



30th August 2023

Subject: Appeals: FAC156/2022 relating to Licence CN90390

Dear

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 Statement of Fact (SoF) provided by the DAFM, all materials on file, the notice, and grounds of appeal and in particular the following considerations, the FAC has decided to aside and remit the decision of the Minister regarding licence CN90390.

THE LICENCE.

Licence CN90390 is for 3.74 Ha of afforestation the townland of Straduff, Co. Sligo.

The application for the licence was submitted to the DAFM on the 3rd of March 2020. A decision approving the licence was issued on the 3rd of October 2022 with conditions including compliance with DAFM Technical Standards, retention of all existing hedgerows & trees on the site, planting of additional broadleaved trees (Birch & Hazel), a 60m dwelling setback with an additional 5m planting of broadleaves, and compliance with the conditions contained in the archaeology report on the licence application.

FORESTRY APPEALS COMMITTEE.

A hearing was held remotely at a sitting of the FAC on the 15th of August 2023 which considered the appeal and the processing of the licence as it relates to the decision to issue the licence on the 3rd of October 2022. 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 determine the appeal properly and fairly.

The FAC members present were: Mr. Myles Mac Donncadha (Deputy Chairperson) and Mr. Iain Douglas.

BACKGROUND.

The proposal consists of the afforestation of 3.74 Ha in 2 plots. Plot 1 is GPC 3 (Sitka spruce and Additional Broadleaves), Plot 2 is a bioplot. The plot numbering is that used on the DAFM Site Plots Pre-Approval report dated 3rd of October 2022 and the licence as issued.

The site description given is that the site soils are predominantly podzolic in nature. The slope across the site is predominantly flat to moderate (<15%). The vegetation on the site is described as agricultural grassland. The site is crossed by/adjoins and aquatic zone.

The application documents before the FAC included a Location map, Bio Diversity/Operational Map a Fencing map and an Inet Pre-approval submission report all uploaded to the Forestry Licence Viewer (FLV) on the 3rd of March 2022. A site notice and photograph of the site notice in situ were uploaded to the FLV on the 28th of March 2022 (the site notice is dated 2nd March 2022).

The DAFM referred the licence to Inland Fisheries Ireland (IFI) on the 4th of April 2022. No response was received.

On the DAFM file there is an Inspector's Certification Report; an Inspector's Appropriate Assessment Screening Report (AASR) and an Inspector's Assessment to Determine Environmental Impact Assessment (EIA) Requirement all certified on 29/09/2022 and dated 03/10/2022, an In-Combination Statement completed on 29/09/2022, a Site Details Report and Site Plots Report both dated 03/10/2022 and a DAFM archaeologist's Report (AAR) dated 31st of August 2022.

The Inspector's Certification Report recommends that the licence be approved subject to five conditions: (1). the carrying out and completion of the afforestation in accordance with the measures set out in the Environmental Requirements for Afforestation 2016 (ERA) and the Forestry Standards Manual (FSM), (2). All existing trees and hedgerows within the site shall be retained (replicated as condition 5), (3). Additional broadleaves are to consist of Hazel and Birch, (4). a 60m setback from the adjoining dwelling and the planting of 5 rows of broadleaves along dwelling setback.

The licence as issued included an additional condition that the following specific archaeological and architectural protection requirements shall be fully complied with a) 10m unplanted buffer zone/setback around any historic buildings/structures and a 5m unplanted buffer around the attached infields and along access lanes/roads, within the development area, as illustrated. b) 10m unplanted buffer zone/setback along the line of the historic mill race, as illustrated. c) Any previously unrecorded archaeological site or artefact discovered during the course of the works on site must be left undisturbed and the relevant authorities notified immediately; A minimum exclusion zone of 20m, preferably 100m or more, must be created until the any such site has been properly investigated; The relevant authorities include the duty archaeologist in the Forest Service, DAFM, and in the case of the discovery of human remains An Garda Síochána and the Local Coroner d) See attached archaeological report and illustrative map for further details.

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

The licence was subject of both a Desk Assessment and a Field Inspection. The Field Inspection took place on the 28th of September 2022.

There was one third-party submission on the application for the licence from the owners of the adjoining residence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application.

The grounds of appeal are summarised as follows:

"The FAC has four distinct sets of legal tasks when it deals an appeal.

1. *Firstly, it must assess the requirement for the development to be subjected to Environmental Impact Assessment, according to the Environmental Impact Assessment Directive and the case law of the CJU.....*
2. *Secondly, the FAC is a competent authority having responsibilities under the Habitats Directive and must carry out a screening for Appropriate Assessment.....*
3. *Thirdly the development must be assessed for compliance with the requirements of the Water Framework Directive.....*
4. *Where there is a application for replanting. The decision must show that the original planting was pre-legislation or in total compliance with the legislation.....(No fourth "task" was identified in the appeal. The FAC has assumed this statement to be the fourth "task" since it appears to be contained under the same heading as the other three "tasks")*
5. *The time-frame for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days."*

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal, dated the 23rd of November 2022 confirms the administrative details of the licence application, indicates that the licence application was desk assessed and that a field assessed was carried out on the 28th of September 2022. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application, that there was no requirement for a second 30-day public consultation period and that the 14-day period allowed for making an appeal to the Forestry Appeals Committee (FAC) is a statutory requirement.

There is also a statement dated the 15th of November 2022 from the District Forestry Inspector (DI) confirming that the site was desk and field assessed by the DAFM inspector, that the site was approved adhering to all standard operating procedures and guidelines at the time of approval, that an AA screening was carried out and it was determined that AA was not required and that all water/environmental features and water quality concerns are addressed in the Environmental Requirements for Afforestation document. The statement also confirms that the AA process was carried out using the procedures of November 2019.

CONSIDERATION BY THE FAC.

At its sitting on the 15th of August 2023, the FAC had before it the full DAFM record of the decision as made available on the FLV, the notice and grounds of appeal, the SoF provided by the DAFM and all materials on the FLV.

GROUND OF APPEAL

Environmental Impact Assessment

This ground of appeal makes reference to the setting of thresholds under Article 4(2) of Directive 2011/92/EU (the EIA Directive) and Annex II Section 1, Agriculture, Silviculture and Aquaculture Class (d) the initial afforestation and deforestation for the purposes of conversion to another type of land.

The FAC noted that 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 is 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 Regulations in relation to forestry licence applications, require the compliance with the EIA process 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 under appeal relates to a licence for the planting of 3.74 Ha. of forestry and is below the threshold requiring EIA under Irish Regulations.

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement which recorded a consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, or landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale, and location of the proposal.

The ground of appeal also makes reference to Annex III of the EIA Directive (Criteria to Determine whether the projects listed in Annex II should be subject to an environmental impact assessment) and in particular quotes “(v) areas classified or protected under Member States’ legislation; special protection areas designated by Member States pursuant to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (1) and to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (2);”. The FAC noted that the appellant has quoted an outdated version of the Directive and fails to elucidate any particular concern regarding that paragraph of Annex III of the EIA Directive.

The ground of appeal states that “The cumulative assessment cannot in law be limited to five or three years.” however, the appellant has adduced no evidence for this contention. The FAC understands that the EU “Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions” 1999 regards the setting of spatial and temporal boundaries to be of particular importance in the assessment of cumulative impacts. 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., 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 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 completed on 29/09/2022 that this is not explicitly cross-referenced in the EIA Determination. The EIA Determination 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 considering that the proposal is not likely to have a significant impact on the environment might be found in separate documents, based on the foregoing it is not apparent if adequate consideration was given to cumulative impact (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 further noted that the approximate % of forest cover in Straduff townland 5 years ago is given as 5.13% but that publicly available aerial photography for 2017 appears to indicate a significantly higher percentage of forest cover in that townland. The FAC is concerned that the apparent discrepancy could affect the assessment of cumulative impact.

