



22<sup>nd</sup> May 2023.

Subject: Appeal FAC 181/2022 regarding CN88946

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, 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 181/2022 was held remotely by the FAC on 14<sup>th</sup> March 2023.

In attendance

FAC Members: Mr Myles Mac Donnacha (Deputy Chairperson) and Mr. Derek Daly.

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 notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside the decision of the Minister regarding licence CN88946.

#### **Background**

An afforestation licence (CN88946) at Newgrove, County Galway was issued by the DAFM on the 9<sup>th</sup> September 2022. The licence decision pertains to the afforestation of an approved area of 15.26 hectares within 5 sub plots and fencing with a length of 520 metres comprising of GPC 3 planting in plots 1 and 2 with 85% Sitka Spruce and 15% Additional Broadleaves and bio in the other 3 plots. Site is accessed via an existing road. Ground preparation is mounding with slit planting.

The soil type is described in the documentation as dry drained fertile peat soil over reactive grey subsoil at 50cm and slope is considered flat less than 2%. Vegetation is predominantly grassland. There are aquatic zones and water features on site.

Application submitted included general mapping, fencing map, biodiversity map, species map which indicates exclusion zone in the northeast adjoining a residential building, original and revised site notices for new application which are uploaded on the Felling Licence Viewer (FLV) on various dates. A further information request was made by DAFM on the 20/09/2021 in relation to biodiversity and a request for an ecology report. Revised details including a habitat map, species map, biodiversity/operational map and supplementary information for the Habitat Map for CN88946 was submitted and uploaded on the FLV on the 18/10/2021. The supplementary information for the Habitat Map refers to an area of 15.85 hectares and that there are no Annex I habitats associated with the hedgerows, scrub and semi-natural woodland (containing Ash) within the project area. There will be no loss of woodland habitats due to the proposed operations, as the woodland areas will be marked as a biodiversity area.

The site is located within the River Sub-Basin Carra Stream\_010 the status of which is indicated as poor and in terms of risk is indicated as at risk. In relation to pressures hydrogeomorphology is identified as a pressure and there are indications that status may be deteriorating as status in past cycles was moderate.

#### **DAFM Assessment**

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

The application was referred to Galway County Council on 09/06/2021 with no response received and to Inland Fisheries Ireland 09/06/2021 with no response received. A Third Party submission dated 20/06/2021 was submitted.

The DAFM assessment included an Ecology Report prepared by DAFM dated 30/09/2022 which examined the site in relation to protected and other species referred to in submissions. Mitigation measures are outlined in the report including a water setback, a minimum of 20m in width, to be installed adjoining the aquatic zone specifically related to the project site.

An Appropriate Assessment Screening Report & Determination prepared by DAFM dated 30/09/2022 uploaded on the FLV on the 09/11/2021. Reference is made to this file has been remitted from the FAC. The decisions of the FAC in relation to this file and report have been reviewed and taken into consideration in this assessment. There is also reference to an Ecology report has been prepared for this site which includes mitigation measures to be implemented on-site to protect sensitive ecological and environmental receptors not covered in this Appropriate Assessment. The report identifies four Natura sites, Lough Rea SPA IE0004134; Lough Rea SAC IE0000304; Slieve Aughty Mountains SPA IE0004168 and Glenloughaun Esker SAC IE0002213 all of which were screened out. Appendix 2 is an in combination report which in a concluding statement indicates *"that there is no likelihood of the proposed Afforestation project CN88946 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)".*

An Assessment to determine EIA Requirement dated 09/11/2022 prepared by the inspector and uploaded on FLV on the same date indicated the approximate % of forest cover at present in the applications townland and wider area. It also indicates in relation to what is the approximate % of forest cover currently in the underlining waterbody (or waterbodies) as 7.34% (change from previous licence application). There is a response of 'yes' to the question 'Will adherence of this proposal to the Forestry and Water Quality Guidelines (previous n/a), and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value?'. The inspector comments that questions are answered on the basis of Ecology Report and determined EIA not required. The question regarding 'Comments and issues from the general public and non-governmental bodies were received and examined?' now has a response of yes (raised in previous FAC decision).

An Appropriate Assessment Screening Report dated 09/11/2022 was completed by the inspector and uploaded on FLV on the same date screens out all Natura Sites and concludes no likelihood of a significant effect on any European site, and Appropriate Assessment not required.

An Inspector's Certification Report dated 09/11/2022 by inspector and uploaded on FLV on same date recommended approval with conditions with comments including approval recommended on basis of revised wording of conditions, as per the previous FAC decision.

The decision to grant the licence issued on the 9<sup>th</sup> November 2022 subject to conditions which included conditions requiring adherence to published guidelines relating to forestry and also included condition no. 5 that the afforestation project and all associated operations shall be carried out and completed in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars); all existing trees and hedgerows within the site shall be retained; strict adherence to all mitigation conditions, as per Ecology Report 30/09/2022; that a 20m Aquatic Zone setback is required on the Carra Stream\_01 on the southern boundary of Plots 1 and 2 (previous that a 20m Aquatic setback is required on River on southern boundary); approval on basis of revised species and Biodiversity maps provided, dated 10/3/22; that 10 rows of Birch/Alder/ Oak should be planted adjacent 60m Dwelling house Setback, Plot 5, for Landscape reasons; minimum 15% Broadleaves is a requirement; and that the raised gravel ridge that carries the internal track should be retained unplanted on each side, 5-10m width depending on local conditions, with sporadic Native Broadleaf planting if and where soil conditions allow and this should be a linear Biodiversity feature.

### **Appeal**

There is one appeal against the decision to refuse 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 improvements in relation proposal has occurred since the previous licence application but serious concerns remain.

Reference is made to the inequality of the appeal system and issues of assessing information.

