



21st Aug 2024

Subject: Appeal FAC 005/2024 against licence decision CN93379

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 Marine. 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. Appeal FAC 005/2024 was considered by a division of the FAC at a remote hearing on 3rd July 2024. In attendance:

FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. Donal Maguire, Mr. Luke Sweetman
Secretary to the FAC: Ms. Aedín Doran

Decision

Having regard to the evidence before it, including the record of the decision made available by the Department of Agriculture, Food and the Marine (DAFM) on the Forestry Licence Viewer (FLV), the notice of appeal, and submissions received, the FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN93379. The reasons for this decision are set out hereunder.

Background

The decision pertains to an application to establish 3.15 hectares of forest in a rural landscape in the townland of Blindwood in Co Wicklow. It is within the River Sub-Basin REDCROSS_020, approximately 9% of which is under forest cover, which is less than the national average of 11.9%. At 3.15ha, the proposed project is considered small in scale by DAFM. The file record indicates that there was a site inspection by a DAFM inspector on the 10/01/2024, which revealed no relevant watercourses on site. The predominant soil type underlining the project area is reported as being brown earths in nature. The slope is reported to be predominantly flat to moderate.

The record includes a copy of the site notice dated 27/01/2023 and the location of the site notice is marked on the Biomap provided. The application pack included a series of maps and environmental information. The application was not referred to any third parties as the site and the planned activity did not have the characteristics to trigger consultation with any of the relevant agencies or the local authority.

The DAFM carried out an Appropriate Assessment Screening of the application and this is summarised in an Appropriate Assessment Screening Report dated 11/01/2024, which is on the file. Eight European sites were identified within 15km of the proposed development, these were:

Buckroneys-Brittans Dunes And Fen SAC 000729
Deputys Pass Nature Reserve SAC 000717
Magherabeg Dunes SAC 001766
The Murrough SPA 004186
The Murrough Wetlands SAC 002249
Vale Of Clara (Rathdrum Wood) SAC 000733
Wicklow Head SPA 004127
Wicklow Reef SAC 002274

All were screened out due to the separation distance and the lack of a hydrological pathway, or otherwise, between the project area and the European sites.

An assessment for EIA was made, dated the 11/01/2024, and the report is on the file, it concluded that an EIA was not required in this case.

One submission was received prior to the licence decision, dated the 27//2023. *Inter alia*, it raised issues concerning the adequacy of the access roadway to the site, the setbacks being proposed and the species to be planted.

There were responses on the file from the DAFM's Forestry Inspectorate, noting the submission and expressing the view that the proposal was not delinquent with regard to the issues of concern raised.

The licence was granted on the 19/01/2024, subject to standard terms and conditions.

Appeal

There is one third-party appeal against the decision and the Notice of Appeal and full grounds have been provided to the parties. In summary the grounds of appeal were:

1. That there were mapping deficiencies in the application
2. That a necessary water setback was not identified, and setbacks were not properly applied
3. Proper consideration was not given to drainage issues
4. That the determination of the EIA Screening, was based on an inadequately reasoned assessment
5. That there was inadequate assessment for protected species
6. That the property setback was inadequate
7. That there was inadequate access
8. That the DAFM In-Combination Assessment had referred to the wrong County Development Plan
9. That the on-site ESB line was not properly considered.

DAFM response to the appeal

The DAFM submitted a statement in response to the appeal, dated the 05/04/2024 and outlined the dates and

procedure in processing the application.

With regard to the specific grounds of appeal, the DAFM submitted that:

Appeal Ground 1: The maps supplied by the applicant in conjunction with additional aerial photography and maps available and consulted by the inspector were sufficient in allowing the inspector to identify all relevant features within and bordering the project area.

Appeal Ground 2: The application proposed, and the approval that issued, required a 60 meter setback from the neighbouring dwelling(s). This incorporates an adequate setback from the water abstraction point.

Appeal Ground 3: The site visit did not reveal any additional relevant watercourses or aquatic zones. The drain referenced by the appellants does not in the opinion of the inspector constitute a relevant watercourse.

Appeal Ground 4: Standard operating procedure was followed.

Appeal Ground 5: Standard operating procedure was followed.

Appeal Ground 6: The application proposed and the approval that issued required a 60-meter setback from the neighbouring dwelling(s).

Appeal Ground 7: The field inspection determined that adequate access to the project area was in place.

Appeal Ground 8: Standard operating procedure was followed in relation to the in-combination report.

Appeal Ground 9: The maps available to the inspector at the time of certification adequately identify the ESB lines within / adjoining the project area.

It was submitted that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act.

The DAFM's statement was provided to the Appellant to allow for any response they may have.

Considerations of FAC

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and additional submissions received, and the DAFM's response to same.

With regard to grounds 1 to 3 and grounds 5,6, 7 & 9, based on the information before the FAC, and having considered the evidence adduced by the appellants, in the particular circumstances of this case the FAC is not satisfied that the DAFM erred in their decision-making process and also find that the decision was made in compliance with fair procedures.

With regard to Ground 4, concerning the *Assessment to determine the Requirement for an EIA Report*, the FAC notes that under the heading of **Natural Resources: Landscape, Amenity and Recreation**, the question is asked - *Is the project area within an area identified in the relevant County Development Plan as being sensitive for: landscape / visual amenity; and / or recreational / amenity purposes?*

The DAFM inspector's response, in the affirmative, specifically cites the 2016 to 2022 Wicklow County Development Plan.

Further, and taking into account Ground 8, the FAC notes that a new County Development plan for Wicklow,

covering the period 2022 to 2028, came into effect on the 23/10/2022, well before the in-combination statement dated 11/01/2024, which also specifically relies on the 2016 to 2022 Wicklow Development Plan. In the view of the FAC, this reliance on a superseded County Development Plan constitutes a serious error.

In relation to In-Combination assessment 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 an 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 it is not clear that the potential for significant effects to arise from the proposal in combination with other plans and projects was considered by the DAFM as these were ruled out at screening stage for screened-out sites on the basis that there is no likelihood of 'residual' effect(s) that might arise, which are not significant in themselves, creating a significant effect in combination with other plans and projects.

In the FAC's view, the reference to 'residual effects' in the In-Combination report for Afforestation project CN93379 on file that appears to deal with the screened-out sites, creates confusion as it is not clear what effects are being referred to in this instance and there is no explanation as to what gives rise to these effects such that they can be described as being 'residual'. The FAC would understand that the term residual is generally used in the context of what remains after an action is undertaken. In the context of Appropriate Assessment, the term residual effects is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment entitled Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states on page 40,

If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions.

In the context of undertaking the screening again the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion.

The FAC is satisfied that significant errors were made in the making of this decision. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN93379 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to complete a new EIA Screening and AA Screening before making a new decision on the application.

Yours sincerely,

Donal Maguire
On Behalf of the Forestry Appeals Committee