



15th August 2023.

Subject: Appeal FAC 132/2022 regarding CN84374

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 132/2022 was held remotely by the FAC on 02/06/2023.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson) & Mr. Luke Sweetman

Secretary to the FAC: Ms Ruth Kinehan

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 the decision of the Minister regarding licence CN84374.

Background

An afforestation licence for 10.51ha in a single plot at Boleyboy, Co. Leitrim was issued by the DAFM on 08/09/2022. The licence also provides for fencing of 600m in length. The record of the decision to grant the licence, as advised to all parties to the appeal, was provided to the FAC by way of the Forestry Licence Viewer (FLV).

A previous decision of the Minister to grant a licence for this application had been made on the 20/11/2020. This was appealed to the FAC (FAC 860/2020) who set the decision aside and remitted the application to the Minister. In the interests of clarity and for the avoidance of doubt, this decision letter considers only matters relating to appeal FAC 132/2022, 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 08/09/2022.

The licence issued on the 08/09/2022 provides for the planting of the site with ca. 80% Sitka spruce and 20% of additional broadleaf species. Materials on file and mapping on the FLV show the site to be located ca. 4.5km east-northeast of Manorhamilton and to be ca. 550m north of the L67844 local road.

Other documentation on file (in particular the Appropriate Assessment Screening Report bearing a date 08/09/2022 and referring to an Inspection Certification Report of the 06/09/2022) describes the soil type underlining the project area as predominantly podzolic in nature, the slope to be 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. An In-combination statement on file and dated the 06/09/2022 states that the site is within the Owenmore (Manorhamilton)_020 river sub basin. The FAC noted that publicly available map data provided by the EPA indicate that the Owenmore (Manorhamilton)_020 has a "Good" status and is listed as "Not at Risk."

Application documentation on file shown as uploaded to the FLV on the 12/08/2019 and dated the 19/07/2019 include a Biodiversity Map, a site notice accompanied by a photo of same in-situ, a fencing map, and a document entitled *CN84374 Environmental considerations*. This latter documents states that the site the project site is bounded at its northern section by the Dough Thur Mountains NHA and that a stream on the western boundary feeds into a river 2km downstream that is within the Lough Gill SAC. It is also stated that the site is classed by the Leitrim County Development Plan (2002) as having a high landscape sensitivity to Forestry. Various proposed operational details arising from these details are outlined with reference to the Biodiversity/Operational map. That map shows the project site extent, the location of a site notice, proposed areas of open space, the location of rivers/streams, cultivation direction, an area proximate to the NHA to be planted using scrap mounding, and the location of broadleaf planting. The map, apparently in error, gives the townland and County as Coolnagun, Co. Westmeath. This is corrected in a second biomap which is also on file with the same date but showing the same details, and shown on the FLV as uploaded on the 26/08/2019.

Processing of the Application

Submissions and referrals.

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

A member of the public made a submission on a number of applications including CN84374 on the 23/04/2019 stating that "On the basis of the information submitted to the public it not possible to grant a licence for the following planting applications which would be in compliance with the Environmental Impact Assessment and Habitats Directives" (sic). The submission also draws the attention of DAFM to a number of judgements of the European Court of Justice.

Another submission was made by a member of the public on a number of licence applications including CN84374 on the 16/09/2019. This makes a number of points relating to national policy and the impacts of afforestation in County Leitrim

The application was referred for comment by DAFM to the N W Regional Fisheries Board and the Planning Department of Leitrim County Council on the 30/08/2019. The FAC notes that the Northwestern Fisheries Board was subsumed into Inland Fisheries Ireland in 2010, and that it maintains offices at the address to which the referral was issued. No response from the organisation is on file, while a response was received

from Leitrim County Council on the 05/09/2019. This states that part of the project lands are in an area identified as Low Capacity/High Sensitivity and that the project lands are in a designated Area of High Visual Amenity, and that the Planning Authority objects to the granting of a licence. The attention of DAFM is drawn to its obligations regarding Environmental Impact Assessment (EIA) and Appropriate Assessment (AA). The County Council requests a number of conditions that should be applied in the event that a licence is granted, and also draws the attention of DAFM to changes to the Planning and Development Regulations 2013 in relation to road development.

A referral was also made to the NPWS on the 21/09/2021 and a response was received on the 01/10/2021. This refers to an appendix containing general points in relation to Forestry practice and the natural environment and makes no specific comment on the application.

Appropriate Assessment for the purposes of the Habitats and Birds Directives

An Appropriate Screening Report and Determination (AASRD) is on file dated the 11/05/2022 and uploaded to the FLV on the 12/05/2022, prepared by a consultant Ecologist on behalf of the DAFM. This records various details about the project site with supporting maps. These include water features, site location and topography, and the status of waterbodies in the vicinity of the site. The document states that in undertaking the screening for AA, consideration was given to the response received from NPWS and also:

the initial application, including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer) and input from the District Inspector (including information following field inspection);

The AASRD records the presence of seven European sites in Ireland a further two located in Northern Ireland that are within 15km of the project site at distances ranging from 1.6km to 12.7km. Eight of these are screened out of requirement for full AA for reasons including variously the absence of a hydrological connection, distance, and being outside a zone of influence for the Special Conservation Interests for the site. In each case the decision to screen out is also stated to be based on the absence of possible in-combination effects and relies on an in-combination assessment in this regard. Three In-Combination reports are on file dated the 05/10/2021, the 26/01/2022, and the 06/09/2022. It is the second of these, uploaded to the FLV on the same date as the AASRD that the FAC takes to be that referenced. This details searches conducted on the planning systems of Leitrim County Council, the EPA, An Bord Pleanála, and the Forest Service of DAFM; and summarises aspects of the Leitrim County Development Plan. It states that the project is located within the River Sub-Basin Owenmore (Manorhamilton)_020, approximately 34% of which is under forest cover, which is greater than the national average of 11%. It states that at 10.51 hectares, the proposed project is considered medium in scale. The In-combination statement also includes the following paragraph:

It is concluded that there is no possibility that the proposed afforestation project CN84374, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Lough Gill SAC IE0001976. Therefore, there is no potential for the proposed project to contribute to

any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

Also on file dated the 11/05/2022 and uploaded to the FLV on the 12/05/2022 is an Appropriate Assessment Report (AAR) prepared by the same consultant Ecologist on behalf of the DAFM. This restates much of the detail of the project as presented in the AASRD. The AAR considers each of the Qualifying Interests for the Lough Gill SAC (1976) and how the proposed project might impact on the conservation objectives of the SAC. Where appropriate, mitigations are described relating to water setbacks, silt and nutrient controls, use of hazardous materials, use of herbicides, hedgerows and field boundaries, invasive species and otter. The AAR also makes reference to and relies on an In-combination statement and finds that there is no potential for residual impacts. The document includes a final section entitled "Appropriate Assessment Determination". This states that in light of the proposed mitigations the project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European site.

A document entitled Appropriate Assessment Determination (AAD), also dated the 11/05/2022, uploaded to the FLV on the 15/07/2022, is also on file. This was also prepared by the same consultant Ecologist on behalf of the DAFM. It again summarises the screening assessment, and at Section 3 records an AA and the information relied on in so doing. It concludes at Section 4, "Appropriate Assessment Determination", which includes those mitigations put forward in the AAR, and states that no reasonable scientific doubt remains as to the absence of adverse effect on the integrity of any European site.

Inspector's Certification and assessment for Environmental Impact Assessment (EIA)

A number of documents associated with the certification of the project by a Forest Service District Inspector are on file and shown on the FLV as having been uploaded on the 08/09/2022. These include a Site Plots Report and Site Details report both bearing a date of 08/09/2022. An Appropriate Assessment Screening Report is also on file which while listing seven European sites (all in Ireland) as being screened out makes reference to the AAD as the screen out decision for Lough Gill SAC (1976). An Assessment to Determine EIA Requirement dated 08/09/2022 referencing an Inspection Certification date of 06/09/2022 and a spatial run date of 06/09/2022 is on file. This considers the proposed project across a range of headings including land use, cumulative extent, water, soil, protection of freshwater pearl mussel, archaeology, landscape, designated and non-designated habitats, social, public participation, transfrontier, and safety. It records a conclusion that an EIA is not required. The Inspector's certification is on file giving a certification date of 06/09/2022. This includes a comment "Inspection date 14/09/2020, 01/09/2022 add due to Iforis limits". A series of recommendations are recorded, including that all existing trees and hedgerows be retained, adherence to the Environmental Requirements for Afforestation and the Forest Standards Manual (as amended by periodic circulars), adherence to the requirements of the Forestry and Landscape Guidelines, that the DAFM be notified on commencement of works, that the mitigations contained in the AAD be adhered to, and that a buffer be applied to a structure or ruin at specified coordinates.

As previously stated, the licence was issued on the 08/09/2022 by way of an approval letter. Standard licence conditions, those conditions outlined in the Inspector's Certification, and a condition that Leitrim County Council be consulted prior to commencement of work are included.

Other Documents

Also on the FLV is a document shown as having been uploaded on the 06/09/2022 marked as correspondence. This contains no commentary and features a series of five photographs of lands and vegetation.

Appeal and Statement of Fact

There is one third-party appeal against the decision to approve the licence. The full grounds of appeal 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. The SoF was considered in full by the FAC and is to be found on file.

The SoF indicates that the file was referred to the three bodies indicated earlier in this letter, and also to An Taisce on the 02/10/2020 with no reply received. It is stated that the application was the subject of a second public consultation on the 27/05/2022. It is also stated that the application was field and desk assessed, with a field inspection having taken place on the 14/09/2020.

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 and made available on the FLV on the 08/09/2022, and this was advertised on the 09/09/2022.

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 with specific reference to the absence of the public road being marked on the provided bio-map.

It is also submitted that there was a site notice error as the location indicated for the site notice is not on the public road.

DAFM SoF: That the FAC previously adjudicated on this aspect in a previous appeal to the effect that there was sufficient information available. That the site notice location is the access point from the public road to the licence area. The road indicated on the bio map is publicly accessible however it may not be under the remit of Leitrim County Council.

3. **Other.** That there are multiple other errors in the processing of the licence.

DAFM SoF: No Comment made.

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.

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 issued and placed on the FLV on the 08/09/2022 and advertised on the following day.

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 together the grounds of appeal that relate to compliance with the Forestry Regulations of 2017 in relation to mapping deficiencies and the location of a site notice.

In the first instance, the FAC noted the statement in the DAFM SoF to the effect that matters relating to compliance with the regulations had previously been adjudicated by the FAC. The division of the FAC hearing this appeal noted that FAC 132/2022 is a separate appeal, of a new decision by the DAFM, and considered the appeal on its own merits in light of the grounds presented.

The Committee noted the submission in the DAFM SoF that the site notice location is the access point from the public road to the licenced area, and that the road is publicly accessible but may not be under the remit of Leitrim County Council. The Committee considered that that the issue at hand relates to whether the road on which the notice was located can be considered the public road. The committee further considered that resolving this is complicated by the absence on the file of a map that shows the nature of the roads in the vicinity of the project site, and whether the biomap meets the requirements of regulation 5(2a) of the Forestry Regulations of 2019 (SI 191/2017) which state.

(2) An application for a licence in respect of afforestation shall be accompanied by—

(a) an Ordnance Survey map or other map acceptable to the Minister, with the boundary of the land to which the application relates, and all internal plots, where applicable, delineated and shall clearly show the following details—

(i) public roads,

The FAC note that the Biomap provided shows only those roads referred to in the DAFM SoF as being publicly accessible, but does not show its location by reference to how it connects to roads that might fit the appellant's definition of a public road, namely the L61844 in this instance. The FAC considered what the purpose of regulation 5(2a) and concluded it is to allow the DAFM to process the application which includes the public consultation element of the licencing process. The question considered by the FAC was therefore whether a member of the public could reasonably deduce, by reference only to the material provided at application, where the project site is located.

A member of the public might be assisted in this matter by reference to a site notice. 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.

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 notes that notwithstanding the above, the licence application was posted to the FLV, that members of the public made submissions on the application, and that the appellant submitted an appeal. However, the FLV does not form part of the Forestry Regulations and does not form part of the application. It is not clear to the FAC whether a member of the public would be aware of the proposed project based solely on the application information and site notice. As noted below, there are other potential gaps on the record of the application. On the basis of the foregoing, and in light of the specific grounds of appeal, the FAC considers that the Biomap provided does not satisfy the requirements of Regulations 5 and 11 of the Forestry Regulations 2017, and therefore the FAC finds that the licence should be set aside.

Other errors.

The Appellant submits that there are multiple other errors in the processing of the application but does not provide details. The FAC reviewed the documentation on file for adherence to fair procedures and adherence to European Law.

The FAC noted that an Assessment to Determine EIA Requirement dated 08/09/2022 referencing an Inspection Certification date of 06/09/2022 and a spatial run date of 06/09/2022 is on file. The FAC noted that in carrying out this Assessment, the 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. The FAC consider that while the DAFM are entitled to rely on a reading of the entire file, the in-combination assessment is with reference only to European sites, and no indication is made in the assessment for EIA that the information compiled during the AA process is being relied upon. 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.

As noted above, an Appropriate Assessment Screening report is on file dated the 11/05/2022 and uploaded to the FLV on the 12/05/2022 which records the presence of seven European sites in Ireland and a further two located in Northern Ireland that are within 15km of the project site at distances ranging from 1.6km to 12.7km. Eight of these are screened out of requirement for full Appropriate Assessment for reasons that include the absence of possible in-combination effects and relies on an in-combination assessment in this regard. As also noted above three In-Combination reports are on file dated the 05/10/2021, the 26/01/2022, and the 06/09/2022. It is the second of these, uploaded to the FLV on the same date as the AASRD that the FAC takes to be that referenced in the AASRD. This includes the paragraph:

It is concluded that there is no possibility that the proposed afforestation project CN84374, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Lough Gill SAC IE0001976. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

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.

The FAC noted that Section 7 of the AAR prepared on behalf of the DAFM dated 12/05/2022 is headed "AA Determination" and that there is a separate document titled "Appropriate Assessment Determination" dated 15/07/2022 also prepared on behalf of the DAFM. The FAC understand, from national and EU Guidance, that the AAR should reach a conclusion to enable the competent authority, the Minister in this instance, to make a decision on the proposal and therefore the AA determination is made separately. The FAC considers that the use of the term "AA Determination" in the AAR creates confusion as to which document is relied upon when reaching a decision on the licence. In reviewing the record of the decision, the FAC considered that the file presented contained a number of inconsistencies. Individually these may not represent significant errors, but when taken together they serve to undermine confidence in the decision. These include statements in various documents associated with the AA process

that the process was informed by reference to the response from NPWS and information available via iFORIS. The FAC understand iFORIS is an internal system of the DAFM which is also accessible, via iNET, by forestry companies/registered foresters. It is not clear whether those elements of the AA process also had regard for the responses from the other referral bodies. While this information may have been available to the author of those documents via iFORIS, the information on that system is not available to the FAC, or members of the public, and is not included on the FLV which is presented by DAFM as the record of the decision. The FAC noted that both the Biomap and the document titled 'CN84374 - Environmental Considerations' indicate that mound drains will be created throughout large sections of the site (excluding riparian zones, setbacks etc). However, Appendix A of the approval letter states that drainage is "not required". The SoF provided by the DAFM makes reference to a referral to An Taisce, but no such referral or response is on file. The file presented on the FLV includes an untitled document that contains photographs. While these may be photographs of the project site, this is not stated on the document or referred to in any other document made available to the FAC.

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. Based on the information before it, 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 CN84374. The FAC is therefore setting aside the decision regarding licence CN84374.

Yours sincerely,

John Evans On Behalf of the Forestry Appeals Committee