



6th July 2023

NOTES: Appeal FAC 145/2022 against licence decision CN83478

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 (the Minister). 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 145/2022 was held remotely by the FAC on 29th June 2023.

In attendance

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

Decision

Having regard to the evidence before it, including the record of the decision by the Minister, the notice of appeal, the Statement of Fact (SoF) provided by the DAFM, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN83478.

Background

The licence decision relates to an afforestation application at C unlaghfadda, Co. Mayo resulting in a decision to grant a licence for 12.49ha to be planted predominantly with Sitka Spruce (10.6ha) and some additional broadleaves (1.87ha) in an integrated mix. The initial application was for 18.95ha. The licence provides for ground preparation through woody weed removal and mounding followed by slit planting. No fertiliser or herbicides are proposed by the applicant, though the licence provides for the application of Granulated Rock Phosphate in year 3. Weed control would be undertaken manually. The licence provides for 1,370 metres of stock fencing.

The application

The site is described as enclosed, agricultural land with a neutral aspect and comprised of a mixture of mineral and peat soil with a grass, grass rush, and furze vegetation type. The application further states that adequate access is in place and that a site notice has been erected.

As the parties were advised, a record of the decision was made available to the FAC by way of the Forest License Viewer (FLV). On file and uploaded to the FLV on the 19/03/19 is a Site Notice dated 13/03/2019; and an undated location map showing that the initial application consisted of two plots, with the larger plot located immediately north of Lough Nambrackkeah and a smaller plot to its south, ca. 3km south east of Mayo Abbey. Uploaded to the FLV on the 20/03/19 are photos of site-notices in situ, and an undated document entitled "Afforestation Application Plan CN83478" which notes a watercourse of 650m in the afforestation application area with details of setbacks and noting a soil type of deep peat in some areas. Also on file and uploaded to the FLV on the 27/03/2019 is a biomap which shows the locations of site notices, gates and the direction of planting.

The DAFM issued a Request for Supporting Documentation dated the 05/04/19 (uploaded to the FLV on the same date) advising that the smaller plot be excluded from the application together with a portion of the larger plot. The letter also advises that the site is proximate to a former Curlew nesting site and directs the applicant to engage a suitably qualified and experienced ornithologist with relevant knowledge of Curlew to undertake a review of Curlew in the locality, to conduct a walkover habitat survey, to carry out an assessment of the suitability of the site for breeding and foraging Curlew, and to provide a report on the suitability of the site for afforestation and any steps required to protect Curlew.

A further Request for Supporting Documentation issued by the DAFM is also on file dated the 25/11/19 by a way of a reminder of the initial request.

A number of documents received from the applicant were uploaded to the FLV on the 16/12/19. These include a Bio Diversity/Operational Map which shows details for the northern, and now sole, plot. This records the location of a river/stream in proximity to the project area and the direction of cultivation. The map legend notes that all hedgerows and existing trees will be retained, and while these are not marked on the map, the ortho imagery used allows the location of hedgerows to be discerned. Also uploaded on the same day is a fencing map and a species map showing a total planting area of 12.47ha.

Submissions

A submission from members of the public was received by the DAFM on the 09/04/2019 objecting to the proposed afforestation on the basis that it and existing forestry in the area would result in badger populations spreading TB to dairy herds.

Processing by DAFM

On file and uploaded to the FLV on the 08/08/22 is a summary document entitled "Afforestation – Proposed Details" (recorded as a Prescribed Body Appendix on the FLV) which summarises the application information to be subject to assessment. This records various details as noted above and notes that the project as being located within a 3km referral zone for NHA, PNHA, SAC or SPA.

A record of a site survey conducted by a consultant ecologist is on file dated the 20/07/2022. Details of the vegetation on site, as described in the application, are provided together with additional detail. Flora and fauna appear to be unremarkable from a protected species and habitat perspective. Bird species recorded on site include Redpoll, Bullfinch and Swallow. Various linear drains are recorded on a map of the site attached also showing areas using Fossett habitat classifications.

An AA Screening Report and Determination (AASRD) is on file dated the 04/08/2022 and prepared by a consultant Ecologist on behalf of the DAFM. This describes the site as being on a flat to moderate slope with the south-western portion of the project having a south-westerly aspect and the remainder of the project area having a north-easterly aspect. The underlying soil types are given as grey brown podzolics/ brown earths (32%), surface water gleys/ground water gleys (37%), and cutaway/cutover basin peats and blanket peats (some) (31%). Reference is made to the site survey detailed above, which is noted as having been conducted by a consultant ecologist under contract to the DAFM. Peat soil is noted to underly parts of the project area adjoined by relevant watercourses. Remnant hedgerows, a treeline, and a conifer copse are noted. Drainage ditches in the project area are stated to function as relevant watercourses and to be associated with historic turf cutting east of the project boundary. The project is stated to be within the Corrib (30) (75%) and Moy & Killala Bay (34) (25%) catchments. An unnamed stream (EPA Segment Code: 30_1141, Order: 1) flows out of Drumady Lough and joins the Robe River (EPA Code: 30R01, Order: 4) before entering Lough Carra/Mask Complex SAC approximately 37.6 km (in-stream distance) downstream of the project area.

The south-western portion of the project area is said to drain into Nambrackkeagh Lough approximately 20 m (in-stream distance) downstream of the project area. The Meander Stream (EPA Code: 34M05, Order: 1) is noted as flowing out of Nambrackkeagh Lough and entering the River Moy SAC approximately 5 km (in-stream distance) downstream of the project area. The Robe River_030 is noted to have a Good status under the most recent Water Framework Directive Cycle, while the Meander_010 is noted to have a Moderate status.

The AASRD records the presence of eleven European sites within 15km of the project site. Of these, the River Moy SAC [2298] is noted as requiring a full Appropriate Assessment for possible impact on the conservation objectives of the site. Reasons given include the possible effect of impact arising from there being a separation distance of 2.7km with a possible pathway for sediment, nutrient and pollutants via the Nambrackkeagh Lough located ca. 20m south of the project. The remainder of the European sites are screened out for reasons including separation distances, opportunities for settlement, absence of surface or groundwater connections, unsuitability of the site for marine birds, and the application of habitat tables for terrestrial qualifying interests. These screen-out decisions are also supported by a finding of there being no possibility of in-combination effect based on an In-Combination report.

The In-Combination report is attached to the AASRD as an appendix. This considers planning applications from a range of planning authorities and consent bodies including Mayo County Council, An Bord Pleanála, the EPA, and the DAFM Forest Service; all consulted on the 08/08/22 and focusing on the general vicinity of the project area in the River Sub-basin Robe_030 and Meander_010. Consideration is also given to the County Mayo Development Plan.

The In-Combination report concludes with a statement that the project, when considered in combination with other plans and projects, will not give rise to any significant effect on the European sites considered in the AASRD. In so doing, the statement includes the following:

It is concluded that there is no likelihood of the proposed Afforestation project CN83478 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 Sites, when considered in-combination with other plans and project.

An Appropriate Assessment Report (AAR) is on file also dated the 04/08/22 prepared by the same consultant Ecologist on behalf of the DAFM. This considers each of the qualifying interests for the River Moy [2298] SAC in turn, and where appropriate makes recommendations as to mitigation measures to prevent significant effect on the SAC. These include mitigation for the protection of water quality and aquatic and marine species, the protection of hedgerows and field boundaries, the control of invasive species, the general protection of the environment, and a requirement that the site operations be overseen by an Ecologist and/or registered Forester who will carry out regular on-site inspections. An assessment of in-combination effects is made relying on the same appendix as in the AASRD, and there is also an assessment of residual impacts is also made which finds that none will arise on the basis that the site-specific mitigation will prevent residual impacts impacting on the attainment or maintenance of favourable conservation status for qualify interests or special conservation interests of European sites.

An Appropriate Assessment Determination (AAD) is on file. This summarises the findings of the AASRD and the AAR and the process of conducting the Appropriate Assessment (AA). Those mitigation measures noted in the AAR are restated and it is concluded that following the full implementation of mitigation measures, no adverse effect on the integrity of River Moy SAC [2290] will occur, alone or in combination with other plans and projects.

Inspector's Certification and screening for Environmental Impact Assessment

On file are a number of reports associated with the Inspector's certification of the project. These include a Site Details report and a Site Plots report both with a date of 26/09/22 recording various details of the project and site.

Also on file is an Assessment to Determine EIA Requirement also with a date of 26/09/22, referring to an Inspection Certification date and spatial run date of 22/09/2022. This considers the project across a range of criteria including cumulative effect with reference to forestry projects.

