



9th December 2024

Subject: Appeal FAC 012/2024 regarding CN84526

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 (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 (SoFs) 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 and remit the decision of the Minister regarding licence CN84526

THE LICENCE.

Licence CN84526 is for the afforestation of 16.06 Ha. with FT1 (Native Forest) in 8 plots

The application for the licence was submitted to the DAFM on the 19th of December 2022 following initial applications on 23rd of November 2021 and, following a material change to an initial application, on 23rd August 2019. A decision to refuse the licence was issued on the 22nd of January 2024 for the reasons that the application was "*Outside scope of Scheme*", the application was found to be "*completely ineligible due to the new Environmental Criteria*" and that the application area "*lies within a curlew breeding area*".

FORESTRY APPEALS COMMITTEE.

A hearing of the FAC was held remotely on the 15th of November 2024 which considered the appeal against the decision CN84526 as dated 22nd of January 2024. The FAC members present were:

Mr. Myles Mac Donncadha (Deputy Chairperson), Mr. Vincent Upton, and Mr. Iain Douglas.
Secretary to the FAC: Ms. Aedín Doran.

BACKGROUND.

The proposal consists of the planting of 16.06 Ha. of Native Forest. Species include Downy Birch, Goat Willow, Pedunculate Oak, Birch and Common Alder.

It would appear that the application as initially submitted was for the planting of Sitka spruce and additional broadleaves. The proposal was amended to comprise Native Forest FT1, and new

applications were submitted in 2021 and 2022. The DAFM have maintained the same reference number for all applications and published all documentation under the same reference number and in the same file which creates significant unnecessary confusion in the documentation. In responding to the appeal, the statement from the Minister states that the application was made on 23rd August 2019, but that application was refused by the Minister and new applications were made subsequent to that refusal. Furthermore, the statement refers to multiple submissions made on the applications which suggests that the Minister had regard to submissions made on separate applications in making a decision on the most recent application. For the avoidance of doubt, it is the decision of the Minister to refuse an afforestation licence on 22nd January 2024 that is before the FAC.

The site is described as being agricultural grasslands on a flat to moderately-sloped (<15%) site facing south-east. The soils on the site are stated to be predominantly Peaty gleys and with peats at the mid-to bottom of the slope and brown earths on the upper slopes. The habitat on the site is primarily wet grassland (GS4/ GSi4) with improved grassland (GA1) on the upper slopes.

The site lies in the Water Framework Directive (WFD) Sligo Bay Water Catchment and the Owenmore[Sligo]_SC_020 Sub-catchment. The site is located within the Clooneen (Sligo)_010 Sub-Basin. The WFD River Waterbody Clooneen River (Sligo) which adjoins plots 3,5,7 and 8 on the southern and eastern site boundaries had Good Status in the monitoring period period 2016-2021) and its status is under review in the WFD 3rd cycle. Forestry is not identified as a pressure on this river waterbody. The underlying groundwater body is the Gorteen IE_WE_G_0028 which was of Good status in the 2016-2021 monitoring period and is stated as Not being At Risk in the WFD 3rd cycle.

The application documents before the FAC included documentation from the licence as first submitted on 23/08/2019 comprising a location map & fencing map (undated); a site notice & an in-situ photograph of the notice on-site dated 23/08/2019; a Biomap dated 27/08/2019; a Revised Biomap dated 27/08/2019 (uploaded to the FLV on 04/03/2020); and a Natura Impact Statement (NIS) dated 20/08/2020. A second set of documents comprising (a species map, site notice & in-situ photograph) are dated 23/11/2020. A third set of documents comprising (a Biomap dated 15/12/2022, fencing map undated uploaded 02/11/ 2023 and an Appropriate Assessment Pre-Screening Report & NIS both dated 27/12/2022).

The application was referred to Mayo County Council on 01/11/2019 which responded on 20/11/2019 stating that AA screening should be carried out and that the proposal had a low impact on the landscape. The application was referred again on 13/01/2022 and 24/01/2023 no response to these referrals was received.

The application was referred to the National Parks & Wildlife Service (NPWS) on 01/11/2019 which responded on 08/01/2020 highlighting potential impacts on European Sites and recommending *inter alia*, exclusion of plots 1,2 and 6, native woodland planting for all remaining plots, retention of hedgerows and use of trees of Irish provenance. This report also indicated that the bogs and wetlands associated with Cloonakillina Lough had unconfirmed breeding Curlew and that afforestation should be avoided where there is a risk to Curlew where present or where population recovery is feasible. The application was referred to the NPWS again on 13/01/2022 and the response of 09/03/2022 highlighted *inter alia* the need for Appropriate Assessment (AA), including a NIS and the need for an Ecological Impact Assessment (EclA). The application was referred again on 24/01/2023, the response of 20/02/2023 recommended screening for AA.

The application was referred to An Taisce on 01/11/2019 which responded on 13/11/2019 stating that AA should be carried out for Cloonakillina Lough SAC (001899) and Flughany Bog SAC (000497) SACs. The application was referred again on 13/01/2022 the response of 08/02/2022 expressed concerns

regarding referring to concerns regarding AA Screening of the two SACs, Water Quality and Setbacks from Watercourses and Areas for Biodiversity Enhancement (ABE). A third referral was made on 24/01/2023 no response to this referral was received.

The application was referred to Inland Fisheries Ireland on 11/04/2023 no response to this referral was received.

The DAFM file on the FLV includes an Assessment to Determine EIA Requirement and an Inspector's Certification Report both dated 09/01/2024, a Site Details Pre-Approval Report and a Site Plots Pre-Approval Report both dated 01/22/2024.

The FAC noted reference to a DAFM AAD and a DAFM Archaeology Report in the DAFM SoF but that neither was available on the FLV. The AAD is dated 28/01/2021 and the Archaeology Report is dated 08/01/2020 it is evident that both were prepared before the decision was made on the licence on 22/01/2024.

The applicant submitted an NIS dated 24/08/2020 which screened 10 Natura 2000 sites Cloonakillina Lough SAC (Site Code 001899), Flughany Bog SAC (Site Code 000497), River Moy SAC (Site Code 002298), Doocastle Turlough SAC (Site Code 000492), Templehouse and Cloonacleigha Loughs SAC (Site Code 000636), Turloughmore (Sligo) SAC (Site Code 000637), Callow Bog SAC (Site Code 000595), Tullaghanrock Bog SAC (Site Code 002354) Bricklieve Mountains and Keishcorran SAC (Site Code 001656) Lough Gara SPA (Site Code 004048).

Cloonakillina Lough SAC, Flughany Bog SAC and Templehouse and Cloonacleigha Loughs SAC proceeded to AA Stage 2 with mitigations proposed.

The applicant subsequently submitted an Appropriate Assessment Pre-Screening Report dated 27/12/2022 which identified 14 Natura 2000 sites within 15 km of the proposed planting:- River Moy SAC, Doocastle Turlough SAC, Turloughmore (Sligo) SAC, Callow Bog SAC, Tullaghanrock Bog SAC, Bricklieve Mountains and Keishcorran SAC, Lough Gara SPA (Site Code 004048), Cloonakillina Lough SAC, Flughany Bog SAC, Templehouse and Cloonacleigha Loughs SAC, Unshin River SAC (Site Code 001898), Union Wood SAC (Site Code 000638), Ballysadare Bay SAC (Site Code 000622), Ballysadare Bay SPA (Site Code 0041292).

Cloonakillina Lough SAC, Templehouse and Cloonacleigha Loughs SAC, Unshin River SAC, Union Wood SAC, Ballysadare Bay SAC were screened in for AA Stage 2 for the reason that there is a downstream hydrological connection from the site. Flughany Bog SAC was screened in for AA Stage 2 for the reason that the site adjoins and is within 1km upstream of the SAC. Ballysadare Bay SPA was screened in on a precautionary basis for risk of loss of silt/ sediment/ chemicals/ hydrocarbons and invasive exotic species

The applicant prepared a second Natura Impact Statement (NIS) also dated 27/12/2022 for the screened in sites which included mitigation measures for each of the relevant Qualifying Interest(s) for the SACs and Special Conservation Interest(s) of the SPAs.

The file record shows DAFM prepared an AAD but that it was not on the FLV. The FAC requested a copy of that AAD which is dated 28/01/2021. The AAD screened the same sites as the applicant's first NIS, that of 24/08/2020 and screened in the same 3 sites as the applicant, Cloonakillina Lough SAC, Flughany Bog SAC and Templehouse and Cloonacleigha Loughs SAC. In undertaking the AAD the DAFM states that it considered the initial application documents for CN84526, the applicant's NIS of 24/08/2020, the third-party submissions of 3/09/2019 and 31/01/2020, the submissions of An Taisce

dated 13/11/2019 and the NPWS dated 08/01/2020. The DAFM determined that the project proposed under CN84526, individually or in combination with other plans or projects, will adversely affect the integrity of the European Sites Cloonakillina Lough SAC and Flughany Bog SAC, having regard to their conservation objectives.

The file record shows DAFM prepared an Archaeology Report but that it was not on the FLV. The FAC requested a copy of that Archaeology Report which is dated 08/01/2020. The report recommended a number of conditions be attached to the licence.

The file records that there was one third-party submission on the licence, (the FAC noted that the submission on 31/01/2020 is not on the FLV but the submission relates to a previous application).

THE APPEAL.

There is one appeal against the decision to refuse this licence application. The grounds of appeal, in summary, are as follows:

1. No detailed information was given by the Forest Service to support its decision.
2. That the Forest Service may have carried out further assessment which the appellant has not been provided with.
3. There is no indication of environmental considerations of concern that would result in a refusal.
4. That more information is required from the Forest Service in order for the appellant to carry out an independent review of (a) the current status of the site regarding the Curlew and (b) clarification on the status of the Curlew and what information was available to the Forest Service.
5. That application has been with the Forest Service since 1st August 2019 and that the recurrent site assessments (NISs) have not been considered by the Forest Service when arriving at their decision.

CONSIDERATION BY THE FAC.

At the FAC hearing of the 13th of November 2024, the FAC had before it the full DAFM record of the decision as made available on the FLV, the Notice of Appeal Form, the grounds of appeal, the Statement of Fact (SoF) provided by the DAFM, and all materials on the FAC file.

The FAC having reviewed all the documentation and submissions, including that of the appellant, considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal which is dated the 19/09/2024 confirms the administrative details of the licence application. 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.

The SoF also contains a statement from the Forestry Inspectorate dated the 30/08/2024 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and in response to the appeal states that *"The entire project area lies within an NPWS curlew buffer. It is not eligible for afforestation of any kind under the current afforestation scheme."*

Also on file is a response from the DAFM Ecologist to the grounds of appeal relating to Curlew and the fact that under the Forestry Programme 2023 – 2027 and according to the Environmental Requirements for Afforestation of August 2023:

- *Areas wholly within the 1.5 km buffer of a Curlew breeding site are ineligible and must not be submitted. (This will be indicated on iNET, drawing from a confidential dataset.)*
- *Any part of a site overlapping with the 1.5 km area of a Curlew breeding site is ineligible and must be excluded from the application. (This will be indicated on iNET, drawing from a confidential dataset.)*

The response also included a response to the grounds of appeal relating to the length of time the application was in the system and that a NIS was conducted on the application.

GROUND OF APPEAL.

The FAC considered the appellant's grounds of appeal under the headings:- Inadequate Information in the decision-making, Further Assessment, Inspector's Certification & Assessment to Determine EIA Requirement, Further information and Timeline of the application and NISs.

Inadequate Information in the decision-making.

This ground of appeal contends that no detailed information was given to support the DAFM decision to refuse the licence. The FAC has taken this to mean that there is no explanation as to why, in the first reason for refusal, the application was found to be "*Outside scope of Scheme*", in the second reason why the application was "*completely ineligible due to the new Environmental Criteria*" and the third reason was how the DAFM decided that the application was within a curlew breeding area

In addressing the first reason for refusal, the FAC understands the "*Scheme*" to refer to the Afforestation Scheme 2023-2027 which is a forestry grant scheme administered and operated by the DAFM. The FAC was established under the Agriculture Appeals Act 2001, as amended, with a function to hear and determine appeals against decisions of the Minister for Agriculture, Food, and the Marine under Section 7 of the Forestry Act 2014, (excluding grant aid), and the Forestry Regulations 2017-2020 in relation to afforestation, tree felling, forest road works and aerial fertilisation. The matter of the refusal for grant aid does not fall within the remit of the FAC but clearly this, in itself, is not an acceptable reason to refuse the licence.

In addressing the second reason for refusal the FAC considered the term "*new Environmental Criteria*". The FAC noted that on the date the decision was made the DAFM had published a document "*Environmental Requirements for Afforestation Working Document v.31Aug23*" which replaced an earlier edition of December 2016. The FAC considers that the term "*new Environmental Criteria*" is vague and lacks clarity because there is no explanation of what the new environmental criteria are or where they are to be found or what the specific concern might be.

The FAC understands that the courts have established that reasons for refusal should be clear and unambiguous, as informative and helpful as possible, and should be self-contained statements.

