



24th January 2023

Subject: Appeal FAC 103/2022 relating to Licence CN90680

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.

DECISION.

Having regard to the evidence before it, including the Department of Agriculture, Food and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to allow the appeal and set aside the decision of the Minister regarding licence CN90680.

THE LICENCE.

Licence CN90680 is for 10.41 Ha. of afforestation GPC 3 (7.33 Ha.) & GPC 10 NWE (2.16 Ha.) and GPC 8 (0.94 Ha.) within the townlands of Lisgillock Glebe & Aghalough, Co. Leitrim, and was submitted to the DAFM on the 19th of April 2022. A decision approving the licence with conditions was issued on the 8th of August 2022 including compliance with DAFM Technical Standards, retention of all tree/hedgerow on site, the planting of 5 to 8 rows native tree species on the eastern edge of Plot 2, a 10 m set back from the watercourse & lake on Plots 3,4 & 1, the planting of 8 rows broadleaves at the water setback on Plot 1, no new drainage within 20m of an EPA watercourse and lake, pit planting or scrap mounding only within 20m of EPA watercourse and lake.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC held on the 11th of January 2023 considered the appeal and the processing of the licence as it relates to the decision to issue the licence on the 8th of August 2022. The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton, Mr. Derek Daly and Mr. Iain Douglas. Secretary to the FAC: Mr. Michael Ryan and Ms. Vanessa Healy.

In the interest of clarity and for the avoidance of doubt this sitting of the FAC considered appeal ref. FAC 103/2022 in relation to the licence decision of 8th August 2022 only.

BACKGROUND.

The site was the subject of a previous application and licence CN86376 and appeals FAC 071-073/2021 and FAC 135/2021. That licence was set aside and remitted to the Minister on the 15th of November 2021 for a new EIA Screening, a new In-combination assessment and an assessment of the impact of the project on the water quality of Cloone Lough. The current appeal, the subject of the FAC hearing

on 11th January 2023, is against the decision of the Minister for Agriculture of 8th August 2022 in relation to an application made on 19th April 2022.

The public file recording the processing of the application by the DAFM is available on the DAFM Forestry Licence Viewer (FLV). Only those documents relevant to the appeal under consideration are referred to below. This includes a copy of a site notice dated 20th April 2022 and a photo of the site notice in place. The location of the site notice is also marked on the mapping submitted.

The licence was not referred to any statutory body.

The proposed afforestation is located between two loughs. The southern shore of Lough Cam forms part of the site boundary of Plots 1,4 & 6. The northern shore of Cloone Lough forms part of the boundary of Plot 1. A WFD river waterbody (Cloone_10) forms a boundary to Plots 1,3 & 4 as shown on the application biomap.

The Inspector's Appropriate Assessment Screening (AAS) Report dated the 21st of July 2022 indicates that the predominant soil types underlying the site are highly modified peat & peaty podzols, that the slope is predominantly flat to moderate (<15%) and that the site is crossed by/adjoins an aquatic zone(s). The vegetation is described as being grass and rush.

The AAS considered 2 sites within 15km and that there was no need to extend that distance in this case. The European sites considered were Lough Oughter & Associated Loughs SAC (Site Code 000007) and Lough Oughter SPA (Site Code 004049). Both sites were screened out, Lough Oughter & Associated Loughs SAC because of *"The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection. Upper Shannon 26C"*. Lough Oughter SPA because of *"Other factors, distance"*. The overall conclusion was that there was no possibility of a significant effect on any Natura site, and that Appropriate Assessment (AA) was not required.

The DAFM prepared an In-combination Statement on the 20th of July 2022 on the proposal's potential to impact on the two Natura 2000 sites in combination with other plans and projects. The In-combination Statement concludes that the proposed afforestation, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed in the AA Screening.

An Inspector's Certification Report dated the 21st of July 2022 is on file.

An Assessment to Determine EIA Requirement was carried out, dated the 21st of July 2022 that considered the proposed afforestation across a range of criteria and a determination that the proposal should not be subject to the Environmental Impact Assessment process.

The proposed afforestation was Desk Assessed and Field Inspected following the licence application.

There was one third-party submission following the licence application.

THE APPEAL.

There is one third-party appeal against the decision to approve the current licence.

The grounds of appeal are summarised as follows:

1. Lack of Due process: (i) the date of decision and the date of publication of decision does not comply with the Aarhus Convention. (ii) Non-availability of documents on the Forest Licence Viewer (FLV) Licence and inconsistent practice between sections of the Forest Service
2. No evidence that reasons for previous remittal have been addressed in this application.
3. Licence not operable. There is no access to Plots 1 & 2.
4. Application Errors, non-compliance with Forestry Regs 5(2) in that a historical feature (townland boundary) has not been identified, areas of vegetation cover/ woody weed for removal have not been identified and that the areas of ABE have not been justified.
5. Licence Condition 2 cannot be understood by a lay person.
6. The Licence conditions are not consistent with the reasons given.
7. EIA Screening (i) lack of reasoning for the EIA screening conclusion, (ii) Cumulative Impact assessment flawed also Inspector states NO to the question on is forestry as significant issue in the locality when the previous response was YES, (iii) map submitted stating that it shows large amount of forestry in the area, (iv) Inadequate ecological/environmental assessment regarding HNV lands, Article IV spp Bats & Otter, impact on the landscape, impact on water quality referencing the Hyland judgement, response to question on public participation, planting on peat soils.
8. Appropriate Assessment Screening Report (i) identity of assessor not indicated, (ii) Distance not given for screening out of Lough Oughter SPA.
9. Lack of referral to Leitrim County Council & NPWS.
10. Right tree in the right place, planting of exotic conifers does not accord with the existing biotic community.

The appellant requested an oral hearing.

CONSIDERATION BY THE FAC.

At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM and all materials on file. 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.

DAFM STATEMENT OF FACT.

The Statement of Fact (SoF) provided by the DAFM for the appeal and dated the 2nd of November 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed and that a field assessment was carried out on the 16th of June 2022. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on this licence application. The SoF included a statement dated the 21st of October 2022 from the Forestry Inspector confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a response to the grounds set out in the appeal.

GROUNDINGS OF APPEAL

Lack of Due Process

Notification

This ground of appeal submits that there is a lack of due process arising from the date of decision and that the date of publication of decision does not comply with the Aarhus Convention. The FAC noted that the date of the decision to grant the licence was the 8th of August 2022 and that the public was notified of the decision the following day the 9th of August 2022. The FAC also noted that the application and a number of other documents were available for a number of months before the decision was made and that the licence decision was also published on the Forestry Licence Viewer (FLV). The FAC does not consider that there was undue delay, and notes that the appellant has

submitted an appeal for consideration by the FAC. The FAC is satisfied that the DAFM has complied with its obligations under the Forestry Act and Regulations with respect to notification of the public of its decision and is not satisfied that a serious or significant error occurred in relation to these grounds.

Forest Licence Viewer

This ground of appeal contends that the consultation process for this appeal has been compromised by the unavailability of the application documentation for a two-day period during the appeal period due to a technical failure of the FLV. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. The issue raised in this ground of appeal refers to matters that are post-decision and therefore do not fall within the remit of the FAC. The FAC provided the appeal and the submissions to all parties, informed the parties of the source of information that it would be referring to in considering the appeal, and provided for a period in which submissions might be made.

Previous Licence.

This ground of appeal contends that the reasons for remittal of the previous licence have not been addressed in this application. The FAC noted that the licence subject of this appeal is not a remitted licence but is in fact a completely new licence application and as such is required to be considered *de novo* by the DAFM without recourse to previous assessments. As noted, the FAC considered the appeal in relation to the decision of 8th August 2022. The FAC does not consider that the DAFM erred as it relates to this ground of appeal.

Access to Plots 1 & 2.

This ground of appeal contends that the licence is not operable as there is no access to Plots 1 & 2. The FAC noted that the site access is from the public road forming the eastern site boundary and is shown on the biomap submitted with the licence application and that Plot 2 can be readily accessed. The biomap also shows that while Plot 1 is bounded by a public road no access is proposed from that road and there is no marked crossing of the watercourse. The FAC considered that it would be necessary for the DAFM to consider how the proposal might be undertaken in processing the application and that the manner in which operations would be undertaken in plots 1 and 3 are not provided in the application. The FAC noted that the biomap legend indicates a symbol for “existing watercourse crossing” and that an aquatic zone (WFD river waterbody Cloone_10) bisects the site. It is a requirement of the Forestry Standards Manual 2015 that the biomap should show the location of any crossings of aquatic zone. The FAC considers a river crossing in the context of this licence to be a feature which may be relevant to the application under Regulation 5 of the Forestry Regulations 2017 (as amended) and the processing of the application by the DAFM under the Regulations and as such the omission of the location of such crossing(s) represents a serious error in the making of the decision. In the context of a serious error occurring in the application submitted and the particulars of the evidence before it the FAC determined that, in this instance, the appeal should be allowed and the decision set aside.

Application Errors.

Historical/Cultural Feature

This ground of appeal contends that the application does not comply with Article 5(2) of the Forestry Regulations 2017 (as amended) in that an “*Historical/Cultural feature has not been identified in the application – the Townland boundary*”. The FAC noted the report from the DAFM Archaeology section dated the 22nd of August 2022 which explains the requirement of Article 5(2)(a)(v) and states that townland boundary is a natural feature, a watercourse and as such there is no requirement to explicitly identify which field boundaries, roads, or water courses are also townland boundaries, unless

they are in themselves designated as a Recorded Monument, as a Registered Historic Monument, or as a National Monument.

Woody Weed Removal

This ground also contends that woody weed removal is to be undertaken but that the location of such areas has not been identified and removal of woody weed may have an impact on water quality. The FAC noted that areas of woody weed are not required to be identified on biomaps and that the content of biomaps is set out in the Forestry Standards Manual 2015. The FAC also noted the Inspector's response to this ground of appeal which states that "*Woody weed removal is a standard operation in afforestation sites and indeed agriculture in general*". The FAC further noted that the site was inspected, that the Inspector was aware that weed removal is to be carried out manually, that no additional drainage is to be carried out and that planting will be by mounding, invert mounding and slit planting and that the Inspector concluded that adherence to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval would be sufficient to prevent any potential significant impact to aquatic zones and their Q value.

ABE

With regard to the appellant's contention that the Areas of Biodiversity Enhancement (ABE) shown on the biomap are not justified as being the "*Best Areas for Biodiversity Enhancement*" as areas of woody weed could potentially be good habitat. The FAC noted that the ABE referred to on the biomaps consist of setbacks for public roads, hedgerows and dwellings and that use of these setbacks as ABE complies with the DAFM Environmental Requirements for Afforestation 2016. The FAC noted additional setbacks are required to comply with the conditions of the licence also qualify as ABE and that the lands are agricultural in nature.

The FAC does not consider that the DAFM erred as it relates to these grounds of appeal.

Licence Condition 2.

This ground of appeal contends that Condition 2 of the licence cannot be understood by the lay-person. 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. 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 lay-person demonstrating average judgment. 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 the DAFM has erred regarding this ground of appeal.

The licence conditions are not consistent with the reasons given.

This ground of appeal contends that the licence conditions are not consistent with the reasons given for those conditions, with particular reference to Condition 3 of the licence "*All works to adhere to the specific Operational Proposals set out in Appendix A. Reason: In the interest of clarity.*" and Condition 5 bullet point 2 "*All existing trees and hedgerows within the site shall be retained. Reason: In the*

interests of protecting the character of the landscape and the protection of the environment, in particular, habitats for flora and fauna." FAC considers that the conditions, taken within the ordinary meaning of the words, can be readily understood by a lay-person demonstrating average judgment and that the reasons given relate directly to those conditions in a clear and unequivocal manner. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Assessment to Determine EIA Requirement.

This ground of appeal questions a number of matters in the Assessment to Determine EIA Requirement.

Lack of reasoning for the EIA screening conclusion.

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement dated the 21st of July 2022 in advance of making the decision to grant the licence subject of this appeal, the Inspector recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA.

The FAC noted the determination "*EIA: On the basis of this examination this application be subject to the EIA process No*" and that the criteria and the responses given in the Assessment for EIA Requirement determination, and other documents on the file, provide the reasons for the determination. The FAC noted that the procedure as recorded provides for further commentary to be recorded and that no further reasons were provided in this instance.

The FAC noted that the Assessment to Determine EIA Requirement refers to and relies on Guidelines in relation to Water Quality, Archaeology and Landscape however these Guidelines have not been attached as a condition of the licence. Furthermore, the Environmental Requirements for Afforestation, adherence with which is a condition, states that it replaces the existing Guidelines. The FAC considers that this creates unnecessary confusion and a lack of clarity in the processing of the decision.

Cumulative Impact

This ground of appeal questions the DAFM criteria for cumulative impact and the appellant submitted a map titled "*Cumulative impact of forestry in the area – 500m buffer indicated*". The FAC noted that the DAFM in their considerations on the "*Cumulative effect and extent of project*" recorded answers to questions in the Assessment to Determine EIA Requirement relating to, existing afforestation of 3 years or less and any proposed afforestation within a 500m radius exceeding 50 Ha., the approximate % forest cover in the underlying waterbody (or waterbodies) and within 5km, both currently and five years previous. The DAFM concluded that based on the extent of the forest cover that the cumulative effect of this proposal was not likely to have a significant impact. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

This ground of appeal also seeks an explanation as to the "No" response to the question "*Is the amount and type of forest cover in this locality known to be a significant issue?*" in the current application and "Yes" in the previous licence application. The FAC considers that is a completely new licence application and as such was required to be considered *de novo* by the DAFM without recourse to previous assessments.

Inadequate ecological/environmental assessment.

High Nature Value Farmland.

The appellant contends that the lands are High Nature Value (HNV) farmland and should not be planted. HNV farmland, according to Teagasc 'is typically characterised by low-intensity farming

associated with high biodiversity and species of conservation concern'. It is clear from the record that a DAFM inspector did visit the site and did record its characteristics, which did not accord with the Teagasc definition. No evidence was adduced to the contrary and the FAC is not satisfied that the DAFM evaluation of this site contained a serious error.

No assessment of Annex IV species in the Habitats Directive.

This ground of appeal contends that there has been inadequate assessment of the impact of the proposal on species in Annex IV of the Habitats Directive, with particular reference to bats. The FAC noted that the site was inspected and that no potential bat roosting locations were observed. The lands are agricultural in nature and the existing hedgerows are required to be retained. In addition, there are setbacks from the watercourses on site. The FAC further noted that the Environmental Requirements for Afforestation 2016 require an ecological report for Annex IV species where they are known to be present or have been observed. The FAC considers that the granting of the licence does not remove or supersede any other legal obligations on the Applicant or their agents. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Otters & Bats.

The FAC noted that the appellant has adduced no evidence as to the presence of otter or bat in the area of the proposed afforestation. The FAC noted that both otter and bat are protected under the Wildlife Act 1976 (as amended) and that the DAFM have published Forestry and Otter Guidelines 2009 to which forestry operators are required to adhere as set out in Section 14.1 of the Forestry Standards Manual 2015 in making an application. As noted, the lands are in agricultural use and the existing hedgerows must be retained and there are operational setbacks from the watercourse. The FAC does not consider that the DAFM erred as it relates to this ground of appeal.

Impact on the Landscape.

This ground of appeal questions the Inspector's response to the question in the Assessment to Determine EIA Requirement regarding the design of the forest and compliance with the DAFM Forestry & Landscape Guidelines and questions the validity of those Guidelines. The FAC considered that the appellant has adduced no evidence that the Inspector's response was incorrect and that the updating of the Forestry & Landscape Guidelines is a matter for the DAFM. As previously noted, the guidelines were not attached as conditions of the licence and appear to have been incorporated into the Environmental Requirements for Afforestation.

Water quality

This ground of appeal questions the Inspector's "No" response to the question regarding whether the proposal was a threat to the ecological status of waterbodies under the WFD River Basin Management Plan for the area. The FAC noted that no drainage is proposed, and that planting will be by mounding, invert mounding and slit planting and that adherence to the Forestry and Water Quality Guidelines will prevent any potential significant impact to aquatic zones and their Q value. As previously noted the guidelines were not attached as conditions of the licence and appear to have been incorporated into the Environmental Requirements for Afforestation.

Public Participation

This ground of appeal questions the Inspector's "Yes" response as to whether comments and issues from the general public only in this case received and examined. The FAC considered that the appellant has adduced no evidence that the Inspector's response was incorrect or that the comments had not been considered prior to the making of the decision. The FAC noted that the procedure provides for further commentary or an expansion of reasons in the form recorded and that no additional comments were made. The FAC considered that in some instances a specific response to a submission might be reasonably expected where it is not evident on the record of the decision as to the

consideration of the submission. However, in this instance the submission made was of a general nature and not specific to the proposal. The FAC is not satisfied that a serious or significant error occurred in the making of the decision in this matter.

Inappropriate planting on peat soils.

This ground of appeal contends that planting on this site with highly modified peat & peaty podzols is not consistent with national climate change and State Aid commitments. The FAC noted that the site was inspected in the field and found to be suitable for planting and as such in accordance with national policy. The lands are drained grassland in agricultural use. The FAC considers the proposal is not inconsistent with national climate change commitments. State Aid commitments lie outside the remit of the FAC. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Appropriate Assessment Screening Report

Identity of assessor not indicated.

This ground of appeal contends that the identity of the individual who carried out the Appropriate Assessment Screening Report is unknown. The FAC noted that question 3 of the Appropriate Assessment Screening Report refers to the District Inspector, which the FAC considers sufficient identification. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Distance not given for screening out of Lough Oughter SPA.

This ground of appeal contends that the Appropriate Assessment Screening Report is deficient by not specifying the distance of the site from Lough Oughter SPA but provides no reason as to why an assessment might be required in relation to this European site. The FAC noted that, through publicly available information (mapping by the EPA and data from the NPWS), the proposed site is circa 14Km SW of Lough Oughter SPA and is located in a separate WFD sub-catchment. Having regard to the information on file regarding the site and the details of qualifying interests, conservation objectives, and habitats & species of Lough Oughter SPA set out in the Appropriate Assessment Screening Report the FAC considers omission of the exact distance of the site from Lough Oughter SPA would not alter the conclusion reached to screen out Lough Oughter SPA. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

In-combination Statement

The FAC noted that the conclusion of the AA In-combination Statement dated 20th July 2022 states.

“It is concluded that there is no likelihood of the proposed afforestation project CN90680 itself, ie. 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.”

Furthermore, in the screening document the conclusion refers to “cumulative adverse impacts” while the FAC would understand that the screening should consider all potential significant effects.

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 assessment of the impact of such effects of the project itself and in-combination with other plans and projects on the integrity of the European site. As stated on the record it appears to the FAC that other plans and projects were only considered after the assessment on the integrity of the project was completed, which would appear to the FAC not to be in keeping with the requirements of Article 6(3) and the Forestry Regulations 2017.

The FAC considers this to be a serious error as it suggests that the screening undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other plans and projects result in a significant effect on a European site.

Licence should have been referred to Leitrim County Council & NPWS.

This ground of appeal contends that the licence should have been referred to Leitrim County Council and the NPWS to ensure the assessment of the impact of the proposal on the environment, ecology and landscape was comprehensive. The FAC noted that the DAFM is the competent authority for issuing forestry licences and that referrals to local authorities and other bodies is a matter for the DAFM and that in its SoF DAFM gives the reasons why it was deemed unnecessary to refer the licence to Leitrim County Council and the NPWS. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Right tree in the right place.

This ground of appeal contends that the existing biotic community has not been considered adequately and that planting of exotic conifers does not accord with the existing biotic community. The FAC noted the documentation on file, particularly the proposal to plant Alder and GPC 10 Native Woodland, the findings of the *Assessment to Determine EIA Requirement* and the conditions of the licence including the retention of all tree/hedgerow on site, the planting of 5 to 8 rows native tree species on the eastern edge of Plot 2, a 10 m set back from the watercourse & lake on Plots 3,4 & 1, the planting of 8 rows broadleaves at the water setback on Plot 1. The FAC further considered the nature of the proposal and the lands on which it would occur. The FAC considers that due regard has been had to the protection of existing biotic community. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a serious or significant error or series of errors was made in the making of the decision and that this included serious errors in the application that was submitted. The FAC is thus, allowing the appeal and setting aside the decision of the Minister regarding licence CN90680 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee

