



30th May 2023

Subject: Appeals FAC 183/2022 & FAC 184/2022 relating to Licence CN85139

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 Statements of Fact (SoF) provided by the DAFM, all materials on file, the notice and grounds of appeal and submissions and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN85139.

THE LICENCE.

Licence CN85139 is for 17.24Ha of afforestation the townland of Gortinessy, Co. Donegal.

The application for the licence was submitted to the DAFM on the 28th of November 2019. A decision approving the licence was issued on the 17th of November 2022 with conditions including compliance with DAFM Technical Standards, an 80 m setback and 2 rows of additional broadleaves to apply to the dwelling adjoining Plot 2. The additional broadleaves to consist of Rowan/Birch & Pedunculate oak and adherence to the ecology conditions set out in attached Appropriate Assessment Determination & Ecology Report dated the 9th of November 2022.

FORESTRY APPEALS COMMITTEE.

A hearing was held remotely at a sitting of the FAC held on the 4th of May 2023 which considered the appeals and the processing of the licence as it relates to the decision to issue the licence on the 17th of November 2022

The FAC members present were: Mr. John Evans (Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy.

BACKGROUND.

The proposal consists of 17.24Ha of afforestation in 7 Plot, Plots 1 and 2 are GPC3 with Sitka spruce and Additional Broadleaves, Plots 5, 6 and 7 are GPC 9 Native Woodland Establishment with Sessile oak and Additional Broadleaves and Plots 3 and 4 are Bioplots.

The site is located townland of Gortinessy, Co. Donegal approximately 2.3km north-east of the village of Pettigoe, Co. Fermanagh. The site is accessed via local roads off the R233 Pettigoe – Lough Derg Regional Road. The southern boundary of the site is the Termon River, and the eastern site boundary is a public road. The land use in the area is agriculture and there are a number of residences in the area with two adjoining the proposed afforestation. The site description given is that the soils in the southern area of the site are mostly cutover peats and that the soils in the northern area of the site are surface water gleys and groundwater gleys (deep, poorly drained material). The slope in the southern area is flat with the northern area having steep slopes of 18% with an easterly aspect. Vegetation is mainly semi-improved grassland, and some hedgerows exist along some field edges and there is a depositing lowland watercourse on the site.

This licence was the subject of a previous non-oral hearing of the FAC held on the 5th of July 2021 for appeals FAC 842/2020, FAC 843/2020 and FAC 844/2020. The licence was set aside and remitted to the Minister to reassess the potential for the proposed development to have an impact on the Termon River WFD waterbody, having regard to the 'Hyland' High Court judgment.

In the interest of clarity and for the avoidance of doubt the sitting of the FAC on the 4th of May 2023 considered appeals FAC 183/2022 and FAC 184/2022 only and took no account of the previous appeals save where specifically raised in the grounds of the current appeals.

The application documents before the FAC included a Bio Diversity/Operational Map (as revised), a species map a Location Map, a copy of the Site Notice, a Fencing map, and a Natura Impact Statement (NIS) dated the 8th of June 2020 submitted by the applicant.

The DAFM referred the licence to Inland Fisheries Ireland (IFI) on the 12th of December 2019 which replied on the 12th of December 2019 indicating that the proposed afforestation should adhere to the Environmental Requirements for Afforestation (ERA) and seven conditions related to the protection of water quality.

On the DAFM file there is an Inspector's Certification Report dated the 11th of November 2022; an Inspector's Assessment to Determine EIA Requirement dated the 11th of November 2022; an Appropriate Assessment Screening and Determination (AASD) dated the 5th of October 2020 prepared behalf of the DAFM, an Appropriate Assessment Determination (AAD) dated the 6th of October 2020; an ecology report, a second AASD and second AAD (including an In-combination Statement) all dated the 9th of November 2022.

The Inspector's Certification Report recommends approval of the licence subject to three conditions; 1. the carrying out and completion of the afforestation in accordance with the measures set out in the ERA and the Forestry Standards Manual (FSM), 2. an 80 m setback and 2 rows of additional broadleaves to apply to the dwelling adjoining Plot 2. The additional broadleaves to consist of Rowan/Birch & Pedunculate oak and 3. adherence to the ecology conditions set out in attached Appropriate Assessment Determination & Ecology Report dated the 9th of November 2022. These conditions were attached to the licence.

The Inspector's Assessment to Determine EIA Requirement concluded that the proposed afforestation is not required to undergo EIA.

The licence was subject of both a Desk and Field Inspection. The Field Inspection took place on the 10th of October 2021.

The file records that there were sixteen third-party submissions on the licence.

THE APPEAL.

There are two third-party appeals against the decision to approve this licence application. Both appeals have the same grounds which are summarised as follows:

Appropriate Assessment (AA).

- That no AA has been carried out.

Appropriate Assessment Screening Report & Determination (AASD) & Appropriate Assessment Determination (AAD).

- That there are no site-specific conservation objectives therefore findings of no adverse effect cannot be made.
- That Lough Nageage SAC should not be screened out.
- There is no evidence to support the findings of White-clawed Crayfish mobility.
- That the River Finn SAC is connected to Termon River and should have been screened in.
- There is no assessment of the impact on otters or bats.

Climate Change.

- That draining this wet site will lead to emissions.

Applicant's Ecology Report.

- That there is species rich semi-natural grassland on adjacent lands in Fermanagh.

In-Combination Assessment.

- That forestry in the Northern Ireland part of Termon sub-basin is not included in the list of projects.

Environmental Impact Assessment (EIA)

- That the "No" response to forestry being an issue locally is not sustainable in the light of the number of submissions made previously.
- That the screening out of EIA is not adequately reasoned as the DI answered "Yes" to a number of questions and that the application was referred to the Forest Service ecologist.
- There is no reference to the water quality status of Sessiaghkeelta_10 which is At Risk with forestry as a pressure.

CONSIDERATION BY THE FAC.

The FAC, at the sitting of the FAC on the 4th of May2023, had before it the full DAFM record of the decision, the notice, and grounds of appeal, the SoFs provided by the DAFM and all materials on file.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal, dated the 27th of February 2023 confirms the administrative details of the licence application, and indicates that the licence application was desk assessed and field assessed. 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 includes information on the administration of this particular licence application in response to issues raised in the appeals.

There is also a statement dated the 21st of December 2022 from the District Forestry Inspector (DI) confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contains a response to the ground of appeal that the amount and type of forest cover in the locality is known to be a significant issue by virtue of the number of submissions made on the licence application. The response refers to the amount of forest

cover in the townland as being 16% and in the underlying waterbody as 19% which the inspector does not consider to be significant. The response refers to the other grounds of appeal as having been addressed by the DAFM ecologist (Ecologist's Response to the appeal dated the 19th of December 2022).

GROUND OF APPEAL

Appropriate Assessment.

This ground of appeal contends that there is no appropriate assessment on file for this project. The FAC understands that Appropriate Assessment is a process to evaluate whether a plan or project not directly connected with or necessary to the management of a Natura 2000 site(s) is likely to have a significant effect upon those site(s) and that process is carried out in four stages. Only Stage 1 and 2 are relevant to this appeal. Stage 1, Screening for Appropriate Assessment: Screening is the process that addresses and records the reasoning and conclusions in relation to the first two tests of Article 6(3) of the Habitats Directive: i) whether a plan or project is directly connected to or necessary for the management of the site, and ii) whether a plan or project, alone or in combination with other plans and projects, is likely to have significant effects on a Natura 2000 site in view of its conservation objectives. If the effects are deemed to be significant, potentially significant, or uncertain, or if the screening process becomes overly complicated, then the process must proceed to Stage 2, Appropriate Assessment: This stage considers whether the plan or project, alone or in combination with other projects or plans, will have adverse effects on the integrity of a Natura 2000 site, and includes any mitigation measures necessary to avoid, reduce or offset negative effects. The proponent of the plan or project will be required to submit a Natura Impact Statement, ie. the report of a targeted professional scientific examination of the plan or project and the relevant Natura 2000 sites, to identify and characterise any possible implications for the site in view of the site's conservation objectives, taking account of in combination effects. This should provide information to enable the competent authority to carry out the appropriate assessment.

The FAC noted that prior to making this current decision on this licence; the DAFM had before it an NIS prepared by the applicant; that a DAFM ecologist inspected the site on the 25th of October 2022 and prepared an Ecology Report on the proposal; that the DAFM (as the competent authority) considered that it had sufficient information to carry its second Appropriate Assessment Screening Report & Determination (AASD) which determined that AA Stage 2 was not required and, on that basis made a second Appropriate Assessment Determination AAD which determined, based on objective information, that no reasonable scientific doubt remained as to the absence of any adverse effect on the integrity of any European site. The FAC is satisfied that an AA was carried out, that the required documents are on file and that the DAFM did not err in this aspect of processing the licence application.

Appropriate Assessment Screening Report & Determination (AASD) & Appropriate Assessment Determination (AAD).

The appellants contend that the AAD contains mitigations, but that they are not specific to any Natura 2000 site since no site has been screened in for AA, that the mitigation measures are generic and not based on an AA of the impacts of the project on a particular site. The FAC noted the response of the DAFM ecologist to the grounds of appeal dated the 19th of December 2022 and that the AAD indicated that *"No mitigation is required to protect the conservation objectives of the European sites within the zone of influence. However, the mitigation identified in the NIS and detailed below will ensure protection of the local environment including water quality."* The FAC further noted that the *"mitigations"* in the NIS are standard general forestry conditions contained in the ERA.

The appellants state that in the absence of site-specific conservation objectives it is not possible for the Minister to make a determination that there will be no adverse effect on the conservation objectives of Natura Sites. The FAC noted the response of the DAFM ecologist to the grounds of appeal that the NPWS have updated most, if not all of their documents, including the European sites within the Zone of Influence of the proposed application.

The appellants contend that Lough Nageage SAC (Site Code 002135) should not have been screened out of AA because a hydrological connection exists with the site of the proposed afforestation and it has not been established that the afforestation would not have an effect on the White-clawed Crayfish, the Qualifying Interest (QI) of that SAC. The FAC noted that the that the proposed afforestation is located downstream of Lough Nageage SAC and the response of the DAFM ecologist to the grounds of appeal that if deleterious material were to enter the Termon River (the hydrological connector) from the proposed afforestation it is impossible for it to move against the direction flow of the water from the SAC to reach the same SAC 9km upstream.

The appellants contend that the ecology report provides no substantiating evidence as to what 'relatively stationary' means with reference to the White-clawed Crayfish or why an impact on the downstream population cannot have an impact on the Lough Nageage SAC population. The FAC noted the response of the DAFM ecologist to the grounds of appeal and both his own experience and the reference to the studies by Robinson, C.A et al. (2000), particularly the daily movements observed for male and female, White-clawed Crayfish.

The appellants contend that the River Finn SAC is connected to Termon River and should have been screened in for AA and that the afforestation is sufficiently proximate to the River Finn SAC to be within the range of Otter. The FAC noted the response of the DAFM ecologist to the grounds of appeal that the project site and the River Finn SAC are located in different WFD catchments so that there is no hydrological connection between the sites, furthermore the sites are 4.2km apart and are separated by an afforested hillside. The FAC also noted that the site had been inspected by two different and independent ecologists who did not find any evidence of otter on the site.

The appellants contend that the draining of this wet site to accommodate the forestry site will lead to emissions and is not consistent with Ireland's Climate Action Plan. The FAC noted the response of the DAFM ecologist to the grounds of appeal that the peat soils are located within the southern portion of the proposed application, where, due to the large network of hydrological features this portion of the site will largely consist of unplanted water setbacks. Native broadleaves will be pit planted outside the setback of these features without drainage and will be set-aside for wildlife habitat and aquatic protection (as stipulated in the NIS). These trees will also sequester carbon.

The appellants contend that the adjacent land on the Fermanagh side of the Termon River forms part of the Drumlongfield 1320 Sensitive semi-natural grassland area and that the adjacent area in Fermanagh is marked as part of a Marsh Fritillary Larval webzone. The FAC noted the response of the DAFM ecologist to the grounds of appeal that the site of the proposed afforestation is c.350m distant from the Drumlongfield 1320 semi-natural grassland area and that they are separated by several treelines, this, taken together with the aquatic setbacks and broadleaved planting in the south of the application area means there will be no significant effect on the Drumlongfield 1320 grassland habitat as a result of the afforestation. The FAC further noted that none of the three ecologists who inspected the site identified the presence of the Devil's-bit Scabious plant.

On the basis of the FAC's observations on the grounds of appeal and the record of the decision as set out above, the FAC find that DAFM made no general error in relation to Appropriate Assessment and the related grounds of appeal when processing the licence application. Those grounds of appeal

relating to in-combination assessment and the conduct of that assessment are considered separately as set out below.

In-Combination Assessment.

The appellants contend that the in-combination report does not include any projects in Northern Ireland and that the Minister cannot make a valid determination regarding the in-combination effects of this project if projects from Northern Ireland have been excluded in the assessment. The FAC noted that the Termon River (Pettigoe) WFD River Sub Basin to which the In-combination Assessment refers is partly located in Northern Ireland and that the response of the DAFM ecologist to the grounds of appeal relies on the AAD conclusion that:

“It is concluded that there is no likelihood of the proposed afforestation project CN85139 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.”

The FAC understands 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 determination 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.

The FAC further noted that the DAFM, subsequent to the appeal, carried out a review of the Northern Ireland planning portal and did not identify any developments which could have a “significant cumulative impact”. The FAC considers that having referred to the site as being partially within the Termon River (Pettigoe) WFD River Sub Basin which is itself partially located in Northern Ireland the In-combination Assessment is incomplete as it did not examine those projects in Northern Ireland which have the potential to result in a significant effect on a European site and that the examination of plans and projects in Northern Ireland occurred after the In-combination Assessment on file had been carried out and as such represents a serious error in the processing of the licence.

The FAC therefore considers that the determination should be undertaken again to consider whether the project in-combination with other plans and projects has the potential to result in a significant effect on a European site.

Environmental Impact Assessment (EIA)

The appellants contend that the “No” response to forestry being a local issue is not sustainable in the light of the number of submissions made on the licence previously. The question in the Assessment to Determine EIA Requirement in the section “Cumulative effect and extent of project” is “Is the amount and type of forest cover in this locality known to be a significant issue? If so tick yes and describe in the Inspectors comments box below.” The Sof indicates that the DI’s response was given with reference to the amount of forest cover in the townland as being 16% and in the

underlying waterbody as 19% which the inspector does not consider to be significant. The appellant refers to the number of submissions as indicating the proposal is a significant issue in the locality.

The FAC considers that there is a difference of interpretation of the question between the appellant and the DI and that interpretation of questions is outside the remit of the FAC. However, the FAC noted that the Assessment to Determine EIA Requirement provides an opportunity for the Inspector to make comments and that the use of this would aid the public's understanding of the EIA assessment carried out by the DAFM.

The appellants contend that the "Yes" response to three questions - *Is the site within an area designated as sensitive to fisheries? Is the proposed application within 3km upstream of the border with Northern Ireland? Is the proposed application within 500m of the border with Northern Ireland?* and the fact that the DI referred the licence to the Forest Service Ecologist means the DI has not adequately reasoned the screening out from EIA. The FAC noted that the responses to the three questions were binary and a matter of fact and would not of themselves generate an environmental impact and that the question on whether the proposed planting is likely to have a significant trans-frontier impact is answered "No". The FAC noted that IFI in its report did not identify the proposal as having an impact on fisheries. The FAC further noted that EIA and AA are separate processes neither dependent on the other and that the FS ecologist was concerned solely with AA.

The FAC considers that the DAFM did not err in this aspect of processing the licence application.