The grounds submit that there are issues in relation to the location of the site notice which is located on a private road and not a public road contrary to Forestry Regulations and a letter from Galway County Council regarding the status of the road is submitted.

Reference is made to the invasive species Japanese Knotwood and the absence of a management plan to address this matter.

The grounds contend that there is an absence of assessment of climate impact arising from the development.

The absence of referral to NPWS is referred to in the grounds.

The grounds include photographs and a letter from Galway County Council in support of the appeal.

#### **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, states that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act and addresses the grounds of appeal. It is noted that the approval should have been for non granted aided rather than grant aided. The Inspector refers to previous FAC decision 030/2022 and that these issues are addressed in the current assessment and licence issued.

#### **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 Environmental Impact Assessment (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 15.03 hectares which is substantially below the 50 hectares threshold. An Assessment to Determine EIA Requirement was carried out over a range of criteria and determined that EIA was not required and that screening for significant effects under the EIA Directive was not required in this case.

The FAC having considered this issue noting that the EIA determination covers a wide range of criteria including, water, habitats, landscape and amenity designations, the scale of the project and concluded that there is no breach of the provisions of the EIA Directive in relation to the activity permitted in this case, the issues raised in the previous licence application are addressed and consider that the DAFM has not erred in this regard.

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 four Natura sites, Lough Rea SPA IE0004134; Lough Rea SAC IE0000304; Slieve Aughty Mountains SPA IE0004168 and Glenloughaun Esker SAC IE0002213 as the DAFM. The FAC considered the record and the reasons stated for screening out of these sites and in relation to the Appropriate Assessment screening no error has occurred.

The FAC also however 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 statement includes the passage,

*“that there is no likelihood of the proposed Afforestation project CN88946 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)”.*

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. As stated on the record, it appears to the FAC that the potential for

significant effects to arise from the proposal in-combination with other plans and projects were not considered. 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 as it suggests that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in-combination with other plans and projects might result in a significant effect.

In relation to the matters raised in the grounds of appeal reference is made to the inequality of the appeal system and issues of assessing information. The FAC was established under the Agriculture Appeals Act 2001 to hear and determine appeals from people dissatisfied with decisions of the Minister for Agriculture under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. In relation to this it is noted that the FAC consideration and determination of this appeal is made in accordance with the statutory provisions as set out in Section 14B(13) of the Agriculture Appeals Act 2001 as amended.

The grounds submit that there are issues in relation to the location of the site notice which is located on a private road and not a public road contrary to Forestry Regulations and a letter from Galway County Council regarding the status of the road is submitted. The notice in question it is stated is 335 metres from the public road.

The Forestry Regulations 2017 in Article 11 (1) sets out the requirements in relation to the site notice indicating that;

*“the applicant shall, before the making of the application, erect a notice in a form determined by the Minister, at the entrance from the public road to the land to which the application relates or, where no entrance exists, at the point where it is proposed to create an entrance, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time”.*

Based on the documentation submitted, and the absence of any documentation in response to contradict it, and an examination of publicly available mapping for the area, the placement of the public notice does not appear to be on a public road. The FAC considers this apparent non-compliance with the requirements of the Regulations 2017 as set out in Article 11 (1) to be an error.

Reference is made to the invasive species Japanese Knotwood and the absence of a management plan to address this matter. The location of the site as identified in the grounds of appeal is not on the project site but based on the appeal submission alongside the road leading to it. Japanese Knotwood is an identified invasive species and is referred to in the *Environmental Requirements for Afforestation* December 2016 and is identified as of significant concern regarding water quality. There is identified best practice in relation to bio-security measures to prevent the spread of any invasive species and for the application of good site hygiene to prevent the introduction and spread of invasive species and to thoroughly check and if necessary, clean, vehicles and machinery prior to entering and leaving the site which would be understood by registered foresters and if the project were to proceed there are statutory requirements to require that the carrying out of the project would not assist in the spread of Japanese Knotwood.

The grounds contend that there is an absence of assessment of climate impact arising from the development. The FAC notes that within the approved area of 15.03 hectares 3 of the 5 sub plots provide for bio areas, that forestry is recognised as carbon capture and all existing trees and hedgerows are to be retained. The grounds of appeal do not offer any evidence that supports an issue of climate impact.

In relation to the absence of referral to NPWS is referred to in the grounds of appeal and the matter of referral is for DAFM to determine depending the circumstances of the project. The FAC however notes that the project was the subject of an ecology report and an Appropriate Assessment Screening Report & Determination prepared by a DAFM ecologist and the reports in addition to screening out Natura sites and stating the reasons for doing so also indicate conditions to be included in any grant of a licence for the protection of the environment and water and the FAC does not consider that the DAFM has erred in this regard.

In relation to WFD and on water quality generally the FAC viewed the information on the EPA and Irish Catchments websites and current mapping and data would indicate the project is within the River Sub-Catchment Carra Stream\_010 the status of which is indicated as poor and in terms of risk is indicated as at risk. In relation to pressures hydrogeomorphology is identified as a pressure and there are indications that status may be deteriorating as status in past cycles was moderate. It is however noted that in addition to standard conditions, condition no 5 of the licence set outs specific requirements of strict adherence to all mitigation conditions as per Ecology Report 30/09/2022, that a 20m Aquatic Zone setback is required on the Carra Stream for the protection of water quality and aquatic ecosystems. The FAC consider that the issue of water quality was addressed in the assessment of the project and that the development will not have adverse effects on receiving waters.

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 CN88946 in relation to the Appropriate Assessment screening of the proposal itself and in combination with other plans or projects and in relation to the location and siting of the public notice which should be at the public road in accordance with Forestry Regulations 2017. The FAC is therefore setting aside the decision regarding licence CN88946.

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee

