



23<sup>rd</sup> December 2024

**Subject:** Appeal FAC036/2024 against licence decision CN86267

Dear Sir,

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 and Decision**

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. A hearing of appeal FAC036/2024 was held remotely by the FAC on 11<sup>th</sup> December 2024. In attendance:

FAC Members:	Mr. Seamus Neely (Chairperson), Mr. Derek Daly, and Mr. Vincent Upton.
Secretary to the FAC:	Ms. Aedin Doran.

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 set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN86267. The reasons for this decision are set out hereunder.

#### **Background**

The decision under appeal relates to an afforestation application at Ballyvongane, Co. Cork submitted on 20<sup>th</sup> April 2020. The proposal, as applied for, covered an area of 10.57 hectares divided into seven plots. Plots 2, 3 and 7 would not be planted. Plot 1 and 4 would be comprised of sessile oak and other broadleaf species. Plot 5 would be planted with Sitka spruce and 20% broadleaves and Plot 6 would be planted with Norway spruce and 20% broadleaves. Plots 1 to 4 are grouped to the north, while Plots 5 and 6 are larger plots to the south. Three site notices are recorded as being erected and access to each section is marked. The lands are described as enclosed agricultural land with a grass, grass/rush vegetation on a mineral soil. On 14<sup>th</sup> October 2020, the DAFM sought an area correction of plot 5 on the basis that it contained cleared woodland.

The documentation includes a number of Biomaps that outlines the proposal lands and environmental features. The FAC understands the most recent Biomap (24/05/23) to be the most relevant. Plot 6 adjoins a river that lies to the south and forms part of the Lee (Cork)\_070. The lands lie in the Lee[Cork]\_Sc\_040 sub-catchment of the Lee, Cork Harbour And Youghal Bay (19) catchment.

The record includes photos of four site notices and the mapping records the location of four site notices. There were 14 submissions from members of the public, all objections. The submissions raised a number of concerns regarding impacts on the village, land availability, enclosure, phone and broadband, the environment and flooding amongst other issues.

The application was referred to Cork County Council and the SW Regional Fisheries Board. The County Council responded drawing the applicant's attention to provisions of planning legislation and referring to monuments on site.

The DAFM sought further information on 24<sup>th</sup> July 2023 in relation to a drainage map and the hydrology of the site. The southern plot is described as being separated from the watercourse by an existing high berm. A drainage report prepared by an Engineer is on file which concludes that the drainage of the site meets the required standard. The file also contains drainage maps and an assessment of sedimentation risk.

The DAFM considered the proposal across a number of criteria and concluded that it was not required to be subject to an Environmental Impact Assessment. There are two screenings on file one dated 15/08/22 and a second certified on 19/02/24.

The file includes a screening for Appropriate Assessment dated 12/07/2022 prepared by an Ecologist. This identifies four European sites within 15km of the proposal. These are Blackwater River (Cork/Waterford) SAC 002170 (12.9km to the north), Mullaghanish to Musheramore Mountains SPA 004162 (9.2km to the west north west), The Gearagh SAC 000108 (8km west south west), and The Gearagh SPA 004109 (9.2km west south west). There are two more unsigned screenings dated 15/08/2022 and 19/02/2024.

The application was referred to a DAFM Archaeologist who prepared a report and included specific archaeological conditions. The northern section of the proposal lands contain a number of monuments and works are excluded from the monuments and within a buffer surrounding the monuments. Archaeological monitoring is also required in an area to the south of the monuments. A setback from a 19<sup>th</sup> Century building proximate to the southern section of the proposal lands is also included although this buffer falls within Plot 7. The report was described as agreed with the National Monuments Service on 06/10/2020.

The DAFM completed a second screening for Appropriate Assessment on 15<sup>th</sup> August 2022 and identified four European sites within 15km. These are Blackwater River (Cork/Waterford) SAC 002170,

Mullaghanish to Musheramore Mountains SPA 004162, The Gearagh SAC 000108, and The Gearagh SPA 004109, each site is screened out.

The decision to approve the licence subject to conditions was made on 14<sup>th</sup> March 2024.

### **Appeal**

There is one third party appeal against the granting of the licence and the Notice of Appeal and grounds has been provided to the parties. In brief summary, the grounds submit that,

- A 60 metre setback in Plot 6 is not being adhered to,
- That Macroom is stated to be the closest village but that this is incorrect and the closest village is Ballyvongane,
- The assessment to determine EIA requirements does not address the concerns raised by the local residents and contains errors in relation to forest cover,
- That there was a lack of consultation and that the purpose of the application is to access grant aid.

The appeal was accompanied by a copy of the Sedimentation Risk Assessment and maps and a copy of an Assessment to determine EIA Requirement (certified 19/02/2024) with a number of figures highlighted and comments included.