Water Framework Directive.

The appellants contend that there is no evidence that the reason for the previous remittal has been addressed and that there is no reference to the water quality status of the Sessiaghkeelta_10 waterbody which is At Risk with forestry as a pressure.

The FAC noted that, on the publicly available EPA website the site is in the WFD Catchment Erne 36 and the Billary_SC_010 sub-catchment where forestry is not identified as a pressure. The site lies in two River Sub-Basins, Termon River (Pettigoe) and Sessiaghkeelta_010. The River water body Termon River (Pettigoe) adjoins the site, which the EPA website states was of Moderate Status in the period 2013-2018 and is At Risk in the 3rd cycle, and forestry is not identified as a pressure on this river waterbody. The underlying Groundwater body is Pettigoe IEGBNI_NW_G_009 which was of Good Status in the period 2013-2018 and is Not at Risk in the 3rd cycle.

The FAC further noted that the AASD of the 9th of November 2022 addresses the status of this river waterbody as required by the reason for remittal.

The FAC noted that the river waterbody Sessiaghkeelta_010 located some 190m west of site was of Good Status in the period 2013-2018 and is to be reviewed in the 3rd cycle and that forestry is recognised as a pressure on this river waterbody.

The FAC noted the conditions of the licence requiring compliance with the ecology conditions set out in the AAD & Ecology Report of the 9th of November 2022 and the DAFM Environmental Requirements for Afforestation and the Forestry Standards Manual and is not satisfied that the DAFM made an error in its consideration of the application for a licence in respect of the protection of surface water quality.

INCONSISTENCY IN THE FIGURES OF THE % OF FOREST COVER IN THE AREA.

The FAC noted that the figures given to the questions in the Assessment to Determine Environmental Impact Assessment (EIA) Requirement *"What is the approximate % of forest cover at*

present within 5 km?" is 20.89% and *"What is the approximate % of forest cover currently in the underlying waterbody (or waterbodies)?"* is 19.28%. The FAC noted that these figures are inconsistent with the figure given in the In-combination Statement of approximately 30% for River Sub-Basin Sessiaghkeelta_010 and 16% for River Sub-Basin Termon River (Pettigoe) in both of which the proposed afforestation is located. The FAC concluded that, in the absence of a documented reconciliation of the apparent differences in the forest cover percentages as recorded in the Assessment to Determine EIA Requirement and the In-Combination report, the DAFM made a serious error in the processing of the application in this case as it related to the EIA Directive.

CUMULATIVE EFFECT.

In reviewing the Assessment to Determine EIA Requirement the FAC noted that questions that relate to cumulative effect only refer to forestry projects and do not consider other types of projects. The FAC also noted that a separate process was carried out for AA which includes an in-combination assessment of other plans and projects which includes a range of other plans and projects in addition to forestry projects. This in-combination assessment was carried out on the 21st of July 2022. The FAC consider that while 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 AA In-combination report.

TRANS-BOUNDARY CONSULTATION.

The FAC noted that the southern boundary of the site is formed by the Termon River which forms the border with Northern Ireland. The FAC understands that the DAFM has no formal position with regard to consultation with the relevant authorities in Northern Ireland. However, in light of the fact that the proposed afforestation immediately adjoins the border, the FAC considers that, notwithstanding the consideration of Natura 2000 sites in the AAD, the failure to consult with the relevant authorities in Northern Ireland is a serious error in the processing of the licence application.

CONCLUSION.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the SoFs submitted by the DAFM. In accordance with Section 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 regarding licence CN83176. The FAC is thus, setting aside the decision of the Minister and remitting it to require the DAFM to; carry out of a new Appropriate Assessment of the project to include an In-combination assessment that takes into consideration whether the 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; carry out of a new Assessment to Determine Environmental Impact Assessment (EIA) Requirement to reconcile the differences in the forest cover percentages as recorded in the Assessment to Determine EIA Requirement and that recorded in the In-Combination report; consult with the relevant authorities in Northern Ireland on the proposed afforestation, before the making of a new decision.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee