



07 April 2021

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[REDACTED]  
[REDACTED]

Our ref: FAC 042/2019

Subject: Appeal in relation to afforestation licence CN82117

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine in respect of afforestation licence CN82117.

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 CN82117 was granted by the Department on 13 February 2019.

#### Hearing

An oral hearing of appeal 042/2019 was conducted by the FAC on 01 April 2021.

#### Attendees:

FAC Members: Mr Des Johnson (Chairperson), Mr Dan Molloy and Mr Pat Coman

Secretary to the FAC: Mr Michael Ryan

Appellant: [REDACTED]

Appellant representatives: [REDACTED]  
[REDACTED]

Applicant representatives: [REDACTED]

DAFM representatives: Mr Kevin Keary (forestry inspector) & Ms Mary Coogan (EO)

#### Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM and the grounds of appeal, and all other submissions before deciding to allow the appeal and set aside the decision to approve the licence (Reference CN 82117).

The proposal is for afforestation on a stated site area of 10.97ha at Skehanagh, Co. Clare (the licence issued relates to a site area of 4.64ha). Fencing of 686m would be provided. Native woodland planting

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is proposed with Birch, Rowan, Scot's Pine, and ADB. Invert mounding and angle notch planting are proposed, and it is stated that road access is provided.

A Pre-approval submission report states that soils are mineral peat and the site is moderately exposed with a neutral aspect. No drainage is required, and the site is stated to be not acid sensitive or sensitive to fisheries. There are no archaeological sites or features and no High Amenity considerations. It is stated that the site is free of shell marl or highly calcareous soils and is prone to flooding.

In November 2018 the DAFM carried out screening for Appropriate Assessment for Natura sites within 3kms. The area is stated to be hydrologically connected to Natura 2000 designations - Lower River Shannon SAC (678m) and Lough Derg (Shannon) SPA (2.5km). The SAC is screened out for Stage 2 Appropriate Assessment for reason of the absence of any habitats listed as Qualifying Interests, and unsuitability of the project area for use by species listed as a Qualifying Interest. The SPA is screened out for Stage 2 Appropriate Assessment for reason of the small scale of the proposal, and separation distance.

The DAFM requested further information on 01.10.2018 and 18.01.2019. The first request stated that the Inspector had visited the site. There was evidence of shell marl 20cms below the soil surface in the southern half of the site. It stated that the applicant may conduct a survey to see how widespread the marl problem is. Also, the extent of flooding should be gauged. The site is deep peat in the southern half. The second request was for a revised species map with revisions mitigating the problems of flooding and shell marl.

The FAC requested further information from the DAFM on 24.01.2020 in respect of the screening exercise for Appropriate Assessment conducted. In a written response the DAFM stated that mitigation measures had been taken into consideration in the screening exercise.

The licence issued on 13.02.2019. It is subject to standard conditions plus the following:

- Ensure no planting is carried out where marl is a problem for the proposed species
- Ensure no areas prone to flooding are planted
- Adhere to forestry biodiversity guidelines
- Adhere to forestry and water quality guidelines.

There is a single appeal against the decision to grant the licence. The grounds contend that the appellant is the registered owner of the property affected by this proposal. Land folios are submitted. The appellant has occupied the property since 2005 to the exclusion of all parties. He has continued to use the property, worked the property and applied for Single Farm Payments on the property. The applicant is not resident in Ireland. The rules of Forestry make it clear that the applicant has to reside within a 70-mile radius to acquire a licence. The land is zoned as a flood plain within a Disadvantaged Area. The Minister may require satisfactory evidence demonstrating that the applicant is the owner of the lands concerned. This has not happened in this case. The owner has not consented to the application. There is wildlife living and breeding in the area – duck, mallard, geese, snipe, all forms of wildlife, also a rare butterfly.

In response the DAFM state that, following a site inspection, it was determined that parts of the site were ineligible because of the risk of flooding and the presence of shell marl. It is now recommended





that, following re-examination of the flood data, an additional area of the site be removed in accordance with the attached map. This map was not attached to the file received by the FAC.

An Oral Hearing was convened on 01.04.2021 and all parties were invited to attend. The FAC sat remotely and the DAFM, applicants and appellants participated electronically. The DAFM stated that the original application was for a stated site area of 10.97ha but, following assessment and inspection revealing areas of shell marl and flooding, the licence issued was for a smaller area of 4.64ha. Following the submission of the appeal, the Inspector examined aerial photography (dated around 2008) and relevant websites before concluding that the licenced area should be reduced by a further 1.27ha. The Minister has the power to alter the terms of the licence, but this had not happened to date. The DAFM representatives pointed out that the screening for Appropriate Assessment undertaken would not be 'fit for purpose' under current procedures as further Natura 2000 sites would be screened and the likelihood is that a number of sites would be screened in for Stage 2 Appropriate Assessment. It was assumed by the DAFM that the applicants were the site owners or had the consent of the owners to make the application. The situation whereby the ownership of the site was being contested was 'very unusual'. Queried about the wording and enforceability of a number of conditions attached to the licence, the DAFM stated that there would be a reliance on the licensee to comply with the conditions. It was arguable that greater information in respect of the occurrence of shell marl and flooding should have been gathered before the decision to grant the licence. The DAFM representatives at the Oral Hearing were not involved in the DAFM response to the FAC request for further information; this had been prepared in Wexford. The applicant's representatives stated the precise extent of marl and flooding on the site had been difficult to determine but that it was accepted that the site area for planting would be reduced further. The Deed of Transfer for the lands had been submitted and accepted by Land Registry. The appellant's representatives stated that the screening for Appropriate Assessment was not fit for purpose. The procedure adopted was defective. The Lower River Shannon SAC is only 650m from the project lands and the Otter is a qualifying interest. There is a flood risk on these lands. The area approved by the licence had not been reduced. The maps attached to the licence was very difficult to read. At least some of the approved area appears to be liable to flooding. The appellant's representative questioned the enforceability of some of the conditions attached to the licence. With reference to the further information sought by DAFM dated 01.10.18, there is no evidence that any survey was carried out. With marl found at 20cms, there is doubt that the lands are suited to the proposed planting. It is likely that there is widespread marl on the site. In respect of ownership of the lands, it was open to the Minister under the Forestry Act and associated Regulations to question details of ownership, but this had not happened. It appears that the applicant may be a limited partnership based in Jersey but this had not been investigated. The landscape is classified as 'moderately sensitive' and located on a drumlin, it is unclear what consideration was given to this. There is a major gas line on the southern part of the site and heavy machinery would have to cross this (The DAFM clarified that the pipeline does not transect the approved area but would be crossed during the proposed development). The appellant's representative confirmed the grounds of appeal regards a 70-mile rule are no longer pursued. Under questioning by the FAC, the DAFM stated that details of ownership have to be given post planting and that there was enough information to enable the application to be assessed. The



approved area has very few drains, with 2 -3 ha of high dry land and a drop down to flatter lands where there are 'closed in' field drains. This is a Native Woodland proposal which would be considered as beneficial to the area. The DAFM stated that there are no landscape issues for consideration in this proposal. While the gas pipeline would have to be crossed, it is buried under ground. The DAFM outlined the processes undertaken regards ownership and the awarding of an 'FO' (forest owner) number occurs when these are met, the checks would include company registration and VAT number, this work is conducted by a DAFM section (CPS) in Co Cavan, and an FO number is in place in this instance.

There are various issues arising in this appeal both from the written grounds of appeal, the DAFM response to the FAC request for further information, and through submissions made at the Oral Hearing. It is considered that the key issues to be determined fall under the following headings:

- Application details/information
- Screening for Appropriate Assessment and the provisions of Article 6(3) the Habitats Directive
- The terms of the licence granted
- Site ownership
- Wildlife on the project lands
- Other issues

The application submitted related to a stated site area of 10.97ha. The pre-approval submission indicated that the application lands are free of shell marl or highly calcareous soils. It is apparent from details of the DAFM consideration of the application, the licence issued, and submissions made at the Oral Hearing that this information was incorrect. While the pre-approval submission indicated that the site was prone to flooding, the extent of this was not known at the time of granting the licence, and in a post licence submission in response to the grounds of appeal, it is now accepted by the DAFM that part of the licensed site should be removed. The FAC considers that greater details in respect of the shell marl and flooding should have been obtained by the DAFM before the licence was granted, and that the absence of such details represented a significant and serious error in the decision to grant the licence.

The screening exercise for Appropriate Assessment was carried out applying DAFM procedures at the time and was restricted to considering the likely effects on Natura 2000 sites within a 3km radius. Two sites were screened and the DAFM concluded that Stage 2 Appropriate Assessment was not required. The DAFM are now of the view that the screening carried out at that time was 'not fit for purpose'. The FAC considers that a radius of 15km should have been applied and accepts the views of the DAFM and the appellants that it is likely that a revised screening of sites within 15kms would be likely to conclude that one or more of the designated sites would require Stage 2 Appropriate Assessment. Furthermore, the FAC notes that the DAFM indicated in their response to the FAC request for further information, that mitigation measures had been considered in the screening undertaken. For these reasons set out, the FAC considers that the screening exercise in respect of Appropriate Assessment did not meet the requirements of the provisions of Article 6(3) of the Habitats Directive, and was an incorrect basis for the making of the decision to grant the licence. The FAC considers that this constitutes a significant and serious error.

There is a very significant difference between the area applied for (10.97ha) and the area to which the licence relates (4.64ha). This reduction occurred during the consideration of the application by DAFM.



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There is no information before the FAC to indicate any revised public notification for the reduced area, but it is not clear if such revised notification should have been required. The FAC notes that the DAFM re-examined the issue of flooding on the site following the issuing of the licence and the submission of the appeal, and now concludes that the site area should be reduced by a further 1.27ha for reason of flooding on the site. The FAC noted the conditions of the licence indicate that sufficient details in respect of shell marl, and areas prone to flooding, were not available to the DAFM at the time of the making of the decision to grant the licence, and that the wording of the conditions lacks precision. In these circumstances, the FAC concluded that there was a significant and serious error in the decision to grant the licence.

On the issue of ownership, there is information before the FAC indicating a claim to ownership of the project lands by both the applicant and the appellant. It is noted that the information now before the FAC was not before the DAFM at the time of the making of the decision. The FAC considers that the resolution of ownership, in the circumstances presented, lies outside the remit of the FAC and is more properly a legal matter for resolution in the Courts. On this issue the FAC does not accept that the DAFM made a significant or serious error in the decision to grant the licence.

The appellant submits that there is a range of wildlife on the project lands, including a rare butterfly, but did not provide any convincing supporting information in support of this contention. Reference is made to the existence of the Otter – a qualifying interest for the Lower River Shannon SAC but not specifically on the project lands.

Other issues raised by the appellant relate to the existence of a gas pipeline on the southern part of the project lands and the apparent lack of consideration to landscape issues in the consideration of the application by DAFM. The gas pipeline is buried and not directly impacted by the proposed planting but will required to be crossed in accessing the site. There is no evidence before the FAC to indicate that the proposed development would have any adverse impacts on the pipeline. The FAC is satisfied that the proposed development would not be injurious to the landscape amenities of the area.

The FAC concluded that there were significant and serious errors in the making of the decision to grant the licence, as detailed above, and in these circumstances the decision of the Minister to grant the licence should be set aside.

Yours Sincerely

Pat Coman, on behalf of the FAC

