



26th June 2023

Subject: Appeal FAC164/2022 against licence decision CN91069

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 appeals. A hearing of appeal FAC164/2022 was held remotely by the FAC on 8th June 2023. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision, 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 CN91069. The reasons for this decision are set out hereunder.

Background

The licence decision relates to an afforestation application at Corderry, Co. Leitrim. The proposal was for the planting of 4.95 hectares with birch and was subsequently amended to mixed native broadleaf tree species comprised of pedunculate oak, birch, hazel, and other broadleaves. Invert mounding was proposed in relation to additional broadleaf species and ground preparation would be through woody weed removal followed by slit planting. No fertiliser or herbicides are proposed and weed control would be undertaken manually. The proposal included 1,049 metres of deer fencing.

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

The application included a biomap that included an outline of the site and marked a number of environmental features and the location of the site notice and access. The map marks a relevant watercourse crossing the lands in an east - west direction and the location of an existing crossing point. A ruined building, hedgerows and setbacks are also marked. Fencing and species maps were also submitted. The documents include a copy of the site notice.

The DAFM undertook a screening of the proposal for Appropriate Assessment and identified three European sites within 15km, Boleybrack Mountain SAC 002032, Cuilcagh - Anierin Uplands SAC 000584, and Lough Gill SAC 00197. Each site is considered in turn with its qualifying interests and are screened out and reasons are provided. These relate to an absence of pathways and the related habitats on the site. In addition, a consideration of the proposal across a series of criteria is also recorded and the DAFM concluded that the proposal was not required to be subject to the Environmental Impact Assessment process.

The application initially included birch and the DAFM wrote to the Applicant on 2nd September 2022 and stated,

"Inspector's Advice/Remarks: Consult with owner regarding species choice and Grant and Premium Category (GPC)"

The licence was approved on 13th October 2022 subject to conditions including conditions related to setbacks.

Appeal

There is one third party appeal against the decision and the Notice of Appeal and full grounds have been provided to the parties. In summary, the grounds contend that there was a delay in publishing the decision as the decision was issued on 13th October 2022 and not published on the Department's website until 14th October 2022 and that this is contrary to the Aarhus convention and manifestly unfair with reference to the period in which an appeal can be taken. The grounds contend that the maps submitted with the application were deficient. Specifically, it is submitted that the presence of hedgerows on the site cannot be determined without the time and date that the image was taken. It is submitted that the conditions require that all existing trees and hedgerows be retained but that existing trees have not been clearly recorded and that a cultural feature, a townland boundary, is not clearly identified on the application. The grounds continue with the contention that the application was legally deficient.

The grounds contend that the licence conditions are not understandable by the layperson. With reference to the Environmental Requirements for Afforestation and the Forestry Standards; it is submitted that these have been amended and that no consolidated version is available and the circulars

do not appear alongside the documents and that the condition cannot be understood by a layperson. The grounds contend that the licence conditions are not consistent with the reason for the condition and all existing trees have not been recorded.

The grounds contend that the determination of the EIA Screening is based on an inadequately reasoned assessment. The grounds provide a number of contentions and in particular claim that cumulative impacts, high nature value farmlands and protected species are not being assessed. The grounds contend that there is a record of Marsh Fritillary within the boundary of the project area.

It is further submitted that the appropriate assessment screening is flawed with reference to the dating of the in-combination report and the screening conclusion and the form that the screening took. The grounds refer to national policy and suggest that the site may be suitable for an emergent woodland scheme following ecological assessment.

Minister's statement

The DAFM provided a statement in response to the appeal and contested the grounds of appeal. It is submitted that the licence was processed and advertised following DAFM procedures and that there was no delay in publishing the decision. It is submitted that there was no requirement to contact the NPWS and that the mapping was appropriate for the DAFM to process and assess the application. The DAFM submit that the details of the lands were confirmed during a site inspection and that the biomap and application do not contain errors. It is submitted that no changes were requested by the DAFM but that clarification was sought and the applicant changed species to mixed native woodland which the DAFM did not consider to be a material change. It is submitted that while not expressly labelled the townland boundary is marked by a hedgerow that will be retained.

The DAFM contended that the licencing conditions are clear, well-reasoned and follow standard operating procedures and reflect standards of good forestry practice. It is submitted that the EIA assessment is correct and that there would be no cumulative negative impact. It is submitted that high nature value farmland is a national issue and that the maps generated by Teagasc were not intended to be used on a site-specific basis. It is submitted that the location identified in the appeal as a record for Marsh Fritillary is the centroid of a 10km grid square and that at inspection no suitable habitat for Marsh Fritillary was observed. The DAFM submit that the licence area to be on a small scale and unobtrusive and unlikely to have a negative impact on visual amenity. The DAFM contend that there was no chronological error on the appropriate assessment screening and that the screening was correct.

A separate response from a DAFM Ecologist was also submitted. This described the site and the general location in relation to specific ecological information. It is also submitted that application was not referred to the ecology unit prior to granting and responses in relation to the matters relevant to ecology are submitted. The submission describes the development of the Teagasc High Nature Value Farmland model and maps and the site visit by a DAFM Inspector. It is submitted that the site did not contain biodiverse habitats and showed no potential links to Annex habitats and that the habitats encountered at site inspection are widespread within the wider environment.

It is submitted that the granting of an afforestation licence does not exempt the holder from meeting any legal requirements of the Wildlife Acts 1976 which places obligations on the landowner. It is submitted that all hedgerows and treelines within the site shall be retained and there will be no loss of habitat or commuting corridors for protected species. It is submitted that the site will be afforested with native Irish species which will provide a habitat for species in the long term and with setbacks will provide a mosaic habitat. The Ecologist statement also submitted that the point referred to in the grounds is the centre point for a 10km grid square which happens to coincide with the site. It is submitted that Marsh Fritillary habitat is located to the east of the lands but that the proposal area does not contain suitable habitat.

Considerations of the FAC

In relation to the period in which an appeal might be made, this is stated to be 14 days in law and the FAC is precluded from considering an appeal received after this period. The application documentation and notification of the application were published on the DAFM website and on the DAFM's Forestry Licence Viewer prior to the decision being made. The FAC does not consider that the publishing of the final decision a day after it was made could be considered a significant delay. The Appellant was provided with the response from the Minister in relation to the appeal and was provided with the opportunity to provide a response. The FAC does not consider that the publishing of the decision a day after it was made could be considered a serious or significant error in the making of the decision.

In relation to the suggestion that the biomap provided was legally deficient, the appeal provides no evidence of hedgerows or trees not being mapped properly. Furthermore, the grounds of appeal provide no reason as to why the townland boundary is of significance in this case or how it would be impacted by the proposal. The townland boundary adjoins the boundary of the site and is comprised of hedgerow which will be retained and would remain outside of the proposed operations.

In relation to the licence conditions, the FAC considers that the requirement to comply with standards and guidelines of good practice is a normal and accepted type of licence condition in many sectors including forestry. As with many other sectors, a licence holder is required to abide by the conditions of the licence and a licence holder may engage the services of trained professionals to undertake the works that have been licenced. The boundary of the operations has been clearly identified in the application that was made. The FAC is satisfied that the term woody weed removal is readily understood, particularly by anyone working in a land-based sector. The lands in question are enclosed, agricultural lands and have been subject to agricultural management.

The FAC did note that there was a change in species composition from birch to mixed native broadleaf species. While this does constitute a change the FAC is satisfied that this was not material in any manner as the nature and footprint of the proposal remained the same and the change involved the planting of a number of species of native broadleaves as opposed to a single native broadleaf species.

A number of grounds relate to the screenings undertaken for Appropriate Assessment and Environmental Impact Assessment (EIA). The Appropriate Assessment Screening in considering other plans and projects in-combination with the proposal makes the following conclusion,

Furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects

It is concluded that there is no likelihood of the proposed Afforestation project CN91069 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.

The grounds provide no reasons as to how the proposal could result in a significant effect on a European site but does refer to a number of reasons provided in the screening conclusion. The grounds challenge the sentence,

“The position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection. “

The FAC considers that this may constitute an error as a hydrological connection may exist where a project is downstream but the significance of this would depend on the qualifying interests of the European site and the nature of the proposal and if and how effects might arise. In relation to the absence of habitats within and adjoining the site, the FAC notes that the project was site inspected and the DAFM addressed this matter in some detail in their statement. The actual distance from the proposal lands to a European site is a matter of fact and the grounds provide no basis by which it could be claimed that the proposal could result in a significant effect on a European site.

The grounds contend that there is a chronological error as the screening conclusion appears to have been made in relation to other plans and projects before the consideration of the proposal itself. The DAFM contend that this was not the case and that the consideration of the proposal itself was

completed before other plans and projects were considered in combination with the proposal. While the FAC considers that it might be reasonably concluded that the screening was undertaken in this order, the screening documents, or the relevant sections of the screening documents, do not appear to be dated to a sufficient degree that this could be determined.

The circumstances under which the FAC might undertake its own screenings or assessments and the decision-making powers of the FAC are described in the Agriculture Appeals Act 2001. The grounds refer to EU Regulation 1305/2013 which address the European Agricultural Fund for Rural Development. The FAC's remit is provided for in the Agriculture Appeal Act 2001 and does not extend to grant aid decisions.

In relation to the EIA screening undertaken, the grounds of appeal include a number of matters that relate to policy in general and not the decision under appeal and do not fall within the FAC's remit. The record 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. 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. In this instance no additional reports were submitted as part of the original application.

While the grounds contend that there was a number of issues with the maps submitted, as previously noted the FAC does not agree with the Appellant's contention that a serious error occurred in this regard.

In relation to protected species, the FAC considered the submission of the Appellant that there is data suggesting the presence of habitat for marsh fritillary (*Euphydryas aurinia*) on the proposal lands with reference to a data point on a biodiversity database. They do not provide any other evidence in relation to the proposal lands. As explained by the DAFM the data point identified in the grounds relates to the centre point of a 10km grid and is related to a submitted record in the general area within this 10km grid. The lands were site inspected and the DAFM recorded no suitable habitat on the lands. The FAC finds that the granting of the licence for the operations in this case does not exempt the holder from meeting any legal requirements set out under the Wildlife Act or any other statute. The FAC is not satisfied that an error was made in the making of the decision in relation to these grounds of appeal.

The screening document relies on guidelines, including in relation to landscape which are referenced in the appeal, 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.

The grounds question the spatial and temporal thresholds employed in the EIA screening with reference to the reference to those that refer to 3 years and 500 metres. However, as is recorded by the DAFM a number of temporal and spatial thresholds are employed in the screening process. Furthermore, the grounds provide no basis as to how the proposal could result in significant effects on the environment. However, 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 Determination.

The grounds submit that the lands are more appropriate to the Emergent Semi-Natural woodland scheme but the FAC's remit does not include grant aid and this was not the application on which the decision under appeal was made.

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 CN91069 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

