



**An Coiste um Achomhairc
Foraoiseachta**
Forestry Appeals Committee

8th August 2024

Subject: Appeal FAC015/2024 against licence decision CN91558

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 (Minister). 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

A hearing of appeal FAC015/2024 was held remotely by the FAC on 24th July 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC: Ms. Aedín Doran

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.

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 allow the appeal and set aside the decision of the Minister for Agriculture, Food and the Marine (Minister) to grant licence CN91558. The reasons for this decision are set out hereunder.

Background

The appeal relates to the decision of the Minister for Agriculture, Food and the Marine to grant an afforestation licence for 4.16 hectares at Aughrim, Coolmeen, Co. Roscommon. The forest would comprise two plots both of which would contain mixed, native tree species. Plot 1 is 2.37 hectares and would be comprised of birch and other broadleaf species and Plot 2 is 1.79 hectares and would be planted with alder, birch and goat willow. Both plots would be planted as integrated mixes without the use of fertiliser or herbicide and 150 metres of stock fencing would be erected. Planting would be undertaken using pit planting and invert mounding with some containerised willow plugs. The land is described as enclosed, agricultural land with a grass, rush vegetation type.

The application included operational and environmental information, including a number of maps. The Biomap shows the plots to be separated by an aquatic zone and a number of drains cross the lands. Access to the lands and a site notice are marked to the north of the lands. The documents include a copy of a site notice.

The application was referred to Roscommon County Council and An Taisce. A response from the County Council is on file which refers to an Engineer's comment that the County Council has no objection to the proposal in principle subject to a stated condition.

The application noted the presence of recorded monuments in the vicinity and a report was prepared by a DAFM Archaeologist noting that the site does not contain recorded monuments but that a number of monuments are contained in the general vicinity. Specific archaeological conditions are outlined.

The documents include a screening for Appropriate Assessment which identifies that the site does not lie within a European site and that two European sites are situated within 15km, Annaghmore Lough (Roscommon) SAC 001626 and Clooneen Bog SAC 002348, both of which are screened out on the basis of distance. Other plans and projects considered in combination with the proposal are also recorded.

The documents also include a screening for Environmental Impact Assessment (EIA) which considers the proposal across a number of criteria and concludes that the undertaking of an EIA is not required in this instance.

The licence was granted on 31st January 2024 subject to conditions. The conditions include standard conditions including adherence with best practice standards and a number of specific archaeological conditions.

Appeal

There is one third party appeal against the decision and the full grounds of appeal have been provided to the parties. In summary the grounds submit that,

- There are mapping deficiencies in relation to public roads and wayleaves and the application did not meet the requirements of Section 5 (2) of the Forestry Regulations,
- That there are issues with rights of way and access to the lands such that there is inadequate access to facilitate the development and a failure of due process, with specific reference to Section 5.3.1 of the Forestry Standards Manual.
- That there was a breach of Section 11 (1) of the Forestry Regulations in relation to the site notice, that the position of the site notice is not indicated on the BioMap or other documentation and that the site notice was incorrectly positioned,
- That the licence conditions are deficient and the operational proposals are not detailed with specific reference to licence condition 3,
- That the site includes shell marl which is deemed unplatable in the Forestry Standards Manual,

- That the Appropriate Assessment in-combination assessment is in error and references the wrong County Development Plan,
- That the licence application must be refused under Article 4 (1) of the Water Framework Directive with reference to two lakes which are described as being unassigned and there is a flood risk associated with the lands.

The appeal was accompanied by a number of emails between DAFM staff and the Applicant that are described as having been attained through an AIE request.

A statement was submitted on behalf of the Minister in response to the appeal and the full text has been provided to the parties. In summary the Minister submitted that,

- The biomap and other imagery and mapping submitted with the application show all relevant features that are required,
- The landowner has full legal access to all of the lands and the biomap shows access,
- The proposal is for pit planting of native broadleaves with fencing and no other operational proposals that are required to be attached to the licence and the licence is clear,
- The site was assessed by a highly experienced forestry inspector who determined the site conditions for growing native woodland and that the Minister made the decision to approve based on site specific conditions,
- That the in-combination text refers to the correct County Development Plan and the DAFM conducted a screening of the proposal itself and in-combination with other plans and projects,
- That the DAFM argue that the small proposal to plant 4.8 hectares of native woodland with no drainage, fertiliser, or herbicide use cannot in any measurable way impact negatively on water quality and that there will be benefits from the proposal.

The Appellant made a further submission in response to the statement which was provided to the parties. This contends that,

- The only map on the file prior to the decision being made was the biomap and that this does not show all of the required features,
- There remains doubt as to how the land might be accessed and ownership,
- The biomap does not clearly show the public road and that the site notice was not located on the public road,
- The Inspector's submission validates the grounds of appeal,
- The site is unplantable under the Forestry Standards due to the presence of shell marl within 70 cm of the surface,
- The incorrect County Development Plan was referenced,
- The DAFM is not competent authority for making any determination on water quality and that the subject of flood risk has not even been addressed.

Considerations of the FAC

The FAC considered, in the first instance, the matter of the site notice and the content of the licence application.

The grounds of appeal contends that the location of the site notice as identified on the biomap is not visible from the public road and the public road is not shown on the application mapping. The DAFM contends that this location is visible from the public road and met the requirements of the Forestry Regulations 2017. The Applicant made no submission on the appeal.

The Forestry Regulations 2017 require an applicant for an afforestation or forest road licence to erect a site notice at the entrance, or proposed entrance, to the application lands such that the site notice is visible and legible by persons using the public road. The Regulations also require an application to be accompanied by a map, acceptable to the Minister, that shows a number of features including public roads.

The FAC reviewed the documentation on the file as provided by the Minister. The FAC is of the view that the mapping submitted with the application does not show the public road as required. No Ordnance Survey Ireland map was submitted with the application but one is contained in the archaeology report. This map does not show the site notice location marked on the biomap as being on or close to the public road. Furthermore, the FAC considers that the aerial imagery contained on file shows the site notice at the end of a track the entrance of which is adjacent to the graveyard and that there is a gate or barrier across the track entrance. On the basis of the evidence before it, the FAC considers that the site notice was not located in a location that could have resulted in the site notice being legible and visible from the public road, nor did the maps provided with the application show the public road. On this basis the FAC is allowing the appeal and setting aside the decision of the Minister.

In relation to access, the FAC considers that there is no evidence on file that the Applicant has access to the lands to be planted from the access point identified. Access is available from the public road on the western section of the lands, marked as a track on the biomap, and the Applicant has ownership or a right of way from this point. The grounds refer to a wayleave marked on the folio map associated with the lands. The FAC examined the folio map and noted that the wayleave is located at the eastern boundary of the lands and outside of the proposed operational area.

In relation to the matters of access and shell marl and the stated requirements of the Forestry Standards Manual. The Forestry Regulations 2017 state the Minister shall have regard to any guidelines, codes of practice and standard for good forest practice in making a decision on a licence application. The FAC would understand the Forestry Standards Manual and Land Types for Afforestation documents to be included in such a description and both documents state that they will be considered in both grant aid and licence decisions. The Forestry Standards Manual states,

5.2 Access

5.2.1 Ownership of access

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 Forest. 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. Access and legal rights-of-way should be shown on the Biodiversity Map at Form 1 stage. DAFM may seek further information on access matters at pre-approval stage or before a site may be deemed eligible for 1st Instalment payments. (Pg 18)

The Forestry Standards Manual suggest that areas where shell marl occurs within 70 cm of the soil surface are unplantable and should be excluded from applications.

Land Types for Afforestation: Soil & Fertility (June 2024) states,

Section 4: Ineligible Land

The second category – 'Ineligible Land' – applies to sites that do not meet the soil requirements set out in Section 2 and / or have a R+N score of less than 6.0. Sites with certain inhibiting factors also fall into this category, regardless of their R+N score and status regarding organic soil.

Examples of Ineligible Land are as follows:

...

➤ *Sites with shell marl within 70 cm of the soil surface. (Pg13)*

In relation to access, as noted the FAC considers that there is no evidence that the Applicant has access to the lands from the access point marked on the biomap but does have access at the western section of the lands. There is a marked existing crossing point providing access to the southern plot.

In relation to shell marl, the Appellant submitted a series of emails in which the staff of the DAFM formulated a strategy by which they considered the lands might be plantable. The proposal is for the planting of mixed native woodland comprised of species which would be associated with wet woodlands and generally appropriate to such sites. Such a proposal would not be of a commercial nature.

While the Forestry Standards Manual states that both access and shell marl provisions as requirements, the Forestry Standards Manual is stated to be employed for both grant aid and for licencing. The Forestry Regulations 2017 require the Minister to have regard to such standards. The FAC would understand that the Minister is therefore not absolutely bound by the standards and may deviate from them but that this should involve a reason for such a deviation to be recorded. The FAC considers that, outside of the emails attained through an AIE request and submitted with the appeal, the documentation made available to it does not contain reasons as to why the Minister considered that they could not abide with the provisions of the Forestry Standards Manual in this case. This represents a serious error.

In relation to the consideration of other plans and projects, the grounds contend that the incorrect County Development Plan was considered but does not provide a reason as to how the proposal might have a

significant effect on a European site itself or in-combination with other plans and projects. The documentation includes an individual document entitled *Appropriate Assessment Screening Report Appendix A: In-combination report for Afforestation project CN91558* which is dated 20/12/2023 and refers to the Roscommon County Development Plan 2014-2020. According to the County Council, the Roscommon County Development Plan 2022-2028 was adopted at a Special Planning Meeting on the 8th of March 2022 and that the Plan is in effect from 19th April 2022. The FAC considers that the incorrect CDP was referred to in the documentation. However, the Appellant has provided no basis to conclude that there is any significance in this error and how the CDP has any real relevance to the proposal and decision under appeal. The proposal is for the small-scale planting of native woodland on agricultural land in a remote rural location. There is no basis to conclude that this error might be of a serious or significant nature in the circumstances of this particular proposal.

In relation to the licence conditions and the operational proposals in particular as outlined in "Appendix A", the grounds contend that this has not been completed and that multiple entries are recorded as "not entered". The DAFM submitted that the proposal involves pit planting of native woodland without operational inputs. The FAC would understand that an applicant would be bound to adhere to the activity that they applied for and the operational details outlined in the application. While this might be amended by condition, Appendix A contains multiple records of "not entered". The FAC would not understand that this might allow the applicant to vary the activities that they had applied for and that there is no real basis to conclude that this constitutes a serious or significant error. The FAC did note however that the application includes both pit planting and invert mounding.

In relation to the Water Framework Directive and the Appellant's reference to the "Hyland Judgement", the grounds refer to Lake Nahincha and Lough Dooneen and suggest that there was a requirement for an ad hoc analysis of these lake waterbodies to be undertaken as part of the decision-making process. The DAFM submitted that the proposal cannot in any measurable way impact negatively on water quality and that its ad hoc review is consistent with protecting water quality. The Appellant questioned whether the Minister/DAFM is a competent authority to undertake analysis of water quality.

The lands are crossed by a river, the Owenur 020 waterbody, which has been assigned a Good status and deemed to be not at risk by the EPA in relation to the objectives of the Water Framework Directive. This river then flows easterly into Nahincha Lough, which, as noted in the grounds, has not been assigned a WFD status. The hydrological system then continues through a number of other small lakes including Doneen Lough.

The grounds make reference to the "Hyland Judgement", which involved an aquaculture licence and the extraction of water from a freshwater lake that was unassigned for the purposes of the WFD. The FAC considers that it is not possible to make a meaningful comparison between the activities and facts at issue in the Hyland case and the decision before the FAC. The decision under appeal relates to the establishment of a small native woodland using low impact methods and conditioned on meeting standards of good practice. There would be no direct exploitation or interference with a waterbody. The closest waterbody

to the proposal is the Owenur 020 which has been assigned a status and a set back from any watercourse forms part of the proposal.

The grounds provide no basis as to how the proposal might impact on water quality in any manner, let alone in a manner that might have a tangible adverse impact on the status of lakes downstream from the planting site, such that an ad hoc analysis might be required.

The DAFM have suggested that the proposal cannot in any measurable way impact negatively on water quality and makes general reference to scientific literature on the matter. The grounds of appeal provide no basis as to how the activities might result in any impact on the identified lakes. The FAC considers that there is no reason to consider an error was made in relation to these grounds of appeal.

The grounds also suggest that the lands are located in an area of Flood Risk. The appeal contains no mapping or other data to substantiate this claim but makes reference to the website floodinfo.ie. The FAC examined this source and noted that it does not suggest the area on which works would occur is prone to flooding and that there is no basis to conclude an error occurred in relation to this matter.

The FAC is satisfied that serious errors were made in the making of decision CN91558, including errors in the application and erection of the site notice, and is, therefore, allowing the appeal and setting aside the decision of the Minister.

Yours sincerely,


Vincent Upton,
On Behalf of the Forestry Appeals Committee