



18/08/2023

Subject: Appeal FAC182/2022 in relation to afforestation licence CN91355

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 the Marine. The FAC, established in accordance with Section 14A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Hearing & Decision

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. Appeal FAC182/2022 was considered during a sitting of the FAC held remotely on the 28/03/2023 which was attended by the following participants:

FAC Members – Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman.

FAC Administration – Mr. Michael Ryan.

The record of the Minister's decision was made available to the FAC by way of the Forestry Licence Viewer¹ (FLV). The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, the DAFM's Statement of Facts (SoF), before deciding to set aside and remit the Minister's decision to grant afforestation licence CN91355 for the reasons outlined hereunder.

Licence Details

The licence under appeal was issued by the DAFM on the 15/11/2022 and is for the afforestation of 12.75ha of GPC9 (Native Woodland Establishment) in Lackabrack, Co. Cork. The proposed development comprises one plot of native species including Scots pine, Pedunculate oak, and Additional Broadleaves. The application was not referred to any consultation bodies and no submissions were received on the application by members of the public. The licence was issued with the following *Silvicultural and Environmental Conditions*; (i) that the project be carried out and completed in accordance with the measures set out in the Environmental Requirements for Afforestation (ERA) and the Forestry Standards Manual (FSM) (as amended by periodic Circulars), (ii) compliance with the archaeological report produced by the Forest Service archaeologist and dated 19/10/2020, along with specific archaeological conditions, (iii) "A deer fence is not required, as this area has few, if any, deer. Protect the site with a rabbit fence. Plant the site with 50-60 percent oak, 15-20 percent Scots pine, 15-120 percent silver birch, with the

¹ <https://flv.apps.services.agriculture.gov.ie/>

remainder as rowan, holly, and common alder. Plant the various species in intimate mixture. Invert mounds should be placed back into the hole and not beside the hole from which the mound is dug.”

The approved operational details in Appendix A of the Approval Letter state that there is no drainage or firebreaks required, zero fertiliser will be applied, and the ground preparation will be “invert mounding”. There will be slit planting and weeds will be controlled by herbicide in years 1, 2 & 3. The fencing details included refer to 1,643m of deer fencing.

Location

The proposal is located in a predominately agricultural landscape approximately 13km southwest of Mitchelstown, Co. Cork. The *Site Details Report* on the FLV describes the site as enclosed agricultural land with mineral soil and a current vegetation cover of grass. The site is described as “moderately exposed” with a westerly/neutral aspect and as having adequate site access.

The proposal is in the Blackwater (Munster) Catchment, the Funshion_SC_020 Sub-Catchment, and the Funshion_050 River Sub-Basin. According to publicly-available Environmental Protection Agency² (EPA) maps there are no EPA-mapped watercourses within the application site and the closest watercourse is the Awbeg [Buttevant] which is c.2km south-west of the proposal at its nearest point. The publicly-available information on www.catchments.ie shows that the Funshion_050 is a High-Status Objective Waterbody which has ‘Good’ status for the 2016-2021 period (assessed by monitoring) but is “At Risk” with *Agriculture* listed as the significant pressure. The proposal is underlain by the Mitchelstown Ground Waterbody which has ‘Good’ status but is ‘At Risk’ with *Agriculture, Forestry and Unknown anthropogenic* listed as the significant pressures.

DAFM Processing of the application

Assessment to Determine Environmental Impact Assessment (EIA) Requirement

The application was field inspected on the 04/11/2022 as well as desk-assessed. The DAFM completed an “Assessment for EIA Requirement”, which was uploaded to the FLV on the 15/11/2022 with a certification date of 10/11/2022. The EIA assessment considered the proposal’s potential impact on the environment across a range of criteria before concluding that the application should not be “subject to the EIA process”. The assessment included the following information:

- The application, together with other Form 1 applications within 500 metres and recommended for approval but not yet planted constitutes an area of 12.75ha.
- The site contains or adjoins a listed archaeological site or monument, etc. and additional measures beyond standard archaeology guidelines apply.
- The approximate percentage of forest cover currently in the “underlining waterbody (or waterbodies)” is 1.82%.

DAFM Appropriate Assessment (AA) Screening

The DAFM completed an *Appropriate Assessment Screening Report* (AASR) which was certified on the 10/11/2022 and posted to the FLV on the 15/11/2022. The AASR screened five European sites within 15km of the proposal and all were screened out with reasons provided with the overall conclusion stating that

² <https://gis.epa.ie/EPAMaps/>

there was “No likelihood of a significant effect on any European site, and Appropriate Assessment not required”.

AA In-Combination Assessment

An in-combination report (ICR) was completed by the DAFM on the 08/11/2022 and published on the FLV on the 15/11/2022. The ICR notes that the proposal is within “the River Sub-Basin Funshion_050, approximately 1% of which is under forest cover, which is less than the national average of 11%. At 12.75 hectares, the proposed project is considered medium in scale.” The ICR considers the potential for the proposed afforestation project to contribute to an “in-combination impact” on European sites and consulted various online planning systems and datasets (including Cork Co. Council, the FLV, An Bord Pleanála, and the EPA) to identify other plans and projects, focusing on the general vicinity of the project area in the Funshion_050 River Sub-Basin.

The ICR concluded that there is “there is no likelihood of the proposed afforestation project CN91355 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”.

Grounds of Appeal and DAFM Response

There is one first-party appeal against CN91355 (FAC182/2022). In summary, the grounds of appeal state that the application included deer fencing, as does the technical approval, and contends that there are a lot of deer in the area and the crop is at high risk of being damaged by deer.

The DAFM provided a response to the grounds of appeal in an SoF which provided a summary of the processing of the application, a comment from a DAFM Administrative Representative that “the decision was issued in accordance with our procedures, S.I 191 of 2017 and the 2014 Forestry Act”, and a statement from the District Inspector (DI). In summary, the DI stated the following:

- He met the applicant on site who told him that “there were no, or almost no, deer in the area” and that the local rabbit populations fluctuate.
- He has been the DI in the area for 22 years and there is very little forestry in the area to provide habitat and cover for deer and based on his experience “The appeal is factually incorrect. There is not a high risk of the afforestation being damaged by deer and there is not a lot of deer in the locality.”
- Estimated prices for deer and rabbit fencing are provided, highlighting a potential saving to the tax-payer of over €20,000 where rabbit fencing only is erected. Reference is made to the requirement of the Standards in Public Office Code of Conduct for Civil Servant’s to “endeavor to ensure the proper, effective and efficient use of public money”.
- “In my professional opinion and based upon my experience, only a rabbit fence is required...”

FAC Considerations

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision the subject of the appeal, or if the decision was made in compliance with fair procedures.

DAFM AA & EIA Process

In the first instance, the FAC considered the DAFM's decision to grant CN91355 in light of the requirements of the EU Habitats and EIA Directives.

Article 6(3) of the Habitats Directive states that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to AA of its implications for the European site in view of the site's conservation objectives.

As detailed previously in this letter, the FAC noted that the DAFM completed an AASR which screened out five European sites within 15km of the proposal for AA. The AASR contains reasons for the screening decisions and concludes that there is "No likelihood of a significant effect on any European site, and Appropriate Assessment not required". The FAC are satisfied that the DAFM screened the proposed project in line with the requirements of the Habitats Directive in terms of the potential for an individual significant effect on European sites. However, the FAC also noted that the DAFM produced an ICR which concluded that "there is no likelihood of the proposed afforestation project CN91355 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 considered the phrasing of this conclusion to constitute a significant error in the DAFM's AA screening process as it demonstrates that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which, in combination with other plans and projects, could result in a significant cumulative effect on a European site.

The FAC considered the DAFM's screening of the proposal for EIA. The 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 EIA is required. Neither afforestation nor deforestation are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Forestry Regulations 2017 (S.I. No. 191 of 2017) require that an *environmental impact assessment* is carried out in respect of an application for a licence for afforestation of an area ≥ 50 ha, the construction of a forest road of a length ≥ 2000 m, and any afforestation or forest road application below the specified parameters 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 12.75ha, so is sub-threshold for mandatory EIA and the DAFM completed an assessment to determine the requirement for EIA. The DAFM considered the proposal's potential to impact on the environment across a number of criteria before concluding that EIA was not required in this instance.

The FAC considered the DAFM's *Assessment for EIA Requirement* and noted that this document only refers to other forestry projects in the section titled *Cumulative effect and extent of project*. The FAC understands that the "*Assessment for EIA Requirement*" document should be read as a summary document, and in combination with the record of the DAFM's decision as a whole, and that the ICR considered non-forestry plans and projects in the vicinity of the proposal. However, the EIA assessment does not expressly cross-reference the detailed record of other plans and projects contained in the ICR and the FAC considered this to be a significant error on the DAFM's behalf.

The FAC also noted that in screening for EIA, the Minister relied on Forest Service guidelines in relation to water quality, landscape, and archaeology but these guidelines have not been attached as conditions to the licence. Furthermore, licence Condition 2 requires adherence to the *Environmental Requirements for Afforestation* (ERA). The ERA document states that it replaces a suite of Forest Service guidelines, including those relating to water quality, landscape, and archaeology.

Fencing Requirements

In considering the grounds of appeal, the FAC noted that Section 12.1 of the FSM deals with fencing and requires that "Plantations must be fully protected from the time of planting." Based on the evidence before it, the FAC found that the DI, in his role as an officer of the Minister for Agriculture, Food and the Marine, made a decision regarding the silvicultural requirements of the proposed project, informed by his experience and using his professional judgement, that only rabbit fencing was required in order to protect the plantation under CN91355. The FAC considered that the appellant has not adduced sufficient evidence on which the FAC could rely to overturn the DAFM's decision in this case. However, the FAC noted that the approval letter issued for CN91355 states in Appendix A that "Described below are certain specific Operational Proposals particular to this application that have been approved. These must be implemented in full and in accordance with any Supplementary Details in order to comply with both the Afforestation Licence and the Technical Approval for the Afforestation Scheme. No change is permitted to these proposals and to the species approved unless agreed in advance by the Department. The Department may insist that proposed changes constitute a new application." The *Operational Proposal Details* then go on to state in the section labelled *Fencing Details* that 1,643m of deer fencing is approved.

The FAC formed the view that the licence conditions, which require the erection of rabbit fencing instead of deer fencing, contradict the approved operational details of the licence in Appendix A which "must be implemented in full" in order to comply with "the afforestation licence." The FAC considers this to be a significant error in the DAFM's decision to issue CN91355.

Conclusion

Based on the evidence before it, as outlined above, the FAC found that the DAFM made significant errors in their processing of the application prior to issuing afforestation licence CN91355. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to complete a new AA screening of the proposed development both individually and in combination with other plans and projects, and a new assessment to determine the requirement for EIA prior to the making of a new decision. The FAC also considered that, if it transpires that a new afforestation licence is issued, any

prescribed licence conditions should be coherent with the approved operations contained in Appendix A of the approval letter.

Yours sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee