



5<sup>th</sup> July 2023.

**Subject: Appeal FAC 127/2022 regarding CN90982**

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, 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 127/2022 was held remotely by the FAC on 14<sup>th</sup> March 2023.

#### **In attendance**

FAC Members: Mr Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.  
Secretary to the FAC: Mr Michael Ryan

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to allow the appeal and set aside the decision of the Minister regarding licence CN90982.

#### **Background**

An afforestation licence (CN90982) at Derrynawana, County Leitrim was issued by the DAFM on 25<sup>th</sup> August 2022. The licence decision pertains to the afforestation of an area of 3.39 hectares over a single plot and fencing with a length of 155 metres located on the western side of the plot. The planting comprises 2.89 hectares Sitka spruce and 0.51 hectares Additional Broadleaves. The project site is accessed via an existing road which is on lands that are in the applicant's control and which connects to the public road network. There are forestry lands to the north, east and south. Ground preparation is mounding with slit planting and weed control is herbicide control in years 1 and 2. The soil type is described in the documentation as predominantly highly modified peat & peaty podzols in nature and

the slope is considered flat to moderate. Vegetation on the lands is grass/rush and scrub/laurel. There are no significant water features on site.

The application submitted included a Pre-Approval Submission Report, public notices, general mapping, fencing map, biodiversity map which indicates an exclusion zone in the southwest adjoining a residential building, access arrangements from the site to the public road which were marked as uploaded on the FLV on the 27/06/2022.

Publicly available information on [www.catchments.ie](http://www.catchments.ie) shows that the site is located across two river sub-basins. The River Sub-Basins Aghacashlaun\_010, the status of which is indicated as good and in terms of risk is indicated as at risk with hydromorphology the listed pressure, and the Aghacashlaun\_020, the status of which is indicated as good and in terms of risk is indicated as not at risk.

#### **DAFM Assessment**

The application was subject to desk and field assessment by the DAFM. The application was not referred to any statutory body.

The DAFM assessment included an Inspector pre-approval Certification dated 25/08/2022 and marked as uploaded on FLV on same date. In relation to Appropriate Assessment (AA) Screening, one Natura site was identified, Cuilcagh-Anierin Uplands SAC 000584 and was screened out as the project area is downstream from the Natura site, and the subsequent lack of any hydrological connection and therefore Appropriate Assessment was deemed not required.

An In-Combination Statement was completed on the 23/08/2022 and marked as uploaded on the FLV on the 24/08/2022 by the DAFM. The Statement concluded *“that there is no likelihood of the proposed Afforestation project CN90982 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. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s)”*.

An Assessment to determine EIA Requirement dated 25/08/2022 by an inspector and marked as uploaded on FLV on same date indicated that there is approximately 45.84% of forest cover at present in the townland in which the proposal is located. The assessment indicates that approximately 23.09% of forest cover currently exists in the underlining waterbody (or waterbodies) which is similar to data indicated on in/combination statement. It was determined that an EIA was not required.

The Inspector's Certification Report dated 25/08/2022 and marked as uploaded on FLV on same date recommended approval with conditions including retention of identified scrub areas and setback requirements from a dwellinghouse.

The decision to grant the licence issued on the 25/08/2022 subject to conditions which included conditions requiring adherence to published guidelines relating to forestry and also conditions requiring that all existing trees and hedgerows within the site shall be retained, that existing scrub habitat located ITM 606167, 814213 be retained, specifying setback requirements and specifying additional broadleaves planting requirements.

### **Appeal**

There is one appeal against the decision to grant the licence and a brief summary of same is included below. The full grounds of appeal were considered by the FAC and are to be found on file.

The grounds of appeal submit that that there was an application of undue process referring to untimely publication of the decision as the licence was issued on the 25<sup>th</sup> August 2022 and the public were informed on the 26<sup>th</sup> August 2022 and reference is made to Aarhus Convention in this regard. Further it is submitted that the licence and reasons were not made available to the public within an adequate timeframe and reference is made in this regard to the narrow appeal window.

It is submitted that there are deficiencies in relation to the information submitted with reference to Forestry Regulations 5(2) and 11(1) specifically in relation to public road and access and required areas for biodiversity enhancement should have been based on and justified by an ecologist and ecological assessment.

It is submitted that the condition no 2 cannot be understood by the layperson as circulars and standards are updated and there is an absence of consolidation of these documents. In addition the conditions and their reasoning are unclear and in this regard reference is made to woody weedy removal, there is no record of what trees and shrubs are to be retained and there is not enough protection of hedgerows.