The FAC noted that the Assessment to Determine EIA Requirement also refers to and relies on Guidelines in relation to Water Quality, Archaeology and Landscape but 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.

Appropriate Assessment.

This ground of appeal is a statement that *“the FAC is a competent authority having responsibilities under the Habitats Directive, and must carry out a screening for Appropriate Assessment”*. The FAC noted that under section 14B(10)(a) of the Agriculture Appeals Act, 2001 (as amended) it is stated that:

“The Forestry Appeals Committee may, where it considers it necessary or expedient in determining an appeal, carry out a screening for an environmental impact assessment, an environmental impact assessment, a screening for an appropriate assessment, or an appropriate assessment.”

There is therefore no imperative on the FAC to carry out a screening for appropriate assessment in all instances.

The FAC noted that the DAFM had carried out a Stage 1 Screening Assessment for Appropriate Assessment, including an In-combination assessment, in advance of making the decision to grant the licence. The FAC noted the procedures adopted by the DAFM in its screening, listing the qualifying interests and conservation interests for seven Natura 2000 sites within a 15km radius of the proposal and an assessment of the project design, location of the project and possible pathways to the listed designated sites. The FAC further noted that the DAFM concluded that there was no possibility of significant effects arising in the case of all the identified Natura 2000 sites listed and that Appropriate Assessment (Stage 2) was not required.

The ground of appeal makes reference to the mitigation measures section of the Appropriate Assessment Determination. The FAC noted that both national and EU guidance indicate that mitigation measures should not be contained in an AA Screening Report and that the DAFM AA Screening Report does not contain mitigation measures.

The ground of appeal also makes reference paragraph 44 of CJEU and quotes:

“So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned.”

The FAC noted that DAFM in its AA Screening Report determined that AA under Article 6(3) of the Habitats Directive was not required.

The FAC also noted that the conclusion of the In-combination Statement of 29/09/2022 contains the following statement,

It is concluded that there is no likelihood of the proposed afforestation project CN90390 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 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.

Water Framework Directive.

This ground of appeal is a statement that *"the development must be assessed for compliance with the requirements of the Water Framework Directive."* The FAC noted that the Assessment to Determine EIA Requirement contains a section on "Water" with a question, amongst others *"Does the application and its associated operations threaten the achievement of good ecological status recovery objective set for the underlining waterbody or waterbodies under the WFD River Basin Management Plan?"* to which DAFM response is "No". A second question *"Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value"* to which DAFM response is "Yes". The FAC further noted that the licence issued is conditional on adherence to the Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. FAC is satisfied that the DAFM did not err in its decision concerning the Water Framework Directive.

Replanting.

This ground of appeal is a statement *"Where there is an application for replanting. The decision must show that the original planting was pre-legislation or in total compliance with the legislation."* The FAC noted that the licence application CN90390 is for afforestation only.

Public Consultation.

This ground of appeal is a quotation of Article 6(7) of Directive 2011/92/EU (as amended) *"The timeframes for consulting the public concerned on the environmental impact assessment report referred to in article 5(1) shall not be shorter than 30 days."* The FAC also noted the provisions of the Forestry Regulations 2017, Part 7 Regulation 13 which sets out the provisions for public consultation on environmental impact assessment of forestry development. The FAC further noted that no EIA was required for the proposal and as stated in the DAFM SoF, a second public consultation was not required. The FAC is satisfied that the DAFM did not err in the processing of this aspect 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 SoF 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 CN90390. The FAC is thus, setting aside and remitting the decision regarding licence CN90390 to the Minister to carry out 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;

to carry out a new Assessment to Determine EIA Requirement to demonstrate that adequate consideration was given to cumulative effects (including non-forestry projects) when making the determination for EIA requirement.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee

