



9th June 2023.

Subject: Appeal FAC 126/2022 regarding CN90557

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 126/2022 was held remotely by the FAC on 18th May 2023.

In attendance

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.

Secretary to the FAC: Ms. Vanessa Healy

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 set aside and remit the decision of the Minister regarding licence CN90557.

Background

An afforestation licence (CN90557) at Stralongford, County Leitrim was issued by the DAFM on 25th August 2022. The licence decision pertains to the afforestation of an approved area of 4.34 hectares and fencing with a length of 1,310 metres comprising GPC 10 planting over two plots. The site is accessed via an onsite track 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 no fertiliser is proposed. The soil type is described in the documentation as mineral predominantly podzols in nature and slope is considered flat to moderate. Vegetation is Grass, Grass Rush, Bracken/Briar, Scrub/Laurel/Rhodo.

The application submitted included general mapping, fencing map, and biodiversity map marked as uploaded on the FLV on the 04/05/2022. Further information was submitted relating to the site notice which was marked as uploaded on the FLV on the 15/07/2022.

The site is shown to be located within the River Sub-Basin Yellow (Ballinamore_010) waterbody. Mapping data indicates the status of the Yellow (Ballinamore_010) as being good and is indicated as not being at risk. The Sub catchment Assessment of WFD Cycle 2 Catchment Erne Sub catchment Yellow (Ballinamore)_SC_010 report indicates significant pressure with forestry identified as a pressure.

DAFM Assessment

The application was subject to desk and field assessment by the DAFM.

The DAFM assessment included an Inspector Certification pre-approval report. In relation to Appropriate Assessment (AA) Screening one Natura 2000 site was identified, Cuilcagh-Anierin Uplands SAC 000584 and was screened out as the project area is downstream from the Natura site, and the lack of any hydrological connection. An Assessment to Determine need for Environmental Impact Assessment (EIA) Requirement is on file, which determined that EIA was not required. The Inspector's Certification Report recommended approval with conditions which provided for exclusion areas.

An In-Combination Statement was completed on the: 23/08/2022 by the DAFM. The Statement concluded that *"there is no likelihood of the proposed Afforestation project CN90557 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)".*

A number of submissions were made by other parties. Leitrim County Council (LCC) who in a response indicated the land is located within an Area of High Visual Amenity and is designated Low Capacity/High Sensitivity for forestry. The response referred to Section 4.7.3 of the County Development Plan which states the following in relation to areas of Low Capacity: *'These include the County's Mountain and moorland landscapes and steep slopes above and around 300m AOD. These are characteristically open landscapes. New woodlands are highly visible and seldom in keeping with moorlands character. New afforestation in these areas will be strongly discouraged and where possible the existing area under forestry will be reduced. However, as noted above, the subject 'planting' lands are located within an area which is deemed to be low capacity in terms of absorbing afforestation as identified in the County Development Plan 2015-2021. Leitrim County Council therefore objects to the afforestation of these lands.'* The District Engineer advised that there is no objection to the proposal subject to a number of conditions.

An Taisce who in a response refers to the presence of the Otter (1700m) and Badger (500m) species in the area and makes recommendations for protection of the species.

A number of third party submissions received objected to the proposal

The decision to grant the licence issued on the 25th August 2022 subject to conditions which included conditions that all existing trees and hedgerows within the site shall be retained; that due consideration must be given to the Tullylacken Looped Walk during operations, and that all associated operations must ensure that the Tullylacken Looped Walk is protected with consideration given to users and their safety. The licence also required that an unplanted forest road / walking trail setback of a minimum width of 5 metres shall be installed at planting stage; that a setback with a minimum width of 20 metres from the nearest waters' edge shall be installed alongside the river located on the eastern boundary; that a setback with a minimum width of 5 metres shall be installed on one side (if on the outer perimeter) or both sides (if traversing the site) of the relevant watercourse[s]; that existing scrub habitat located ITM 607514, 817172 shall be retained, that a setback with a minimum width of 3 metres shall be installed around scrub area, that no new drainage to be installed in plots 1 & 2 and that planting shall be pit or scrap mounding only.

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 a breach of due process referring specifically to the untimely publication of the decision as the licence was issued on the 25th August 2022 and the public were informed on the 26th August 2022 and reference is made to Aarhus Convention in this regard.

The grounds contend 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.

The grounds contend that no EIA screening information was made available to the public and also that no AA information was made available to the public.

The grounds submit that false information was submitted with the application in particular in relation to the issue of ownership and that the applicant is not the owner of the site. The issue of access is raised as it is stated that it is across private land with no agreement in place to cross the land.

The grounds contend that conditions are difficult for lay persons to understand as circulars and standards are updated and there is an absence of consolidation. It is also contended that irrelevant conditions, specifically in relation to roads, are stated and the reasoning of conditions is unclear. In this regard reference is made to what trees and shrubs are to be retained and that there is no indication of how the landscape is to be protected.

The grounds contend that the proposal is inconsistent with Leitrim County Development Plan and contends that issues raised in the LCC submission are not addressed.

The grounds contend that the EIA Screening is flawed and also that the cumulative impact assessment is flawed.

The grounds contend that there is inadequate ecological and environmental assessment. In this regard reference is made to High Nature Value (HNVs).

Reference is made to inadequate setback from hedgerows, that landscape impact is not adequately assessed and that there is no reasoning indicated in relation to impacts even though the high level of forestry in the area is recognised. Reference is also made that Landscape Character Assessment is a significant part of EIA.

Reference is made in the grounds to the protection of species under Article 12 of the Habitats Directive and the EIA screening does not provide for the screening of species. Reference is also made to the site as within 1.2 km buffer zone of a successful Hen Harrier breeding site.

The grounds refer to the issue of water quality and measures to ensure good quality and queries what evidence is presented to support this. Reference is also made to proximity to a source of public water supply.

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

An oral hearing was requested.

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 and addresses the grounds of appeal. It indicates that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act. It also refers to the issue of the applicant and authorisation procedures, in relation to the applicant, when making an application. In relation to untimely publication of decision the SOF states that standard practice was followed and that the documents were uploaded on the FLV and allowed two weeks for an appeal. The parties, it states, were notified on the date of decision of the licence.

The SOF response indicates that adequate access is available; that the conditions are clear and well-reasoned; that the site is not within or adjoining a Natura site and is downstream of a Natura site and that there is no pathway from the appeal site to the Natura site. It is also contended that the site has undergone AA, that AA screening procedures were adhered to and Natura sites assessed. The site was also field inspected as part of this assessment.

In relation to visual impact, it points out that the site is small in scale, is not in an open area and not visible. It submits that EIA screening procedures were adhered to and that the site is not in a red zone in relation to the Hen Harrier species.

It is also indicated that DAFM are aware of issues in relation to water supply and specific conditions and water setbacks address this. Tullylacken Looped Walk is, the SOF states, specifically addressed in the conditions of the licence.

Applicant response to appeal

The applicant in a response indicates that it is correct to state that the applicant is not the owner and has never been the owner of the lands. It states that this is not disputed and was a clerical error that this was stated. It submits that it was not the case that the application was made without the consent nor knowledge of the landowner. It is contended that this is a minor feature of the application and has no influence on the suitability or assessment of the site for Native Woodland afforestation as proposed and that this would not be a substantive reason to overturn a legitimate approval decision.

In relation to access it is submitted that there is well established law, which has been codified by the Land & Conveyancing Law Reform Act 2021, that Prescriptive easements over land (such as rights of way) are rights that come about informally through long and established use as of right and that there is currently pending in the Property Registration Authority an application to formally register such a Prescriptive Right of Way (PROW) against the private lands. The Site Notice, it points out, was installed in the location indicated on the Bio map submitted, as it was the correct place for it to be installed as per the guidelines on installation of Site Notices in the Forestry Regulations.

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 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 4.34 hectares. This project being the afforestation of 4.34 hectares is substantially below the 50 hectares threshold.

An Assessment to Determine EIA Requirement was carried out and assessed the application over a range of criteria which determined that EIA was not required and that screening for significant effects under the EIA Directive was not required in this case.

The FAC noted that the procedure as recorded provides for further commentary to be recorded and in this case no additional comment was provided. 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. The grounds of appeal question the DAFM criteria for cumulative impact. The appellant submitted a map to demonstrate Cumulative forestry around CN90557 and that based on forestry cover and the scale of increase in the townland and a 5 kilometre buffer area there is an absence of reasoning in the Assessment to Determine EIA to support the view that forestry is not a significant issue. 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., and in relation to water 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 however noted that while the Minister recorded a separate characterisation of plans and projects in the area in the In-combination Report carried out as part of the AA process and dated the 23rd August 2022, that this is not explicitly cross-referenced in the EIA Determination. The EIA Determination itself only refers to forestry projects and references a ‘Last Spatial Run Date’ of the 24th August 2022. While the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for considering that the proposal is not likely to have a significant effect on the environment might be found in separate documents, based on the foregoing it is not apparent if adequate consideration was given to cumulative effects (including non-forestry projects) when making the determination for EIA requirement. The FAC considers this to be an error in the processing of the application.

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 as identified by the DAFM, Cuilcagh-Anierin Uplands SAC 000584, using publicly-available EPA maps. The FAC considered the record and the reasons stated for screening out of this site. The FAC concluded that based on the information available to it, that the DAFM has not erred in its processing of the application as it relates Appropriate Assessment screening of the proposed project individually.

The FAC also 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 said In-Combination statement includes the passage;

“there is no likelihood of the proposed Afforestation project CN90557 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 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. 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. The FAC considered this to be a significant error in the processing of the application.

In relation to the matters raised in the grounds of appeal regarding due process and submitting an untimely publication of the decision and reference is made to Aarhus Convention in this regard. The FAC finds that the licence was issued on the 25th August 2022 and the public were informed on the 26th August 2022. The DAFM refer to standard practice in relation to notification noting that the appellant and all parties who made submissions received a copy of the decision and documents on the 25th August 2022. On the face of the record the decision was published and issued to parties on the same day. The DAFM in the response refer to parties having an adequate period of time in relation to making an appeal. Based on the information available to it the FAC does not consider that the DAFM has erred in its processing of the application as it related to these grounds of appeal.

In relation to the issue of visual impact the grounds of appeal refers to the submission from Leitrim County Council and the provisions of the County Development Plan (CDP). The FAC noted the submission of Leitrim County Council and the reference to section 4.7.3 of the CDP to the site’s location within an area of low capacity for forestry and that new afforestation in these areas will be strongly discouraged and where possible the existing area under forestry will be reduced. The CDP noted these areas include the County’s mountain and moorland landscapes and steep slopes above and around 300m AOD and that these are characteristically open landscapes and that new woodlands are highly visible and seldom in keeping with moorlands character. The submission also refers to the subject ‘planting’ lands are located within an area which is deemed to be low capacity in terms of absorbing

afforestation as identified in the County Development Plan 2015-2021 and Leitrim County Council therefore objects to the afforestation of these lands.

The appeal site is located within an area which has a high level of forestry rather than an open moorland, is below 300m AOD and a native woodland is proposed. As part of the EIA Determination Landscape is a matter considered and as already stated the high level of forestry in the area is recorded in the requirement for EIA Determination. It is noted that there is a positive response indicated in relation to whether the forest design submitted (and any additional design improvements recommended) are sufficient to prevent any significant impact on the landscape and that the design complies with the Forestry and the Landscape Guidelines. Based on the information available to it and having considered the submission from Leitrim County Council the FAC is not satisfied that the DAFM has erred in its assessment of this application being for a native woodland proposal in so far as it relates to this ground of appeal.

In relation to High Nature Value (HNV) which is referred to in the grounds of appeal the FAC noted that this ground of appeal was submitted with reference to EU Regulation No 807/2014 (supplementing EU Regulation 1305/2013) on support for rural development by the European Agricultural Fund for Rural Development. These regulations were repealed by EU Regulation 2021/2115 which governs the rules that apply to Union support financed by the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development. The FAC, as established under the Agriculture Appeals Act 2001, as amended, has no role in relation to the administration of grant-aid schemes and is confined to matters relating to the issuing of a licence.

In relation to the Water Framework Directive and effects on water quality generally the FAC viewed the information on the EPA and Irish Catchments websites and current mapping and data which confirmed information contained on the DAFM file that the project is within the River Sub-Basin Yellow (Ballinamore_010) waterbody. Mapping data indicates the status of the waterbody concerned as good and in terms of risk is indicated as not at risk. In relation to pressures forestry is identified as a pressure within the catchment. It is noted that in addition to standard conditions, condition no 5 of the licence set out specific requirements in relation to setbacks from watercourses for the protection of the environment specifying a minimum of 5 metres and in relation to one watercourse 20 metres. The FAC also noted the nature of the proposed planting (GPC10) and that ground preparation is mounding and that no fertiliser or herbicide use is proposed. The FAC noted that the issue of water quality, including protection of water supply, was addressed in the assessment of the project, that this is reflected in the licence conditions and that the development will not have adverse effects on receiving waters. The FAC concluded that the DAFM has not erred in its processing of the application in so far as this ground of appeal is concerned.

In relation to the grounds which refer to the protection of species under Article 12 of the Habitats Directive and the EIA screening does not provide for the screening of species. Reference is also made to the site as within 1.2 km buffer zone of a successful Hen Harrier breeding site. The FAC notes that the site is not within a Natura site and that it is not in a red zone in relation to the Hen Harrier species which

are regularly updated. The FAC does not consider that the DAFM has erred in its processing of the application in so far as this ground of appeal is concerned.

In relation to the issue of ownership raised in the appeal, the DAFM in the SOF response refers to the procedures in relation to authorisation by the owner of land to permit another party to make an application and the applicant in the response to the appeal noted a clerical error was made but that the application was not made without the consent nor knowledge of the landowner. The FAC notes the error which it considers, having regard to the circumstances, to be minor in nature in so far as the owner had consented to the submission of the application.

The FAC considered the grounds in the appeal regarding access and notes the submissions made by the appellant and applicant in relation to this issue. The FAC also notes that no specific objection is raised or submitted by an owner of the lands to the use of this right of way.

In relation to the grounds of appeal that conditions as stated are difficult for lay persons to understand as circulars and standards are updated and there is an absence of consolidation. The grounds are noted but the conditions do provide for an evolving situation where circulars and standards are updated and require a level of technical language and are applied using a precautionary principle.

The FAC considered the grounds of appeal to the inclusion of irrelevant condition specifically in relation to roads. The FAC considered that licence conditions which apparently refer to a forest road project should not have been included as part of an afforestation licence.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, the DAFM's SOF, and all submissions received. The FAC concluded that serious or significant errors were made in the making of the decision in respect of licence CN90557. The FAC is therefore setting aside and remitting the decision regarding licence CN90557 to the Minister to carry out an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and to undertake a new Assessment for EIA Requirement, before a new decision is made.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee