



22nd January 2024

Subject: Appeals FAC194/2022, FAC195/2022 and FAC198/2022 against licence decision CN88792

Dear

I refer to the appeals 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 ("The Act"), 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. A hearing of appeals FAC194/2022, FAC195/2022 and FAC198/2022 was held remotely by the FAC on 28th November 2023. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Ms. Vanessa Healy

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 set aside and remit the decision of the Minister for Agriculture, Food and the Marine to refuse licence CN88792. The reasons for this decision are set out hereunder.

Background

The appeal relates to a decision by the Minister for Agriculture, Food and the Marine to grant an afforestation licence on 15.14 hectares at Kilduff Middle, Co. Cavan. The proposal is divided into four plots and would involve the establishment of native woodland across three plots with a fourth plot retained as unplanted. Plots 1 and 4 would be planted in keeping with grant and premium category 9 and 10 of the Native Woodland Scheme and comprised of a mixture of alder, pedunculate oak, birch and other broadleaves, plot 2 would be planted with alder, birch, hazel and other broadleaves, and plot 3 would

remain unplanted. Planting would occur in an integrated mix. The land is currently enclosed, agricultural land with a grass, grass rush vegetation type. Site preparation would be through woody weed removal and invert mounding without additional drainage. The eastern plot would be pit planted. No fertiliser or herbicide is proposed and 1,500 metres of stock fencing is included. Documentation on file also indicates that two recorded monuments lie close to but outside the plots.

The application included site and operational details and a series of maps. The Biomap shows the lands to be comprised of a number of agricultural fields divided by a network of hedgerows. Access is described as adequate and the maps show the plots adjoining the public road where access and the location of the site notice is marked. Plot 4 which is separated from the other plots has separate access to the north and access and a site notice are identified. A number of dwellings are situated along the public road and a 60 metre unplanted setback is proposed from these dwellings and this setback comprises plot 3. A number of relevant watercourses are situated to the north of the plots and an aquatic zone runs to the east. A 10 metre setback from the public road and a 20 metre setback from the aquatic zone were identified.

The application included an ecological survey whose purpose was described as to gather information with the purpose to assess any possible links to the Annex I habitat "Species-rich Nardus grasslands, on silicious substrates in mountain areas 6230" and survey for Marsh Fritillary (*Euphydryas aurinia*) larval webs. The report documented a relevé survey of grassland types across the site recording both positive and negative species. In relation to Marsh Fritillary the survey, which was conducted on 17th September 2021, recorded that no larval webs (occupied or unoccupied) were observed on site on the day of the survey.

A second report was submitted dated 23rd June 2022 which recorded a survey for the presence of the Small-white Orchid (*Pseudorchis albida*). The field work, a walk-over survey, was conducted on 17th June 2022 and found no specimens of the target species on the day.

Submissions from five members of the public were made including a number from individuals living adjacent to the site. These noted concerns with flooding, impacts on dwelling, a previous appeal and its outcome, impacts on dwellings and lack of consultation, amongst other concerns.

A report by a DAFM Archaeologist was prepared which noted the proximity to two recorded monuments outside the proposal and recommended a number of conditions related to historic cottages and laneways and adherence with DAFM archaeological requirements.

The documents on the FLV include an Appropriate Assessment pre-screening report dated 4th June 2021, which maps habitats on the lands but describes an afforestation project with some different characteristics.

The DAFM wrote to the Applicant on 23/06/2022 requesting that a drainage survey be undertaken and submitted. A drainage report prepared by an Engineer dated 3rd October 2022 was submitted. This followed from a ground survey that included mapping using GPS. The report included information from CFRAMS for a 1 in 100 and 1 in 1000 flood probability superimposed on a map and shows the eastern

sections of land as falling within these models. The author also noted that the same sections of land are likely to fall within a 1 in 10 flood probability. However, they note the elevation and slope differential and state that as Native woodland (pit planting) is proposed in this general area, no new drains are required.

