

The FAC notes the location of the site notice is clearly visible on the biomap submitted 16/12/2021, as is the proposed access point. Based on a reading of regulation 11(1) only it would appear that the correct location of a site notice for this particular application would be at the point where the private road, which the appellant has identified as a Coillte Forest Road, meets the public road. Based on an examination of the application maps, and publicly available mapping including the FLV, this appears to be ca. 1km south east via the public road from the location of the site notice as marked on the bio map dated 16/12/2021. The actual position of the site notice, where there appears to be no proposal to open an entrance to the site, is on the public road and immediately adjacent to the site.

Regulation 11(3) indicates that the Minister may direct a further site notice to be erected for reasons including where the site notice *“does not adequately inform the public”*. There is no evidence before the FAC that the Minister made such a direction, however the FAC consider that Regulation 11(3) is indicative of the intention of the overall purpose of the Regulation, that is to inform the public of the project proposal. The FAC note that a previous site notice was erected at the point where the site would be accessed via private road which the appellant has stated is a Coillte Forest Road which previously had been used to access a dwelling house and so was publicly accessible. While noting there is nothing in the regulations that prevent an applicant erecting multiple site notices where there is potential ambiguity, under the circumstances of this application, the FAC is satisfied that the applicant has made efforts to notify the public of the proposed project and that the location of the site notice as noted on the biomap dated 16/12/2021 was appropriate for this purpose.

The appellant also submits that the site notice was not maintained in accordance with Regulation 11(2), and that at some point in the required 5-week period it was defaced so as to be illegible but has not produced any evidence of such defacement or whether it was such so as to make the notice illegible. The applicant has provided evidence of the site notice in situ. The FAC finds that the DAFM made no

error in processing the application with respect to the requirements of Regulation 11 of the Forestry Regulations 2017.

In relation to those other grounds of appeal relating to asserted mapping deficiencies the FAC had regard for the information on file and the submission made by the DAFM in its SoF that the townland boundary is a natural feature, and that the site was subject to a field inspection. The FAC note that the biomap dated the 16/12/2021 clearly shows the location of the public road, and that various features can be discerned on the map. The FAC is satisfied that no error was made in respect of the mapping provided in support of the licence application.

Setbacks for biodiversity enhancement.

It is a ground of appeal that there is an inappropriate use of a required set back as an area for biodiversity enhancement, with the appellant making reference to the Forestry Standards Manual (FSM) and querying an area of open space having trees/scrub and natural regeneration of coniferous trees. In considering this ground, the FAC noted that the application of the rules for biodiversity enhancement relates to the regulation of DAFM Forest Service payment schemes over which the FAC has no remit. Insofar as the ground of appeal has relevance to licence conditions, the FAC had regard to the statement in the SoF provided by DAFM to the effect that the specified areas for biodiversity enhancement adhere to scheme rules, that "Area 2" does not fit within the definition of a forest, and that specific archaeological conditions apply to the licence areas including setbacks. The FAC notes that the FSM (DAFM, 2016) at page 24 includes a list of site features and their eligibility for inclusion as Areas of Biodiversity Enhancement, and that road setbacks and archaeological exclusion zones are included as eligible areas. The appellant makes reference to the FSM as requiring selection of the "Best area for biodiversity enhancement" but does not provide a reference in the manual to that requirement. The FAC take this to be a reference to a bullet point of the manual at page 25 that in full states:

Select features that will deliver the 'best quality' ABEs within the new forest, while also protecting watercourses and archaeological sites through the use of aquatic buffer zones and exclusion zones.

The Appellant provides an oblique photograph of an area of the application said to be "Area 2", but provides no definitive evidence that the area meets the definition of a forest. The FAC is not satisfied that an error was made in relation to the processing of the licence arising from this ground of appeal.

Invasive Species.

The Appellant submits that there was inadequate assessment of invasive species, with specific reference to the asserted presence on the site of Japanese Knotweed with photographs provided. The DAFM SoF submits that the area pictured is outside the license area and along the adjoining stream, and provides a location using Irish Transverse Mercator (ITM) Coordinates. In considering this ground of appeal, the FAC noted that the vicinity of the application is recorded in publicly available mapping provided by the National Biodiversity Centre as having observations of Japanese Knotweed, and that the invasive plant can be clearly observed in Google Maps street view imagery recorded in 2009 at the location identified by DAFM in its statement of fact. The FAC also noted that the site was field inspected by the DAFM. On this basis the FAC is not satisfied that that an error was made in the processing of the licence in this regard. Nevertheless, the FAC considers that the control of invasive species is a matter of utmost

importance as reflected in its inclusion as a species for which it is an offence to plant, disperse, allow dispersal or cause the spread of under the European Communities (Birds and Natural Habitats) Regulations 2011 (SI 477/2011). Noting the close proximity of the coordinates provided by DAFM, and the possibility that dispersal has taken place in the locality, and having regard to the fact that the decision of the Minister is to be set aside and remitted for reasons as set out elsewhere in this letter, the FAC recommends that in the event that a decision is made to re-issue the licence it should contain specific licence conditions to control the spread and support the eradication of invasive species.

Licence Conditions

It is a ground of appeal that Condition 2 of the licence cannot be understood by the layperson. Condition 2 states:

*“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).
[Note: These documents may be found on the Department's website, alongside the amending or updating Circulars, which are arranged by year.]”*

The FAC understand that this is a standard condition used in all afforestation licences. The substance of the ground of appeal refers to the understanding of the contents of the two documents, the updating of the two documents, and the availability of circulars on the DAFM website and as such not all of the matters are within the remit of the FAC. The FAC had regard for the submission by the DAFM in its SoF that the conditions are clear and well-reasoned and follow standard operating procedures. In dealing with the actual wording of the condition the FAC considers that the condition, taken within the ordinary meaning of the words, can be readily understood by a layperson demonstrating average judgment. The FAC noted that the Forestry Act of 2014 makes several references to the inclusion of conditions in a licence. Section 7 of the Act provides for the Minister to grant a licence, to revoke a licence for reasons that may include non-compliance with any conditions, that where the applicant is not the owner that the conditions are binding on the owner. The condition that is referred to in the grounds of appeal relate to standards of good practice that are published and available on the DAFM website. On this basis the FAC is satisfied that conditions attaching to a licence are for the purposes of ensuring compliance on the part of an applicant or owner of lands on which a licence is granted, and that a basic understanding of forestry operations, including those relevant standards and circulars that may be in effect, can reasonably be assumed. The FAC considers that requiring adherence with standards of good practice is common and accepted practice across a number of areas including Forestry. The FAC is not satisfied that an error was made in the granting of the licence in relation to this ground of appeal.

In relation to the grounds of appeal that the licence conditions are not consistent with the reasons for the condition and that there is no record and inadequate mapping of existing trees and hedgerows that are to be retained, the FAC had regard for the SoF provided by the DAFM, the application, and the licence conditions. The FAC noted that the licence makes specific reference to the retention of all trees and hedgerows. The application was accompanied by initial and revised biodiversity and other maps from which the location of hedgerows and treelines can be discerned. The FAC is not satisfied that an error was made in the granting of the licence in relation to this ground of appeal.

Landscape and planning

It is submitted as a ground of appeal that there was inadequate regard for the objections of Leitrim Co. Council, with specific reference to the lands being included in an area of High Visual Amenity. The appellant submits that the development is not exempted development where it interferes with the character of a landscape, with reference to Section 4(4) of the Planning and Development Act 2000 (as amended) and the requirements therein where a requirement for EIA or AA exists. The FAC noted that this ground of appeal relies on the application being subject to EIA or AA, and that these matters are considered elsewhere in this letter. The FAC further notes that the FAC makes decisions as an administrative appellate body on certain decisions of the Minister for Agriculture, Food and the Marine as specified in the Agriculture Appeals Act 2001. The FAC notes that at Section 5 of the Planning and Development Act of 2010 (as amended) no powers are conferred on the FAC with regard to making a declaration on exempted development. The FAC also notes that Section 4(4) of the Planning and Development Act 2000 was qualified by the Environment (Miscellaneous Provisions) Act of 2011 by the addition of section 4(4A) allowing regulations prescribing certain classes of development as exempted development notwithstanding the provisions of section 4(4). The FAC is satisfied that the DAFM acted within its authority in relation to this ground of appeal. The FAC is further satisfied that no error was made by the DAFM in respect of the appellant's submission that there was inadequate assessment of the landscape impact having had regard for the SoF provided by the Department in respect of that submission which states that the proposed application is small in scale and unobtrusive.