The Inspector's Certification Report is on file with a certification date of 22/09/2022. This notes a number of site-specific conditions that are to be attached to the licence, including a requirement that the mitigations set out in the AAD are adhered to. There are also two conditions relating to hedgerows. A further condition requires adherence to scheme rules for the exclusion of certain areas of afforestation.

The licence issued on the 26/09/2022 by way of an approval letter. It includes a number of standard conditions such as adherence to industry manuals and standards, adherence to the operational proposals which are included as an appendix, notification to the Department on the commencement of works. It also includes those conditions listed in the Inspector's Certification and adherence to the mitigations set out in the AAD.

Appeal and Statement of Fact.

There is one third party appeal against the decision, received by the FAC on the 04/10/2022. There is a single ground of appeal, in summary that the afforestation of an area of 12.49ha is substantial in an area where it is submitted has been listed as a black spot because of TB outbreaks in dairy herds. It is submitted that the proposed area of afforestation will hinder attempts to cull the badger population in the area.

In a Statement of Fact submitted to the FAC on the 20/03/23, the DAFM confirm the administrative details of the processing of the licence and state that the site was field assessed on the 03/04/2019. The statement incorrectly states that the AA process resulted in no European sites being screened in for appropriate assessment. In the portion completed by the District Inspector, it is stated that the Inspector is not aware of any proven link between increased risk of the spread of bovine TB and afforestation and notes the DAFM Bovine TB Eradication Strategy 2021 – 2030. It is also noted that no badger setts were observed onsite during a field inspection on the 03/04/2019 or during the ecology survey recorded in a report of 20/07/22.

Following circulation of the SoF by the FAC to all parties, the appellant provided a further submission to the FAC dated 04/04/23 and received on the 18/04/23. In the submission the appeal grounds are restated, and information detailing confirmation from the DAFM on various herds in the locality which were restricted due to confirmed TB cases.

Consideration by the FAC

In the first instance the FAC considered the grounds of appeal, which are centred on the assertion that the proposed area of plantation will hinder existing attempts to cull the badger population in an area with a high incidence of Bovine Tuberculosis (TB). The appellant submits various data and documents to demonstrate the high incidence of TB in the immediate vicinity of the application. The FAC had regard to the SoF provided by the DAFM, in which the Inspector disputes that there is any proven link between increased risk of spread of TB and afforestation, and notes that the DAFM has published a Bovine TB Eradication Strategy 2021-2030¹. The Inspector submits that this strategy is intended to drive levels of the disease towards a target of eradication by 2030. The Inspector further notes that no Badger setts were observed during a field inspection on 03/04/2019 and site survey on 20/07/2022.

The FAC noted the strategy referred to by the Inspector which refers to Badger at page 20, and notes that Badgers are a native Irish species which are protected under the Berne Convention on wildlife. This protection is given effect under the Wildlife Acts. The strategy outlines a number of measures to eradicate TB including a programme of culling and vaccination. The FAC notes that curtailment of afforestation activity does not feature in the strategy.

The FAC further notes that a condition of the licence is adherence to the mitigation measures set out in the AAD; and that these include an obligation on the applicant to ensure that the proposed forestry operation be monitored by an Ecologist and/or Registered Forester who will, among other things, ensure compliance with all relevant Forest Service Guidelines, Requirements and Standards. A condition of the licence is also that operations be conducted in accordance with Forestry Standards Manual

¹ See: <https://www.gov.ie/en/publication/a6130-bovine-tb-eradication-strategy-2021-2030/>

(DAFM, 2015) which in turn requires adherence to the Code of Best Forest Practice (Forest Service, DMNR 2000) which directs that operations be planned and conducted having identified features such as badger setts. On the basis of the foregoing, the FAC is not satisfied that an error was made by the DAFM in respect of the grounds of appeal.

Having considered the grounds of appeal, the FAC also reviewed the processing of the application to ensure adherence to the application of European law and fair procedures.

The application was subject to an Appropriate Assessment process for the purposes of the Habitats and Birds Directives as set out above. An AASRD considered a number of European sites as designated under the requirements of those Directives, and identified one such site, the River Moy SAC [2298] as requiring full Appropriate Assessment. In screening out the other sites, a range of reasons were provided which included reference to absence of a possibility of in-combination effects. This was based on an in-combination report which was attached to the AASRD in the form of an appendix. The In-Combination report includes an In-Combination statement which contains the following paragraph:

It is concluded that there is no likelihood of the proposed Afforestation project CN83478 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 Sites, when considered in-combination with other plans and project.