In addressing the third reason for refusal that the site of the application lies within a Curlew breeding area. The FAC noted that, on the face of the public record available on the FLV, in particular the Assessment to Determine EIA Requirement and Inspector's Certification Report of 09/01/2024, there is nothing to indicate that the application should be refused on the grounds that site of the application lies within a Curlew breeding area. The FAC noted that the Inspector's recommendation in the Inspector's Certification Report simply states "*Refuse*" without giving a reason or explanation.

Furthermore, the DAFM AAD of 28th January 2021 determined that:

“The current application, even with the mitigation proposed in the NIS, would result in the fragmentation of peatland habitat in the area, would not be in line with the strategy for these SACs, which includes the maintenance and, where possible, increase of the populations of important or protected species. Due to the sensitivity of the area, including risks from fragmentation of rare habitats on the ecology of the area, and the spread of non-native trees onto peatland habitats, mitigation measures proposed are deemed to not be adequate. Hence it is recommended that the current application is refused.”

The FAC noted that the AAD was made on the impact on the Qualifying Interests of the three screened-in SACs which are specific habitats and the reference to important or protected species is a general statement without particular reference to Curlew. The FAC further noted that the AAD did not assess the proposal in-combination with other plans and projects and as such the AAD is incomplete and is a serious error in the processing of the licence application. The DAFM have already accepted that there was an error in issuing an AA conclusion as a further information request. The FAC is satisfied that this constituted a serious error.

The refusal letter issued to the Appellant and the statement provided in response to the appeal suggest that the DAFM did not complete the legally required processing of the licence application as they determined that the application for grant aid was being refused. This represents a serious error.

The statement from the DAFM and the documentation that was provided to the FAC suggest that the DAFM considered the application had been made in 2019 and that they had regard to all documentation from this point despite the fact that a previous decision had been made on that application and a new application had been made on the lands. This also represents a serious error.

Further Assessment.

This ground of appeal contends that the Forest Service may have carried out further assessment which should be made available to the appellant. The FAC noted that the SoF made by the DAFM Ecologist refers to an AAD dated 28th January 2021 and that the DAFM SoF indicates that there was a DAFM Archaeologist’s report and that neither is available on the FLV. The FAC considers that both the AAD and Archaeologist’s report form part of the file record and were not available to the appellant on the FLV. The FAC considers the failure to make the two documents available to the appellant on the FLV, constitutes a significant error in the overall processing of the application.

The FAC recommends to the DAFM that the record should be corrected and a completed DAFM AAD and the DAFM Archaeology Report are published on the FLV in order to complete the record.

Inspector’s Certification & Assessment to Determine EIA Requirement.

This ground of appeal contends that there is no indication in the Inspector’s documentation that there were environmental considerations of such concern that would result in a refusal. The FAC noted that in the Inspector’s Certification Report of 09/01/2024 a response of “N/A” (which is taken by the FAC to mean “Not Applicable”) is given to all questions except the 5th. The FAC considers that questions 1-4 and 6-12 require a binary “Yes” or “No” response and is of the view that an “N/A” response was not an appropriate one and that therefore the DAFM has not demonstrated that it has given proper consideration to the matters raised in its own certification process. The FAC is satisfied that the responses in respect to questions 1-4 and 6-12 represent an error in the certification of the project by the DAFM.

The FAC noted that, with regard to the Inspector's Assessment to Determine EIA Requirement, there appear to be inconsistencies in the responses to a number of questions. In the section titled *Physical Characteristics* the response to Q1. is "No" while it is clear the applicant's documentation had been examined since there was a change of forest type and that the DAFM AAD referred to the applicant's NIS. In the section titled *Natural Resources: Soil and Wetlands* the response to Q1. is "N/A" when the applicant applied for FT1 through project redesign. In the section titled *Natural Resources: Birds and Special Protection Areas (SPAs)* the response to Q7. is "No" while one of the reasons for refusal states that site is within the Curlew buffer zone, the response to Q12. is "N/A" while the Ecology Section did address the issue through the AAD. In the section titled *Natural Resources: Other Areas Designated for Nature Conservation* the response to Q2. is "N/A" while the Ecology Section did address the issue through the AAD. The FAC considers that the DAFM has not demonstrated that it has given proper consideration to the matters raised in its own Assessment to Determine EIA Requirement process. The FAC is satisfied that the responses in respect to the questions outlined above represent an error in the EIA processing of the project by the DAFM.

Further information.

This ground of appeal contends that the appellant requires more information from the Forest Service in order for the appellant to carry out an independent review of (a) the current status of the site regarding the Curlew and (b) clarification on the status of the Curlew and the information available to the Forest Service. The FAC noted that response to this ground of appeal from the DAFM Ecologist in their SoF dated 29/05/2024 in particular, that the NPWS provides DAFM with information on Curlew breeding sites and that due to its sensitive nature, this information, together with the 1.5 km buffer, is kept confidential. The FAC also noted that in November 2023 the Forest Service received additional locational data for breeding Curlew from NPWS and that as they were new nesting sites, areas previously not within a Curlew buffer are now within a buffer and as such ineligible for afforestation under the Forestry Programme 2023 – 2027 and that such is the case for licence application CN84526. These additional nest sites with a 1.5km buffer went live on the Forest Service system on the 19th of December 2023. The FAC considers that the decision to refuse the licence was taken on the best scientific information available on the date that the decision was made, in accordance with standard practice.

Timeline of the application and NISs.

This ground of appeal contends that the application has been with the DAFM since 1st August 2019 and that not all NISs have been considered by the Forest Service when arriving at their decision. The FAC noted that response to this ground of appeal from the DAFM Ecologist in their SoF dated 29/05/2024 explaining the timeline. The FAC noted that the applicant submitted an NIS dated 24 August 2020 and that after considering that NIS the DAFM made an AAD dated 28th January 2021 recommending refusal of the licence. The refusal recommended in the AAD was erroneously sent as a Further Information Request and the applicant submitted new documentation including a revised NIS, dated 27th December 2022. The FAC noted that the NIS of the 27th December 2022 assessed 4 additional Natura 2000 sites not assessed in the NIS of 24 August 2020. On the face of the record no new AAD was carried out. The FAC considers that the DAFM should have carried out a new AAD based on the new NIS. The FAC considers the failure to carry out an AAD based on the NIS of 27th December 2020 constitutes a significant error in the overall processing and assessment of the proposal.

OTHER MATTERS.

Environmental Requirements for Afforestation.

The FAC noted that under the Forestry Act 2014 (as amended) and the Forestry Regulations 2017 (as amended) the Minister has a general responsibility to protect the environment and is required to have regard to "any guidelines, codes of practice and standard for good forest practice". The FAC further

noted that over the time period within which the application was processed the guidelines on the Environmental Requirements for Afforestation, to which the Minister is required to have regard, changed in respect to the protection of the Curlew. The Environmental Requirements for Afforestation 2016 (the operative guidelines at the date the application was submitted in August 2019) made no specific reference to protection of the Curlew. In January 2024 when the decision was made the operative guidelines were Environmental Requirements for Afforestation 2023 which has extensive reference to protection of the Curlew and in particular Section 2.5 *Biodiversity - Birds (including SPAs)*, and Appendix B *Environmental Considerations – Guidance for Registered Foresters* Sections 1.1, 5.2 and 5.4

CONCLUSION.

While it is clear that multiple serious errors were made in the processing of the application and the making of the decision, the Minister has placed an absolute restriction on planting forest on this land under the *Environmental Requirements for Afforestation (2024)*. The Forestry Regulations 2017 require the Minister to have regard to any guidelines, codes of practice and standard for good forest practice and the FAC would understand that the afforestation requirements would fall within this category.

The FAC considered that the ultimate matter that might be central to the appeal is whether the Minister is entitled to place such an absolute restriction on private property in this manner and that such an issue may be beyond the remit of the FAC to determine. The FAC would consider its remit to extend to the making of the decision under the Forestry Act 2014 and the Forestry Regulations 2017. It may be that the Minister again refuses the licence application with reference to the Environmental Requirements for Afforestation and specific provisions of the forestry legislation, but the FAC considered that the Appellant is entitled to a proper consideration of their licence application and for reasons for whatever decision is made in keeping with the provisions of the Forestry Act 2014 and the Forestry Regulations 2017 and fair procedures.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the SofS 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 CN84526. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence CN84526 to ensure that before a new decision is made the project a new Appropriate Assessment of the proposal itself should be carried out and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and have in place an updated Inspector's Certification and Assessment to Determine EIA Requirement to address the errors identified by the FAC earlier in this letter. In making a new decision on the afforestation licence application, the Minister should provide reasons that are clear and are in keeping with the Forestry Act 2014 and the Forestry Regulations 2017.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee