



10th July 2023

Subject: Appeal FAC101/2022 against licence decision CN81866

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 FAC101/2022 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, Ms. Ciara Murphy

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 CN81866. The reasons for this decision are set out hereunder.

Background

The licence decision relates to the afforestation of 5.05 hectares at Ballyglass, Co. Roscommon. The site is divided into four plots with one plot to remain unplanted and three plots to be planted with a mixture of Sitka spruce and broadleaves. Site preparation would be through mounding with slit planting and without additional drainage and the spreading of 250 kg per ha of granulated rock phosphate. Weed control would include manual methods and herbicide at ground preparation stage. The proposal includes 780 metres of sheep fencing. The application was subject to desk and field inspection.

The application included a biomap showing the outline of the site and plots and a number of features. The site extends to the public road and access is marked with the plot adjoining the public road remaining unplanted. The map refers to 3 metre unplanted "access tracks" on 600 metres of the site.

As the parties were notified, the Forestry Appeals Committee FAC reviewed the documents provided on the DAFM's Forestry Licence Viewer (FLV). The file includes a copy of a site notice and a site notice is marked on the biomap. A separate fencing map was also submitted.

There were two submissions on the application, both objections. A submission raised concerns in relation to the impact on property values, vermin and mental health. A second submission raised concerns regarding a right of way on the land and access to lands adjoining the site.

The DAFM wrote to the applicant seeking documentation in relation to the ownership of the lands and the extent of a right of way claimed on the lands.

The applicant's forester provided a response on 20th February 2019 submitting that an area in plot 841 was included by mistake and had been excluded. In relation to the right of way they submitted that the right of way was 12ft 6" wide and that it would be fenced off by the applicant at the time of fencing. They also submitted that the right of way would be marked out by an engineer hired by the applicant. The submission included maps with a right of way marked and the area of plot 841 excluded.

The application was referred to Roscommon County Council which provided a response that described the lands in relation to the water catchment and water body and described the risk category as at Risk. They also referred to conditions that might be attached to the licence and submitted that existing internal drains were not marked on the application maps. The DAFM sought an amended map showing a watercourse that crossed one of the plots and this was provided.

The file includes an Appropriate Assessment Screening Report prepared by an Ecologist on 9th June 2022. The screening describes a site visit by a Forest Service Ecologist that noted the presence of drains on site and their connection to an aquatic zone that links to Lough Ree SAC and Lough Ree SPA.

The screening considers 10 European sites in detail and screens in Lough Ree SAC and Lough Ree SPA to proceed to Appropriate Assessment. An Appropriate Assessment Report and an Appropriate Assessment Determination (AAD) were prepared that outlined the qualifying interests and conservation objectives of the two sites and considered potential significant effects on each of the interests of the sites. A series of measures related to water quality are specified that include avoidance measures such as setbacks.

A second screening document is on file in which all sites are screened out.

The AAD, dated the 21st July 2022, concludes

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The proposal was considered across a range of criteria, and it was concluded that the application did not need to be subject to the EIA process.

The application was approved on 28th July 2022 subject to conditions including adherence with the AAD.

Appeal

There is one third party appeal against the granting of the licence and the full grounds of appeal have been provided to all parties. In summary, the grounds contend that the Appellant enjoys a right of way over the land to adjoining lands from which they harvest turf. The grounds seek the preservation and maintenance of the right of way during forestry operations in the context of the licence approval. The Notice of Appeal included a map and a signed declaration that refers to a right of way.

Minister's statement

The DAFM provided a response to the appeal in which the processing of the application was outlined. The DAFM submission refers to a letter of 20/02/2019 and that the right of way will be left unplanted and an engineer will assess the definitive route and the right of way will be fenced off.

The Notice of Appeal and Statement from the DAFM were provided to the parties.

Considerations of the FAC

The FAC considers that the determination of a right of way would be a civil matter and does not fall within its remit. However, the Minister has a number of obligations in considering an application for an afforestation licence. This includes having regard to submissions made by the public. In this case the Appellant had made a submission in relation to a right of way claimed across the land. The Applicant had noted in their application, tracks that cross the land and would be left unplanted. The DAFM sought further information from the Applicant in relation to the right of way and the Applicant undertook to leave the right of way unplanted and fenced and to engage the services of an engineer to establish the exact route. The FAC considers that the provision of such undertakings as part of an application for consent would form an inherent part of the licence if issued. The licence confirms this in stating that,

The afforestation project must be carried out and completed in accordance with plans and particulars lodged with the application, as amended by any further plans and particulars submitted at the request of the Department, (see Appendix A), except as may otherwise be required to comply with the conditions set out in this section.

The FAC is satisfied that the concerns of the Appellant were addressed in making the decision and that the right of way will be retained unplanted as a requirement of the licence. The FAC is not satisfied that an error occurred in the making of the decision in relation to the grounds of appeal.

In considering the appeal and having regard to the record of the decision, the FAC noted the screenings undertaken and recorded in relation to the requirements of the EU Habitats and EIA Directives. The file includes a number of documents that relate to a screening and Appropriate Assessment undertaken to assess possible significant effects on European sites. The screening documents include the following text,

It is concluded that there is no likelihood of the proposed afforestation project CN81866 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. For this reason, the FAC considers that the screening should be undertaken again.

An Appropriate Assessment was undertaken in relation to effects on Lough Ree SAC and SPA. In the documents each of the qualifying interests of the European sites are considered in turn, possible effects are identified, and mitigation measures are specified. However, in relation to Natural eutrophic lakes with *Magnopotamion* or *Hydrocharition* - type vegetation [3150] in the SAC, the AA report records contradictory information in relation to the potential for adverse effects to occur and the requirement for mitigation measures. The FAC considers this to be a serious error as it is unclear whether the assessment considers effects might arise, the nature of those effects and the need and effectiveness of mitigation measures.

The record also includes a document entitled Assessment for EIA Requirement. 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 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.

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 maps showing environmental features on and surrounding the lands. Further maps were provided that outlined in more detail the right of way on 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.

The screening document relies on guidelines that have been replaced by the Environmental Requirements for Afforestation (DAFM) according to that document. Neither were these guidelines attached as conditions of the licence. The reliance on these documents constitutes a serious error.

In addition, while the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the EIA 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 EIA Determination and the consideration of likely significant effects on the environment.

The FAC also noted that the record includes the following responses,

Is the site within an area of high nutrient sensitivity? S/A

The FAC considers that it is for the Minister to undertake the screening and that information provided by the Applicant can be relied on for this purpose. However, there is no indication as to where this matter was self-assessed by the Applicant and no explanation or further reasons provided on the record.

Were comments from the Local Authority received and examined? No

The Local Authority did make a specific submission on the application following referral and requested that certain matters be addressed in relation to application information and licence conditions. These appear to have been considered as part of the application as further information was sought from the Applicant and specific water protection measures are attached to the licence. In this regard this error is likely of a clerical nature but should be addressed in undertaking a new screening.

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 CN81866 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to 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