



10th January 2023

Subject: Appeal FAC066/2022 against licence decision CN89428

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC066/2022 was held remotely by the FAC on 7th December 2022. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Derek Daly, & Mr. Vincent Upton
Secretary to the FAC: Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN89428. The reasons for this decision are set out hereunder.

Background

The licence decision under appeal pertains to an application for afforestation on 3.92 hectares at Corderry (peyton), Co. Leitrim. Planting would occur across two plots and would be comprised of Sitka spruce and birch in an integrated mix. The lands are described as enclosed, agricultural fields with a grass, grass rush vegetation type on a mineral soil. Ground preparation would include woody weed removal, mounding and pit planting without additional drainage and 847 metres of stock fencing. The operations would include herbicide weed control, no fertiliser use and it is stated that adequate access is in place. The application included a series of maps and environmental information and it is submitted that the lands fall within a moderate landscape sensitivity designation in the County Development Plan. The record includes a photo of a site notice dated 1st September 2021 and the Biomap marks a site notice on the public road.

The lands are situated on a private lane that leads to a minor public road and separated from the public road by an existing mature forest. The Department of Agriculture, Food and the Marine (DAFM) record the lands as being silviculturally and environmentally suitable for the site. The application was subject to desk and field assessment and was referred to An Taisce and Leitrim County Council. No response is recorded from An Taisce while the County Council responded submitting that the lands are not within a designated area in the County Development Plan 2015-2021, that areas of High Capacity under Section 4.7.3 of that plan may be able to accommodate larger areas of woodland subject to considerations, that a section of the lands is identified as being prone to flooding, that there does not appear to be any recorded monuments on the lands, that the Forest Service should satisfy itself in relation to Appropriate Assessment (AA) and Environmental Impact Assessment and included a number of conditions requested by the District Engineer.

The DAFM undertook a screening for AA and identified one site within 15km and recorded that there was no need to consider sites beyond that range. The European site identified was Cuilcagh - Anierin Uplands SAC 000584 and its qualifying interests (QI) and reasons for screening the proposal out for AA are recorded. The reasons include a consideration of the project design, the European site and its conservation objectives, the possibility of potential sources and pathways, the absence of QI habitats within or adjacent to the site and the absence of aquatic zones or relevant watercourses. A separate consideration of other plans and projects, forestry and non-forestry, is also recorded. The screening concludes that,

AA Screening has been carried out in accordance with S.I.477 of 2011 (as amended) and S.I.191 of 2017 (as amended). The project is not directly connected with or necessary to the management of any European Site. Furthermore, DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on this European site.

The DAFM also recorded a consideration of the proposal across a range of criteria and concluded, with reference to the record, that the proposal was not required to be subjected to EIA.

The licence was granted subject to conditions and issued on 14th June 2022.

Appeal

The granting of the licence is subject to one third party appeal and the Notice of Appeal and full grounds of appeal were provided to all parties. In summary the grounds contend that while the licence was issued on 14th June 2022 it was not made known to the public until the 15th June 2022 and that the delay was manifestly unfair and contrary to due process in relation to the appeal window.

It is submitted that the licence was not fully supported in that the Biomap was not available on the Forestry Licence Viewer and that the public should have access to the Biomap at consultation and licencing stages. It is submitted that site access is unclear and that the application contains errors as the vegetation type is recorded as grass/grass rush and no scrub is recorded whereas woody weed removal

is recorded and that this is inconsistent, and that it is indicated that 30-40% of the site is on peat. It is submitted that licence condition 2 cannot be understood by the layperson and that there is no consolidated version of the documents referenced.

It is submitted that there is a lack of reasoning in the EIA screening, that a potential flooding issue has not been addressed and that the assessment of cumulative impacts is flawed. It is submitted that the project forms part of a contiguous area afforested during the period of the EIA Directive that exceeds 50 hectares. It is submitted that the lands comprise High Nature Value Farmlands and that some provisions for the protection of High Nature Value Farmlands are included under EU Regulations 1305/2013 and 807/2014. It is submitted that the proposal would not be in keeping with Ireland's climate change commitments. It is submitted that the application did not consider the strict protections provided under Article 12 of the Habitats Directive and that bats are likely to occur on the lands. It is submitted that reasons have not been provided in relation to landscape impacts or accidents.

It is submitted that the status of the waterbody in which the project lies, Adhacashlaun 030 has not been assigned a status under the WFD (the FAC understands this to be Water Framework Directive) as a result of testing and that the legality by which a Good status has been assigned to the waterbody by means of "Expert Judgement" is highly questionable.

It is submitted that the licence condition in relation to hedgerows and existing trees being retained is not consistent with the reasons provided and that there are no trees recorded. It is submitted that there are no Scots pine in the area and that the condition is not consistent with the protection of the character of the landscape. It is submitted that the assessment of the project lands is superficial and incomplete and not in keeping with Government principles.

A responding statement was provided by DAFM to the FAC addressing the processing of the application and grounds of appeal. The statement provided the dates of the processing of the application and the conditions. It is submitted that there were no submissions made by the public on the application and dates of the response from the County Council is noted. It is submitted that the decision was made in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. It is submitted that that the approval issued on 14th June 2022 and advertised on 15th June 2022 but that documents were available on the Forestry Licence Viewer as soon as the approval issued except for the Biomap which was made public on 24th June 2022. It is submitted that access is clearly shown on the maps provided and that adequate access is in place. It is submitted that the predominant species on the site are grass rush and woody weed removal is a standard operation in afforestation generally for the control of gorse and briars and that a specified condition is attached in relation to scrub. In relation to soils it is submitted that the site is predominately surface water gleys and peaty gleys with highly modified peat in the northern areas of plot 2 and that soil maps are indicative only.

It is submitted that the DAFM contend that the licence conditions are clear and well-reasoned and follow standard operating procedures. It is submitted that the EIA screening followed standard operating procedures but that a yes response was provided in error in relation to accidents but that

there is no significant risk of accidents, having regard in particular to the substances or technologies used and that the minor error does not influence the conclusion. It is submitted that the site was desk and field inspected and that there were no signs of regular inundation on inspection and that no risk is recorded on the OPW flooding map. It is submitted that the site was field inspected and that there was no evidence of Annex species or habitats present and that the DAFM has access to curlew breeding sites from the NPWS and that the site does not fall within such an area. It is submitted that the area falls outside of a designated area in the County Development Plan and that the County Council did not object to the application. It is further stated that the character of the landscape was not referenced in the condition in relation to Scots pine. It is submitted that testing and assigning a water quality status is a matter for the Environmental Protection Agency. Reference is made to the conditions on the licence and it is submitted that a 5 metre setback applies and that a Biomap was provided identifying hedgerows clearly. The DAFM statement was provided to all parties.

Considerations of FAC

The FAC considered in the first instance the matter of the Biomap not being placed on the Forestry Licence Viewer (FLV) until after the licence as issued. The FAC considered that an application for afforestation is required to be accompanied by maps that show a number of environmental and other features. The website of the DAFM¹ states that, *Application documentation for applications received from 11th January, 2021, will be made available in the FLV, when that application is advertised and open for public consultation.*

The application in this instance was received on 19th August 2021. The FAC considers that the failure to make the Biomap available during the public consultation period was not in keeping with the DAFM's published procedures and that the public would have been disadvantaged in making a submission on the application. The FAC is satisfied that this constituted a serious error in the making of the decision and that the decision of the Minister should be set aside and remitted to make the Biomap available on the FLV and to provide for a period of public consultation before a new decision is made.

In relation to water quality the FAC noted that the Adhacashlaun 030 waterbody has been assigned a Good status by the EPA in relation to the Water Framework Directive. The grounds contend that the method by which the status was assigned is questionable but provide no basis for this contention or evidence that the status is inaccurate. The grounds contend that the status has been assigned by expert judgement while the EPA record the assessment technique as being modelling. The FAC is not satisfied that an error was made in the making of the decision in relation to these grounds of appeal.

In the context of these grounds that relate to water quality and other grounds that refer to effects on the environment, the FAC considered the record of the decision and the Assessment for EIA Requirement document dated 13th June 2022, in particular. Annex II of the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) identifies classes of development for which Member States may set

¹ <https://www.gov.ie/en/publication/e305a-public-consultation-on-licence-applications-for-felling-afforestation-forest-roads-and-aerial-fertilisation/>

thresholds or criteria for requiring environmental impact assessment. This includes “initial afforestation and deforestation for the purpose of conversion to another type of land use” and road construction. The Forestry Regulations 2017, SI 191 of 2017, require that afforestation of 50 hectares or more be subject to an Environmental Impact Assessment (EIA). Afforestation of less than the threshold of 50 hectares but which the Minister considers likely to have significant effects on the environment, taking into account the criteria set out in Schedule 3, must also be subject to EIA.

The grounds contend that a number of procedural errors were made in the making of the decision but provide no evidence in relation to likely significant effects on the environment.

The record includes a number of documents that describe the likely effects of the proposal on the environment including the application and maps and screening for Appropriate Assessment. The FAC understands that the reasons for the decision not to proceed to EIA might be read across different documents on the record. The FAC understands that the DAFM employs a Geographic Information System and multiple spatial datasets as part of its acceptance, processing and assessment of an application as described in the Forestry Standards Manual (DAFM, 2015) and Forests & Water Achieving Objectives under Ireland’s River Basin Management Plan 2018-2021 (DAFM, 2018).

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

The application includes details of the proposed operations and a series of maps including detailed Biomaps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects. In this instance no additional reports were submitted as part of the original application.

Article 4(5) (b) of the EIA Directive states, in relation to a sub-threshold Determination that,

where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

Regulation 21 requires the Minister to provide reasons for their decisions in relation to applications for licences.

The FAC understands that these reasons may be provided in the record of the decision, including the maps and Appropriate Assessment, and in particular the Assessment for EIA Requirement determination and licence. Furthermore, the FAC understands that such reasons and information should allow members of the public to check whether an adequate screening for EIA was carried out, and to enable interested parties to decide whether to appeal against the decision.

In this instance, a number of responses are recorded in the Assessment for EIA Requirement document which appear to be errors. While the form provides for further commentary and reasons to be provided none were included in this case. The FAC considers that some of the matters that appear to be errors might have been addressed had further written reasons been provided.

Amongst the criteria to be considered in the screening is the cumulation of the project with other plans and projects, both in relation to the characterisation of the project and in terms of likely significant impacts. In response to the question *Is the total area of this application 50 ha or greater?* an N/A response is recorded and no further commentary is provided. It is not clear why this response is provided in this instance. The grounds contend that the proposal forms a cumulative area of 50 hectares. While the FAC considers that 50 hectares is the threshold provided for single projects, sub-threshold projects must be screened having regard to cumulation with other plans and projects and significant effects must also be considered in this context. This response introduces a lack of clarity in the screening and is unexplained in the document.

While the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the Determination, which itself only refers to forestry projects. While the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for not considering that the proposal is likely to have a significant effect on the environment might be found in separate documents, it would be clearer if an explicit reference to the characterisation of existing and approved projects was included in the Determination.

A question that relates to accidents is recognised by the DAFM as being recorded in error. The FAC considers that this should be addressed in making a new decision.

The grounds raise specific concerns about impacts on the landscape and the guidelines that are referred to. The County Council did not raise any concerns in relation to the landscape and described the lands as being in an area with a high capacity to accommodate forestry. The lands to be planted are on a private laneway, at a distance from the public road, and separated by existing forest. There are conditions that relate to diverse planting on the areas that might be visible from the public road.

The Forestry and Landscape Guidelines, however, do not appear to have been included in the conditions of the licence while they are relied upon in the EIA screening. While there is a reference to the

Department's environmental and silvicultural guidelines this would appear to refer to the stated conditions. Adherence with the Environmental Requirements for Afforestation have been included and page 2 of that document states,

The Environmental Requirements for Afforestation replace those measures relating to afforestation contained within the following Forest Service Environmental Guidelines: Forestry & Water Quality Guidelines, Forestry & Archaeology Guidelines, Forestry & the Landscape Guidelines, and Forest Biodiversity Guidelines. (Note, however, that these guidelines still apply to other Forest Service regulated activities, as specified in any approval, consent or licence issued.)

While it appears to the FAC that both documents contain many of the same requirements and most if not all of the main operational requirements, the reliance on the Forestry and Landscape Guidelines is technically an error and introduces confusion into the screening process. For the same reason the reliance on the Forestry and Water Quality Guidelines and Forestry and Archaeology Guidelines would represent an error although not one of a necessarily serious nature in this instance given the overall assessment undertaken and the nature and scale of the proposal and the availability of the relevant documents.

In responding to the appeal, Officers of the Minister provided considerations in relation to protected species that are not recorded in the Determination that was made. The FAC considers that these reasons are relevant and should have been recorded.

In responding to the appeal, the DAFM submit that a setback of 5 metres is required in relation to hedgerows. The Biomap submitted with the application refers to 3 metres and 5 metres and the conditions do not clarify the matter. The FAC considers that if it was intended that a 5 metre setback be imposed than an error was made in setting conditions on the licence and that this should be rectified.

The licence does require the retention of a scrub area that is geolocated in the conditions and that a 5 metre setback is required in this instance. The FAC noted the mapping provided and the fact that the application was field inspected and is satisfied that the information provided and the processing of the application was appropriate.

As noted, the Minister is required to have regard to the relevant criteria identified in Schedule 3 of the Regulations. While the FAC considers that the matters addressed on the record, both in the application and the assessment of the application by the DAFM, reflect a consideration of the relevant criteria in Schedule 3, the FAC considers that it would be clearer if the Minister employed the exact language of the relevant criteria as headings or another form of identification in the application and assessment process. Furthermore, while it can be reasonably interpreted that in concluding that the proposal should not be subject to the EIA process the Minister considers that the proposal is not likely to have significant effects on the environment taking into account the criteria set out in Schedule 3, the FAC considers that it would be clearer if this language was employed.

For these reasons the FAC is of the view that the Minister should undertake a new determination as to the likely significant effects on the environment and whether an EIA is required in keeping with the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

In reviewing the Appropriate Assessment screening, the FAC noted that the consideration of other plans and projects in combination with the proposal includes the following reasoning,

It is concluded that there is no likelihood of the proposed Afforestation project CN89428 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project.

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in the Appropriate Assessment of the impact of such effects on the integrity of the European site. As stated on the record, it appears that the incorrect test was employed at the screening stage in that any potential significant effects on a European site from the proposal itself or in-combination with other plans and projects should be considered in deciding whether to proceed to Appropriate Assessment. The Minister in making a new decision should undertake a new screening for Appropriate Assessment to ensure that the correct test is being employed.

In relation to access to the site, the FAC examined the record of the decision and is satisfied that access to the public road is clearly shown on the maps submitted and the County Council also noted in their submission that access to the public road is shown.

The grounds contend that the licence conditions are unclear in relation to adherence with published standards and conditions. The FAC considers that adherence with such standards is common practice across a number of industries and that the condition is clear.

The grounds contend that woody weed removal has been proposed while scrub has not been identified on the maps submitted and that this represents an error. Woody weeds and scrub are common terms and refer to different forms of vegetation and there is no contradiction in this matter. The application states that existing trees and hedgerows will be retained and the licence includes a specific condition in relation to scrub in the centre of the site. The FAC is not satisfied that an error occurred in this regard.

The DAFM submits that the lands are not recorded as being prone to flooding on the maps published by the OPW and the FAC confirmed this matter. The proposal is for the planting of trees on agricultural land with a limited and controlled use of inputs over limited periods of time.

In relation to the date of the publishing of the decision, the FAC noted that the application documents had been made available on the FLV for a number of months before the decision was made and that the application was subject to public consultation, notwithstanding the error in relation to the Biomap. The licence is recorded as being published on the FLV on the day of issue and it is also recorded on the DAFM website² in its published lists of decisions on 15th June 2022. The FAC does not consider that the fact that the licence was published on the DAFM website one day after its issue could be considered a significant error particularly in the context of the application documentation having been available for a number of months prior to the decision being made, that the application was subject to public consultation.

In relation to climate action, the grounds make a general claim that the proposal is not in keeping with Government policy on climate action. The Climate Action Plan identifies afforestation as a specific climate action. The Plan also recognises the importance of harvested wood products from commercial forests. The National Policy Position also recognises the role of forestry in climate action and low-carbon development in the agriculture and land use sectors. The appeal refers to a section of the lands as being on peat soils but does not appear to take into account the current use of the land in agriculture or the nature of greenhouse emissions and removals from land. The lands have clearly been in agricultural use for some time and the land would likely be a source of greenhouse gas emissions at present and would be reported as such in Ireland's National Inventory Report to the UNFCCC. This would be in addition to emissions from the livestock that might graze the land or any use of nitrogen fertiliser which could be an additional source. The planting of the lands will likely reduce emissions and increase removals of greenhouse gases on the land overall in addition to supporting decarbonisation in other sectors through the provision of harvested wood products and the FAC is not satisfied that the proposal is not in keeping with Government policy or that the Minister made an error in this regard.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a series of serious and significant errors was made in the making of the decision in this case. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN89428 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to provide for a period of public consultation having made the Biomap available to the public and undertake new screenings for Appropriate Assessment and Environmental Impact Assessment, before a new decision is made.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee

² <https://www.gov.ie/en/collection/8c742-afforestation-decisions-report-june-2022/>

