



29th April 2022

Subject: Appeal FAC 098/2021 relating to Licence CN87696

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 (as amended) has now completed an examination of the facts and evidence provided by all parties to the appeal.

Licence.

The licence is for 6.42 Ha of GPC 3 and GPC 10 afforestation at Kiltycarney, Co. Leitrim. The application was submitted to the DAFM on the 08/12/2019. There was one third party submission on the licence. The Department of Agriculture, Food and the Marine (DAFM) issued the licence on the 19/05/2021 with a number of conditions, including retention of existing trees/hedgerows, setbacks of 10m from the public road and 5m from relevant watercourses and water hotspot, and compliance with archaeological requirements.

There is one appeal against the decision to grant the licence.

Forestry Appeals Committee.

The appeal was considered at a sitting of the FAC held on 13/10/2021. The FAC Members present were; Mr. John Evans (Deputy Chairperson), Mr Vincent Upton and Mr. Iain Douglas. Secretary to the FAC: Ms. Marie Dobbyn. At the sitting of the FAC, it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM.

Decision.

Having regard to the evidence before it, in particular the record of the decision by the DAFM, the notice and grounds of appeal, the SoF from the DAFM and the considerations set out hereunder, the FAC has decided to affirm the decision of the Minister for Agriculture, Food and the Marine to grant licence Reference No. CN87696 at Kiltycarney, Co. Leitrim as issued.

Background.

The SoF provided by the DAFM dated 13/09/2021 indicates that a both a desk and field inspection were carried out on the proposed afforestation. The final Inspector's Certification Report (with a spatial run dated 18/05/2021) describes the soil type underlying the project area as predominantly podzolic in

nature, with a predominantly flat to moderate (<15%) slope and that the project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area is comprised of grass and rush.

The report notes that there are no Natura 2000 sites located within 15Km of the proposed afforestation and records an Appropriate Assessment (AA) screening decision to screen out the application on the basis of spatial separation, due to the fact that the zone of influence centred on the application does not overlap with any Natura site.

The report is accompanied by an in-combination assessment carried out by the DAFM dated 18/05/2021 that concludes that the project itself, *"i.e. individually, was deemed not to have an effect on certain European Site(s), as it does not represent a source, or if so, no pathway exists. Consequently, the DAFM deems that there is no potential for the project to contribute to any effects on the same European Site(s), when considered in-combination with other plans and projects."*

The Inspector's Certification Report also contains an assessment of the environmental factors relating to the proposed afforestation in order to determine whether the proposed afforestation requires an Environmental Impact Assessment Report (EIAR) and concludes that it is not necessary to subject the proposed afforestation to EIA.

The DAFM decided that it was not necessary to refer the licence application to any of the prescribed bodies, however the proposal was referred to the DAFM Archaeology section whose report of 10/11/2020 including conditions was agreed with the National Monuments Service on 01/04/2021.

Appeal.

There was one appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

1. The Inspector's response to Question 36 of the EIA Screening, (Risk of accidents) is S/A (self-assessment). This response indicates that the Inspector himself has not confirmed that there is no significant risk of accidents when a definite answer was required, therefore the Inspector should have sought Further Information or an EIAR should have been requested
2. The Inspector's response to Question 11 of the EIA Screening, (Is forestry an issue in the area?) is "No", the significant community concerns regarding afforestation in Leitrim should be known to the Inspector, therefore the response is not acceptable.
3. Not all hedgerows on site are identified and that the 3m setback proposed is insufficient and that a 7m setback is recommended in the BIOFOREST Report.
4. The site is located in a Priority Area for Action under the WFD where water quality is poor and at risk. The application of phosphate on the poorly drained soils on site are a risk to water quality.
5. The application adjoins two plantations in the same foilo. Is this acceptable under grant payments and that it could be seen as project splitting?
6. The site is either in or in close proximity to Curlew breeding grounds and was the site assessed by the Forest Service before granting the licence.

DAFM Statement of Fact

The FAC also had before it a Statement of Fact (SoF) provided by DAFM dated 12/08/2021. This included confirmation of the administrative details of licence application CN87696 as outlined above, , and stated that the DAFM was satisfied that all criteria in its standards and procedures had been adhered to in making the decision on this licence application. The SoF also included a contribution from the DAFM Forestry Inspectorate dated 13/09/2021 which submitted that the relevant AA procedure in operation at the time was applied, that Standard Operating Procedures were applied and addressed the grounds of appeal.

Consideration by the FAC.

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the DAFM, and other on-line services.

The application describes the lands as enclosed, agricultural land on a mineral, peat soil and with a grass, grass rush vegetation cover. Aerial photography including that submitted with the application show the land that it is proposed to plant is agricultural grassland. The site is in two Plots, the eastern and western boundaries of which abut existing mature forest.