The DAFM provided a statement in response to the appeal which was provided to the parties. The statement submits that the Biomap delineates dwelling house setbacks in plot 6 and that a 60-metre unplanted setback is required. It also submits that the identification of Macroom as the nearest village is a clerical error, that the site is not within a High Value Landscape under the County Development Plan and that the broadleaf planting will enhance the landscape. The DAFM restate the forest cover figures and submit that the relative proportion and extents of the tree species are within Forest Service scheme rules.

### **Considerations**

As the parties were informed the FAC relied on the Forestry Licence Viewer as the record of the decision and the documents and evidence that the Minister is required to provide in response to an appeal. A licence decision for these lands had been made in 2022, which was subject to a previous appeal and decision to remit the decision. For the avoidance of doubt. It is the appeal against the decision of 14<sup>th</sup> March 2024 which is before the FAC.

The FAC considered in the first instance the grounds in relation to setbacks from dwellings and other buildings. The record includes a number of maps with newer updated maps showing dwelling setbacks. As noted in the licence decision, the Licence Applicant is required to adhere with the plans and particulars in the application which would include the setbacks. In any case the licence conditions include adherence with the Environmental Requirements for Afforestation and the Forestry Standards

Manual, which clearly lay out the requirement to include an unplanted setback from dwellings. The FAC considers that the Applicant is required not to plant within 60 metres of dwellings under the licence condition. It will be for the Applicant to adhere to the licence conditions and for the Minister to enforce the licence and conditions should that be required. The FAC is not satisfied that the Minister erred in the making of the decision in relation to these grounds of appeal.

In relation to the recording of the closest village to the lands, the DAFM has noted that there was an administrative error in their systems which recorded this as Macroom and that this is incorrect. The application included a number of maps of the lands and the surrounds including an Ordnance Survey Ireland Discovery Series map which includes village and town names. The DAFM mapping systems also clearly identify the location of the proposed planting. While the DAFM system does include an error in identifying Macroom as the closest village, the FAC considers that the location of the proposed planting and its proximity to Ballyvongane is well recorded on the application and maps employed in the making of the decision. The FAC is not satisfied that a serious or significant error was made in the making of the decision in relation to the ground.

The grounds suggest that there has been lack of consultation with the local community and questions the motivations of the Applicant. The FAC did not consider that the motivations of the application in relation to grant aid are a matter that should be considered in the making of the decision. Part 6 of the Forestry Regulations 2017 addresses consultation in the making of an afforestation licence application. The Applicant was required to erect site notices at the entrance to the lands or where the entrance might be. The application records that four site notices were erected which the FAC understands to be on the basis of their being a number of spatially distinct plots that made up the application. Fourteen submissions were made on the application which suggests that there was awareness of the proposal in the locality. The DAFM records that multiple public submissions were made on the application. The application was referred to prescribed bodies and the local authority made a submission which included a reference to the monuments on site. The application was considered by a DAFM Archaeologist and related conditions were attached to the licence.

As regards consultation, the FAC considered the record showed that site notices were erected and that submissions were made on the application that are referenced in the processing of the decision. The Minister made further referrals to prescribed bodies and the archaeological matters were assessed as part of the decision-making process. The FAC is not satisfied that a serious or significant error was made in the making of the decision in relation to the ground.

The FAC considered the grounds that contend that potential environmental impacts were not considered through the assessment to determine EIA requirements, and the decision did not address the concerns raised in the submissions on the application. A number of specific errors are also alleged. The FAC considered the document dated as *Inspection Certified:19/02/2024*.

The FAC would consider that the Minister is required to consider the application before them and to make a licence decision in keeping with their powers under the Forestry Act 2014 and Forestry

Regulations 2017. Some of the matters raised in the submission would not generally be considered to be matters on which the Minister might refuse a licence. For example, the fact that someone might wish to purchase the land and use it for agriculture or to build a house in the future might not be basis for the Minister to refuse the licence application before them. The submissions also raised a number of concerns regarding the environment.

Annex II of the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) identifies classes of development for which Member States may set thresholds or criteria for requiring environmental impact assessment. This includes "initial afforestation and deforestation for the purpose of conversion to another type of land use" and road construction. The Forestry Regulations 2017, SI 191 of 2017, require that afforestation of 50 hectares or more be subject to an Environmental Impact Assessment (EIA). Afforestation of less than the threshold of 50 hectares but which the Minister considers likely to have significant effects on the environment, taking into account the criteria set out in Schedule 3, must also be subject to EIA. The proposal in this case is 8.42 hectares and significantly below the threshold for mandatory EIA.

In making a decision on an afforestation licence application, the Forestry Regulations 2017 require that the Minister consider likely significant effects on the environment and whether an Environmental impact Statement and Assessment are required and whether significant effects on European sites are likely to occur. The Minister is also required to have regard to standards of good practice and submissions made by members of the public and prescribed bodies. The FAC considered the document dated 19/02/2024 to be the relevant determination that was made before the licence was issued.

The grounds suggest that the area of forest cover as expressed in the assessment to determine EIA requirements within 5km of the project is incorrect as it records 5 hectares and that the area is larger. However, the FAC, in reviewing the record, noted that this figure is expressed as a percentage so the figure is 9% and not 9 hectares as indicated in the grounds.

The grounds further question a number of responses provided in the EIA screening. It is noted that part of the southern section of proposal lies in an area that is modelled as being prone to flooding. The record includes an assessment of drainage and sedimentation in addition to a description of the lands and the grounds does not challenge the content of these reports. The proposal is for the planting of trees and not a residential or other form of development.

As previously noted, no tree planting within 60 metres of a dwelling is permitted under the licence. Setbacks from public roads are also required and there would planting of broadleaf species between the setbacks and the planting of conifers. These requirements are reflected in the application but are also conditioned through the requirement to adhere to the Environmental Requirements for Afforestation and the Forestry Standards Manual.

The FAC did note that the following was recorded,

- Does the project area contain or adjoin a listed archaeological site or monument? Yes
- Is the project area adjacent to (i.e. within 200 metres of) a listed archaeological site or monument? Yes
- Does the project area contain or adjoin a Protected Structure or a building or structure in the National Inventory of Architectural Heritage? Yes
- If 'YES' to any of the above, has this sensitivity(-ies) been addressed by the Archaeology and Built Heritage Section and any resulting recommendation(s) enacted through conditions to be attached to the afforestation licence (if issued), or refusal? No

A DAFM Archaeologist had prepared a report that included specific archaeological conditions. If these were considered to be insufficient to address the sensitivities identified, this should have been addressed and reasoned. There is no reason provided as to why the report and conditions proposed does not address the sensitivities identified or the consequences of same. This represents a serious error.

The document also contains the following,

*Is the project area within a Zone of Contribution or Source Protection Area, or within the 250 m buffer for a drinking water abstraction? Yes*

However, there is no explanation of the significance of this question, which was a matter raised in the public submissions, or any record as to whether the Minister considers that significant effects on water quality are likely to arise. The FAC is satisfied that this constituted a further error.

The Forestry Regulations 2017 require the Minister to consider likely significant effects on European sites, Special Areas of Conservation and Special Protection Areas, designated under the EU Habitats Directive. The FAC noted that the DAFM screened the proposal for Appropriate Assessment (AA) on a number of occasions. One screening was undertaken by a named Ecologist on 12/07/2022 which predates the previous licence decision which had been set aside and remitted by the FAC. It is the licence decision of 14th March 2024 which is the subject of the current appeal before the FAC. The record includes two AA screenings, dated 15/08/2022 and 19/02/2024 which are unsigned but postdate the previous decision. From the record, these screenings were undertaken prior to the making of the licence decision.

Both screenings record that a consideration of other plans and projects was not undertaken as part of the screening process. Furthermore, in relation to Mullaghanish to Musheramore Mountains SPA 004162, it is recorded that the SPA was screened in but has been *functionally screened out in order to progress the file in iFORIS for Approval with Conditions or Refusal*. The FAC considered that the reasons in a screening process must be clear and relate to the European site and its conservation objectives. As recorded, the most recent screening before the decision to grant the licence was made, stated that the proposal had been screened in to proceed to Appropriate Assessment but that this did not occur and no reasons are provided. It is then stated that the proposal has been *functionally* screened out. The FAC is satisfied that this constitutes a serious error in the making of the decision.

The FAC further noted that the DAFM had regard to an outdated County Development Plan and Forestry Programme in considering other plans and projects in-combination with the proposal. Furthermore, in the FAC's view, the reference to 'residual effects' in the In-Combination report / assessment on file 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 (AA) 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'.*

The FAC is satisfied that a series of errors was made in the screening for Appropriate Assessment such that the decision should be set aside and remitted for the process to be completed properly.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the submissions received. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that serious errors were made in the making of the decision in relation to licence CN86267. The FAC is thus setting aside and remitting the decision of the Minister to ensure, that before a new decision is made, the project is subject to a new Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive and the Forestry Regulations 2017, and to undertake a new Assessment to Determine EIA Requirement, in keeping with the requirements of the EU EIA Directive and the Forestry Regulations 2017 and to address the errors identified by the FAC in this letter.

Yours sincerely,

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Vincent Upton, On Behalf of the Forestry Appeals Committee

