



13th February 2023

Subject: Appeals FAC083/2022 & FAC084/2022 against licence decision CN88697

Dear

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

Hearing

Having regard to the particular circumstances of the appeals, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeals. A hearing of appeals FAC083/2022 and FAC084/2022 was held remotely by the FAC on 11th January 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, Mr. Derek Daly, & Mr. Vincent Upton
Secretary to the FAC: Mr. Michael Ryan, Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to allow the appeal and set aside the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN88697. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to the granting of an afforestation licence on 5.79 hectares at Drimina, Tullanaglug, Co. Sligo. The site is divided into six plots with planting occurring across four plots and two remaining unplanted. Three plots would be planted with a mixture of Sitka spruce and birch and one plot planted with pure birch. The application included maps and silvicultural and environmental information. The lands are described as enclosed agricultural land with a mineral, peat soil with a grass, grass rush vegetation type and as exposed and moderately exposed. The application shows the location of access to the lands and the position of a site notice and photos of the erected site notice were submitted. The application includes setbacks from a river crossing the lands and hedgerows. Two ESB

lines cross the lands and are marked on the submitted maps. A further habitats map, showing the lands as comprised of wet grassland and hedgerows was also submitted. Ground preparation was proposed through woody weed removal and mounding without additional drainage with slit planting. Application of 250 kg of granulated rock phosphate and herbicide control is proposed. The application included 1,106 metres of fencing. The application was desk and field inspected by the DAFM.

The application was referred to National Parks and Wildlife Service (NPWS) and Inland Fisheries Ireland (IFI). No response from IFI is provided while the NPWS responded noting the presence of a river on the lands that links to the River Moy SAC and questioning access to the lands as provided on the maps submitted.

There was one submission on the application from a member of the public which submitted that they had hoped to buy the land and that they considered it unfair that supports were in place to plant forests on the land that would increase the value of the land above the agricultural value. A second submission was made during the public consultation for Appropriate Assessment in relation to local impacts of the proposal.

The proposal was subject to a screening for Appropriate Assessment (AA), initially by a District Inspector and then by an Ecologist. The screening concluded that the proposal should proceed to AA in relation to three European sites River Moy SAC 002298, Killala Bay/ Moy Estuary SAC 000458 and Killala Bay/ Moy Estuary SPA 004036.

The DAFM recorded a consideration of the proposal across a range of criteria with reference to the application and the processing of the application and concluded that the proposal should not proceed to a full Environmental Impact Assessment.

The licence was granted on 4th July 2022, subject to conditions. The conditions include adherence with the mitigation measures in the Appropriate Assessment Determination and to liaise with Inland Fisheries Ireland Environmental Officer.

Appeal

There are two third party appeals on the decision and the full grounds of appeal have been provided to the parties. In summary, FAC083/2022 submits that the proposal would impact on their views of the community and surrounding landscape and on the mental health of the residents. It is submitted that they did not see the site notice and have not accessed the Forestry Licence Viewer and learned of the proposal by chance. They question whether the distance from the proposal to their house had been measured.

Appeal FAC084/2022 submits that they live adjacent to the property and that two existing forests border their property. It is submitted that the proposal would block their view of the road and will block their view of trees and create a sense of isolation. They submit that the boundary of a plot lies less than 20 metres from their home and question the allocation of bio plots. They question the need for a

firebreak and refer to the presence of power lines running through the site and the occurrence of fires. They question the management of plots adjoining their property and the access for the ESB to the power lines.

The appeal questions access to the southern plot and how machinery and materials might be brought to the plot and refer to the submission made by the NPWS. They note that reference is made to a bridge across the river but question whether this has been assessed as adequate. The grounds question access to the powerlines if the area is fenced and state that there can be no crossing of drains under the AA report.

The grounds submit that there is excessive forestry and forestry activity in the area and note its location less than 1km from the River Moy SAC and close to a local town. The grounds question the figures provide by the DAFM in their assessment of the application.

The grounds make reference to the National Planning Framework Ireland 2040 and question the value of existing forests in the area. The grounds question the cumulative impact of forests in the area and the assessment of the DAFM of the application in relation to EIA.

The appeal questions the impact on the River Moy SAC and the Maiden River in relation to the quality status of the tributaries. It submits that the DAFM had originally stated that the proposal would impact on the status of the river and that this was changed. The grounds question the mitigation measures that have been imposed and the operations that are proposed and licenced. The cumulative effects of the proposal are questioned with reference to other developments and the accuracy of the documentation including the recording of submissions made. A number of environmental features are suggested to be absent.

The grounds question the screening, report and determination documents in relation to Appropriate Assessment and the conclusions reached therein. The appeal included a number of photos of the lands from the Appellant's dwelling and of surrounding lands, trees, forests and rivers, with commentary.

A response was provided by the DAFM which was provided to all parties. The response provided a summary of the processing of the application and the associated dates. It submits that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act, and that the numbers on the Forestry Licence Viewer are labels and not plot numbers. The Inspector submitted that the road adjoining the proposal is a public road and that road safety issues are an issue for the Gardai, that the lands are improved agricultural land and that the fire risk is not considered to increase, that the ESB maintain the area under the powerlines, that the existing water crossing allows access to plot 5, that water quality and setbacks are addressed in the Environmental Requirements for Afforestation and that the River Moy SAC is addressed in the AA. The statement continues with a response from the Ecologist which provides an overview of the lands and operations and addresses a number of specific grounds of appeal.

The Appellant of 084/2022 submitted a response on 21st November 2022 that again questioned the consideration of other plans and projects, ownership of the lands and provided mapping of the area. The submission also questioned a number of responses provided by the DAFM. The DAFM provided a response on 7th December and the Agents of the Applicant submitted a response on 29th November 2022. The Appellant of FAC084/2022 made a further response on 19th December 2022 responding to the matters on the publication of the documentation and the ownership of the lands. All submissions were circulated to the parties.

Considerations of FAC

The FAC considered in the first instance the submissions made by the parties on the matter of ownership of the land. The FAC considers that matters related to conflicts over the ownership of property are generally of a civil nature and do not fall within the FAC's remit. However, Article 22 of the Forestry Act 2014 requires an application to include the name and address of the applicant and the name and address of the owner of the lands, if different from the applicant. In this instance, the FAC, based on the submissions received, considers that this requirement was not met and that this would constitute a serious error. As the error relates to the application that has been made the FAC is allowing the appeal and setting the decision aside.

The grounds also question the mapping and plot numbers provided. Regulation 5 of the Forestry Regulations 2017 requires an application to include a map delineating all internal plots and a plot table accompanying the map detailing the number of each plot. The maps provided show five numbered plots while the application and plot table refer to six plots and the plot numbering does not align exactly. This constitutes an additional error in the application and the uncertainty around this information formed part of the grounds of appeal.

In relation to access to the lands, the FAC considers that the application clearly shows that the proposal extends to the public road to the north of the lands and access to the lands and the position of the site notice is marked at this location on the mapping provided. There would be no access from the south which formed part of the concerns of the Appellants and the southernmost plot would be unplanted and fenced as described in the application. Planting could not take place within 60 metres of a dwelling under the conditions of the licence. Crossing points of the watercourses are marked on the maps provided and the DAFM confirmed that these are sufficient for the proposal and that the application was subject to field inspection. The existing hedgerows and trees on the lands will be retained as a condition of the licence. A setback under and around the ESB lines is included and the management of the lines themselves is a matter for the ESB.

The FAC noted the position of the Appellants' dwellings to the south of the proposal and the requirement to not plant within 60 metres of the dwellings so that there would be no direct impacts on light. The FAC also considered that access to the lands is identified on the application and that access to the lands would not directly interfere with the Appellants' properties. The FAC was not satisfied that an error was made in the making of the decision in considering the grounds of appeal related to these matters.

A number of grounds challenge the Appropriate Assessment undertaken. In reviewing the documentation related to the Appropriate Assessment, the FAC noted the following conclusions were employed,

It is concluded that the proposed afforestation, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the above Screened Out European Sites, and associated Qualifying Interests and Conservation Objectives. There is therefore no potential for the proposed works to contribute to any cumulative adverse effects on these Screened Out European sites, when considered in combination with other plans and projects.

Furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in combination with other plans and projects.

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 Appropriate Assessment of the impact of such effects on the integrity of the European site. As stated on the record, it appears that the incorrect test was employed at the screening stage in that any potential significant effects on a European site from the proposal itself or in-combination with other plans and projects should be considered in deciding whether to proceed to Appropriate Assessment.

The FAC further noted that the Appropriate Assessment (AA) Report did not explicitly identify the likely significant effects on Salmon. While the intention of the report was clearly related to the protection of water quality and aquatic species and there are extensive measures specified, the absence of a clear and direct reference to this qualifying interest would constitute an error. Furthermore, the FAC considered that a measure relying on “specialized FS-DAFM otter mitigation” was not stated in a sufficiently precise or clear manner. While the specialised FS-DAFM otter mitigation might have been intended to be the Forestry and Otter Guidelines this is not stated and these guidelines are included as a separate measure. In addition, the aquatic setback is stated to be 20 metres or the 1 in 20 and 1 in 100 flood risk area but there is no map provided of the flood risk area or a clear reference to the source. The FAC examined floodinfo.ie as a common, publicly available source of flood risk information and could not readily identify a dataset providing a 1 in 20 flood risk. Conditions specified on the licence include adherence with the AA measures and a separate condition which states that the aquatic setback is 10 metres and 20 metres where soils are peat and no reference to flood risk is made. The setback measure is therefore unclear and imprecise. These represent errors in the Appropriate Assessment.

In relation to the submission from the NPWS, the FAC considered the incorrect recording of the word “sufficient” to be an obvious error in the context of the overall assessment undertaken. The Minister for

Agriculture, Food and the Marine is the competent authority for the issuing of afforestation licences while the decision should have regard to submissions from prescribed bodies. In this instance, concerns were raised in relation to access while access is marked on the maps submitted and the application was subject to field inspection. The Applicant submitted a Habitat Map and the application was considered by an Ecologist. While the Minister has the discretion to make further referrals to the prescribed body and this may have been advisable, the FAC is not satisfied that not making an additional referral constituted a serious error under the circumstances where access to the lands was readily identifiable from the application and the application was subject to field inspection. However, the Appropriate Assessment Report refers to "CONTACTS" for further information in relation to the submission and it is not clear to what this is specifically referring or whether all of the required information to facilitate public consultation has been provided. While this reference is likely the submission that was made, a copy of which is on the Forestry Licence Viewer, the reference in the report is unclear.

In relation to Environmental Impact Assessment, the record includes two versions of a document entitled *Assessment for EIA Requirement* which differ in some responses provided. Annex II of the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) identifies classes of development for which Member States may set thresholds or criteria for requiring environmental impact assessment. This includes "initial afforestation and deforestation for the purpose of conversion to another type of land use" and road construction. The Forestry Regulations 2017, SI 191 of 2017, require that afforestation of 50 hectares or more be subject to an Environmental Impact Assessment (EIA). Afforestation of less than the threshold of 50 hectares but which the Minister considers likely to have significant effects on the environment, taking into account the criteria set out in Schedule 3, must also be subject to EIA.

When making an application for a forest licence, an applicant must provide the information in Schedule 1 of the Forestry Regulations 2017. This includes a physical description of the whole project and location; a description of the aspects of the environment likely to be significantly affected and a description of any likely significant effects on the environment from the expected residues, emissions, and waste where relevant and the use of natural resources, to the extent of the information available on such effects. This information must take account of the criteria identified in Schedule 3 of the Forestry Regulations 2017.

The application includes details of the proposed operations and a series of maps including detailed Biomaps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects. In this instance no additional reports were submitted as part of the original application.

As noted in the grounds of appeal the application and the processing of the file are at odds as it is stated that the site is not greater than 5ha and in an area sensitive to fisheries. The more recent Assessment to Determine EIA Requirement records the response in relation to whether the site is within an area of

high nutrient sensitivity as N/A but no explanation is provided as to why this is not applicable. This document also relies on guidelines, including in relation to landscape, that appear to have been replaced by the Environmental Requirements for Afforestation. While the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the Determination, which itself only refers to forestry projects. While the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for not considering that the proposal is likely to have a significant effect on the environment might be found in separate documents, it would be clearer if an explicit reference to the characterisation of existing and approved projects was included in the Determination. The in-combination document records that the proposal is within the River Sub-Basin Tubbercurry_020 which is approximately 11% under forest cover while the EIA document records forest cover in the waterbody as 7.23% and there is no explanation of this discrepancy. These would represent errors in the making of the decision, however, while errors were identified in the AA and EIA screening which might be addressed through the remittal of the decision, the FAC concluded for the reasons previously provided that the appeal should be allowed and the decision set aside.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a series of serious and significant errors was made in the making of the decision in this case and that this included serious errors in the application that was submitted. The FAC is, thus, allowing the appeal and setting aside the decision of the Minister regarding licence CN88697 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee

