



17th May 2023.

Subject: Appeal FAC 143/2022 regarding CN86254

Dear

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 ("the Act"), 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 143/2022 was held remotely by the FAC on 16th February 2023.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson), Mr. Donal Maguire, Mr. Derek Daly and Mr. Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, the Statements of Fact (SoF) provided by the DAFM, 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 CN86254.

Background

An afforestation licence for 25.66 ha in two plots at Lackanoneen, Co. Kerry was issued by the DAFM on 19th September 2022. The licence decision pertains planting predominantly consisting of 20.31 ha of Sitka spruce with planting of Common alder (3.81 ha) and other broadleaf species (1.27 ha).

Documentation on file describes the predominant soil type underlining the project area as consisting of Acid Brown Earths, Brown Podzolics (5%), Surface water Gleys, Ground water Gleys (52%), Surface water Gleys (Shallow), Ground water Gleys (Shallow) (11%), Peaty Gleys (13%), Podzols (Peaty), Lithosols, Peats (7%), Mineral Alluvium (6%) and Blanket Peats (6%). The slope is described as being predominantly flat to moderate (<15%) with an average of 9% ranging from 3% to 17%. The project area is crossed by or adjoins an aquatic zone(s). The vegetation type(s) within the project area is described as predominantly improved agriculture grassland, and also includes hedgerows, treelines, drainage ditches and a

river/streams. Watercourses on site are an unnamed stream and a part of the Lackanoneen which rises on the site. The site is located in the Maine_020 and Owveg (Kerry)_010 river sub-basins, the Feale_SC_030 (1%) and the Maine_SC_010 (99%) sub-catchments, and the Laune-Maine-Dingle Bay [22] (99%) and the Tralee Bay-Feale [23] (1%).

Application documentation submitted includes: a fencing map, an initial biodiversity/operational map dated 16/03/2020, a site notice photograph showing a date of 14/04/2020, a further biodiversity/operations map dated 11/03/2021, a revised Fencing map dated 06/09/2022, a revised biodiversity maps dated 06/09/2022, an undated revised species map (uploaded to the FLV on 07/09/2022)

A request for further information issued from DAFM to the applicant on the 15/08/2022, requesting revised operational, fencing and biodiversity maps (which are included in the application documentation above).

Also on file are documents created by DAFM in the course of processing the licence. These include an Appropriate Assessment Screening Report with a date of 11/03/2021, an In-combination Report making reference to consultation of planning systems on the week of 28/05/2020, an Appropriate Assessment Screening Report and Determination dated 30/05/2022 including an appendix entitled Cumulative Effects and making reference to consultation of planning systems on the week of 27/05/2022, an Appropriate Assessment Report dated 30/05/2021 containing a section entitled Cumulative effects and also making reference to consultation of planning systems of 27/05/2022, an Appropriate Assessment Determination dated 14/07/2022, an Ecology Report dated 14/07/2022, a record of an Assessment for EIA requirement referencing a spatial run date of 15/09/2022, an Inspector's Certification Report with a certification date of 15/09/2022, a further Appropriate Assessment Screening Report with a date of 19/09/2022, a Site Details – Pre Approval report with a date of 19/09/2022, a Site Plots – Pre Approval report with a date 19/09/2022.

The file was referred to Kerry County Council and An Taisce on the 20/04/2020, and to the NPWS on the 04/06/2020. These are on file, and no response was received. The file was also referred to Inland Fisheries Ireland on the 04/06/2020, and a response was received on the 16/07/2020, both of which are on file.

Three submissions were made by members of the public and these are on file. These raise concerns in relation to access to the proposed site, possible impacts on the Glashearoon river, and the requirements of environmental law.

The licence which issued on the 19/11/2022 is on file, as are various notifications to parties on foot of the decision to grant the licence.

Ground of Appeal and Statement of Fact.

There is a single third party appeal to the decision to grant the licence.

The ground of appeal submits that the proposed access to the site passes over the Appellant's land, that the marked route from the location of the site notice to the project site is a private road, and that consent is not given for its use for the purposes of an afforestation project. The appellant submits a

number of documents in support of the ground of appeal including a document entitled “Afforestation – Proposed details”. This is not available on the FLV, though the information contained therein is reproduced in the Site Details–Pre Approval report and the Site Plots–Pre Approval report documents.

The DAFM provided a statement of facts (SoF) to the FAC. This confirms the administrative details of the file available on the FLV, and notes that the Appropriate Assessment Report was misdated through a clerical error as 30/05/2021, and should be 30/05/2022. The SoF also states that the project site was field inspected on the 13/05/2020. A statement from the certifying Forestry Inspector is included addressing the ground of appeal, as follows:

As there is access to the site the application was granted technical approval. The licence was granted in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars).

Post Appeal Correspondence

Following the initial consideration of the appeal by the FAC at its hearing, and while this letter was being prepared, correspondence was received by the committee which had been forwarded by the Forest Service of DAFM. This was from an agent from the applicant which included materials including a letter from the applicant’s solicitor together with an annotated copy of a Property Registration Authority map in which it is stated that the applicant has unfettered access to the project site from the public road on the basis of historical use.

Consideration of the appeal by the FAC

In considering the appeal, the FAC considered the specific ground raised, and also 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 only ground of appeal relates to the appellant’s contention that the road proposed for access to the site is in private ownership and that no consent is given for its use for the purposes of the proposed project. The appellant references folio KY 36209F, and states that a copy of the folio was provided. The folio however is not included in the papers recorded as received by the FAC.

The DAFM in their SoF state that approval was granted on the basis that there is access to the site and refer to the Environmental Requirements for Afforestation and the Forestry Standards Manual. The FAC reviewed the documents referred to, and relevant circulars issued by the DAFM. The Environmental Requirements for Afforestation is silent on the issue of access to afforestation project sites. Section 5.3.1 of the Forestry Standards Manual specifies that:

The applicant must own or have written permission, certified by a solicitor, to use or have right-of-way on the access route to the plantation. Where the owner’s site is land-locked, access to a public road should be sought and written permission to use an access road should be provided to the Forest Service. Access and legal rights-of-way should be shown on the Biodiversity Map at Form 1 stage.

The issue of access was raised in one of the submissions from members of the public during the consultation period in the licencing process, and as a result it would be expected that the particular

requirements of Section 5.3.1 would be addressed. The Biodiversity Maps provided, including the most recent dated 06/09/2022, show the proposed access route, but do not indicate whether or not a right-of-way is being employed. The only other reference to access in the project documentation provided to the FAC by the DAFM is in the Site Details-Pre-Approval Report, which includes the question "Do you have adequate access to manage this site?" which is answered "Yes-adequate Access".

The FAC is not in a position to adjudicate on legal entitlements of ownership or use of rights of way, and considers these civil matters for the courts to determine, and notes that a granting of a licence does not confer any entitlements to such rights. However, based on the foregoing, the FAC is not satisfied that the record of the decision demonstrates that the requirements of the Forestry Standard Manual in relation to access have been met. Notwithstanding the receipt post hearing correspondence on this matter as outlined above, which on its face would suggest that the information was not before the inspector at the time of making the decision, the FAC considers this represents an error in the processing of the licence.

In so concluding, the FAC note that for reasons outlined elsewhere in this letter, the decision of the Minister to grant a licence is being set aside and remitted for the Minister to make a new decision and suggest that greater clarity in relation to the use of the right of way be ascertained and recorded in any new decision to be made by the Minister.

The FAC considered the processing of the licence with respect to the EIA directive. The decision before the FAC relates to the afforestation of 25.66ha hectares which is substantially below the 50ha threshold for mandatory EIA as set out for afforestation applications in the Irish Forestry Regulations 2017 (S.I. 191 of 2017). The regulations also provide that the EIA should be carried out for projects below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. In order to determine this, the DAFM carried out an Assessment to Determine EIA requirement. This considered the project across a wide range of categories, including Archaeological, Land Use, Water, Protection of FPM, Landscape, Designated Habitats and Cumulative effect, and concluded that an EIA is not required. The questions that relate to Cumulative effect only related to forestry projects and do not consider other types of projects. The FAC note that a separate process was carried out for Appropriate Assessment on European sites which include an in-combination assessment of other plans and projects (including, but not limited to, forestry projects). The FAC consider that while the DAFM are entitled 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 Appropriate Assessment in-combination report.

The FAC also considered the Appropriate Assessment of the project as required by the EU Habitats and Birds Directives. The Directives require 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 the information as uploaded to the FLV to inform the general public as to the content of the application including that relating to Appropriate Assessment. As noted above, an ecologist carried out an Appropriate Assessment Screening Report and Determination (dated 30/05/2022). This considered five Natura 2000 sites and screened out four while screening one in for full Appropriate Assessment. In screening sites out, it was concluded that the proposed project will not have any significant effect, alone or in combination with other plans and projects, on the considered European Sites and determined that the project will not adversely affect the integrity of these European Sites. This included an In-Combination Assessment based on a search of planning systems on the 27/05/2022, which concluded that in the absence of a source/pathway to the screened-out sites, individual or in-combination effects could be excluded. An Appropriate Assessment Report, and Appropriate Assessment Determination (dated 14/07/2022) considered the Conservation Interests of the screened in site, the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161. A number of mitigations were considered, and were considered sufficient to protect the integrity of the site, including possible in-combination effects. The FAC is satisfied that no error was made in the Appropriate Assessment process followed by DAFM in determining the licence.

The FAC reviewed the licence issued by the DAFM on 19th September 2022. The licence decision provides for afforestation of 20.31 ha, and includes conditions reflective of the Appropriate Assessment Determination and adherence to various standards and guidelines. Condition 3 requires adherence to the specific Operational Proposals set out in Appendix A. At Appendix A, a table of Species Approved for Afforestation for Plot 1, for an area of 11.3 ha, is provided. No such table is included for any other plot or for the balance of the area licenced. The FAC regards this as an error in the processing of the licence.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence CN86254. The FAC is therefore setting aside and remitting the decision regarding licence CN86254 to the Minister for consideration whether to certify the licence in light of the requirement for access as set out in the Forestry Standard Manual, and if so, to correct errors in the licence issued.

Yours sincerely,

John Evans On Behalf of the Forestry Appeals Committee

