



4<sup>th</sup> October 2024

**Subject:** Appeal FAC 035/2024 regarding Licence Ref: CN93823

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 Statement of Fact (SoF) 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 allow the appeal and set aside the decision of the Minister regarding licence CN93823

**THE LICENCE.**

Licence CN93823 is for the planting of 10.43 Ha. of Native Forest FT1 in 3 Plots located in the townlands of Caherconreefy & Cloverfield, Co. Limerick.

The application for the licence as submitted to the DAFM was dated the 4<sup>th</sup> of January 2024. A decision approving the licence was issued on the 13<sup>th</sup> of March 2024 subject to conditions including adherence to DAFM Environmental & Forestry Standards, an attached archaeology report & conditions, the planting of Additional Broadleaves comprising Scots pine (30%), Downy birch (30%), rowan (15%) alder (15%) and holly (10%), a setback from residential properties of 60 m. and the retention of all Trees & Hedgerows on the site.

**FORESTRY APPEALS COMMITTEE.**

A sitting of the FAC was held remotely on the 24<sup>th</sup> of July 2024 which considered the appeal (FAC 002/2024) against the decision to issue the licence of the 13<sup>th</sup> of March 2024. A further sitting was held on 18<sup>th</sup> September 2024 at which the appeal was considered. The FAC members present for both sittings were: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton and Mr. Iain Douglas. The Secretary to the FAC was Ms. Aedín Doran.

**BACKGROUND.**

The proposal consists of the planting of 10.43 Ha. of Native Forest FT1. The soil on the site is described as predominantly brown podzolic. The slope is described as being predominantly flat to moderate (<15%). It is stated that the site adjoins an aquatic zone or relevant watercourse. The habitat on the site is predominately improved grassland.

The site lies in the Water Framework Directive (WFD) Shannon Estuary South 24 Catchment and the Drumcomoge\_SC\_020 Sub-catchment. The site is located within the Camoge\_010 River Sub-Basin. The nearest WFD River Waterbody to the site is the Camoge\_010 which adjoins part of the southern boundary. This river water body had Poor status in the period 2016-2021 and its status is At Risk in the WFD 3<sup>rd</sup> cycle. Forestry not identified as a pressure on this river waterbody. The Mulkear (Limerick)\_020 river waterbody is located ca. 377m south-east of the site but is in a separate sub basin. The underlying groundwater body is the Knockseefin-Longstone West IE\_SH\_G\_134 which is of Good status in the 2016-2021 monitoring period and is stated as Not at Risk in the WFD 3<sup>rd</sup> cycle.

The application documents before the FAC included an Inet Pre Approval Submission Report, a Bio Diversity/Operational Map, a Fencing map, Habitat Description and Map, a Location Map, a Site Notice and a photograph of the Site Notice in Situ.

The licence application was referred to An Taisce and Limerick City and County Council on the 29<sup>th</sup> of January 2024. No reply was received from An Taisce. Limerick City and County Council replied on the 21<sup>st</sup> of February 2024 stating that it had no issues with water quality and that prior to the granting of any licence an Archaeological Impact Assessment must be carried out.

The DAFM file on the Forestry Licence Viewer (FLV) relating to licence CN93823 includes a DAFM Appropriate Assessment Screening Report (ASSR), a Screening Stage In-combination Report, an Assessment for EIA Requirement, and an Inspector's Certification Report (all certified on 11/03/2024). The file also includes a Site Details Report and a Site Plots Report (both dated 13/03/2024) and an Archaeology Report dated 19/02/2024.

DAFM Appropriate Assessment Screening Report identified five Natura 2000 sites within 15 km of the proposed planting project namely Clare Glen SAC (Site Code 000930), Glen Bog SAC (Site Code 001430), Glenstal Wood SAC (Site Code 001432), Lower River Shannon SAC (Site Code 002165), Slievefelim to Silvermines Mountains SPA (Site Code 004165). All five European Sites were screened out. The Screening Stage In-combination Report concluded:

*"...that there is no likelihood of the proposed Afforestation project CN93823, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects....."*

The Assessment for EIA Requirement determined that an EIA was not required.

The file records that there were two third-party submissions made on the licence application.

#### **THE APPEAL.**

There is one third-party appeal against the decision to approve this licence and the full grounds of appeal were provided to the applicant and the DAFM. The grounds of appeal are in summary:

1. That the 20 m. setback from Recorded Monument LI023-059 is inadequate and that a minimum setback of 100m is required to safeguard the above and below ground archaeological remains.
2. The appeal refers to the DAFM Archaeology Report.
3. The appeal refers to another licence CN89760 in the townland of Dromkeen South which contained a similar moated archaeological site, and which was refused for the reason that it impinged on the archaeological character of that site.
4. The appeal refers to the presence of funerary monuments being on the site.

**Post-Appeal Submissions.**

Post-appeal submissions were made by the applicant, appellant and the DAFM. In the interest of clarity and for the avoidance of doubt, in considering the post-appeal submissions (and associated e-mail correspondence), the FAC had regard only to those matters it deemed to be an elaboration or clarification of points raised in the grounds of appeal proper and responses to the grounds from the parties. Additional new matters or matters unrelated to a proper consideration of the afforestation licence as submitted the appeal were not considered.

**CONSIDERATION BY THE FAC.**

At its sittings on the 24<sup>th</sup> of July 2024 and 18<sup>th</sup> September 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 SoF provided by the DAFM, the post-appeals submissions (and associated e-mail correspondence), and all materials on 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 13/03/2024 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 contains a statement from the Forestry Inspectorate dated 08/04/2024 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied.

The SoF also contains the DAFM Archaeologist's response of 29<sup>th</sup> April 2024 to the grounds of appeal and further submissions were made by the DAFM.

**GROUND OF APPEAL.**

The FAC considered the appeal under the headings as presented in the grounds of appeal CN93823 date stamped 28 Mar. 2024.

**Adequacy of the 20 m. setback from Recorded Monument LI023-059.**

This ground of appeal contends that the condition requiring minimum 20m wide archaeological exclusion zone/setback around the Moated Site (LI023- 059) and its exclusion from the proposed planting is inadequate and requests a setback of 100m to safeguard above & below ground archaeological remains.

The FAC noted all of the observations from the appellant and DAFM regarding the adequacy minimum 20m wide archaeological exclusion zone/setback around the Moated Site (LI023- 059) and its exclusion from the proposed planting. The FAC further noted that the DAFM archaeologist in his initial report of 29<sup>th</sup> February 2024 refers to the provisions of the DAFM publication *Environmental Requirements for Afforestation 2023* which requires a minimum 20m exclusion zone from the outermost extent of a designated archaeological site (ie. a monument "entered onto the Record of Monuments and Places (RMP) or the Register of Historic Monuments (RHM); National Monuments in the ownership or the guardianship of the Minister for Arts, Heritage, Regional, Rural & Gaeltacht Affairs or a Local Authority; or those subject to a Preservation Order (PO) or a Temporary Preservation Order (TPO). Also included are sites and monuments newly discovered at the pre-application design stage or during the site works stage, post-approval.") and that condition 2 of DAFM archaeologist's report incorporates that requirement and is stated as condition of the licence. The FAC also noted that the DAFM has indicated

that the archaeologist's report and conditions were agreed by the National Monuments Service on 05/03/2024. In addition to the 20 metre setback the conditions require Archaeological monitoring of ground disturbances within 100 metres of the monument. The grounds query the value of such monitoring. The FAC considers that such monitoring is well established practice across a range of licencing systems, where considered necessary, and that the benefit of having a trained Archaeologist to monitor the works is clear. The licence does not entitle the licence holder or anyone else to damage the monument nor does it remove any legal protections to the monument or remove any legal obligations on the landowner or those involved in the works that are provided in other legislation. The Minister is entitled to suspend, revoke and vary licences and conditions if deemed necessary and the landowner and operators have well known reporting obligations. FAC is satisfied that the DAFM did not err in its decision concerning the matter of archaeological setback.

This ground of appeal referred to Afforestation Licence CN89760 which the appellant stated contained a similar archaeological moated site which was refused on the grounds that it would impinge on archaeological character of that site. The FAC noted that Afforestation Licence CN89760 is located in the townland of Dromkeen South some 1.2 km north of the current application. The appellant went on to make claims regarding the origins of the term Dickies Hollow and suggested burial sites are located on the lands beyond the recorded monument. Both the applicant and DAFM made further submissions on the archaeological and cultural grounds and the FAC preferred the evidence provided by the DAFM and applicant. In addition, as previously stated the granting of the licence does not remove any legal protections on recorded monuments or the finding of remains.

#### **Funerary Monuments on the site.**

This ground of appeal refers to funerary monuments on the site and requests an archaeological setback of 100m. The FAC considered the post appeal submissions from all parties on this matter where there is no agreement whether such funerary monuments exist on the site. The FAC noted that the archaeology report and the licence contain a condition that *"a structured programme of archaeological monitoring is also required for all ground preparation, drainage works and ground disturbances within 100m of the Moated Site, as demarcated in pink on the accompanying map, owing to the elevated archaeological potential in this area, particularly for sub-surface ancillary features associated with this medieval monument and for medieval finds in the topsoil."* and that under the publication *Environmental Requirements for Afforestation* monuments newly discovered during the site works stage are defined as a Designated Archaeological Site and subject to a 20m exclusion zone and additional archaeological monitoring. FAC considered it was not necessary to decide on the merits of any party to the appeal concerning the presence or otherwise of funerary monuments on the site and that the conditions of the licence and compliance with the *Environmental Requirements for Afforestation* offered sufficient protection to any Designated Archaeological Site. As previously noted, the granting of the afforestation licence does not remove any protections provided under separate legislation. FAC is satisfied that the DAFM did not err in its decision concerning the matter of archaeological setback.

#### **APPLICATION DOCUMENTATION.**

A number of grounds refer to the application documentation and the consultation process.

The FAC noted that the application documentation contains a number of documents dated in December 2023 and January 2024. The DAFM record the application as having been made on the 4<sup>th</sup> January 2024 while the site notice was erected on 5<sup>th</sup> January 2024. The Forestry Regulations 2017 (SI 191 of 2017) state in relation to site notices,

*Site Notice in respect of afforestation and forest road works*

11. (1) *Where an application involves—*

*(a) afforestation, or*

*(b) forest road works*

*the applicant shall, before the making of the application, erect a notice in a form determined by the Minister, at the entrance from the public road to the land to which the application relates or, where no entrance exists, at the point where it is proposed to create an entrance, so as to be easily visible and legible by persons using the public road, and shall not be obscured or concealed at any time.*

The FAC would understand that it is, therefore, a requirement that the site notice be erected before the application was made while in the case of CN93823 the application was made before the site notice was erected. The erection of the site notice provides for public notification and relates to the opportunities of individuals to make submissions on such applications. The FAC considers this to be a serious error in the making of the application and the processing of the application which led to the making of the decision.

In reviewing the documentation on file, the FAC further noted that the Bio Diversity/Operational Map must include *inter alia* aquatic buffer zones and dwelling house or building setbacks which should be clearly identified on the map and legend. The FAC noted that the Bio Diversity/Operational Map submitted dated 04 Jan 2024 shows an aquatic zone and setback along the southern boundary of the western section of Plot 1 while the legend details the setback as N/A. The FAC understands that a setback of at least 10 m. should be specified in the legend. The FAC further noted that two dwellings visible on the Bio Diversity/Operational Map, one adjoining the south-east corner of the eastern section of Plot 1 and the other adjoining the western site boundary of the western section of Plot 1 are not identified as such on the map and that no dwelling house or building setbacks buffer zone is shown for them. The FAC noted that in the applicant's submission received 10/09/2024 includes an aerial photograph showing a 60m set back from the dwelling at the south-east corner of the eastern section of Plot 1, however the applicant states the map was received in July 2024, which the FAC noted was post-appeal. The FAC considers that the omission of required information from the Bio Diversity/Operational Map submitted with the licence application in the first instance represents a serious error in the making of the application and the processing of the licence application.

As the FAC has determined that serious errors occurred in the making of the decision at the application stage the FAC is allowing the appeal and setting aside the decision of the Minister.

As noted in the grounds the application was for the planting of Pedunculate oak and Additional Broadleaves while the licence included a condition to plant Scots pine as part of the Additional broadleaf component. The DAFM have submitted that Scots pine is considered an acceptable species under the Native woodland scheme, however, the grant aid decision is not before the FAC nor is it subject to public consultation. For an individual member of the public it might not be clear what species are being applied for in an application that just states "additional broadleaves" and it would be reasonable to conclude that no conifers were being proposed as part of the application. In this case the Minister has conditioned the species which would form the "additional broadleaves". The grounds express dissatisfaction with the planting of Scots pine but the FAC does not consider that this argument has been substantiated in any real way. Scots pine is a native trees species with a relatively light crown and would form only c.16% of the overall planting area which itself is quite small. The

Minister has reasoned the condition and explained the benefits of the species. The FAC is not satisfied that this constitutes a serious or significant error in the context of the fact of this case.

In reviewing the documentation on file, the FAC noted that for each of the sites assessed in the AASR it is stated that the *"details of this European site, including its qualifying interests (listed below) & conservation objectives, and supporting habitats & species (as relevant), as per [www.npws.ie/protected-sites/sac/004165](http://www.npws.ie/protected-sites/sac/004165)"* were reviewed. However, it was noted that no qualifying interests were listed for any of the sites assessed in the AASR.

The FAC further noted that the reason given in the ASSR for screening out the Lower River Shannon SAC is *"The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection."* On examination of the publicly available information on the Catchments.ie website the FAC noted that the proposed planting is located upstream of the Lower River Shannon SAC and is hydrologically connected to that SAC, albeit at a distance of ca. 40 Km.

The FAC concluded that the Appropriate Assessment Screening Report had not been recorded appropriately and that this constituted a serious error in the making of the decision.

In reviewing the documentation on file, the FAC noted that the Inspector's Certification Report contains a section titled *"Submission Details"* in which the Inspector can make comments on each submission. On record there are two submissions on the FLV raising different issues and the DAFM SoF confirms that there were two valid submissions on the licence. The FAC noted that the Inspector's Certification Report addresses only to one of the submissions on file. The FAC further noted that it is a requirement under the Forestry Regulations 2017 that the Minister has to have regard to written submission or observation received. The FAC concluded that in referring to only one of the submissions in the Inspector's Certification Report the DAFM has not demonstrated how it has complied with the Forestry Regulations 2017 with regard to the second submission and that this constituted a serious error in the making of the decision.

In reviewing the documentation on file, the FAC noted that Bullet Point 3 in the section titled *"NEIA Sub Threshold Determination"* of the Assessment to Determine EIA Requirement document reads *"...afforestation projects summarised above or other non-afforestation projects s listed in the AA in-combination report for the project,...."*. The FAC is of the opinion that the sentence should read *"...afforestation projects summarised above and other non-afforestation projects s listed in the AA in-combination report for the project,...."*.

#### **IN-COMBINATION REPORT.**

In reviewing the documentation on file, the FAC noted that the AASR relies on a Screening Stage In-combination Report which includes the statement:

*"There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects."*

The FAC consider that an in-combination assessment conducted at AA screening stage should not consider the potential *"residual"* effects of a proposed plan or project. The FAC consider that this wording is ambiguous as it is not clear whether residual effects are being considered cumulatively in-combination with other plans and projects, or individually in-combination with other plans and projects, and that as a result it is unclear if the proper test has been applied.

The FAC noted that the in-combination assessment referred to the objectives of the Limerick County Development Plan 2010-2016 (as varied) but that on the date the in-combination assessment was carried out (11/03/2024) the operative county development plan was Limerick Development Plan 2022-2028 which came into effect on 29/07/2022. The FAC further noted that the objectives of the Limerick Development Plan 2022-2028 are different to that of Limerick County Development Plan 2010-2016 (as varied).

The FAC considers that the lack of clarity in the wording of the In-combination conclusion and the use of out-of-date information in carrying out an AA Screening is a serious error in the processing of the licence.

In any case for the reasons previously outlined the appeal is being allowed and the decision set aside.

**CONCLUSION.**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, the SoF submitted by the DAFM and post-appeal submissions made. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of serious errors was made in the making of the decision in relation to licence CN93823, which include serious errors in the making of the application. The FAC is thus allowing the appeal and setting aside the decision of the Minister in relation to licence CN93823.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

