



09 February 2021

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FAC ref: 208/19 & 239/19

Subject: Appeal in relation to afforestation licence CN84099

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence CN84099.

The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has now completed an examination of the facts and evidence provided by the parties to the appeal.

Background

Afforestation licence CN84099 was granted by the Department of Agriculture, Food and Marine (DAFM) on 16 August 2019.

Hearing

An oral hearing of appeals 208/19 and 239/19 was conducted by the FAC on 12 January 2021.

Attendees:

FAC: Mr Des Johnson (Chairperson), Mr Luke Sweetman, Ms Paula Lynch & Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Appellant*: [REDACTED]

DAFM representatives: Mr Martin Regan & Ms Mary Coogan
[REDACTED]

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant this licence (Reference CN84099).

The proposal is for the afforestation of a stated site area of 4.33ha at Derriniver, Co. Leitrim, that comprises 7 plots including 3 of bio-diversity (0.14 ha, 0.16 ha and 0.18 ha) which will remain unplanted. The planted plots will comprise 2 of Pedunculate Oak (0.73 ha and 0.18 ha) and 1 of Alder (0.16 ha), and the final plot (2.77 ha) is to be cropped with Sitka Spruce (2.35 ha) and additional broadleaves (0.42 ha). Underlying soils are stated to be predominantly Podzols in nature. Proposed

works include woody weed removal, ground preparation by mounding, a slit planting method and no drainage required, fertilising with 250 kg/ha of ground rock phosphate is included and manual herbicide application in years 0, 1, 2 and 3. Proposal site is mostly flat with a modest slope from west toward public road, elevations are 80m to 90m. Proposal is sided by the Leitra River to the east, is in the Erne Catchment and the Blackwater (Newtowngore)_SC_010 sub-catchment, and the Blackwater (Newtowngore)_20 waterbody.

The application was subject to a desk and field inspection by the DAFM. In processing the application there were no referrals to any consultation bodies by the DAFM. The application was screened out for Appropriate Assessment (AA) on 15 August 2019 with no Natura sites within a 3 km radius. The proposal was found not to be within an area of high amenity, and was subject to a screening on the DAFM's IFORIS database for EIA by the Forestry Inspector. There is no evidence of an in-combination assessment screening of the proposal regards other plans and projects.

Licence issued with the following additional conditions on 16 August 2019;

- Adhere to Forestry and Water Quality Guidelines
- All guidelines to apply

There are two appeals against the decision to issue the licence

Grounds of appeal 239/19;

- Grave concerns in relation to the cumulative impact which the continued afforestation with this monoculture industrial crop (Sitka Spruce) will have on the Social and Environmental aspects of this townland and neighbouring townlands, including Derradda and Coragh.
- This plantation should it proceed will have a detrimental impact on the habitats of many species of birds and insects which have migrated to these lands as a result of habitat loss due to the blanket afforestation in this region. These lands are considered as High Nature Value and should not be planted at a time when there is a biodiversity emergency.
- This proposed development drains into tributaries of the Blackwater River and from documents provided this application has not been sent to the relevant consultees. Grave concerns for the protected species and protected habitats in this region.
- The use of weedkillers (Glyphosate) over the course of establishing this crop is extremely worrying and the impact that will have on aquatic life and water for animal and human consumption.
- The negative impact on the local farming community is not being measured or addressed by the Forestry Inspector even though obliged to do so.

Grounds of appeal 208/19;

- Breach of Forestry Regulation 5(2). The Bio-Map is inadequate compared with Circular 09/2019 IFORIS ortho-photography is an acceptable base mapping layer for these requirements. However, ensure that all internal and boundary hedgerows are delineated with a marker or otherwise even when they are clearly visible on the ortho-photograph.' Some boundary hedges not recorded.
- Breach of Condition 36 of the State Aid Decision as there is no evidence that the lands at Derrinivver have been assessed as being under High Nature Value farming therefore the consistency of this licence with the State Aid Decision cannot be assured.
- The Inspector's conclusion of no significant cumulative impacts on the environment is not supported by evidence, Condition 40 - there is no evidence to indicate that the cumulative impact of afforestation on the ecological infrastructure at a County, regional or local level has been considered in a coherent and integrated manner.



- The Inspectors Certification indicates that over 50% of this Townland is afforested and that 14.61% of the area within a 5km radius of the site is afforested. This is up 25% from the 11.68% of 5 years ago.
- Failure to install a system to protect negative HNV farmland impacts
- Inconsistency with the objectives of the Environmental Regulations for Afforestation
- Areas for Biodiversity Enhancement must be situated where they provide the best opportunity for enhancing the biodiversity within the forest area (Circular: 10/2009).
- Potential breach of Article 12(1) of the Habitats Directive. There is no evidence of any assessment of Annex IV species. The site is a potential habitat for otters and bats
- Failure to take account of the input made during public consultations.

The DAFM response in respect of the grounds of appeal in both instances is as follows; I carried out a desk audit and field inspection under the above assessment and I am satisfied that all criteria are adhered to.

An Oral Hearing was held on 12 January 2021. One of the Appellants and the DAFM attended and participated electronically. The other Appellant did not attend or participate. The DAFM detailed the procedures followed in making its decision and confirmed the AA screening was undertaken prior to any decision to grant the licence. The Appellant contended there was an issue with proof of ownership of the application lands, also site access has to be defined from the beginning and this proposal is located in a lane that is not registered. The Appellant explained there is no owner listed for these lands on Land Registry. The Appellant stated there is a bridge on the laneway and there appears to have been no assessment of it. Also, there are two Natura sites downstream from the proposal including the Lough Oughter and Associated Loughs SAC, hydrologically connected via the Leitira River, and there has been no in-combination screening undertaken for the proposal with other plans and projects. The Appellant stated there is no indication of forest cover in the surrounds given by the Inspector's certification even though this townland is now over 50% afforested, and another application CN86943 exists for a further 5.4 ha. The DAFM confirmed CN86943 was at processing stage and a small area overlap existed with the licence lands at appeal, but that this would be clarified in processing that application and resolved for the licence at appeal if needed. The DAFM confirmed that a proof of ownership request had issued to the parties as well as requests for revised maps where required. The DAFM stated the total forest cover within the townland and within a 5 km radius were to hand when processing the application but having had to revisit the IFORIS certification system caused these to no longer show on screen. The DAFM stated forest cover would be between 50% and 75% in the townland and is regarded as high forest cover. The DAFM confirmed the species area from the proposal is 3.83 ha due to a slight variation of 0.01 ha. The DAFM on-site field inspection found no evidence of any relevant watercourses. The DAFM stated that land ownership is checked at form 2 stage of processing (a grant and premium stage), but that every applicant must declare at the licence application stage that they own the land. The DAFM stated the Inspector had also met the applicant. The DAFM were unable to state definitively regards hedgerow composition but that all hedgerows would be retained based on what is shown on the bio-map.

In addressing the grounds of appeal, the FAC considered, in the first instance, a number of these related to policy matters. The FAC may have regard to such policies matters in determining appeals coming before it, but is not a policy making body in respect of forestry or competing land uses. Furthermore, the FAC has no remit in respect of State Aid matters.

The EU Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine, through thresholds or on a case-by-case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation (nor clear-felling) are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use". (Class 1 (d) of Annex II). The FAC examined the procedures followed by the DAFM before concluding that EIA is not required in this case. The proposal for conifer and broadleaf woodland on a site area of 4.33 ha which is significantly sub-threshold for mandatory EIA under Irish Regulations which sets a threshold for such mandatory assessment at 50ha. The FAC is satisfied that the DAFM had adequate information before it in respect of the characteristics of the proposed development, the location and the type and characteristics of potential impact arising from the proposed development, to enable a preliminary screening for EIA. In this regard, the FAC noted the detailed information submitted describing the proposed development, including planting methods, submitted information relating to the location, forestry coverage in the townland and within 5km and the field inspection carried out in advance of the making of the decision. Based on the information before it, the FAC considers that there is no convincing evidence before it to indicate that conclusion reached by the DAFM that an EIA is not required, is incorrect.

There are no nationally designated NHA sites or pNHA sites in the vicinity of the proposal, and the proposal was found not to be within an area of 'high amenity' per the County Development Plan. Having regard to the nature and scale of the proposed development and the characteristics of the receiving environment, the FAC considers that the DAFM properly exercised its discretion in respect of referrals.

Regards hedgerows, while the Appellant did not indicate any particular hedgerow that was excluded, the FAC is satisfied the application was accompanied by a bio-map, on an ortho-photo background, with hedgerows clearly marked and nothing further arises.

The Appellant raises concerns regards the AA screening may be flawed but offered no convincing evidence to substantiate these concerns. Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans or projects, having regard to the conservation objectives of that designated site. The FAC has noted there are four Natura Sites within a 15km radius of the proposal. The Cuilcagh Anerin Uplands SAC (c. 4.4 km) shares the Erne Catchment with the proposal albeit at a higher elevation and upriver from those rivers that are closest to the proposal, this is also the case regards the Cuilcagh Mountains SAC (NI site). Both Lough Oughter and Associated Loughs SAC (c. 13.3 km) and the Moninea Bogs SAC (NI site), have a hydrological connection albeit well in excess of 30 km by river distance from the proposal and there are lake water-bodies in between. However, none of these sites have been subject to an AA screening regards the proposal.




The FAC considers the absence of a screening of the sites within a 15km radius and the absence of an in-combination assessment of the proposal with other plans and projects comprises a significant error having regard to the requirements of Article 6(3) of the Habitats Directive and the circumstances of the proposal.

The Appellants contend that the licence should provide a system of protection for wild birds during the period of breeding and rearing and of Annex IV species, but provided no specific information in respect of the presence of wild birds or Annex IV species on the project lands. In these circumstances, the FAC concluded that conditions, of the nature requested by the appellant, should not be attached to the licence. Compliance with the licence conditions and enforcement, where appropriate, are matters for the DAFM and the FAC considers that there is no convincing reason to require additional conditions attaching to the licence in this respect.

The proposal is adjacent to the Leitra River and is within the Blackwater (Newtowngore)_20 waterbody. However, the FAC does not consider the proposal to represent a significant threat to water quality. While the use of fertiliser and herbicides is proposed these must be used in a regulated manner and would occur at the establishment phase of the planting over the course of many decades and would not be out of keeping with other land use practices in the area. Conditions on the licence require that such inputs can not be used in proximity to water courses. Also, the FAC observed that the use of plant protection products in Ireland is governed by SI 155 of 2012 and SI 159 of 2012, which are based on and give effect to EU Directive 2009/128/EC (concerning the sustainable use of pesticides) and Regulation (EC) No. 1107/2009 (concerning the placing of plant protection products on the market).

Land ownership and access are legal matters for the applicant to address where required. The resolution of any dispute in relation to ownership and access is more properly a matter for the Courts.

In the above circumstances, the FAC concluded that the decision of the DAFM should be set aside and remitted to the Minister to carry out an AA screening of the proposed development on Natura 2000 sites within a 15km radius of the project lands on its own and in combination with other plans and projects, before making a new decision on the licence application



Pat Coman, on behalf of the FAC