



3rd April 2024.

Subject: Appeal FAC 178/2022 regarding CN84537.

Dea

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 (The Minister). 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 the 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 Statements 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 set aside the decision of the Minister regarding licence CN84537.

THE LICENCE.

The licence issued on the 27/10/2022 and is for 5.23ha of afforestation, accompanied by 284m of stock fencing at Coor West, Co. Clare. Planting is to be of 4.45ha of Sitka spruce accompanied by Birch of 0.78ha. No fertiliser is to be applied, with herbicide application permitted in years 0 (planting year) and 1. Conditions apply including good practice, retention of hedgerows and adherence to mitigations in an accompanying Appropriate Assessment Determination (which is discussed below).

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC was held remotely on the 6th of December 2023 which considered the appeal against the decision to issue the licence. The FAC members present were: Mr. John Evans (Deputy Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy.

The record of the decision was provided to the FAC by DAFM by way of the Forestry Licence Viewer (FLV).

BACKGROUND.

The site

The project site is located to the north of, and is contiguous to, Local Road L2116 which provides site access and is ca. 2000m north of the western end of Doolough Lake. To the north of the site at a distance of ca 150m is a water course referred to by the EPA as the AUGHAVEEMA_010 which, in the most recent Water Framework Directive (WFD) monitoring programme (2016-2021), is recorded as having a Moderate/At Risk status. The site is located within the WFD Sub Basin is AUGHAVEEMA_10 for which forestry is not recorded as a pressure. Publicly available EPA mapping shows the site to be not in a specially designated area/river. The land slopes towards the AUGHAVEEMA_010 but no direct hydrological connection is shown on the application bio-map which is on file. An Appropriate Assessment Screening Report (AASR) on file describes the site as follows:

This project comprises 5.23 hectares of afforestation. The predominant soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise Wet Grassland, Grass rush, wet mineral soils.

The Application

In the context of the appeal the details of the application documentation are not contested. On file there is a copy of the site notice, photos of the site notice in situ, a location map, a fencing map, a biodiversity/operational map, a surface water sampling test report showing results for 4 samples testing alkalinity with values for CaCO₃ of between 14 and 41 mg/L. Also on file are a pre-approval site-plots report showing species mix and a pre-approval site details report confirming vegetation type, road access, exposure etc.

Submissions and Referrals.

There are three submissions on file, with names and addresses redacted.

- One raises concerns that the project is close to the Aughaveema river in relation to the use of herbicides and pesticides, and that the lands qualify under High Nature Value which is not considered appropriate for afforestation under DAFM guidelines (with a reference to DAFM 2015).
- The second states there is an unnamed stream on the northern edge of the plot which joins the Aughaveema river, and that this is connected to two Natura sites. It states the river is already under pressure from forestry at upstream sites. It states the site is in immediate proximity to a sensitive catchment for FWPM.
- The third lists a number of forestry applications, including CN84537, and draws attention to European Case law in relation to the establishment of possible effect for Appropriate Assessment purposes.

Referrals to and responses from three referral bodies are on file. These include:

- NPWS, no specific comment with a general reference to good practice in the assessment of forestry projects.
- IFI. No objection, but states that "it has been pointed out that this site is located within the Annageragh River Catchment which is a Pearl Mussell catchment" and advises referral to NPWS.¹
- EPA. Noting the provided test results which are not in the range 8-15 mg CaCO₃/L, it is stated that the Agency has no objection subject to good practice and catchment scale assessment. The response also states that "The nearest river water body is the Aughaveema_010. The Aughaveema_010 is not at risk of meeting its Water Framework Directive Objectives. The objective is good status. Forestry has not been identified as a significant pressure".

Processing of the application.

The FAC considered the processing of the file generally and, with reference to the grounds of appeal, in particular the Appropriate Assessment of the application as required under the Birds and Habitats Directives.

¹ The FAC note that the site is adjacent to, but not in, the Annageragh River Catchment as stated by IFI.

An AA Screening Determination (AASD) is on file dated the 11/09/2020 carried out by a DAFM ecologist that concluded that a significant effect could occur as a result of the project on two European Sites (Carrowmore Point To Spanish Point And Islands SAC 001021 and Mid-Clare Coast SPA 004182). Three other sites were screened out. On that basis it was concluded that a NIS was required from the applicant. Reference is made to an assessment of in-combination effects, and an in-combination report run on the 09/09/2020 is on file which states

Following the initial screening and subsequent expert verification , and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), DAFM has determined that there is the possibility of the project having a significant effect, either individually or in combination with other plans and projects, on the European Site(s) listed below.

- Carrowmore Point To Spanish Point
- Mid-Clare Coast SPA 004182

A separate AA Screening Report and Determination (AASRD) dated 18/08/2022. This reaches the same conclusion as the AASD, but instead of requiring an NIS concludes that the project “must advance to the appropriate assessment stage in relation to the European Sites”. The conclusion relies on an in-combination assessment, but no such assessment appears to be on file.

An AA Report (AAR) is on file, prepared by a consultant ecologist, and dated 28/08/22. This recommends mitigations should the project be authorised. The report on file appears to be in draft format as there are review comment mark-ups visible. The AAR includes an in-combination report as an appendix referencing planning systems being consulted on the 19/09/2022. This includes the paragraph.

It is concluded that there is no possibility that the proposed afforestation project CN84537, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: Carrowmore Point to Spanish Point and Islands SAC IE001021 and Mid-Clare Coast SPA IE0004182 Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

An AA Determination (AAD) is also on file, dated 13/10/2022 and prepared by a consultant ecologist. This restates the mitigations, and includes what appears to be the same in-combination report as that included in the AAR.

Also on file is an assessment for EIA which concludes that an EIA report is not required.

The Appeal and Statement of Fact

There is one appeal against the decision to grant the licence, the grounds of which include procedural/regulatory issues.

The appellant’s Eircode, as provided to the FAC indicates that their residence is on the opposite side of the road at the southeastern corner of the proposed project.

The appellant makes reference to the following regulations:

- Forestry Regulations 2017 ([SI 191/2017](#)) (The “Forestry Regulations” below)
- European Communities (Birds and Natural Habitats) regulations 2011 ([SI 477/2011](#)) (as amended) (“The habitats regulations” below). These regulations were amended by the European Union (Birds and Natural Habitats)(Amendment) regulations of 2021 ([SI 293/2021](#)).

The DAFM provided a Statement of Fact (SoF) from the Inspector and Administration. The Inspector deferred to DAFM ecology division in relation to the Appropriate Assessment (AA) process. A separate response that accompanied the SoF from a consultant ecologist on behalf of DAFM is on file.

The DAFM ecology comments are summarised with the relevant ground of appeal summary below in *italics*.

For the avoidance of doubt, the following is a summary only of the grounds of appeal and the SoF which were considered in full by the FAC and which are available on the FAC file.

In summary the grounds are:

1. That there were two AA processes, with no explanation as to why, and that on this basis the requirements of Articles 6(2) and 6(3) of the Habitats Directive have not been complied with. *DAFM (Consultant Ecologist) comment: Appropriate Assessment Screening of the afforestation application CN84537 was initially carried out in 2019, there was a determination that the project must under-go Stage 2 Appropriate Assessment. A Natura Impact Statement (NIS) request letter was issued to the applicant on 11/09/2020, however this was not received. Subsequently, to facilitate processing of the file, DAFM carried out stage 2 through its Appropriate Assessment Report (AAR).*
2. That in the initial AA process, an AA Screening process identified possible impact on two Natura sites, and that as a result an NIS was requested from the Applicant. No such NIS is on file, and that if no NIS was received the application is deemed to be withdrawn. The appellant refers to the DAFM guidance on Natura Impact Statement for Forestry Projects (August 2020) in this regard.

DAFM (Consultant Ecologist) comment: Following the 2019/2020 AA Screening, it was determined that the application must proceed to Stage 2 Appropriate Assessment and the NIS request letter was issued to the applicant on 11/09/2020 with the NIS to be submitted to DAFM by 11/09/2021, however this was not received. Subsequently, to facilitate processing of the file DAFM carried out stage 2 through its Appropriate Assessment Report (AAR). An Appropriate Assessment Report dated [23/08/2022] was carried out by Sophie Knightly (Envirico Ltd) on behalf of DAFM.

3. That in the second AA process (2022), no NIS was requested, and that this is required under regulation 19 of the Forestry regulations, and that under the forestry and habitats regulations the processing was not valid. Reference is also made to the Planning and Development Act 2000 as amended. *The DAFM (Consultant Ecologist) response asserts that regulation 19(2) of the Forestry regulations leaves it to the Minister’s discretion to request an NIS or not. The response also asserts that an AAR fits the definition of an NIS as set out in Regulation 2 of the habitats directives.*
4. That given an AA was conducted in the absence of an NIS, that AA must be deficient. Specific reference is made to regulation 42.12(a) of the habitats regulations.

The DAFM (Consultant Ecologist) response asserts that regulation 19(2) of the Forestry regulations leaves it to the Minister's discretion to request an NIS or not. The response also asserts that an AAR fits the definition of an NIS as set out in Regulation 2 of the habitats directives.:

The DAFM (Consultant Ecologist) response is substantially as above.

5. That the appellant, as an observer on the original application, was entitled to be notified of the second (Appropriate Assessment) consultation in accordance with regulation 42(8)a of the Habitats Directive.

DAFM (administration) comment: Due to the numbers of applications being advertised for 2nd public consultation, DAFM are not in a position to inform every submitter when a file is advertised a second time. The Department's chosen method of advertising is by using our website and the onus is on an interested party to keep an eye on the website if there is a particular application that they wish to object to, in the same way as they would keep an eye on the newspaper if that was our chosen method of advertising.

CONSIDERATION BY THE FAC

In the first instance the FAC considered whether it was necessary to hold an Oral Hearing in order to properly and fairly determine the appeal and concluded that it was not. The FAC also considered the record of the decision and the SoF provided by DAFM and considered whether it adequately addressed the grounds of appeal so as to allow the FAC properly and fairly address the appeal and concluded that there remained certain matters of fact that required clarification.

On the 07/12/2023 the Committee wrote to DAFM and asked it to clarify or comment on the following points as appropriate:

1. Did the appellant in this case make a submission to DAFM as part of the first consultation process? The FAC is unable to ascertain this due to redactions on the file.
2. In a response that accompanies the SoF, prepared by a consultant ecologist, it is stated that:

"...an NIS request letter was issued to the applicant on the 11/09/2020 with the NIS to be submitted to DAFM by 11/09/2021".

This letter is not on the public file made available to the FAC by way of the Forestry License Viewer. The Committee request that a copy of this letter, and any other correspondence to or from the applicant relating to a request for an NIS, to be made available to it.

3. in the SoF, the Department states:

"Due to the numbers of applications being advertised for 2nd public consultation, DAFM are not in a position to inform every submitter when a file is advertised a second time. The Department's chosen method of advertising is by using our website and the onus is on an interested party to keep an eye on the website if there is a particular application that they wish to object to, in the same way as they would keep an eye on the newspaper if that was our chosen method of advertising".

In the grounds of appeal, at Ground 5, the appellant draws attention to Regulation 42(8)a of the European Communities (Birds and Natural Habitats) regulations 2011 (SI 477/2011) (as amended), which reads:

“(8)(a) Where, in relation to a plan or project for which an application for consent has been received, a public authority makes a determination that an Appropriate Assessment is required, the public authority shall give notice of the determination, including reasons for the determination of the public authority, to the following—

- (i) the applicant,
- (ii) if appropriate, any person who made submissions or observations in relation to the application to the public authority, or
- (iii) if appropriate, any party to an appeal or referral”.

In the context of sub-paragraph (a)(ii) of the above regulation and the specifics of this appeal, the Committee requests that the Department advise how it determines whether it is appropriate or not to notify a person that has made a submission or observations to the Department in relation to an application.

On the 19/12/2023 DAFM responded to the FAC with the following comments in relation to the points above:

1. *The appellant did make a submission to DAFM on the 06/09/2019. Please see the unredacted copy attached.*
2. *[DAFM] have made the NIS request letter dated 11/09/2020 available on the FLV. It will be visible with today's date (19/12/2023). No NIS was received and was subsequently unnecessary as the file was processed by the ecologist by completing an AAR and an AAD. To avoid confusion, we originally did not make the NIS letter public as it was no longer relevant to the application.*
3. *[DAFM] haven't been informing submitters of subsequent public consultation up to this point due to the number of files involved. However, a decision has now been made to start informing submitters when a file is going for a 2nd public consultation. A procedure has been put in place to facilitate this at 2nd public consultation so that all submitters going forward will be notified.*

On receipt of the DAFM response the FAC circulated it to the other parties to the appeal and afforded them an opportunity to comment. No response was received from the applicant. The appellant responded on the 20/01/2024 and this correspondence is on file and was considered by the FAC. In the response, the appellant related the DAFM response to the general points of the appeal and emphasised their relevance.

In considering the grounds of appeal, the FAC had regard to the licence application on file, the grounds of appeal, the statements received from DAFM, the correspondence summarised above and the additional documents placed on the file through that correspondence.

In relation to the processing of the file generally, the FAC noted that an AASD of the project dated the 11/09/2020 was produced out by DAFM in accordance with requirements of the Habitats and Birds Directives in which three sites were screened out and two sites screened in for stage 2 appropriate assessment, and that this was the basis for a request to the applicant for an NIS. In the AASD reference is made to an assessment of in-combination effects, and an in-combination report run on the 09/09/2020 is on file. This states that:

Following the initial screening and subsequent expert verification, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of

2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), DAFM has determined that there is the possibility of the project having a significant effect, either individually or in combination with other plans and projects, on the European Site(s) listed below.

- Carrowmore Point To Spanish Point
- Mid-Clare Coast SPA 004182

While the above statement provides a rationale for those sites that are screened in for stage 2 appropriate assessment, it does not provide a definitive statement that the project in combination with others will not have a significant effect on the three other European sites identified in the screening reports.

The FAC also note that a separate AA Screening Report and Determination (AASRD) dated 18/08/2022 is on file. This reaches the same conclusion as the AASD, but instead of requiring an NIS concludes that the project “must advance to the appropriate assessment stage in relation to the European Sites”, and this was the basis for the subsequent preparation of an AAR. The conclusion states that there is no likelihood of the afforestation project proposed under CN84537 having any significant effect, either individually or in combination with other plans or projects, on any of the following European site. However, no evidence of any in combination assessment is on file other than the in-combination report two years earlier run on the 09/09/2020.

The FAC considers that based on the foregoing, there was inadequate consideration of the possible in-combination effects of the project and that this represents an error in the Appropriate Assessment of the proposed project and is a significant error in the processing of the application.

In the first ground of appeal, the appellant submits that there were two AA processes, with no explanation as to why, and that on this basis the requirements of Articles 6(2) and 6(3) of the Habitats Directive have not been complied with. In the third and fourth grounds of appeal it is further submitted that in the second AA process (2022) no NIS was requested, and that this is required under regulation 19 of the Forestry regulations, and that given the AA was conducted in the absence of an NIS, that AA must be deficient.

The FAC considered these grounds of appeal together as they relate to the requirements of Article 6(3) of the Habitats Directive and more specifically to Regulation 42 of the European Communities (Birds and Natural Habitats) regulations 2011 as amended by the European Union (Birds and Natural Habitats)(Amendment) regulations of 2021. The FAC note that there is an AAR on file, prepared by a consultant ecologist, and dated 28/08/22. The FAC had regard to the consultant ecologist’s statement that accompanied the SOF, in which it is stated that DAFM carried out a Stage 2 assessment on its own following the non-receipt of a requested NIS. The FAC also noted that, as stated in the consultant ecologist’s response that accompanied the SoF, that *regulation 19(2) of the Forestry regulations leaves it to the Minister’s discretion to request an NIS or not*. The FAC also notes the European Communities (Birds and Natural Habitats) regulations 2011 (as amended) in Regulation 2 states that:

“Natura Impact Statement” means a report comprising the scientific examination of a plan or project and the relevant European Site or European Sites, to identify and characterise any possible implications of the plan or project individually or in combination with other plans or projects in view of the conservation objectives of the site or sites, and any further information including, but not limited to, any plans, maps

*or drawings, scientific information or data required to enable the carrying out of an
Appropriate Assessment;*

The FAC considers that the AAR on file meets the definition of an NIS, and that notwithstanding the fact that an AA process was initiated on two occasions, the process did conclude with the completion of an AAD which is on file. The FAC considers that, insofar as these grounds of appeal are concerned, an error did not occur in the processing of the licence.

In the fifth ground of appeal, it is submitted that, as an observer on the original application, the appellant was entitled to be notified of the second (Appropriate Assessment) consultation in accordance with regulation 42(8)a of the Habitats Directive. The FAC took this as a reference to regulation 42(8)a of the European Communities (Birds and Natural Habitats) regulations 2011 (as amended) rather than a reference to the Habitats Directive itself. As a result of redactions on the public file provided to the FAC by way of the FLV, it was not immediately apparent to the FAC at its hearing whether the appellant had made a submission to the DAFM in the course of its licencing process. For this reason, the FAC included in its letter to the DAFM of the 07/12/2023 a question as to whether the appellant was one of the three people who had made a submission on the application. The FAC also noted that the section in regulation 42 of those regulations mentioned states that (with emphasis in bold added for the purposes of this letter):

(8)(a) Where, in relation to a plan or project for which an application for consent has been received, a public authority makes a determination that an Appropriate Assessment is required, the public authority shall give notice of the determination, including reasons for the determination of the public authority, to the following—

- i. the applicant,
- ii. **if appropriate**, any person who made submissions or observations in relation to the application to the public authority, or
- iii. if appropriate, any party to an appeal or referral.

The FAC also requested in its letter to the DAFM that the Department set out how it determines whether it is appropriate or not to notify a person that has made a submission or observations to the Department in relation to an application.

In considering this ground of appeal, the FAC had regard for the SoF and the Department's response to its letter of the 07/12/2023 which was received on the 19/12/2023, and the appellant's observations on that response. In the first instance, the FAC noted that in its response the DAFM confirmed that the appellant had made a submission on the licence application. The FAC also noted that, while not directly addressing the question as to how the DAFM determines whether it is appropriate or not to notify a person who made a submission of a second consultation, the Department has not in the past informed "submitters" but that it was its intention to do so in the future.

Based on the appellant's Eircode (which was provided to the FAC as part of the appeals process), it is observed that the appellant's dwelling house is located on the opposite side of the road that lies immediately to the south of the proposed afforestation, and that on examination of the biodiversity/operational map that forms part of the application this dwelling is noted as being the subject of a 60m setback. Under these circumstances the FAC considers that it would have been appropriate for the DAFM to notify the appellant of the second consultation as required under

regulation 42(8)a of the European Communities (Birds and Natural Habitats) regulations 2011 (as amended), and that this represents a significant error in the processing of the application.

In making the determination of this ground of appeal, the FAC observe that while there are annotations on the biodiversity/operational map on file relating to dwelling setbacks, the actual setback is not marked on the map. It is not readily apparent to the FAC whether the required setbacks relating to public roads and dwelling houses are being adhered to.

The appellant's second ground of appeal was considered by the FAC. This contends that arising from the first screening for Appropriate Assessment undertaken by the DAFM, a possible impact was identified on two Natura sites and that as a result an NIS was requested from the Applicant; however, as no such NIS was received the application should have been deemed to be withdrawn. The FAC at its hearing noted that in response from the consultant ecologist that accompanied the SoF, it was confirmed that an NIS was requested from the applicant, but also noted that on the record of the decision that was presented on the FLV there was no such correspondence. For this reason, the FAC included in its letter to the DAFM of the 07/12/2023 a question as to whether a request for an NIS had actually issued to the applicant and that is so the letter and any other correspondence to or from the applicant relating to a request for an NIS be made available to it. In its response of the 19/12/2023 DAFM responded that arising from the FAC's query that an NIS request letter dated the 11/09/2020 had been made available on the FLV and would be available to view on the 19/12/2023. In its response DAFM further stated that as the file was subsequently processed by the ecologist by completing an AAR and an AAD the NIS was not necessary, and that the DAFM to avoid confusion, did not make the NIS letter public as it was no longer relevant to the application. On receipt of the response from the DAFM, the FAC verified that the NIS request letter, labelled as Further Information, was available on the FLV and had regard for its contents.

In considering this second ground of appeal, the FAC consider it appropriate in the first instance to highlight that the record of the decision should include all documents relevant to the processing of a file. On the substance of the ground of appeal, the FAC note that the DAFM's own document *Natura Impact Statements for Forestry Projects - Guidance Note and Template* published in August of 2020 states on page 2 that:

Where the Minister requires a NIS in relation to one or more European Sites, it will notify the Applicant in writing. This NIS Request Letter will also set a deadline for the submission of the NIS. Unless otherwise agreed, if the Applicant does not provide the NIS within the specified period, the application will be considered withdrawn.

The FAC further note that such an approach is consistent with the requirements of regulation 42(4) of the European Communities (Birds and Natural Habitats) regulations 2011 (as amended) which states that:

Unless the public authority otherwise directs, where an applicant for consent for a plan or project who, having been directed in accordance with paragraph (3), fails to furnish a Natura Impact Statement within the period specified in the notice under that paragraph, or any additional period that may be agreed by the public authority, the application shall be deemed to be withdrawn.

The FAC also noted that while DAFM had provided a copy of the request for an NIS, there was no other correspondence relating to the request provided, including any correspondence where the DAFM might have directed the applicant otherwise as to the requirement for an NIS.

Under these circumstances, the FAC consider that there was a breach of the DAFM's own guidelines and the European Communities (Birds and Natural Habitats) regulations 2011 (as amended) and that this represents a significant error in the processing of the licence such that the application should be considered withdrawn.

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 Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of significant or serious errors was made in the making of the decision in relation to licence CN84537, and that a breach occurred of the European Communities (Birds and Natural Habitats) regulations 2011 (as amended) such the application should be considered withdrawn. The FAC is thus setting aside the decision of the Minister in relation to licence CN84537 and directing that any consideration of afforestation of the site should be on foot of a new application if such an application is submitted.

Yours sincerely,

John Evans,
On Behalf of the Forestry Appeals Committee