Soil types on the site, identified through EPA mapping, are Surface water Gleys and Groundwater Gleys, (both basic deep, poorly drained mineral soils and acid deep, poorly drained mineral soils) and Alluvium. The site lies within the Upper Shannon 26C WFD Catchment and the Shannon[Upper]_SC_030 Sub catchment.

EPA mapping shows that the nearest identified waterbody to the site is the Shannon[Upper]_60 which is on the opposite side of the public road forming the northern site boundary and which flows north and west away from the site. The water quality status of the Shannon[Upper]_60 in the 2013-2018 period was Poor and is At Risk. Pressures identified for the second WFD period include Urban and Domestic Wastewater and Agriculture.

The underlying Groundwater body is the Carrick- on-Shannon IE_SH_G_ 048, the water quality status of which was Good in the period 2013-2018 and is Not at Risk.

The proposed afforestation is not within a Natura 2000 site nor is it required for the management of a Natura 2000 site. The FAC has confirmed that there are no Natura 2000 sites identified as being within 15km of the site.

The FAC noted that DAFM completed and recorded a screening for Appropriate Assessment (AA) that determined that the proposal itself and in-combination with other plans and projects would not result in any significant effects on a Natura 2000 site.

The FAC noted that the DAFM recorded a consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, landscape

and cumulative effects, and determined that the project was not required to undergo EIA. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale and location of the proposal.

The site of the proposed afforestation is not in an Area of High Visual Amenity, Outstanding Natural Beauty or within an Outstanding View, and is situated in an area considered to have a low sensitivity/high capacity to accommodate forestry in the Leitrim County Development Plan 2015-2021. In addressing the grounds of appeal, the FAC considered the following matters,

Assessment to Determine EIA Requirement.

Question 36 “Is there a significant risk of accidents, having regard in particular to substances or technologies used? If so, describe in Inspectors comments box below.” The FAC noted the Inspector’s response in the certification as S/A (self-assessment) and the Inspector’s response to the grounds of appeal is that that it is for the landowner to assess the risk of accidents and so should be self assessed by the applicant. The FAC noted that the Inspector’s response refers to the operational phase of the project “hazards on and around forestry work-sites” but that the requirement of Article 4 of the EIA Directive is to state reasons with reference to the relevant criteria in Annex III which includes “the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;” The grounds of appeal, while contesting the nature of the response to this question, do not suggest that the proposal would pose a risk of major accident or identify what form that risk might take. The FAC is of the view that the Inspector, while correct in outlining the obligations of the landowner, should be able to assess the risk of major accidents and/or disasters posed by the afforestation itself and associated planting operations in the form of a Yes or No response and therefore the S/A response is in error.

However, given the location, nature and scale of the proposed afforestation, the nature of the land to be planted, the provisions of the licence to comply with the DAFM Environmental Requirements for Afforestation and the Forestry Standards Manual (as amended by periodic Circulars), the FAC is not of the view that the proposed afforestation could be considered to present a risk of major accident and/or disaster within the meaning of Article 3 of Directive 2012/18/EU.

Taken in the context of the Assessment to Determine EIA Requirement as a whole and given the location, nature and scale of the proposed afforestation, the nature of the land to be planted and the provisions of the licence the FAC considers that the S/A response is not of such significance that the conclusion drawn in relation to requirement for an EIAR is in error. Therefore, the FAC is not satisfied that a serious or significant error was made in the making of the decision in relation to this matter.

Question 11 “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.” The FAC noted the Inspector’s response in the certification as No and the Inspector’s response to the grounds of appeal as set out in the SoF, that no submissions or objections were received from residents in the locality of the application. The appellant

has adduced no evidence that the amount and type of forest cover in this particular locality is a significant issue therefore the FAC is not satisfied that the DAFM has erred in this matter.

Hedgerows & Setbacks.

The appellant contends that not all of the hedgerows on site have been marked on the applicant's maps. The FAC noted the updated biomap uploaded 17/05/2021 and the hedgerows marked thereon and visible on the underlying aerial imagery. The FAC examined aerial photography from a number of sources and is satisfied that the hedgerows marked on the updated biomap are consistent with the information available to the FAC and furthermore, that the site was inspected on the ground and the Inspector indicated in his response to this ground of appeal that all hedgerows have been clearly marked on the biomap. The appellant contends that the setback from the hedgerows of 3m specified on the updated biomap is insufficient and that the BIOFOREST Report recommends a setback of 7m to avoid the forestry suppressing the growth of hedgerows. The FAC noted that the BIOFOREST Report (Biodiversity in Irish Plantation Forests Final Report¹) was a research project under the auspices of the EPA and COFORD and includes a recommendation to "*Retain scrub, hedgerows and other marginal and additional habitats and allow for adequate buffer zones*" and is not part of the DAFM Guidelines and Standards. The FAC also noted the Inspector's response to this ground of appeal indicated that a minimum 5m setback is specified in Section 2.5.4 of the Environmental Requirements for Afforestation 2016. The FAC considered that the Environmental Requirements for Afforestation state that all hedgerows must be retained and

"A habitat setback (5 metres minimum) should also be considered in relation to particular hedgerows onsite, to ensure their continued presence as the surrounding canopy develops. This decision should be informed by the quality of the hedgerow (in terms of its age, species composition and structure), its landscape importance, and other attributes (e.g. whether or not the hedgerow represents a townland boundary or if it is associated with another habitat such as a stream)"

The FAC further noted that the first part of Condition 5 of the licence requires that the afforestation and all associated operations to 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). The application has identified hedgerow setbacks in the mapping provided and the FAC considers that where specified in the application these must be of 5 metres minimum in keeping with the Environmental Requirements for Afforestation in addition to the retention of all hedgerows. Furthermore, sections of hedgerows will be included in the setback areas of watercourses, public roads and the ESB corridor as identified in the mapping provided. The proposal does not cross a townland boundary and the area of planting closest to the public road will comprise of mixed species native woodland. The FAC is not satisfied that the DAFM has erred in the making of the decision in this matter.

WFD Priority Action area.

The FAC noted that the site lies within the Kilukin- Shannon WDF Area for Action and that currently forestry is not a significant pressure in any of the waterbodies within that Area for Action and that in fact

¹ <https://www.epa.ie/publications/research/biodiversity/ERTDI-Report-51.pdf>

the position has improved with regard to forestry. In relation to phosphates the FAC noted that the Inspector's certification and the applicant's pre-approval submission report both record a fertiliser application of 250Kg per ha Granulated Rock Phosphate, a slow release fertiliser type which is in keeping with the Forestry Standards Manual. The Inspector's response to this ground of appeal is that the application of granulated rock phosphate is a generalised crop maintenance operation and may or may not be carried out depending on the needs of the crop and that operational safeguards are set out in Environmental Requirements for Afforestation section 3.7.2 provide effective protection of water quality. The FAC further noted that the first part of Condition 5 of the licence requires that the afforestation and all associated operations to 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). The FAC is not satisfied that the DAFM has erred in this matter. As noted the pressures identified for the second WFD period on the Shannon[Upper]_60 include Urban and Domestic Wastewater and Agriculture. The area closest to the waterbody and the hotspot identified will be planted with native woodland and the FAC considers the proposal as licenced is in keeping with the River Basin Management Plan. The FAC is not satisfied that an error was made in the making of the decision in this regard.

Adjoining Forestry

The appellant queries whether the fact that the proposed afforestation adjoining two areas of existing forestry within the same folio is acceptable the payment of grants from the DAFM. The FAC was established under the Agriculture Appeals Act 2001, as amended, with a function to hear and determine appeals against decisions of the Minister for Agriculture, Food and the Marine under Section 7 of the Forestry Act 2014 (as amended) and the Forestry Regulations 2017 (as amended) in relation to afforestation, tree felling, forest road works and aerial fertilisation but excluding grant aid. In this regard this aspect of the matter does not fall within the remit of the FAC itself to determine.

The appellant also queries whether the proposed afforestation could be construed as project splitting (taken by the FAC as a reference to the EIA Directive). Project splitting is predicated on a project being subject to EIA. The FAC noted that the EU EIA 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 is 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 Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The proposed afforestation is 6.42 Ha. substantially below the EIA threshold and even taking the existing forestry in the same folio (circa 6 Ha.) into account the EIA threshold for afforestation would not be met. The record of the decision includes a consideration of the possible significant effects of the proposal in combination with other plans and projects on European sites and considers the possible

significant effects of the proposal cumulatively. The grounds provide no evidence of a deficiency in these matters. The FAC is not satisfied that the DAFM has erred in this matter.

Curlew

The appellant queries whether the lands were assessed by the Forest Service for the presence of Curlew before granting the licence. The FAC noted that while the site lies within the Mid-Co. Leitrim Curlew Conservation Programme Area and the response of the Inspector to this query which indicated that the DAFM has up to date access to the Curlew breeding layer on IFORIS and no past or active breeding site for Curlew is in the vicinity of this afforestation or that the site overlaps a mapped curlew breeding buffer. The appellant has adduced no evidence that Curlew is present or in close proximity to this proposed afforestation, therefore the FAC is not satisfied that the DAFM has erred in this matter.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision and the submitted grounds of appeal. The FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision or that the decision was made without complying with fair procedure. The FAC is thus affirming the decision of the Minister regarding licence CN87696 in accordance with Section 14B of the Agriculture Appeals Act 2001 (as amended). In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and good forestry practice.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee