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered on the basis that these were precluded by reason of individual projects not having a significant effect. The FAC would consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considers 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 also noted an Assessment to Determine EIA requirement was conducted, by the DAFM and that the questions in that assessment that relate to Cumulative effect only related to forestry projects and do not consider other types of projects. As discussed above, a separate process was carried out for Appropriate Assessment on European sites which include an in-combination assessment of other plans and projects (including, but not limited to, forestry projects). While the FAC consider that the DAFM are entitled to rely on a reading of the entire file, it would be clearer if it was made explicit that the assessment to determine EIA requirement included consideration of the Appropriate Assessment in-combination report. However, given the deficiency identified above in relation to the in-combination

report, that deficiency carries through to the assessment of cumulative effect for the purposes of assessment to Determine EIA requirement.

The FAC note that in the processing of the application, the DAFM issued a Request for Supporting Documentation dated the 05/04/19 advising that the smaller plot be excluded from the original application together with a portion of the larger plot. The letter also advised that the site is proximate to a former Curlew nesting site and directs the applicant to engage a suitably qualified and experienced ornithologist with relevant knowledge of Curlew to undertake a review of Curlew in the locality, to conduct a walkover habitat survey, to carry out an assessment of the suitability of the site for breeding and foraging Curlew, and to provide a report on the suitability of the site for afforestation and any steps required to protect Curlew. A reminder issued to the applicant on the 25/11/19.

In reviewing the file, the FAC were unable to find any reference to the required survey and other actions related to Curlew as having been completed, or any subsequent direction from DAFM to the applicant that the actions were no longer required. The FAC note that Regulation 5(2d) of the Forestry Regulations 2017 (SI 191/2017) specify that an application for a licence in respect of afforestation shall be accompanied by such other information that the Minister considers necessary to issue a licence or determine appropriate conditions. The FAC consider that in the absence of information that had been requested being provided and considered by DAFM, or an explanation of why such information was not required being available on the record of the decision, an error was made in the processing of the licence.

In issuing the licence the DAFM included a requirement, at condition 5, that:

All areas, regardless of size, on the boundary of the site that do not meet the lands types requirements shall be excluded from the afforested area;

Reasons for the condition are given as scheme rules and in the interests of protecting the character of the landscape and the protection of the environment; in particular, habitats for flora and fauna. The reference to lands types is taken by the FAC as a reference to those land types defined as being suitable for afforestation as defined in the publication *Land Types for Afforestation* (DAFM, 2017). While the FAC as established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 does not, in normal circumstances, consider issues relating to the administration of schemes, in this instance the adherence to the requirements of land types for the purposes of the schemes is included as a condition on the licence with reference to the protecting the character of the landscape and the protection of the environment. This document available on the website² of the DAFM states,

This document refers to applications for consent under S.I.191 of 2017 and for grant support under the Afforestation Scheme.

The document referenced includes a method of using indicator vegetation to assess land suitability for afforestation. While an ecologists survey report dated 20/07/2022 is on file which characterises the vegetation on site, this does not include a specification of land types in keeping with the requirements of the procedure identified in the Land Types document. The FAC consider that, with reference to the

² <https://www.gov.ie/en/publication/e384e-forestry-grants-and-schemes/>

requirements of the Forestry Regulations at 5(2d) and that the Minister in making a decision must have regard to any guidelines, codes of practice and standard for good forest practice , the condition is not sufficiently precise, and that those areas to be excluded, where so deemed, should be identified in advance of a licence being issued. The FAC consider this to be an error in the processing of the licence.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence CN83478. The FAC is therefore setting aside and remitting the decision regarding licence CN83478 to the Minister to carry out a new Assessment for EIA requirement and an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects before a new decision is made. Before conducting such assessments, the DAFM should ensure that the record of the decision reflects those steps taken to ensure protection of any curlew in the vicinity as requested by the Department in correspondence to the applicant, and to adequately identify those areas excluded from the licence by reference to being an unsuitable land type, should they occur.

John Evans, On behalf of the Forestry Appeals Committee.