The DAFM prepared an Appropriate Assessment Screening Report dated 28/11/2022. This considered European sites (Special Protection Areas and Special Areas of Conservation) and outlined a walkover survey conducted by a DAFM Ecologist on 11/11/2022. The survey confirmed the habitats description as submitted by the Applicant except for plot 4 which was found to be improved wet grassland. The Ecologist found no badger setts nor encountered any protected bird species.

The screening identified five European sites within 15km of the proposal and considered each in turn with its interests and conservation objectives. The DAFM also considered other plans and projects, forestry and non-forestry in the screening. Each site is screened out and reasons are provided. The DAFM concluded that there was no requirement to proceed to Appropriate Assessment.

The DAFM also recorded an Ecology Report, dated 28th November 2022, that outlined the survey undertaken by the DAFM Ecologist, described the site and habitats and addressed a number of concerns raised in submissions. This report also outlined measures related to the general protection of the environment.

The DAFM also recorded a consideration of the proposal across a range of criteria and concluded that an Environmental Impact Assessment was not required.

The licence was granted on 02/12/2022 and included conditions including to adhere with the measures in the Archaeologist and Ecologist reports.

Appeals

There are three third party appeals against the decision and the full grounds of appeal have been provided to all parties.

In brief summary, the grounds for FAC194/2022 submits that the flood document was not made available to the local community for consultation and contains misleading and inaccurate information. The grounds submit that the report ignores the annual flooding of the lands and that the survey appears unsure of the flooding of the application lands. The Appellant submits that they have seen annual flooding on the lands throughout their life. They also submitted a number of photos that are described as showing the flooding of the lands and emergency services assisting residents in the area. The Notice of Appeal Form was accompanied by a longer letter submitting that the lands are located on a flood plain of the River Shannon and flood regularly. The Appellant submits that they are a neighbouring landowner and that the proposal with all of its new channels carrying large volumes of water will further intensify the flooding.

The Appellant submits that the proposal will have a negative impact on their property and the management of their meadows in particular. The appeal also refers to a previous appeal and decision by

the FAC and that the situation has not changed in relation to flooding. The appeal submits in relation to Plot 4 that there is no drainage system and that the land does not stretch to the watercourse. The appeal also refers to a neighbour having to be rescued due to flooding and contends that the proposal would have a negative impact on the Appellant's health and livelihood.

The Appellant made a further submission which was received on 8th May 2023 addressing the DAFM statement. The DAFM made a further submission on ecological matters. The Appellant made further submissions that were received on 16th May 2023 that referred to recent flooding, 10th July 2023, primarily in relation to ecological matters, and 28th July 2023, with relation to the flooding report.

The grounds of FAC195/2022, in summary, submitted that there were errors in the application with reference to mapping and public consultation, the licence conditions, the EIA screening, the AA screening and the ecological report. It is submitted that the applications maps are not consistent with the Forestry Regulations 2017, that there have been material amendments to the proposal with reference to Plot 3 and the availability of information, including the drainage report, during the consultation period. The grounds contend that the licence conditions are not consistent with the reasons for the conditions. The grounds express concerns regarding a number of matters in relation to the EIA screening, including with reference to state aid rules, County Development Plan, protected species, and cumulative effects. The grounds contend that the screening for Appropriate Assessment was flawed with reference to the consideration of other plans and projects and regarding the reasons provided for the screening out of Boleybrack SAC and Cuilcagh Anierin Uplands SAC. The grounds further contend that the ecological report has identified species and habitats that are incompatible with the DAFM guidelines for afforestation. The Appellant made a further submission on 1st May 2023 in response in the DAFM statement and the DAFM Ecologist made a further submission on 24th May 2023.

The grounds of FAC198/2022, in summary, raise concerns of the Appellant who lives adjacent to the proposal and submits that the proposal had been subject to a successful third-party appeal previously. In particular, the grounds submit that the land is subject to frequent flooding. The grounds further contend that the planting of hardwood and Sitka spruce behind their house would limit light levels and impact on household costs. The grounds also contend negative impacts on surrounding nature. The Appellant made a further submission on 8th May 2023 in which the grounds were re-stated, and reference was made to impacts on protected species. In particular, it is submitted that the proposal would have dire consequences for bats and that hen harriers and otters have been noted by the Appellant's family members in the area. The Appellant made a further submission on 8th May 2023.

Statements were provided by staff of the Department of Agriculture, Food and the Marine in response to each of the three appeals and the post-appeal submissions made. These submitted an overview of the processing of the application and the making of the decision. The DAFM submitted that the drainage survey was made public when the licence was issued and that this was standard practice. The DAFM submits that that the drainage report draws on information from the OPW National Flood Map system, survey information carried out by an engineer and an interpretation of data and that the report concludes that the area is liable to flooding and floods on a regular basis but for short periods of time following heavy

and prolonged rainfall. The DAFM submits that there is no need drainage proposed and that the lack of new drainage and planting of broadleaves would at worst maintain the current drainage situation and is more likely to reduce the speed at which rainwater reaches the stream. The DAFM submits that the Appellants' land will continue to receive normal light levels for the majority of the day. A detailed response was provided by the DAFM Ecologist outlining the reports that were prepared.

The full notices of appeal and grounds and submissions received were circulated to the other parties.

Considerations of the FAC

The FAC noted that a number of references are made in the appeals to a previous licence decision and appeal which resulted in a new decision being made by the Minister. For clarity, this decision of the FAC relates to the decision of the Minister to grant a licence on 02/12/2022 and the subsequent three appeals against that decision.

In the first instance, the FAC considered the screenings undertaken and recorded in relation to the requirements of the EU Habitats and EIA Directives. Grounds contend that errors occurred in the screenings but provide no real basis as to why the proposal should have been subject to Appropriate Assessment or Environmental Impact Assessment. A number grounds also refer to general policy and procedural matters outside of the remit of the FAC. There is a reference to the impact of invasive species in the grounds but there is no evidence of invasive species on the project site which is to be planted with native tree species or that the proposal might lead to impacts on European sites or the surrounding environment from invasive species. The DAFM conducted a field survey of the lands and record that no such species were identified.

The file includes a number of documents that relate to a screening for Appropriate Assessment undertaken to assess possible significant effects on European sites. The screening documents include the following text,

It is concluded that there is no likelihood of the proposed Afforestation project CN88792 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project.

The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in extension the Appropriate Assessment of the impact of such effects on the integrity of the European site. As stated on the record, it appears that the incorrect test was employed at the

screening stage in that only significant effects that might arise from the project itself were considered. For this reason, the FAC considers that the screening should be undertaken again.

The record also includes a document entitled Assessment for EIA Requirement. 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 below the threshold for mandatory EIA.

When making an application for a forest licence, an applicant must provide the information in Schedule 1 of the Forestry Regulations 2017. This includes a physical description of the whole project and its location; a description of the aspects of the environment likely to be significantly affected and a description of any likely significant effects on the environment from the expected residues, emissions, and waste where relevant and the use of natural resources, to the extent of the information available on such effects. This information must take account of the criteria identified in Schedule 3 of the Forestry Regulations 2017.

The application includes details of the proposed operations and a series of maps including detailed maps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects. While no automatic reports were triggered in this case the Applicant provided a pre-screening report and the DAFM requested two ecological reports and a drainage survey, in addition to the DAFM completing an ecological report stemming from field survey, archaeological report and screenings for AA and EIA.

In relation to the content of the application, it was submitted on behalf of the Minister that the application met the requirements of the Forestry Regulations. The FAC considered the application including the operational and environmental details and the extensive mapping provided in the application in the form of biomap, fencing maps, and habitat mapping. The FAC was satisfied that the application contained correct information that was sufficient to facilitate the consideration of the application by the Minister.

The grounds correctly identify that there is a reference to GPC 3 on the pre-approval submission report, although the same document also specifies the species that would be planted. The nature of the proposal is clearly outlined in numerous documents on the file and specified on the licence that was issued. The FAC is satisfied that this is a minor clerical error and does not consider that this constituted a serious or significant error.

The grounds further contend that the licence is unclear in the boundaries of the proposal. The licence application and mapping were published and formed the basis of the decision. The FAC considers that there is extensive mapping of the lands and detailed descriptions of both the lands and the proposal and that there is no basis to claim that the boundaries of the proposal are in some way in question.

The grounds draw equivalence between the terms scrub and woody weeds but these terms are distinct and well understood by people working in a land-based sector. The application clearly describes the nature of the vegetation on site and identifies specific areas of scrub. The proposal is for the planting of mixed species native woodland, which include hedgerow trees.

The EIA screening document relies on guidelines that have been replaced by the Environmental Requirements for Afforestation (DAFM) according to that document. This includes a reference to Water Quality and Landscape Guidelines, about which concerns were raised in the appeal. Neither were these guidelines attached as conditions of the licence. The reliance on these documents in the determination constitutes a serious error in the context of the approach adopted by the Minister.

In addition, while the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the EIA Determination, which itself only refers to forestry projects. While the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for not considering that the proposal is likely to have a significant effect on the environment might be found in separate documents, it would be clearer if an explicit reference to the characterisation of existing and approved projects was included in the EIA Determination and the consideration of likely significant effects on the environment.

The EIA screening also records,

- Is the amount and type of forest cover in this locality known to be a significant issue? If so tick yes and describe in the Inspectors comments box below. Yes

However, no comment or other narrative reason is recorded on the form or in any other document.

The statement on behalf of the Minister submitted in response to the appeal also records a lack of awareness of a newly constructed watercourse. However, an ecological report records the presence of a newly constructed watercourse on the lands. The FAC would consider that all of the relevant decision makers should have been aware of the hydrological system of the lands in making the decision, for example in the completion of the EIA screening.

The grounds refer to the requirements of state aid rules but the decision before the FAC relates only the granting of a licence as the remit of the FAC, provided in the Agriculture Appeals Act 2001, does not extend to grant aid decisions.

The grounds contend that an incorrect County Development Plan was referred to. The FAC noted that the in-combination report refers to considering the County Development Plan 2014-2020 and that this plan appears to have been replaced by a more recent plan when the decision was made. The FAC considers this to be an error that should be addressed in the making of a new decision.

The grounds refer to peat soils on the lands and the ecological reports note that the lands are mineral and peaty mineral soils in relation to the areas that would be planted. The AA screening report does refer to 33% of the site being comprised of cutaway/cutover basin peats and blanket peats (some) however that is derived from an indicative soil map. The soil description provided is based on site surveys is more reliable and it would be better practice for the DAFM to address such discrepancies where they arise in the documentation. In any case, the lands are subject to existing drainage and agricultural use at present including grazing by livestock. The FAC concluded that there is no basis to consider that the proposal would not represent a sink of greenhouse gases. The FAC considered that the proposal would be in keeping with the goals of Climate Action policy.

The FAC are satisfied that serious errors were made in the making of the decision and that the decision should be set aside and remitted for the screenings for AA and EIA to be completed in keeping with the requirements of the Forestry Regulations 2017.

In relation to the drainage report that was submitted. While the FAC notes that this was required to be submitted, the FAC does not consider that the report resulted in any material change in the proposal or contained any significant information that was relied on in the granting of the licence. The drainage report notes the nature of the proposal, being the establishment of native woodland with the eastern section to be pit planted and does not propose the attachment of any additional conditions or measures. On that basis the FAC considers that the report had no material impact on the decision and that there was no requirement to re-open the public consultation process for an additional 30 days. The procedures of the DAFM distinguish between the drainage requirements of commercial proposals and mixed species native woodland, as is proposed in this case.

Based on the dates provided for the publication of the documents on the FLV, it appears that a number of application related documents were not published at the time of making the decision. However, the decision is being remitted to the Minister in any case.

In relation to the claims that the proposal would impact on neighbouring lands through new drainage and increased water flow from the lands, the FAC noted that no new drains are proposed as part of the project. The DAFM contends that at worst the proposal would maintain the current drainage patterns and that the proposal as roots develop may increase percolation rates and improve drainage. The FAC considers that the position of the DAFM is in keeping with the relevant evidence of such changes in land use, in relation to flood attenuation, and that there was no basis for the claims that the proposal would increase water flow from the lands that might impact on adjoining lands. The FAC considers that all parties are in agreement that part of the lands are subject to regular flooding, there is, however, no reason to consider

that the proposal, which is for the establishment of native woodland, would exacerbate this issue or result in additional impacts on neighbouring lands.

The grounds refer to the suitability of the lands with reference to DAFM procedures and question the reliance on specific standards in the making of the decision. The FAC noted that the licence was conditioned on adherence with the Environmental Requirements for Afforestation and the Forestry Standards Manual in the following,

2. The afforestation project and all associated operations shall be carried out and completed in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars).

[Note: These documents may be found on the Department's website, alongside the amending or updating Circulars, which are arranged by year.]

The FAC noted that the only versions of these documents on the DAFM website are working documents with one marked as draft. In addition, it appears that no Circular has issued to clarify the status of these documents or how a licence holder should interpret the related conditions on their licence. The FAC considers this to be a serious error that should be addressed in the making of a new decision.

In relation to the suggested impact on dwellings and light levels. The proposal lies to the north of a number of dwellings including. A 60 metre unplanted setback is proposed from the dwellings as identified in the application. Further unplanted setbacks would be maintained from public roads, watercourses and aquatic zones. A small narrow area of planting would extend to the west of the dwellings with a 60 metre setback. The proposal is for the planting of deciduous native species, primarily of light-crowned species. The FAC does not consider that there is any basis for the suggestion that the proposal would have any meaningful impact on light levels in dwellings or properties or that an extended setback or any other additional condition was required in this case.

The grounds make general references to protected plants and animals but the FAC considers that these have not been substantiated. The grounds make a general contention that the lands contain Annex habitats but the DAFM have clearly outlined the surveys undertaken, their findings and how the decision was made. The grounds provide no meaningful argument against the findings of the Ecologists whose findings were considered as part of the decision-making process.

The application included detailed habitat mapping and a number of ecological surveys. The DAFM itself prepared ecological reports following survey of the lands and screenings and provided detailed responses to the grounds raised in relation to ecology. The FAC has already determined that errors were made in the screening documents. In relation to the general claims of the Appellants that the proposal would have an adverse impact on protected plants or animals in the local area, the FAC concluded that there was no basis to accept the appellants claims. The proposal is for the planting of native woodland on agricultural land following low intensity methods. The surveys show the land to be improved and subject to livestock grazing at present with evidence of soil poaching in its current use. The grounds provide no evidence that

the identified protected plants and animals are present on the site and the DAFM have provided the reports of a number of ecological assessments of the land. In particular, grounds refer to the proposal having a devastating effect on bats. The proposal would retain all existing hedgerows and mature trees. Furthermore, the nature of the proposal is for the development of mixed species native woodland, a well-recognised habitat for bats, on agricultural land.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of the three appeals, the statements of fact submitted by the DAFM and submissions made, including post appeal documentation. The FAC is satisfied that a series of significant or serious errors was made in the making of the decision CN88792. The FAC is setting aside and remitting the decision of the Minister regarding licence CN88792 in accordance with Section 14B of the Agriculture Appeals Act 2001 to complete new screenings for Appropriate Assessment and Environmental Impact Assessment before a new decision is made.

Yours sincerely,

—
Vincent Upton,
On Behalf of the Forestry Appeals Committee