



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16th April 2021

Subject: Appeals FAC110/2020, FAC137/2020, FAC147/2020, FAC151/2020, FAC153/2020, FAC154/2020, FAC158/2020 & FAC178/2020 in relation to afforestation licence CN84354

Dear [REDACTED]

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 the Marine. 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 all parties to the appeal.

Background

Afforestation licence CN84354 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 27th February 2020.

Hearing

An oral hearing of the appeals listed above was held by the FAC on the 11th March 2021.

FAC: Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Derek Daly & Mr Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Appellants:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Applicant:

[REDACTED]
[REDACTED]

DAFM representatives: Ms Mary Coogan, Mr Martin Regan.

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 the decision to grant afforestation licence CN84354.

This licence is for the afforestation of 17.84ha across two plots in Kilduff Middle, Co. Cavan. The DAFM Inspector's Certification states the soil type is predominately Podzols. The slope is predominantly flat to moderate (<15%), and current vegetation cover is Grass/Rush. The species to be planted are 85% Sitka spruce and 15% Additional Broadleaves. Ground preparation is to include woody weed removal and mounding with no additional drainage required. There will be no fertiliser application and slit planting with manual vegetation control plus herbicide applications in years one and two. Road access is provided and there will be 2200m of stock/sheep fencing erected. A watercourse flows along the eastern boundary of Plot 2 and continues c.150m before joining the River Shannon (Upper), which is

south of the proposal at a distance of c.75m at its nearest point. The project site is in the 26A Upper Shannon Catchment, the Shannon[Upper]_SC_010 Sub-Catchment, and the Shannon (Upper)_030 River Sub-Basin. The Shannon (Upper)_030 Waterbody currently has 'Unassigned' status under the Environmental Protection Agency (EPA) 2013-2018 reporting period.

The applicant submitted their application on the 8th July 2019. No referrals to statutory bodies were triggered by the DAFM's spatial rules in this instance but the application was referred to the DAFM Archaeologist. The subsequent archaeological report, including recommended conditions, was attached to the licence. Seven submissions were received in July and August of 2019 after the application had been advertised. The DAFM issued a Further Information Request (FIR) to the applicant on the 16th December 2019 with a response received on 12th February 2020. The FIR asked for the following documentation to be provided:

1. Statement that the land is suitable for planting with regard to flooding and drainage.
2. Landscape design plan with at least 30% broadleaves/diverse conifers.
3. Identify the water main in southwest of the site on the ground and show on map.
4. Exclude buildings from application area.
5. Liaise with adjoining neighbours and where possible, agree setbacks and appropriate planting adjoining setbacks.

The applicant's Forester responded to the FIR as follows (in summary):

1. The Landowner has confirmed that any flood waters that rise recede quickly and would never be in the field for long. The eastern boundary of the site adjoins a stream which flows c.150m to the River Shannon and it is this stream that backs up temporarily. Due care will be taken to ensure no sedimentation enters this stream during site works. The Bio Map states a 20m setback from this stream and the use of silt capture ponds as a secondary precaution.
2. The Landowner is adamant that he wants the normal 15% broadleaves allocated for the site. He is planting his land as an investment and to get the best return he wants 85% conifers on the site. He understands that there are dwelling houses adjacent to the site and increasing the level of broadleaves around these houses can be done and the remaining broadleaves planted in groups on the rise of the hill behind these houses (map attached). Broadleaves are allocated for setbacks along watercourses, road and archaeological setbacks.
3. The water main is now identified on newly uploaded Bio Map.
4. Buildings now excluded from the application.
5. Residents of the three houses adjacent to the site were contacted by the Landowner before the application was submitted. The 60m setback was explained and a range of native broadleaf trees will be planted to soften the setback area. According to the Landowner, the owners of these three houses had no issues with the forestry.

The DAFM completed a Stage 1 Appropriate Assessment (AA) screening which screened four Natura 2000 sites within 15km of the proposal. All four sites (**Boleybrack Mountain SAC, Corratirrim SAC, Cuilcagh Anierin Uplands SAC, and Lough Gill SAC**) were screened out for Stage 2 AA "due to the location of the project within a separate waterbody catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection." The DAFM completed an In-Combination assessment on the 18th February 2020 which consulted various planning websites and DAFM records for other plans and projects in the proposal's Townland (Kilduff Middle) before concluding that the project "when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site."

The DAFM issued the licence on the 27th February 2020 with relatively standard conditions 1 - 12 plus condition 13 which requires:

- Adherence to the attached Archaeologist's report (specific conditions listed also);
- Plant a minimum of 10 lines (20m) of a mixture of appropriate broadleaves along setbacks from EPA stream, public roads and dwellings. This may be increased and claimed under appropriate GPC. Manage this broadleaf area as Continuous Cover Forestry;
- Landscape appropriately and as per supporting documentation submitted;
- Adhere to forestry & water quality guidelines;
- All guidelines to apply.

There are eight appeals against the licence. The written grounds of each were considered in full by the FAC and are summarised below.

1. FAC110/2020:

- Townland boundaries are not marked.

2. FAC137/2020:

- The afforestation would be on a flood plain of the River Shannon. Over half of the site is in the flood plain area;
- Extreme rainfall events cause flooding and road closures. Photographs submitted,
- The appellant's house has experienced flooding twice in the last 5 years and is adjacent to the proposed lands;
- Planting methods proposed (mounding) could exacerbate surface water run-off, making the flooding worse;
- There is an absence of EIA and local consultation.

3. FAC147/2020:

- The development is in the flood plain of the River Shannon. It may have an effect on the River Shannon SACs as it will cause flooding downstream;
- The Appropriate Assessment screening does not comply with the requirements of the law;
- The FAC must carry out a *de novo* screening and, where necessary, an Appropriate Assessment;
- It is merely necessary to determine that there may be a significant effect to trigger Appropriate Assessment (*Kelly v An Bord Pleanála*);
- The FAC must make available records of assessments undertaken to the appellant;
- Where a waterbody is concerned, it is necessary to examine the catchment map and state which catchment the proposed development is in;
- Where there is a Turlough, it is necessary to show evidence that there is no groundwater connectivity;
- It is not appropriate at screening stage to take account of measures intended to avoid or reduce the harmful effects on a European site;
- Likely effects of all aspects of the operation must be considered in combination with other forestry management activities completed, commenced, permitted or proposed;
- The FAC must fully comply with NPWS requirements.

4. FAC151/2020:

- The area in question is in the River Shannon flood plain;
- Flooding is a serious problem in this area. Flooding has occurred as recently as February-March 2020;
- Public roads have been flooded and rendered impassable to traffic. Photographs submitted;
- Proposed planting methods would lead to large volumes of water being created and exacerbate the flooding problem;

- There would be a negative impact on the appellant's property. Light, wind and sun would be blocked and lead to poor grass growth. Adjoining lands would be rendered worthless;
 - There is significant wildlife presence in the area. Curlews, Hen Harriers and Pheasants breed in the area. Badgers and Hares have been observed and deer regularly sighted;
 - There would be an adverse effect on water quality through the use of chemicals, insecticides, and weed killers;
 - Concern for the loss of light and sunlight. Loss of visual connectivity with neighbours. Interference with TV, broadband and mobile phone coverage.
- 5. FAC153/2020:**
- The proposed afforestation comes up to the back of the appellant's house. There would be a loss of daylight;
 - Concern for the devaluation of property;
 - Loss of beautiful views.
- 6. FAC154/2020:**
- The appellant's property is immediately adjacent to the proposed development. No regard has been given to the wellbeing of the appellant's family, neighbours and the local community;
 - Concern for the loss of natural light and heat to the appellant's property
 - Devaluation of property;
 - A tributary of the River Shannon flows through the site. The site is prone to regular flooding. Buffer zones should be required;
 - Concern that there would be water pollution with devastating consequences for wildlife and the local community;
 - An Official Government Report found that blanket afforestation with non-native species is alien to people and the landscape;
 - An article in the Guardian refers to dense blocks of non-native coniferous trees smothering the landscape and driving out wildlife.
- 7. FAC158/2020:**
- The licence granted is not in compliance with the Forest Service's own regulations;
 - The proposed development is socially unacceptable;
 - Concern for negative impact on the enjoyment, use and value of the appellant's property;
 - Light, wind and sun would be blocked;
 - There would be detrimental impacts on mental health and wellbeing;
 - There would be damage to wildlife and biodiversity. Loss of important birds – Hen Harrier, Kestrel, Snipe, Meadow Pipit, Skylark, Cuckoo. Loss of bee species;
 - Concern for the pollution of rivers in the area.
- 8. FAC178/2020:**
- The proposed development is in a flood plain. The proposed development would exacerbate existing problems. Floods of up to 8ft have been recorded. Photographs submitted;
 - Loss of sun, wind and light leading to poor grass growth;
 - Health and safety concerns;
 - Concern for water quality through the use of toxic chemicals, insecticides, fertilisers and weed killers.

The DAFM provided a written response to the grounds of appeal in the form of a Statement of Fact to the FAC. In each case the DAFM stated: "I as District Inspector carried out both a desk audit and field inspection and reviewed submission/appeal. I am satisfied that all criteria referred to above have been fully adhered to and approval is in order."

The FAC held an Oral Hearing on the 11th March 2021. The FAC sat remotely. The applicant, the DAFM and seven of the appellants/appellant's representatives (AR) also participated remotely while one appellant did not participate. The DAFM detailed the processing of the licence application and confirmed that no referrals were made to external bodies because none of their spatial rules for doing so were triggered in this instance. The DAFM addressed FAC questions about a submission made by the National Parks and Wildlife Service (NPWS) confirming it had been received after the licence was issued (19th May 2020) and that it was unsolicited and contained fundamental errors about the nature of the proposed development (referencing clearfell and replanting, not afforestation) and its proximity to Boleybrack Mountain SAC.

The FAC called on each appellant in turn to make their submissions. The first AR explained that they had been asked to represent the first appellant and proceeded to make an oral submission which focussed on a variety of grounds of appeal which were not part of the written grounds submitted by the first appellant. These included reference to procedural errors in the application, the percentage of broadleaves to be planted, the status of the NPWS's submission, the location of the application site on a flood plain, the unassigned status of the Shannon (Upper)_030 Waterbody and the results of a recent Judicial Review regarding unassigned waterbodies, the AA screening conclusions, the proximity of Kilgariff Marsh pNHA, the importance of the area for a variety of wildlife, some of which are protected species, and the threat this proposal poses to the amenity value of Marble Arch Caves Global Geopark. Responding to FAC questions, the first AR stated he did not have specific evidence to support his contention regarding wildlife in the area but that this information was available on the internet. The FAC queried the first AR regarding the details of the Judicial Review he had referenced but he did not elaborate on his initial submission.

The second appellant stated he had lived in the area for 25 years and that, based on the documentary evidence available, the DAFM had not sufficiently considered the issue of flooding on the application site. He stated there had been seven incidents so far in 2021 where up to 1/3 of the application site was under flood waters and that he had submitted photographs to the DAFM. He stated minor rainfall events can lead to flooding and that he had completed works to protect his property from flooding and was concerned the proposed development would exacerbate the problem.

The third appellant did not participate in the Oral Hearing. The fourth appellant, an adjoining landowner, had not been made aware of the application and had not been consulted with by the applicant. She contended that the Inspector's Certification document states the project lands are not prone to flooding but that this was wrong as flooding is a serious problem in the area. She expressed concerns about floodwaters carrying debris onto her land. She stated that mature trees would block sun and wind from her land leading to poor grass growth and the delay of frost thawing. She also expressed concerns about the risk of chemical pollution, and the proposal's impact on television and broadband signal, her view of neighbours, and Otters and Eels in the adjoining stream. She stated the percentage of forestry in the Townland is too much and that afforestation goes against the County Development Plan. The fifth appellant's AR stated that the fifth appellant owns one of the houses adjoining the proposal and that no consultation had taken place. She stated that the applicant made a false claim that the adjoining homeowners had been consulted with and there were no issues. She claimed the proposal would devalue properties, impact television and broadband signal and block light. She also stated that flooding was a serious issue causing local roads to be impassable.

The sixth appellant reiterated their written grounds of appeal and stated that they also owned an adjacent house and had not been consulted with. They emphasised the impact they believed the proposal would have on their property value, the obstruction of views from their house and a general negative impact on the area.

The seventh appellant did not make a statement at the Oral Hearing. The eighth appellant stated they owned the land on the other side of the stream to the east of the proposal. He stated he had not been made aware of the proposed development until the site notice was erected. He stated that he had submitted photographs to the DAFM and had requested to speak with them about the proposal but had not received any correspondence until a copy of the letter of approval was sent to him. The eighth appellant presented the photographs he had submitted to the DAFM and stated that flooding and the subsequent deposition of debris is an ongoing problem on the land and expressed concerns that the damage caused by this debris on his c.20 acres of Hay Meadow would be exacerbated by the proposed project. He queried how the planned drainage works on the application site would impact his land and who would reimburse him for the damage it will cause.

The applicant stated that he is not responsible for flooding in the area and that he is just a farmer trying to make a living from his land. The FAC queried the applicant in relation to the contention that the project lands are on a flood plain. The applicant deferred to his Forester. The applicant's Forester (AF) stated that the DAFM's iFORIS flood layer shows c.10% of the eastern end of the application site is prone to flooding. Responding to FAC questions about the photographs showing the extent of flooding the AF stated if the flood waters recede within a few days then it is not an issue for growing trees. He stated that he did not see how forestry would make the flooding worse. The applicant stated that flood waters recede within a few hours and that roads are only impassable for a few hours at a time.

The DAFM stated that the submissions made on this application had been considered and had informed the DAFM's FIR. The DAFM concurred with the AF's statement that the iFORIS flood layer shows c.10% of the application site as prone to flooding. Responding to FAC questions the DAFM stated there is c.104m between the applicant's land and the River Shannon, that this constitutes a substantial floodplain and that the flooding issue was considered but that the iFORIS flood layer was the sole flood information resource consulted. The DAFM, responding to a FAC queries, stated that the figure for 0% forest cover in the Townland was accurate, to the best of their knowledge. They described the hydrological features on the site, stating that a land drain through the centre of the proposal runs to the watercourse along the eastern boundary of the proposal. The DAFM stated that the area of the site prone to flooding had not been excluded from the application but highlighted that a 20m setback had been applied for in the flood-prone area followed by 10 rows of broadleaves. The DAFM confirmed their field visit had taken place in December 2019 and particular attention had been paid to a water outlet in the south-east corner of the site with no issues found. The FAC queried the DAFM regarding the FIR, which was not in evidence before the FAC; this was read into the record of the hearing along with the AF's response.

Responding to FAC questions, the DAFM stated that if the site flooded within a year of mounding operations then sediment movement would be inevitable but that after a year vegetation cover would be established which would prevent this from happening. Regarding the height of trees and the blocking of light etc., the DAFM stated Sitka spruce can grow up to c.30m but that windblow becomes a critical issue at c.23m and that most trees are felled at c.23-25m. They also stated that the land behind the adjacent houses rises and a dwelling setback of 60m would be in place with broadleaves planted beyond this. There was discussion between the FAC and the eighth appellant regarding debris deposited on his land during which he stated it was more like 50% of the project lands that flood regularly and not 10% as per the DAFM's info. This appellant also stated there is established forest not far from the proposal to which the DAFM responded that this forestry was within a different Townland. The DAFM responded to

FAC questions stating that the Archaeological conditions referred to sites A, B, C and D as per the Archaeologist's report and that no ecological examination of the area had taken place.

In concluding remarks the second appellant submitted that they had observed Otters in the vicinity of the proposed development and stated that the flooding issue remained unresolved. The fourth appellant stated that she had lived in the area for 60 years and that the flooding covers more than 10% of the application site and can last for days.

The FAC had regard to all of the appellants' grounds of appeal and considered, in the first instance, the third appellant's contentions regarding the DAFM's AA procedures. The FAC noted that the DAFM completed a Stage 1 AA screening, in line with the requirements of the Habitats Directive, which considered four Natura sites within a 15km radius. All of these sites were screened out for Stage 2 AA due to a lack of hydrological connectivity. The FAC noted that the closest Natura site which is downstream of the proposal and hydrologically linked is the Lough Forbes Complex SAC at c.68km downstream. The FAC noted that, prior to issuing their decision, the DAFM considered the potential for the proposed development to contribute to an in-combination effect on Natura 2000 sites and considered both forestry and non-forestry plans and projects in the project Townland (Kilduff Middle) before concluding that the project will not give rise to the possibility of a significant effect on any Natura site when considered in combination with other plans and projects. Based on the information before it, the FAC found no convincing evidence that the DAFM made a significant or serious error, or series of errors, in their AA screening process and the conclusions reached. Regarding the third appellant's grounds related to Turloughs, there is no evidence before the FAC to indicate that the proposed development will have any impact on any Turlough or Turlough SAC.

The FAC considered that the primary issue at hand is the location of the application site in a flood plain of the River Shannon. The FAC noted that both the AF and the DAFM stated they had considered this issue in light of the iFORIS flood layer which indicates c.10% of the proposal site is prone to flooding. The statements from numerous appellants at the Oral Hearing (supported by photographs of the site) contend that *between 30-50% of the application site is prone to significant flooding that can last several days*. The FAC consulted www.floodinfo.ie which records two points where recurring flooding occurs "every year after heavy rain". Both points occur along the river bounding the east of the project lands, one point is adjacent to the south-east corner of the site and the other adjacent to the north-east. The extent of flooding is not shown. The FAC considered the DAFM's processing of the application with regards to flood risk. The Inspector's Certification document contains a tick-box question in the 'Risk Analysis' section which asks is there a 'possibility of flooding/high water table' and the box was not ticked. In the 'Silvicultural Considerations' section Question 4 asks 'Is the site prone to flooding' to which the AF answered 'no' and the DAFM Inspector answered 'N/A'. The FAC noted that flood plains are not mentioned in the DAFM's 2016 document Environmental Requirements for Afforestation and only a brief reference is made to flood plains in the 2015 Forestry Standards Manual. The FAC observed that the DAFM's Land Types for Afforestation (2017) document, in Section 4 – *Unsuitable Land* states "sites falling into the Unsuitable Land category are ineligible under the Afforestation Scheme". The list of unsuitable land types includes "sites that cannot be adequately drained, and sites that are prone to flooding." The FAC acknowledges that the DAFM requested further information from the applicant and *inter alia* specifically sought a statement that "the land is suitable for planting with regard to flooding and drainage" and that the applicant replied stating that it was. However, based on the grounds of appeal (both written and at the Oral Hearing), including photographic evidence, and based on the DAFM's own categorising of land that is liable to flood as unsuitable for afforestation, the FAC considers that the DAFM made a serious error in failing to sufficiently assess the extent of the project lands which are liable to flooding. The FAC considers that the area of land within the application site which is prone

to flooding should have been first identified to its full extent and then excluded from the area approved under afforestation licence CN84354.

The FAC considered the grounds contending that the proposed afforestation will block light, wind and views. The FAC notes that the DAFM guidelines require a setback of 60m from a dwelling and that the applicant has proposed to adhere to this requirement and also to plant broadleaves in the area adjoining this proposed setback. However, the FAC acknowledges the submissions at the Oral Hearing that no consultation took place between the applicant and the owners of the adjoining dwellings. Regarding the contention that the proposed development would block broadband and television signal and devalue adjoining homes, the FAC noted that the appellants did not provide any specific evidence in this regard. The FAC considers that broadband and television signal can be an issue throughout many rural areas like the proposal is located in and that quality of broadband and television service is an issue for the service provider.

The FAC noted that the watercourse bounding the east of the proposal forms part of the Kilduff Middle Townland Boundary. Regarding the first appellant's grounds of appeal, the FAC noted that application proposes a 20m unplanted setback from this watercourse. This exceeds the recommended 5m setback from a Townland Boundary in the DAFM's Environmental Requirements for Afforestation (2016) document.

Having regard to the submissions regarding wildlife in the area, there is no specific evidence before the FAC that the proposed development would give rise to an adverse impact on the species mentioned. As detailed above, the site is over 60km from the nearest hydrologically connected downstream Natura 2000 site.

In relation to potential impacts on water quality, the FAC noted that the applicant has proposed that no fertiliser would be used on the site and that herbicide application would be limited to years one and two of forest establishment in addition to manual weed control. The FAC noted the DAFM's statement that if flooding were to occur within a year of the site being mounded, prior to the establishment of ground vegetation cover, then sediment mobilisation would be unavoidable. The FAC considers that this potential outcome is the main threat to water quality from the proposed development.

Based on the information before it, as outlined above, the FAC concluded that the DAFM made a serious error in failing to sufficiently address the issue of potential flooding of the application site, leading to the issuing of a licence which, in parts, is not consistent with the DAFM's own guidelines set out in the Land Types for Afforestation document. In these circumstances, the FAC decided to set aside the decision of the Minister.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on Behalf of the Forestry Appeals Committee