Woody Weed Removal

A ground of appeal contends that the term "woody weed" removal is archaic and imprecise and is in conflict with the stipulation that scrub be retained. The FAC noted the response to this ground in the SoF, that "woody weed" removal is a standard operation in afforestation and agricultural works in general, and that all existing trees and hedgerows within the site are to be retained. The FAC understands the terms "scrub" and "woody weed" are commonly employed in forestry and land management practices generally in Ireland and describe different plants, with "scrub" typically referring to low growing tree species such as willow (*Salix* spp.) and hazel (*Corylus avellana*) while woody weeds might describe furze/gorse (*Ulex* spp.) or bramble (*Rubus* spp.) amongst other non-tree plants. The FAC is satisfied that the use of this terminology is clear, and no error was made in relation to this ground of appeal.

EIA Screening

The appellant submits in the grounds of appeal that there was inadequate EIA screening, by reason of the use of checkboxes with no reasoning, the restriction of spatial and temporal criteria, and cumulative effect with a named (CN90557) application. The DAFM, in the SoF submitted to the FAC submit that the screening for EIA was carried out in line with their procedures, and that the cumulative assessment was correct as the 50ha threshold applied by DAFM is per application. In considering this ground of appeal, the FAC noted that 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 is 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 Regulations, in relation to forestry licence applications, require compliance with the EIA process for applications relating to afforestation involving an area of more than 50Ha. and any afforestation below the 50 Ha. threshold where the Minister considers such development would be likely to have significant effects on the environment. The decision under appeal relates to a licence for afforestation of 12.77ha. so is sub-threshold for mandatory EIA as set out in Irish Regulations.

However, the FAC also noted that in carrying out the Assessment to Determine EIA Requirement DAFM addressed "Cumulative effect and extent of project" and "Designated Habitats" as part of the assessment. The FAC observed that questions that relate to cumulative effect only refer to forestry projects and do not consider other types of projects. The FAC also noted that a separate process was carried out for AA which includes an In-combination assessment of other plans and projects which includes a range of other plans and projects in addition to forestry projects. A number of in-combination assessments are on file, the earliest of which is dated the 04/03/2022 and the latest of which is dated the 6/09/2022 (which the FAC take to be the one relied upon for the purposes of the Appropriate Assessment for this licencing decision). None of these was available prior to the carrying out of the Assessment to Determine EIA Requirement which refers to a spatial run date of the 05/09/2020. The FAC consider that while the DAFM are entitled to rely on a reading of the entire file, a significant passage of time occurred between the completion of the Assessment to Determine EIA Requirement and the In-Combination Assessment for the purposes of Appropriate Assessment. Furthermore, the record states that in undertaking a screening for EIA the Minister only had regard to forestry projects. On this basis, the FAC considers that the Assessment to Determine EIA Requirement was inadequate and that this represents an error in the processing of the licence.

The Grounds of Appeal also submit that the project is in the Zone of contribution for a Group Water Scheme and this is not identified in the processing of the licence. The FAC note that in the Assessment to Determine EIA requirement a positive response was recorded in answer to a question "*Has the proposed development been identified in the application as being greater than 10 ha and located within the catchment of a Local Authority designated water scheme*"? . The FSM sets out at page 4 that sites less than 25ha may be referred to a local authority on a case-by-case basis where certain issues may arise, including proximity to a water abstraction point. The Appellant does not identify such an abstraction point, and no submissions were received from any group water scheme. The application was referred to Leitrim County Council who raised no issues in relation to drinking water in their response. The FAC is satisfied that the DAFM had regard to issues relating to drinking water and no error was made in the processing of the licence in respect of this ground of appeal.

It is further submitted by the appellant that mitigation for EIA (in respect of water) can only be considered where the mitigation can be assured, that the proposal is in an area stated by the EPA to be at risk and under pressure from Forestry and in a Priority Area for Action under the WFD. The FAC notes that the In-Combination report dated the 06/09/2022 gives the project as being located in the River Sub-Basin Yellow (Ballinamore)_010. The FAC did not observe the status for that water body to be stated in any of the project documentation provided on file, but that publicly available information provided by the EPA states that it has a current status (at the time of writing this letter) of "Good" (assessed by monitoring) and "Not at Risk". However, the FAC notes that these data were updated by the EPA in April

of 2023 and at the time of the Assessment to Determine EIA Requirement the status of the Yellow (Ballinamore)_010 was "Moderate". Based on the above, the FAC is not satisfied that the DAFM had regard for the WFD status of the River sub-basin in which the project is located at the time the decision under appeal was made and that, in the particular circumstances of this case, this represents an error in the processing of the licence.

Ecological/Environmental Assessment

The appellant submits that there was inadequate ecological/environmental assessment by reason of no regard for the presence of High Nature Value lands (with reference to Regulation (EU) No 1305/2013), inadequate setback for hedgerows, the requirements of Article 12 of the Habitats Directive (Annex IV species), landscape impact, impact on water quality, and inadequate consideration of comments from the public. The appellant makes submissions in relation to the presence of Hen Harrier and Otter. In considering these grounds of appeal, the FAC had regard for the SoF submitted by the DAFM. The SoF states that the project site was field assessed. It submits that the site is outside of SPAs where Hen Harrier is known to occur, and is not in an area advised by NPWS to be a known nesting site. It submits that the appellant does not provide a source for the claim of a nesting site within 1.2km or the basis for this claim. It is submitted that following a field inspection, there was no basis for a referral to an ecologist or a referral to the NPWS, and that applicants are obliged under law to ensure they conform to the Wildlife Acts. It is submitted that High Nature Value farmland is a policy issue, that that the Teagasc maps referred to are not site specific and are at DED level and are not intended to be used on a site-specific basis. In relation to otter, the FAC notes that no evidence or source for the assertion that this species had been observed on the Yellow river has been provided by the appellant, and that no submission was made to the DAFM as part of the consultation process as to the presence of that species. In relation to setbacks from Hedgerows, the appellant cites a non-statutory report, however the FAC had regard to the licence conditions which conform to the requirements to the FSM and the Environmental Standards for Afforestation. The FAC is satisfied that the DAFM did not make any errors in the processing of the application in respect of these grounds of appeal.

Appropriate Assessment

The grounds of appeal submit that the AA of the project was flawed for reasons that include an unidentified Natura Site in the AA Screening that is within 15km of the site (Cuilcagh Mountain SAC UK0016603), use of lack of hydrological connection to an upstream site in order to screen it out, and failure to consider a source/pathway/receptor relationship between an SAC and natural regeneration of the species to be planted, and an inadequate in-combination effects assessment.

In relation to the proximity of the project site to the Cuilcagh Mountain SAC (UK0016603), the FAC note that DAFM in its SoF states that there is no hydrological connection to Cuilcagh - Anierin SAC, but does not make reference to a site code or comment on proximity to the UK site.

The FAC note that this SAC has been designated by the UK authorities on the basis of the presence of Blanket Bogs and is located ca. 12km from the project site. It is also immediately adjacent to the Cuilcagh – Anierin Uplands SAC and records the presence of six habitats that are included in that SAC. On this basis any screening assessment for the Cuilcagh – Anierin Uplands SAC that considers those habitats would screen out the Cuilcagh Mountain SAC [UK0016603].

The FAC notes that the requirements for the conduct of an Appropriate Assessment of a plan or project not connected with the management of a European Site are set out in the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended). These define the phrases “Special Area of Conservation” and “European Site” in terms of a “Site of Community Importance”. This in turn is defined as:

“site of Community importance” means a site which has been adopted by the European Commission as a site of Community importance pursuant to the third subparagraph of Article 4(2) of the Habitats Directive in accordance with the procedure laid down in Article 21 of that Directive, or has been selected as a site of Community importance pursuant to a decision of the Council made in accordance with Article 5(3) of the Habitats Directive;

And further defines an SAC as:

“special area of conservation” means a site of Community importance designated by a Member State pursuant to Article 4(4) of the Habitats Directive through a statutory, administrative or contractual act, or any combination thereof, where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of either or both the natural habitats and the populations of the species for which the site is designated;

Publicly available information provided by the Department of Agriculture, Environment and Rural Affairs of Northern Ireland² indicate that the Cuilcagh Mountain SAC is designated for a variety of habitat types and was designated in 2007 (before the withdrawal of the United Kingdom from the European Union). In Northern Ireland, legislation has been put in place to continue the status of European Sites in that jurisdiction under the Conservation (Natural Habitats, etc.) (Amendment) Northern Ireland) (EU Exit) Regulations of 2019³.

However, the FAC consider that following the withdrawal of the United Kingdom from the European Union the status of former European Sites in Northern Ireland is ambiguous from an Irish regulatory perspective, as it is unclear to the Committee whether a designation by a former member state remains in place following that state’s withdrawal from the European Union in the absence of specific domestic legislation to that effect. The FAC further considers that determination of this issue is beyond the scope of the FAC which was established under the Forestry Appeals Act 2001 (as amended) to consider appeals against decisions on forestry license applications made by the Minister for Agriculture, Food and the Marine. For this reason, the FAC is unable to determine whether the DAFM made an error in the processing of the licence in not considering the Cuilcagh Mountain SAC (UK0016603). As the decision of the Minister is being set aside and remitted for reasons outlined elsewhere in this letter, the FAC recommend that the DAFM seek legal clarity on this matter before making a new decision.

The grounds of appeal assert inadequacies in the processing of the licence with respect to AA. It is submitted that the use of the screening rationale “The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection” in respect of the Cuilcagh –

² <https://www.daera-ni.gov.uk/publications/reasons-designation-special-area-conservation-cuilcagh-mountain>

³ <https://www.legislation.gov.uk/uksi/2019/582/contents/made>

Anierin Uplands SAC [0584] is ecologically and hydrologically illiterate. The FAC reviewed the position of the project site using publicly available mapping services and data from the EPA and NPWS, and determined that the Qualifying Interests for the SAC largely relate to habitats and to a single immobile plant species. The FAC do not consider that an error was made in the processing of the licence in this regard.

It is further submitted in the grounds of appeal that there is the potential of natural regeneration of Sitka spruce in the SAC. The FAC note that the Cuilcagh – Anierin Uplands SAC is separated from the project site at its nearest point by a distance of ca. 1.6km. The appellant cites an unnamed researcher and unpublished research with no citation. The FAC considers that there is no substantive basis to this ground of appeal and does not consider that an error was made in the processing of the licence in this regard.

As noted above, an AA Screening report is on file referencing a certification date of 05/09/2022, which considers two European sites both of which are screened out of requirement for further AA. In screening out each site, the report makes reference to an attached in-combination assessment. As also noted above, a number of in-combination documents are on file, the latest of which is dated the 06/09/2022. In its closing section 2, entitled “in-combination Statement, it states that:

It is concluded that there is no likelihood of the proposed afforestation project CN80638 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 on the basis that these were precluded by reason of individual projects not having a significant effect. 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 demonstrates 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.

Operability of licence

In the grounds of appeal, the appellant queries the operability of licence conditions, with particular reference to the archaeological conditions. The FAC had regard for the submission in the letter from a DAFM archaeologist that accompanied and formed part of the SoF provided by the DAFM, including those elements relating to the archaeological conditions. The DAFM submit that no setbacks or site

conditions compromise the operability of the licence, that conditions requiring setbacks from archaeological features do not preclude the traversing of those setbacks, that the existing track in place adjacent to an OS marked watercourse which provides access and that the features deemed as requiring archaeological conditions are not designated Recorded monuments, Registered Historic monuments, or National monuments. The FAC considers that no error was made in relation to this ground of appeal.

Government Policy

In relation to the ground of appeal relating to whether the project adheres to Government policy, the FAC considers that these are not matters that fall within its remit under the Act.

Conclusion

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 CN80638. The FAC is therefore setting aside and remitting the decision regarding licence CN80638 to the Minister to carry out a new Assessment for EIA requirement and an AA screening of the proposal itself and in combination with other plans or projects before a new decision is made. In carrying out the Appropriate Assessment, the FAC recommend that the DAFM clarify the status of "European Sites" in Northern Ireland. In the event that a decision is made to grant a licence, the FAC recommend that a condition be included to ensure the control of invasive species.

Yours sincerely,

John Evans On Behalf of the Forestry Appeals Committee