It is submitted that the proposal is inconsistent with Leitrim County Development Plan and was not referred to Leitrim County Council.

It is contended that the EIA screening is flawed with no reasoning stated for the decisions outlined.

It is submitted that the cumulative impact assessment is flawed with no regard to contiguous lands in the assessment and that the Inspector has indicated cumulative impact as not significant without any reason stated.

It is submitted that there is inadequate ecological and environmental assessment and in this regard reference is made to High Nature Value Farmlands (HNVs).

The grounds question why is there ongoing planting on peat which require mounding and drainage.

The grounds make reference to inadequate setback from hedgerows.

Reference is made to protection of species under Article 12 of the Habitats Directive and it is submitted that the EIA screening does not provide for the screening of species.

It is submitted that landscape impact is not adequately assessed and there is no reasoning indicated in relation to impacts.

The grounds make reference to the issue of water quality and measures to ensure good quality and what evidence is presented to support this and to retain good water quality and the monitoring to ensure this occurs.

It is submitted that the Appropriate Assessment is flawed and reference is also made to In Combination and the assessment has not been carried out consistent with EU guidance.

Reference to the right tree in the right place and the conversion of large areas of the County into a single species.

An oral hearing was requested by the appellant.

#### **DAFM Statement**

The DAFM provided a response to the grounds of appeal (SOF) which was provided to the other parties. In summary, the statement provides an overview of the processing of the application, states that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act and addresses the grounds of appeal.

Specific to matters raised in the grounds of appeal, the SOF in relation to untimely publication of decision, sets out that standard practice was followed and that the documents were uploaded on the FLV and that two weeks was allowed for an appeal.

It is indicated that the maps show the public road clearly on the bio map as well as the location of the public notice, that the site was field inspected and was acceptable to the Minister when making the decision.

Regarding biodiversity enhancement, the SOF sets out that all areas mapped are eligible under scheme rules, that the conditions are clear and well-reasoned, that it is clear that all trees are to be retained, that there is a requirement to comply with environmental standards and that there is a 5 metre setback from hedgerows.

The SOF also sets out that the licence area is not within a sensitive landscape or within or adjoining Natura site, that woody weed removal is a standard operation and that as indicated existing trees and hedgerows are to be retained. The SOF further states that EIA standard screening procedures were adhered to.

Regarding the issue of peat the SOF states that the site was field assessed, that the site is highly modified and that the eastern area which transitions to deeper peat is excluded.

The SOF points out that no evidence of protected Annex IV species or habitats were observed during inspection of the site, that bat roosting sites were not observed and that hedgerows are to be retained. In relation to AA, it states that standard AA procedures were adhered to.

### **Consideration of FAC**

In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The FAC considered the submission in the grounds of appeal relating to the Environmental Impact Assessment (EIA) Directive. The EU 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 or not 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 Irish Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence applications, require mandatory EIA for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The decision before the FAC relates to the afforestation of an approved area of 3.39 hectares which is substantially below the 50 hectares threshold. An Assessment to Determine EIA Requirement was carried out over a range of criteria and determined that EIA was not required and that screening for significant effects under the EIA Directive was not required in this case.

The grounds of appeal contends that the EIA screening is flawed with an absence of an explanation in relation to the responses on percentage forestry coverage which is high in the area and an absence of consideration of cumulative impact in particular on the landscape. The FAC noted the response of 'no' in relation to the question "is the amount and type of forest cover in this locality known to be a significant issue" and that the assessment does indicate that approximately 45.84% of forest cover exists at present in the townland in which the proposal is located. The FAC also noted that the assessment also indicates that the approximate percentage of forest cover currently in the underlining waterbody (or waterbodies) is 23.09% which is similar to the data included in the in-combination statement. Related to this, in considering landscape it is noted that the grounds of appeal refer to the proposal as inconsistent with Leitrim County Development Plan and was not referred to Leitrim County Council.

The FAC noted the relatively high forest cover in the wider area as stated in the grounds of appeal but also noted that the Leitrim County Development Plan does identify the project area as within an area having a high capacity in relation to forestry as part of an overall County strategy where capacity throughout the County is considered and identified. The FAC noted that the site is not within a designated amenity area in the Leitrim County Development Plan. The FAC noted that the cumulative impact assessment in the EIA screening refers only to other forestry projects and, although there is an in-combination statement on file for the AA screening process, there is no evidence that other, non-

forestry projects were considered when assessing the cumulative impact of the proposal on the environment. The FAC considers this to be an error in the EIA screening in this case.

The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires 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 on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and identified the same Natura site Cuilcagh-Anierin Uplands SAC 000584 as DAFM. The FAC considered the record and the reasons stated for screening out of this site and concluded that in relation to the Appropriate Assessment screening no error has occurred.

The FAC also however noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement was prepared in relation to the project. The statement includes the passage,

*“that there is no likelihood of the proposed Afforestation project CN90982 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. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s)”.*

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. The FAC considers the conclusion stated above to be an error as it suggests 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 effect on a European site. The FAC would also understand that after concluding that the project itself would not have a significant effect on a European site, the DAFM should also consider other plans and projects and determine whether the project in-combination with other plans could have 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.

In relation to the matters raised in the grounds of appeal reference is made to undue process referring to untimely publication of the decision as the licence was issued on the 25<sup>th</sup> August 2022 and the public were informed on the 26<sup>th</sup> August 2022. Reference is also made to the Aarhus Convention in this regard. The DAFM confirm this in their statement and set out that standard practice was followed and that the documents were uploaded on the FLV on the 25<sup>th</sup> August 2022 which was the date the decision was made and allowed two weeks for an appeal. The FAC does not consider that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

The grounds of appeal submit concerns in relation to protection of biodiversity, preservation of hedgerows and trees and planting on peat. The mapping as submitted in the application documentation identify areas of planting, the licence as issued contains conditions in relation setbacks from hedgerows and the conditions require the retention of existing trees and hedgerows. The conditions of the licence also require the retention of a clearly identified existing scrub habitat and in relation to peat it is noted that areas of the project site where deep peat has been identified is excluded from planting. The FAC considers that the conditions as stated are clear in identifying setbacks and retention of existing trees and hedgerows and that the DAFM has not erred in its processing of the application as it relates to these grounds in the appeal.

Reference is made in the grounds of appeal to the protection of species under Article 12 of the Habitats Directive and it submitted that the EIA screening does not provide for the screening of species. The FAC notes that there is no evidence presented in the grounds of appeal in relation to any protected species and that DAFM who field inspected the site did not identify any protected species.

Reference is made in the grounds of appeal that there are deficiencies in relation to the information submitted with reference to Forestry Regulations 5(2) and 11(1) specifically in relation to public road and access. DAFM in the response indicate that the maps show the public road clearly on the bio map as well as the location of the public notice and that the site was field inspected and was acceptable to the Minister when making the decision. Having examined the documentation as submitted the FAC noted that the biodiversity map indicates a location for the site notice and an access from the site notice to the project area through the applicant's lands but the biodiversity map does not demarcate the public road although the legend of the map clearly provides for the public road to be indicated. The FAC consider that the DAFM has erred in the processing of the licence application in this regard as the public road is not clearly shown as required by Article 5(2) of the Forestry Regulations 2017 and the licence application was therefore invalid.

Reference is made in the grounds of appeal to woody weed removal and the conditions and their reasoning are unclear. Section 9.2 of the Forestry Standards Manual addresses this matter indicating that every effort should be taken to minimise the need for removal for biodiversity purposes but also sets out where it is required to be removed operational requirements in relation avoiding damage to soils and the use of herbicides. Woody weed removal the FAC notes is a standard operation in forestry operations, but it is also noted that the conditions require existing trees and hedgerows are to be retained and this will minimise potential impacts arising.

In relation to WFD and on water quality generally the FAC viewed the information on the EPA and Catchments.ie websites and current mapping on these websites and related data would indicate the

project is within the River Sub-Basins Aghacashlaun\_010 and Aghacashlaun\_020 the status of both is indicated as good and neither is indicated as being at risk. The data in relation to the sub catchments indicate that the status has declined. However, it is noted that the sub basins are within the Subcatchment Yellow [Ballinamore]\_SC\_010 and that forestry is not identified as a risk in River Sub-Basin Aghacashlaun\_010 and River Sub-Basin Aghacashlaun\_020. It is also noted that in addition to standard conditions, condition no 5 of the licence set outs specific requirements in relation to setbacks from watercourses for the protection of the environment, in particular the protection of water quality and aquatic ecosystems. The FAC consider that the issue of water quality was addressed in the assessment of the project and that the DAFM has not erred in its processing of the application as it relates to the protection of water quality.

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 CN90982. The FAC is therefore allowing the appeal and setting aside the decision of the Minister regarding licence CN90982

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee