



16<sup>th</sup> February 2023

**Subject:** Appeals FAC 122/2022 relating to Licence CN86267

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 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.

**DECISION.**

Having regard to the evidence before it, including the Department of Agriculture, Food and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to and set aside and remit the decision of the Minister regarding licence CN86267.

**THE LICENCE.**

Licence CN86267 is for 8.42 Ha. of afforestation and was submitted to the DAFM on the 20<sup>th</sup> of April 2020. A decision approving the licence with conditions was issued on the 16<sup>th</sup> of August 2022 including compliance with DAFM Technical Standards, retention of all trees/hedgerows on site, the planting of 5 rows of broadleaves adjacent to public road setback in Plot 6 and Archaeological conditions.

**FORESTRY APPEALS COMMITTEE.**

A sitting of the FAC held on the 18<sup>th</sup> of January 2023 considered the appeal and the processing of the licence as it relates to the decision to issue the licence on the 16<sup>th</sup> of August 2022. The FAC members present were: Mr. Donal Maguire (Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas. Secretary to the FAC: Ms. Vanessa Healy.

**BACKGROUND.**

The proposal consists of the planting of 8.42 Ha. of GPC 3 (2.37 Ha.), GPC 4 (4.52 Ha.) and GPC 6 (1.53 Ha.) in seven plots within the townland of Ballyvongane Co. Cork. The planting is in three separate sections, Plots 1-4 to the north and Plots 6 & 7 to the south, Plot 5 is an isolated plot in the centre. The western and southern boundaries of Plots 6 & 7 is the Clashgarriff River. The proposed planting is in the environs of Bealnamorrive village.

Two plots (1 and 4) would be planted with a mixture of Sessile Oak and other broadleaved species, one plot (6) would be planted with Norway spruce and broadleaved species, one plot (5) would be planted with Sitka spruce and broadleaved species and three plots (2, 3 and 7) are bio-plots. The application included maps and silvicultural and environmental information. The lands are described

as enclosed agricultural land with a mineral soil, and grass, grass/rush, and furze vegetation on slopes with an exposed aspect. The application shows the location of access to the lands and the position of a site notice. Photographs of the erected site notice were submitted. The application includes setbacks from an aquatic zone, houses, public roads and hedgerows. Ground preparation is by woody weed removal and mounding with slit planting and additional drainage. Application of 250 kg of granulated rock phosphate and herbicide control is proposed. The application included 1,477m. of fencing.

The licence was referred to Cork County Council on the 14<sup>th</sup> of October 2020 which replied on the 9<sup>th</sup> of November 2020 setting out a number of statutory planning requirements the licence was also referred to Inland Fisheries Ireland on the 23<sup>rd</sup> of April 2020 which did not reply. The licence was referred to the DAFM Archaeology section which reported on the 30<sup>th</sup> of September 2020 and its report was approved by the National Monuments Service on the 6<sup>th</sup> of October 2020. The DAFM Ecology section completed an Appropriate Assessment Report & Determination (AASRD) of the proposal on the 12<sup>th</sup> of July 2022.

The Inspector's Appropriate Assessment Screening (AAS) Report dated the 15<sup>th</sup> of August 2022 indicates that the predominant soil type underlying the site as being brown podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprises improved grassland WD1 and scrub woodland.

The DAFM Ecology Section AASRD dated the 12<sup>th</sup> of July 2022 considered the 4 sites within 15km of the proposal and that there was no need to extend that distance in this case. The European sites considered were Blackwater River (Cork/Waterford) SAC (Site Code 002170), Mullaghanish to Musheramore Mountains SPA (Site Code 004162), The Gearagh SAC (Site Code 000108), The Gearagh SPA (Site Code 004109). All sites were screened out from the requirement to proceed to Stage 2 Appropriate Assessment. The Blackwater River (Cork/Waterford) SAC and The Gearagh SAC for lack of any lack of hydrological connection and other sufficient pathways for impact, The Gearagh SPA due to the separation distance of 9.2 km and therefore being beyond likely foraging distance for the bird species of Special Conservation Interest, a lack of hydrological connection and other sufficient pathways for impact and Mullaghanish to Musheramore Mountains SPA for the reason that the project site is less than 11 km from the SPA but is not within a HLNA and does not contain suitable foraging habitat for the Hen Harrier, the Special Conservation Interest of the site.

The AASRD of the 12<sup>th</sup> of July 2022 included an In-combination Statement of the 19<sup>th</sup> of May 2022 on the proposal's potential to impact on the Natura 2000 sites in-combination with other plans and projects. The In-combination Statement concludes that the proposed afforestation, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed in the AA Screening.

An Inspector's Certification Report dated the dated the 15<sup>th</sup> of August 2022 is on file.

An Assessment to Determine EIA Requirement was carried out, dated the 15<sup>th</sup> of August 2022 that considered the proposed afforestation across a range of criteria and a determination that the proposal should not be subject to the Environmental Impact Assessment (EIA) process.

The proposed afforestation was Desk Assessed and Field Inspected following the licence application.

There were fourteen third-party submissions following the licence application.

## **THE APPEAL.**

There is one third-party appeal against the decision to approve the licence.

The grounds of appeal are summarised as follows:

1. Only one of the points in the original submission has been addressed.
2. EIA was requested in the original submission.
3. Plot 6 is in a flood plain and there is a concern that wells may be contaminated.
4. Has impact of the proposal on broadband connectivity been addressed?
5. The applicant has more suitable sites for afforestation.
6. A dwelling at the end of Plot 6 was omitted from the biomap.
7. A request to be included in the EIA.
8. The original submission on the licence was appended to the appeal and is summarised as follows:
  - i. Access to Plot 6 is within the village, has poor sight visibility, will require hedgerow removal which will increase traffic speed and pose a road hazard to children and adversely affect the visual approach to the village.
  - ii. There is no access to Plot 5, a house is omitted in the vicinity of Plots 5 & 6 and a significant part of Plot 5 is in a flood plain.
  - iii. Access to Plot 4 is close to a dwelling, contains a significant archaeological site and is prone to flooding.
  - iv. Trees 40-55m tall along the public road will impact on daylight for road users and school children walking to school and adversely affect the visual approach to the village.
  - v. Plot 6 is in a flood plain and is not suitable for planting.
  - vi. Planting will enclose the village and block light.
  - vii. Tall trees will affect the broadband connection to the village.
  - viii. There are 4 other plantations within 750m of the village.
  - ix. Norway spruce may impact on the water quality of the adjoining river which feeds into the water supply for Cork city.
  - x. Afforestation will impact on the community's plans to improve the village.

## **CONSIDERATION BY THE FAC.**

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 SoF provided by the DAFM and all materials on file. 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.

## **DAFM STATEMENT OF FACT.**

The SoF provided by the DAFM for the appeal and dated the 17<sup>th</sup> of October 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed and that a field assessment was carried out on the 18<sup>th</sup> of September 2020. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on this licence application. The SoF included a statement dated the 23<sup>rd</sup> of September 2022 from the Forestry Inspector confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a recommendation that a *"Plotable area of broadleaves to be planted along the boundary of Plot 6 & 7 (20m) shown on Biodiversity Map, application should be amended to include this as a separate plot, preferably Native Woodland Establishment (Scenario 4)"*.

## **GROUNDINGS OF APPEAL**

For convenience the grounds of appeal have been grouped under the following headings:

**Access.**

The grounds of appeal relating access are (i) the access to Plot 6 is close to the village core and has insufficient sight visibility, (ii) the access to Plot 4 is close to a dwelling and archaeological monument and is prone to flooding, (iii) that access to Plot 5 is not shown and the Plot is in a floodplain. The FAC noted that access to Plot 6 is by an existing gate located outside of the 50Kmh speed limit for the village on a straight section of road and that the licence conditions require that 5 rows of broadleaved trees are to be planted adjacent to the 10m public road setback for Plot 6, in these circumstances sight visibility from the access will not be altered. The FAC noted that access to Plot 4 is by an existing farm gate. The FAC noted that the revised biomap dated 02/03/2022 shows access to Plot 5 from the public road. The FAC noted this licence application is for afforestation and that traffic generated for planting is generally light and uses standard agricultural machinery and does not normally include the use of heavy machinery and that the site was inspected in the field and that the licence is subject to the terms and conditions of the current Forest Service Roads Scheme document and the COFORD Forest Road Manual. The FAC does not consider that the DAFM has erred with regard to this ground of appeal.

**Biomap.**

The FAC considered the ground of appeal that a dwelling at the eastern end of Plot 6 was omitted from the biodiversity map (Biomap). The FAC noted that publicly available aerial photography mapping on the FLV shows a dwelling circa 23m north-east of the junction of the northern and eastern boundaries of Plot 6. The FAC further noted that the requirements for a Biomap are set out in Section 18.7 of the Forestry Standards Manual 2015. The FAC considers the Biomap submitted does not show the dwelling in proximity to Plot 6 or the required dwelling setback referred to in this ground of appeal and therefore constitutes a serious error in the processing of the licence application and the making of the decision.

**Broadband.**

The FAC noted the contention that the proposed afforestation would block the internet broadband connection to the village. The FAC further noted that the appellant has adduced no evidence that such would be the case. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

**Environmental Impact Assessment.**

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement dated the 15<sup>th</sup> of August 2022 in advance of making the decision to grant the licence subject of this appeal. The Inspector recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo EIA.

The FAC noted that 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 decision under appeal relates to a licence for the afforestation of an area of 8.42 Ha. which below the established threshold for EIA. The FAC therefore agrees that screening for EIA was not required in this case.

The FAC noted that in the Assessment to Determine EIA Requirement the figure given to the question “*What is the approximate % of forest cover currently in the underlining waterbody (or waterbodies)?*” is 1.27% and that in the AASRD of the 12<sup>th</sup> of August 2022 the figure given in the In-combination Statement for the percentage of forest cover in the Lee (Cork)\_070 River Sub-Basin is 9%. The FAC concluded that in proceeding to make a Determination regarding the Requirement for an EIA in the absence of a documented reconciliation of the apparent differences in the forest cover percentages as recorded in the Assessment to Determine EIA Requirement and that recorded in the In-Combination Statement in the AASRD, the DAFM made a serious error in the processing of the application in this case as related to the EIA Directive.

The FAC noted that the Assessment to Determine EIA Requirement refers to and relies on Guidelines in relation to Water Quality, Archaeology and Landscape however these Guidelines have not been attached as a condition of the licence. Furthermore, the Environmental Requirements for Afforestation, adherence with which is a condition, states that it replaces the existing Guidelines. The FAC considers that this creates unnecessary confusion and a lack of clarity in the processing of the decision.

### ***Floodplain***

The FAC considered the grounds of appeal relating to the location of Plots 5, 6 and 7 in a floodplain and flooding at Plot 4. Publicly available mapping on the OPW and GSI websites do not indicate any type of flooding at Plot 4 and that and that the southern portion of Plot 5 (the area prone to flooding) has been omitted from the revised biomap dated 02/03/2022. The Pre-Approval Submission Report submitted indicates that drainage is proposed with planting by mounding and slit planting. A Drainage Plan for Plot 6 was submitted by the applicant dated 09/02/2022, schematic drainage was shown on the revised biomap dated 02/03/2022 and the species proposed, Norway Spruce was approved by the DAFM as being suitable for the plot. The FAC noted that the southern boundary of Plot 6 is a Water Framework Directive (WFD) River Waterbody, the Lee[Cork]\_70 which was of Good Status in the period 2013-2018 and is Not At Risk in the 3<sup>rd</sup> WFD Cycle. The FAC considered that with regard to Plot 6, in view of the fact that mound drains are proposed and notwithstanding the proposed 10m aquatic zone setback and additional broadleaved planting, the risk of sedimentation of a WFD river waterbody of good status should have been addressed in more detail and that in failing to do so the DAFM made a serious error in the processing of the application in this case as it related to the Water Framework Directive.

### ***Archaeology***

The FAC considered the ground of appeal regarding the impact of the proposed planting on the archaeology in Plots 1 and 2. The FAC noted that the licence application was referred to the DAFM Archaeology section whose report was approved by the National Monuments Service. The FAC further noted that condition 14 of the licence requires compliance with the conditions of the DAFM Archaeology Report which included the omission of planting from certain areas and a planting setback from the monuments and other identified historical building remains (NIAH Reg. No.: 20906015). The FAC does not consider that the DAFM has erred with regard to this ground of appeal.

### ***Visual Amenity***

The FAC considered the ground of appeal regarding the impact of the proposed planting on the visual amenity of the village and dwellings adjoining the proposed planting. Regarding the approach to the village along the public road fronting Plot 6, the FAC noted that the proposed planting in Plot 6 is set back from the public road by 10m with an additional planting of 5 rows of native broadleaved species and that the average height of Norway spruce in Ireland is circa 18. The FAC further noted that the Inspector recommends that a “*Plotable area of broadleaves to be planted along the boundary of Plot 6 & 7 (20m) shown on Biodiversity Map, application should be amended to include this as a separate*

plot, preferably Native Woodland Establishment (Scenario 4)” and that the licence requires compliance with the Environmental Requirements for Afforestation and the Forestry Standards Manual which specify setbacks for water, retained habitat, archaeology, public roads, dwellings, utilised buildings and landscape. The FAC concluded that the licence as issued would protect the visual amenity of the village and individual dwellings and that the incorporation as a condition in any future licence (if such is issued) of the recommendation of the Inspector in the SoF would further enhance the visual amenity of the proposal. The FAC does not consider that the DAFM has erred with regard to this ground of appeal.

#### **APPROPRIATE ASSESSMENT**

The FAC noted that the conclusion of the AA In-combination Statement dated the 12<sup>th</sup> of July 2022 states.

*“It is concluded that there is no likelihood of the proposed afforestation project CN86267 itself, ie. 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 the assessment of the impact of such effects of the project itself and in-combination with other plans and projects on the integrity of the European site. As stated on the record it appears to the FAC that other plans and projects were only considered after the assessment on the integrity of the project was completed, which would appear to the FAC not to be in accordance with the requirements of Article 6(3) and the Forestry Regulations 2017.

The FAC considers this to be a serious error as it suggests that the screening undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other plans and projects result in a significant effect on a European site.

#### **THE LICENCE**

The FAC noted that this licence application is for afforestation but that conditions 11 and 12 refer to the licence application as being for a forest road and that these conditions are expanded upon in bullet point 4 of condition 13 of the licence. The FAC considers that the inclusion of conditions that are unrelated and unnecessary to the licence applied for represents a serious error in the making of the decision. In the context of a serious error occurring in the conditions of licence itself the FAC determined that, in this instance, the decision should be set aside and remitted to the Minister.

#### **Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a serious or significant error or series of errors was made in the making of the decision on licence CN86267 and that the licence should be set aside and remitted to the Minister to: (i) provide a new biomap to include the omitted dwelling; (ii) explain and reconcile the apparent differences in the forest cover percentages as recorded in the Assessment to Determine EIA Requirement and the In-Combination Statement in the AASRD; (iii) provide a detailed assessment of the proposed site drainage on the water quality of the adjacent WFD river waterbody; (iv) carry out a new AA In-combination Statement which assesses the effect of other

plans and projects before the assessment of the integrity of the project itself is completed; (v) amend the licence (if issued) so that any conditions of the licence are relevant to that licence and to include as a condition the recommendation of the Inspector in the SoF.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee.

