



26th June 2025

Subject: Appeal FAC008/2024 in relation to a decision to refuse an afforestation licence under CN88457

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence refusal decision issued by the Minister for Agriculture, Food, and the 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 all parties to the appeal.

Hearing

A hearing of appeal reference FAC008/2024 was held remotely on the 26th March 2025.

In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Mr. Vincent Upton & Mr. Luke Sweetman.
FAC Administration: Ms. Aedín Doran

In the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

Decision

Having regard to the information before it, including the record of the decision on the Forestry Licence Viewer (FLV), the notice of appeal, and the Statement of Fact (SOF) from the Department of Agriculture, Food, and the Marine (DAFM), the FAC has decided to set aside and remit the decision of the Minister to refuse afforestation licence CN88457 for the reasons set out hereunder.

Background

The decision under appeal relates to an application for the afforestation of approximately 11.45ha of native woodland in Gortloughra, Co. Kerry. The decision to refuse a licence for the proposal was issued on the 18th January 2024 with the following reason provided:

- Outside scope of Scheme,

- The average R+N score is 5.5 and is less than the required level of 6 This refusal is to ensure good forestry practice, the protection of the environment, health and public safety. This refusal is issued under the Forestry Regulations 2017 (S.I No. 191 of 2017). You are now required to remove your site notice immediately

The "Pre-Approval Submission Report" states that the proposal site is currently enclosed agricultural land on an exposed site with a southerly aspect. The current vegetation type is stated to be a combination of "Grass, Grass Rush, Bracken/Briar, Molinia/Calluna, Furze, Scrub/Laurel/Rhodo" and site access is "adequate". The report states that the site is underlain by "mineral" soil. The DAFM's Appropriate Assessment (AA) documents state that the proposal site is within Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC. The average slope across the site is described as steep (ranging from 0% - 45%), the elevation is between 70m - 180m, and the soil types are "Surface water Gleys/Ground water Gleys (11%), Peaty Gleys (15%), Podzols (Peaty)/Lithosols/Peats (73%), Cutaway/Cutover Basin Peats and Blanket Peats (some) (1%)".

Information available online from the Environmental Protection Agency (EPA) shows that the proposal is in the Cottoner's (Laune)_010 River Sub-Basin and the Cottoner's (Laune)_010 River Waterbody currently has "Good" status (assessed by monitoring) for the 2016-2021 period and is "Not at Risk". The proposal is underlain by the Cahersiveen Ground Waterbody which also has "Good" status and is "Not at Risk".

An unnamed watercourse (IE_SW_22C050400 - Order 2) runs along the northern boundary of the proposal. A second watercourse (Gortagreenane - Order 2) runs c.80m to the southeast of the proposal before joining the northern watercourse c.280m east of the proposal to form the Order 3 EPA-mapped watercourse labelled IE_SW_22C050400. The river flows c.600m east into the Cottoner's [Laune]. The Bio Map records a relevant watercourse c.90m long in the most easterly section of the proposal.

DAFM Assessment to Determine EIA Requirement

The DAFM completed an "Assessment to Determine EIA Requirement", certified on the 16th January 2024, which considered the proposal's potential impact on the environment across a range of criteria before concluding that "the project is unlikely to give rise to significant effects on the environment by virtue of its nature, size and location and consequently, an environmental impact assessment is not required".

The FAC noted that under "Natural Resources: Soil and Wetlands" the DAFM Forestry Inspector answered:

- *Do all parts of the site meet the R+N score of 6.0 or greater? "Yes"*
- *Has the area with a R+N score of less than 6.0 been addressed, either through: (i) exclusion from application, through project redesign; (ii) incorporation into the surrounding vegetation unit for planting (where a discrete area(s) less than 2.0 ha is involved); or (iii) refusal of the entire project area (if all of the site has a R+N score of less than 6.0)? "No"*
- *Does any part(s) of the site contain soil type(s) other than the following eligible soil types: (i) mineral soil; (ii) organo-mineral soil with a peat depth of less than or equal to 30 cm; and (iii) modified fen or modified cutaway raised bog that meets the requirements of the native woodland Forest Type and possible to progress without drainage? "Yes"*
- *Has the area containing other soil type(s) been excluded, either through: (i) project redesign (i.e. revised Certified Species Map and Species Table, etc.); conditions to be attached to the afforestation licence (if issued); or (ii) refusal of the entire project area (if all of the site contains other soil type(s))? "No"*

In the section titled "Project Location" the DAFM Forestry Inspector answered:

- Based on the extent of forestry as outlined above, is there a likely significant cumulative impact on the environment from this project, when considered in conjunction with the impact of other existing and/or approved afforestation projects? "No"

- Is the amount and type of forest cover in this locality known to be a significant issue? "No"

The FAC noted that the above questions are not numbered but the following question states "Regarding the answers to Qs. 2.11 and 2.12 above, provide reasons that led to these decisions." The Inspector answered that "Native woodland would fit in well. Low pressure on road network and enhanced wildlife and landscapes."

Appropriate Assessment (AA)

On file is an AA Screening Report & Determination (AASRD) and an AA Report (both labelled as "Other" on the FLV with a published date of 13th June 2023).

The AASRD was signed-off by an Ecologist from Southern Scientific Services on the 6th June 2023 and screened 9 European sites within 15km of the proposal. Three sites, namely Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC, Castlemaine Harbour SAC, and Castlemaine Harbour SPA, were screened in for Stage 2 AA and the remaining sites were screened out with reasons provided for the screening conclusions.

The AASRD included an "Appendix A: In-Combination Report for Afforestation proposed under CN88457" in relation to the screened-out sites:

The current Kerry County Development Plan was examined and the following objectives relating to European Sites were identified: Objectives relating to Natura 2000 sites set out within Kerry County Development Plan 2015-2021 were consulted and are as follows...

In relation to the screened-out sites, the In-Combination Report concluded that

there is no likelihood of the proposed afforestation project CN88457 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. Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in combination with other plans and projects. Therefore, 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 projects.

The AA Report was prepared by Southern Scientific Services on the 6th June 2023. It details the AA of the three screened-in sites and includes Section 3 "Identification and assessment of potential adverse effects arising from the project itself (i.e. individually)" and an In-Combination Report.

Section 4 "Mitigation measures" states that "The potential for the project itself (i.e. alone) to have an adverse effect on the integrity of the screened in European Site(s), was identified on a precautionary

basis” and site-specific measures were identified to prevent or mitigate against such effects. Section 5 addresses In-combination effects and Section 6 includes an Assessment of potential residual impacts.

There is no separate document titled AA Determination. The AA Report includes Section 7 “AA Determination” which states:

It is concluded that the proposed Afforestation project under CN88457, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site(s) listed above. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects on these European site(s). No potential significant cumulative effects are predicted with the plans and projects listed in Appendix A.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. This relates to the proposed activities under this project only. Any subsequent forestry-related activity requiring consent/grant aid shall be subjected to the DAFM Appropriate Assessment Procedure, including an in-combination assessment with the current proposal, prior to any future consent being granted.

Appendix A of the AA Report contains an “In-combination report for afforestation project CN88457” which is dated the 9th May 2023. This report is for screened-in sites and states that the potential for the proposed afforestation project CN88457 to contribute to an in-combination impact on European sites was considered by the DAFM. The DAFM consulted various online planning systems and datasets (including the FLV) on the 09/05/2023 in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Cottonner’s (Laune)_010. As with the report for the screened-out sites, this In-Combination Report also states that the DAFM consulted objectives relating to Natura 2000 sites set out within and outdated Kerry CDP. The report concludes that:

there is no possibility that the proposed afforestation project CN88457, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives. Similarly, there is no likelihood of any residual effect(s) that might arise, which do not in themselves have an adverse effect, creating an adverse effect in-combination with other plans and projects. Therefore, there is no potential for the proposed project to contribute to any adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.

A second In-Combination Report for screened-in sites is on file dated 27/10/2023 and published on the FLV as “Other” on the 18th January 2024. It contains the same CDP error and draws similar conclusions to the preceding report.

The FAC noted that there appears to be no individual AA Determination document on the FLV for this application.

Further Information Request (FIR)

Following their review of the application, the DAFM issued an FIR on the 20th October 2022 which requested that the applicant “Please submit an RANDN Score of the areas of HH3 Wet Heath indicated

by orange hatch on the accompanying map.” The FAC noted that the map referred to was published on the FLV as “Other” on the 13th June 2023. The DAFM sent a reminder FIR to the applicant on the 16th December 2022.

A document which appears to be the Applicant’s response to the FIR is published on the FLV as “Other” on the 13/06/2023. This document is titled “Classification of land types for afforestation at Gortloughra, Co. Kerry (November 2022)” and was completed by Mr. Ciaran Ryan of Kerry Ecological Services on the 16th November 2023. This document states that the overall average R+N score is 5.5 and that:

All quadrats score above 5.0 and below 50cm peat. It is mostly on sloping, reasonably well drained soil. Also, the moss Hyloconium splendens occurs commonly in the ground flora. This species has not been scored (as difficult to assess percentages based on different levels of vegetation). This species scores 6.0 and therefore would increase the overall average R+N score. Therefore, all land suitable for afforestation and rated GPC1. It is considered that the land is very suitable for native woodland proposed – it is already starting to develop on these lands even though livestock grazing is still occurring. Based on soil profile, altitude and expected semi-natural woodland type for the region, it is recommended that Oak-Birch-Holly (Fossitt code WN1) woodland is planted (Bilberry – Holly (QL1) within the Sessile Oak – Woodrush category (QL) – Cross, 2010). This can be achieved by planting predominantly Sessile Oak intermixed with some Birch and Holly.

DAFM’s Site Survey R+N Score

A habitat survey was completed by Mr. Caoimhin O’Neill of the DAFM on the 13th May 2022 and published on the FLV as “Other” on the 18th January 2024. This survey detailed the various habitats found on site and includes an annotated habitat map and photographs. None of the habitats were found to correspond with an Annex I Habitat. This survey does not include an R+N score of the site.

Referrals & Submissions

There were no third-party submissions on this application. The DAFM referred the application to the National Parks & Wildlife Service (NPWS), An Taisce, SW Regional Fisheries Board (IFI), and Kerry County Council. The Council did not reply.

The NPWS response included an Appendix with general observations and in relation to the application under CN88457, stated that the DAFM should consider the following when carrying out its AA of the proposal:

- The location of the proposal within the Killarney National Park, Macgillycuddy’s Reeks and Caragh River Catchment SAC,
- The large amount of Dense Bracken (HD1) on the site, which is not linked to any Qualifying Interest (QIs) of the SAC,
- The presence of small pockets of mature birch woodland within the site and recommended protective measures,
- Areas of Wet Heath HH3 within the site which are likely to be lost to natural succession over the coming years,
- The potential benefits of the proposed planting scheme for the QIs of the surrounding European site,
- Advice to source native provenance Oak saplings, sourced locally if possible.

The IFI response highlighted the location of the proposal within the catchment of the Cottoners River, an important Salmonid river that flows into the river Laune, all within Killarney National Park SAC, and stated that the Forestry and Water Quality guidelines should be followed. IFI also made a number of specific recommendations relating to the protection of water quality from the proposed operations.

An Taisce's response stated that AA is required for Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC and Castlemaine Harbour SAC and stated that it must be ensured that any afforestation activities do not negatively impact on the Cottoner's (Laune)_010 Waterbody.

Grounds of Appeal

There is one first-party appeal (FAC008/2024) against the decision to refuse CN88457. The grounds of appeal were considered in full by the FAC and the following is a summary:

- Basis for appeal is the submission on the land classification assessment by Mr. Ciaran Ryan of Kerry Ecological Services (appended to NOAF)
- As an Agricultural Advisor, the Applicant's opinion is that this is the perfect site for Native Woodland.
- If an R+N score of 6.0 needed, can another survey be conducted during the Summertime and a revised R+N score be submitted?

The Kerry Ecological Services land classification submission appended to the NOAF states:

i) Scoring <6.0

The 2017 Land Types for Afforestation (LTA) states "GPC1 includes sites with an R+N score of 5.4 to 5.9. It also includes sites scoring 5.0 to 5.3 where the site has an average peat depth of less than 50cm and is capable of being suitably drained".

ii) LTA Forest Service Document

The 2017 LTA document has not been superseded and is the defining reference material for land classification assessment. If there is a different approach to land classification, then the LTA should be adjusted. The DAFM's approach is piecemeal and unprofessional.

iii) Marginal Land

The purpose of the classification system is to assess marginal land. This is pointless if the scoring must be >6.0 as land that scores >6.0 would not be classified as marginal and therefore the exercise is pointless.

iv) Application

The proposal, albeit peat based, is all <30cm in peat depth. It is accepted that conifer plantation is not ecologically desirable. This is a native woodland application which is ecologically desirable over the existing species-poor heath habitat dominated by Bracken, Gorse, and Purple Moor Grass. The land is very suitable for native woodland and native trees are already establishing which would result in native woodland if grazing was removed.

It is unfair to backdate the land classification criteria, especially without updating the documentation for people who carry out land classification.

v) Native woodland vs. Grazing

There is an ecological basis for requiring a site for conifer woodland to achieve an R + N score of >6.0, but not for applying this to native woodland. Native woodland is more ecologically beneficial than retaining species-poor heath (which would never qualify as Annex I habitat). Native woodland will naturally establish if not too wet and will “lock carbon within the peat and within the newly established woodland”.

Leaving the land under grazing will increase peat erosion and release carbon. When native woodland is managed by sustainable timber removal and not clearfell it remains in place for generations.

vi) Current FS Land Classification Approach

The lack of clear specifications in the current system makes the task of land classification for the afforestation scheme untenable.

DAFM SOF

The DAFM contend that the decision under appeal was issued in accordance with “our procedures, S.I 191/2017 and the 2014 Forestry Act, as amended”. The DAFM also stated that:

- An R+N score of 5.5 was found as an average across the site. The minimum required for a site to be eligible for any type of afforestation is an R+N score of 6.0. The proposal site falls below this threshold and approval cannot issue.
- “Ireland’s state aid approval has a specific condition that land which falls below this R+N score threshold cannot be planted under the afforestation scheme.”

Considerations of the FAC

The remit of the FAC, as set out in Section 148 of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified forestry licence decisions of the Minister and to determine if a serious or significant error, or a series of errors, was made in making the decision under appeal, and if the decision was made in compliance with fair procedures. The FAC considered all of the submissions provided to it by the parties, including the record of the decision on the FLV. The FAC noted that the DAFM’s SOF states that “Ireland’s state aid approval has a specific condition that land which falls below this R+N score threshold cannot be planted under the afforestation scheme.” The FAC would understand that its remit does not extend to determining appeals in relation to State Aid rules and entitlements under the afforestation scheme, as set out in Schedule 2 of the Agriculture Appeals Act 2001 as amended.

In considering the DAFM’s decision to refuse the licence application, the FAC noted that Regulation 20 of the Forestry Regulations 2017 states:

Decision of Minister on application

20 ... (2) The Minister may refuse an application if, in his or her opinion—

- (a) the application is incomplete in any material detail, or*
- (b) the EIS or Natura Impact Statement is inadequate.*

(3) The Minister shall refuse an application if, in his or her opinion, the proposed development—

- (a) is likely to have an adverse impact on human health, or*

- (b) is likely to have significant adverse impact on—*
- (i) animal or plant health,*
 - (ii) water quality,*
 - (iii) an archaeological, historical or cultural site or feature,*
 - (iv) an area of special amenity,*
 - (v) a European site, or*
 - (vi) nature conservation.*

The FAC noted that the DAFM's stated reasons for refusing an afforestation licence in this instance are that it is "outside the scope of the scheme" and the average R+N score is below the minimum requirement of the afforestation scheme. The FAC considered that these reasons appear to relate solely to the eligibility criteria of the afforestation grants and premium scheme and do not appear to be in line with the reasons set out in Regulation 20 of the Forestry Regulations 2017 as to why a licence application may or shall be refused. In the particular circumstances of this case, the FAC considered the DAFM's reasons for refusing the afforestation licence to be a significant error.

Based on the information before it, in particular part iv) of the submission by Kerry Ecological Services appended to the NOAF, the FAC found that there appears to be a lack of fair procedures in the DAFM's decision to refuse the licence application because the R + N criteria applied to this licence application, which was refused in January 2024, was not published in the updated version of the LTA document until June 2024. The FAC considered this to be a significant error in the DAFM's decision. The grounds of appeal request that another R + N survey be conducted during the Summertime and the revised R + N score be submitted in support of the application. The FAC considered this to be a matter for the DAFM's consideration in considering the matter again or for the applicant to make a new application.

In determining this appeal, the FAC observed that Regulation 20(1)(e) of the Forestry Regulations 2017 states that:

(1) The Minister, after expiration of the consultation periods referred to in Regulations 9 and 10 and having regard to the following-

- ...(d) written submission or observation received under Part 6,*
- (e) any guidelines, codes of practice and standard for good forest practice...*

may, in whole or in part, grant a licence.

In the FAC's view, the effect of this regulation would appear to be that the Minister is not bound to adhere to any guidelines (e.g., the LTA) but is required to have regard to them. The FAC noted that one consideration which may counterbalance the Minister's regard to various forestry guidelines in making licence decisions may be the DAFM's commitments under the Climate Action Plan and the submissions from prescribed bodies, including the NPWS which envisaged some benefits from the proposed native woodland.

In considering the grounds of appeal and the file record, the FAC found that the DAFM's EIA screening document appeared to contain a significant error. As outlined previously, the DAFM completed an "Assessment to Determine EIA Requirement", which concluded that the proposal should not be subject to the EIA process. Based on the information contained in this document, the FAC formed the view that the DAFM's EIA assessment did not consider the potential cumulative effect on the environment of the

proposal in combination with other types of forestry projects or non-forestry plans and projects as it appears the DAFM's cumulative assessment only considered other afforestation projects. As this licence application was refused, the FAC did not consider this error to be significant as there is no risk of a significant effect on the environment arising from it.

As alluded to previously in this letter, the FAC found that the DAFM did not complete an AA Determination for this proposal. The FAC also found that the In-Combination Report for screened-out sites refers to the likelihood of "residual effects" arising from the proposal. Based on this wording, the FAC considered that it is not clear that the report demonstrates that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as the wording refers to consideration on the basis that there is no likelihood of "residual effect(s)" that might arise, which are not significant in themselves, creating a significant effect in combination with other plans and projects. In the FAC's view, the reference to residual effects 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 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 AA titled "Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009)". This document states on page 40:

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

In addition to the above, the FAC also noted that the In-Combination Reports on file indicate that the DAFM consulted an outdated version of the Kerry County Development Plan. The FAC did not consider these errors in the DAFM's AA process to be significant errors because there is no likelihood of any significant effect on any European site as the application was refused.

In the particular circumstances of this case, the FAC decided set aside and remit the Minister's decision to refuse an afforestation licence under CN88457. The FAC considered that in considering the application and the making of a new decision, the Minister should provide reasons for the licence decision which comply with fair procedures and are in line with the requirements of the Forestry Regulations 2017. As previously noted, the AA process was not completed as the decision was to refuse the application. The FAC also identified significant errors in the In-Combination Report for screened-out sites, and the DAFM's assessment to determine EIA requirement. Should the Minister determine that the licence should be granted the processing of the application, including the screening for EIA and AA, would have to be completed again prior to the making of the decision.

Yours sincerely,

Luke Sweetman on behalf of the Forestry Appeals Committee

