



6<sup>th</sup> December 2022

**Subject:** Appeal FAC 067/2022 relating to Licence CN89137

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 set aside and remit the decision of the Minister regarding licence CN89137.

**THE LICENCE.**

Licence CN89137 is for 6.9 Ha. of afforestation GPC 3 (3.99 Ha.) & GPC 10 NWE (2.93 Ha.) in the townland of Tullaghans, Co. Leitrim, and was submitted to the DAFM on the 22<sup>nd</sup> of June 2021. Following Appeal Ref: FAC 135/2021 the licence was set aside and remitted to the Minister on the 16<sup>th</sup> of March 2022

*"to re-advertise the application on the FLV in accordance with Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) and to carry out and record a new assessment to determine the requirement for EIA and, subject to the outcome of that determination, to require the submission of an EIAR, if appropriate, before the making of a new decision."*

On the 14<sup>th</sup> of June 2022 a decision approving the licence was issued with conditions including compliance with DAFM Technical Standards, a minimum unplanted setback from the public road of 10m plus a 10m planting of broadleaved species, a minimum setback of 5m from watercourses, a minimum setback of 10m around an identified water hot-spot, and liaison with Leitrim County Council prior to the commencement of any work.

**FORESTRY APPEALS COMMITTEE.**

A sitting of the FAC held on the 9<sup>th</sup> of November 2022 considered the current appeal and the processing of the licence as it relates to the decision to issue the licence on the 14<sup>th</sup> June 2022. The FAC members present were: Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton and Mr. Iain Douglas. Secretary to the FAC: Mr. Michael Ryan.

In the interest of clarity and for the avoidance of doubt this sitting of the FAC considered appeal ref. FAC 067/2022 only and took no account of the previous appeal.

**BACKGROUND.**

The proposal consists of the planting of 6.9 Ha. of forestry, in two plots at Tullaghans, County Leitrim. The site has a relevant watercourse along the western site boundary of Plot 2 and both Plots adjoin a public road along their northern boundary.

The public file recording the processing of the application by the DAFM is available on the DAFM Forestry Licence Viewer (FLV). Only those documents relevant to the appeal under consideration are referred to below.

The Inspector's Appropriate Assessment Screening (AAS) Report dated the 9<sup>th</sup> of June 2022 indicates that the soil type underlying the project area is predominantly 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 comprise grass/rush.

The licence was referred to the National Parks & Wildlife Service (NPWS) on the 23<sup>rd</sup> of September 2021 which replied on the 1<sup>st</sup> of October 2021 stating it had no comment to make and attaching details on Appropriate Assessment.

The AAS considered 3 sites within 15km and that there was no need to extend that distance in this case. The European sites considered were Boleybrack Mountain SAC (Site Code 002032); Cuilcagh - Anierin Uplands SAC (Site Code 000584) and Lough Gill SAC (Site Code 001976). The overall conclusion was to screen out all sites, concluding that there was no possibility of a significant effect on any Natura site, and that Appropriate Assessment (AA) was not required for reason that the proposed site was located within a separate water-body catchment to that containing the Natura site, with no upstream connection and a subsequent lack of any hydrological connection to the Upper Shannon Catchment 26A.

The DAFM prepared an In-combination Statement on the 8<sup>th</sup> of June 2022 on the proposal's potential to impact on the three 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 9<sup>th</sup> of June 2022 is on file.

An Assessment to Determine EIA Requirement was carried out, dated the 9<sup>th</sup> of June 2022, as required by the decision remitting the licence to the Minister. The Assessment to Determine EIA Requirement considered the proposed afforestation across a range of criteria and a determination that the proposal should not be subject to the Environmental Impact Assessment process.

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

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

#### **THE APPEAL.**

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

The grounds of appeal are summarised as follows:

1. Lack of Due process: the date of decision and the date of publication of decision does not comply with the Aarhus Convention.
2. Availability of documents on the Forest Licence Viewer (FLV) Licence not re-advertised therefore the same issue arises.

3. Licence Condition 2 cannot be understood by a lay person.
4. Inadequate ecological/environmental assessment.
5. Access: access is inadequate and there is no evidence of a suitable access to the site.
6. No assessment of Annex IV species in the Habitats Directive.
7. EIA Screening Cumulative Impact, Leitrim County Council should have been consulted with regard to Landscape Impact, Inspector's response to Accident Risk, planting of the western section of Plot 2 which is peat is not consistent with climate change commitments & state aid; licence should have been referred to Leitrim County Council.

#### **DAFM STATEMENT OF FACT.**

The Statement of Fact (SoF) provided by the DAFM for the appeal and dated the 21<sup>st</sup> of September 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 30<sup>th</sup> of September 2021. 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 25<sup>th</sup> of July 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 response to the grounds set out in the appeal. The Forestry Inspector requested an oral hearing.

#### **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 Statement of Fact (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.

#### **Notification**

The grounds of appeal submit that there is a lack of due process arising from the date of decision and that the date of publication of decision does not comply with the Aarhus Convention. The FAC noted that the date of the decision to grant the licence was 14<sup>th</sup> June 2022 and that the public was notified of the decision the following day 15<sup>th</sup> June 2022. The FAC does not consider that there was undue delay, and notes that the appellant has submitted an appeal for consideration by the FAC. The FAC is satisfied that the DAFM has complied with its obligations under the Forestry Act and Regulations with respect to notification of the public of its decision and no error has occurred in this regard.

The FAC in its letter of the 16<sup>th</sup> of March 2022 remitted the licence to the Minister to "**re-advertise the application on the FLV in accordance with Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017)**". The FAC further noted that the DAFM SoF of 21<sup>st</sup> of September 2022 only refers to the original date of advertising of the licence application, the 9<sup>th</sup> of July 2021, and that there is no evidence on the file that the licence was re-advertised and open to public consultation as required, while the project details and location are available on the FLV. The website of the DAFM<sup>1</sup> states that, *Application documentation for applications received from 11th January, 2021, will be made available in the FLV, when that application is advertised and open for public consultation.*

The FAC considers that the failure to readvertise the application is a serious error in the making of the decision on the licence.

#### **Appropriate Assessment.**

##### **Screening for Appropriate Assessment**

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<sup>1</sup> <https://www.gov.ie/en/publication/e305a-public-consultation-on-licence-applications-for-felling-afforestation-forest-roads-and-aerial-fertilisation/>

In considering the appeal the FAC examined the AAS undertaken by the DAFM. The FAC identified the same three sites as being within 15km from the proposal as the DAFM: Boleybrack Mountain SAC; Cuilcagh-Anierin Uplands SAC; and Lough Gill SAC. The FAC is satisfied that there was no need to extend the 15 Km distance in this case.

The FAC considered the nature, scale and location of the proposal, the European sites identified and their conservation objectives and the reasons for screening out for Stage 2 Appropriate Assessment provided by DAFM. The FAC noted that the DAFM considered each site in turn and provided the reasons for screening out all the sites for AA and that details of other plans and projects were also examined by the DAFM concluding that the project does not represent a source, or if so, has no pathway for an effect on any of the Natura sites listed in AA screening conclusions.

The FAC noted that the conclusion of the AA In-combination Statement states

*"It is concluded that there is no likelihood of the proposed afforestation project CN89137 itself, i.e. 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."*

Furthermore, in the screening document the conclusion refers to "cumulative adverse impacts" while the FAC would understand that the screening should consider all potential significant effects.

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 keeping 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.

*Inadequate assessment on the impact on a protected species (Hen Harrier).*

This ground of appeal contends that there has been inadequate assessment of the impact of the proposal on the Hen Harrier. The FAC noted that, with regard to the Hen Harrier, the DAFM use the most up-to-date, scientific information available, the "2015 National Survey of Breeding Hen Harrier in Ireland" published by the NPWS, supplemented by the best professional advice from the NPWS which is that licence CN89137 is within the current distribution of Hen Harrier but it is not within a red zone (High Likelihood Nesting Area) or within one of the important non-designated hen harrier areas. The appellant has adduced no evidence that Hen Harrier is present in the area or that the site comprises habitat suitable for the Hen Harrier.

With regard to further referral to the NPWS of the licence application, the FAC notes that the DAFM is competent authority for forestry licencing and that referrals to prescribed bodies are at the discretion of the Minister. Furthermore, the FAC understands that the NPWS provides information to the DAFM in relation to a number of species on an ongoing basis. The FAC is satisfied that the lack of a second referral to NPWS does not represent an error in the processing of the licence.

No assessment of Annex IV species in the Habitats Directive.

This ground of appeal contends that there has been inadequate assessment of the impact of the proposal on species in Annex IV of the Habitats Directive, with particular reference to bats. The FAC noted that the site was inspected and that no potential bat roosting locations were observed. The lands are agricultural in nature. The FAC further noted that the Environmental Requirements for Afforestation 2016 only require an ecological report for Annex IV species where they are known to be present or have been observed. The FAC considers that the granting of the licence does not remove or supersede any other legal obligations on the Applicant or their agents. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

Non-Designated Annex I Habitats.

This ground of appeal contend that the licence should have been referred to the DAFM ecologist on the basis that there is a submission on the file which indicates that there are potentially Annex I Habitats on the site. The ground also makes reference to the Environmental Requirements for Afforestation. The FAC notes that the submission referred to does not express a view on whether Non-Designated Annex I Habitats are present on site and the appellant has adduced no evidence to support the presence of those habitats. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

In-combination Statement.

The FAC considered the In-Combination Report dated 08/06/2022 wherein is set out the range of plans and projects from the Local Authority, An Bord Pleanála, the Environmental Protection Agency and Forestry Plans & Projects on the DAFM FLV. The FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that other plans and projects were only considered in this Appropriate Assessment after a conclusion had been made that the project itself would not have an adverse effect on the integrity of the site concerned. The FAC would consider this not to be in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive. The FAC considers that this is an error in the processing of the application in so far as it relates to Appropriate Assessment.

**Assessment to Determine EIA Requirement.**

Assessment to Determine EIA Requirement.

In addressing the ground of appeal, that the cumulative forestry in the area requires EIA, the FAC considered, in the first instance, as to the completeness of the Assessment to Determine EIA Requirement in the Inspector's Certification. In considering this aspect, the FAC notes 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 decision under appeal relates to a licence for afforestation of 6.9 Ha which is sub-threshold for mandatory EIA as set out in Irish Regulations.

The FAC noted that the DAFM carried out an Assessment to Determine Environmental Impact Assessment (EIA) Requirement dated the 9<sup>th</sup> of June 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 the figure given to the question *What is the approximate % of forest cover at present within 5 km?* is 30.06% and that the figure given to the question *"What is the approximate % of forest cover currently in the underlining waterbody (or waterbodies)?"* is 35.73%. The FAC noted that these figures are broadly consistent with the figure given in the In-combination Statement of 36% for the percentage given for the forest cover in the Diffagher\_010 River Sub-Basin. The FAC is satisfied that the DAFM has not made an error in this aspect of their Assessment to Determine EIA Requirement.

The FAC noted that the proposed afforestation is not located in a prime scenic area in the Leitrim County Development Plan 2015-2021 however the Inspector's response to the question *"Is this site in any other High Amenity Landscape?"* is "Yes". No explanation of this matter is provided, and it is unclear what is being referred to or how it was arrived at.

As noted in the grounds of appeal, in relation to accidents it is submitted that this issue has been self-assessed by the applicant but there is no specific evidence on the record provided of this. The FAC noted that, while the Minister uses information provided by the applicant in their consideration, it is for the Minister to reach a determination in relation to likely significant effects on the environment and to provide the main reasons.

While the FAC would understand the *Assessment to Determine EIA Requirement* to be a summary document that must be read in-combination with the record as a whole, only forestry projects are referred to directly in this document while the record contains a detailed characterisation of other plans and projects in the area. The FAC would understand that the Minister in considering the characteristics of the project and considering likely significant effects should consider cumulation with other plans and projects. This document also refers to and relies on Guidelines in relation to Water Quality, Archaeology and Landscape but 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.

The FAC considers that these matters represent a series of errors in the making of the decision. The FAC noted that in its replying statement, the DAFM submitted that it undertook the decision with reference to the previous decision of the FAC. It is the FAC's view that the Minister in making a decision must ensure the requirements of the Forestry Regulations 2017 and the relevant EU Directives are met.

***Water Framework Directive (WFD).***

EPA mapping shows the site lying within Catchment Upper Shannon 26A. The relevant sub catchment is Owengar[Leitrim]\_SC\_010. Forestry not identified as a pressure in this part of the sub-catchment. The site adjoins WFD River water body is the Diffagher\_010 which was of Good Status between 2013-2018 and is Not at Risk. The underlying Ground Water body is the Lough Allen Uplands IEGB\_SH\_G\_002 which was of Good Status between 2013-2018) and is Not at Risk.

## Other Grounds of Appeal

### Licence Condition 2.

This ground of appeal contends that Condition 2 of the licence cannot be understood by the lay-person. Condition 2 states:

*"The afforestation project and all associated operations shall 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). [Note: These documents may be found on the Department's website, alongside the amending or updating Circulars, which are arranged by year.]"*

The FAC understand that this is a standard condition used in all afforestation licences. The substance of the ground of appeal refers to the understanding of the contents of the two documents, the updating of the two documents, and the availability of circulars on the DAFM website and as such not all of the matters are within the remit of the FAC. In dealing with the actual wording of the condition the FAC considers that the condition, taken within the ordinary meaning of the words, can be readily understood by a lay-person demonstrating average judgment. The FAC considers that requiring adherence with standards of good practice is common and accepted practice across a number of areas including Forestry. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

### Access.

The FAC noted that that appellant has not adduced any evidence to substantiate concern regarding the adequacy ownership of the access. The photograph of the site notice in-situ clearly shows the access gate accessing a public road and access is marked on the Biomap provided. The FAC noted that the site was inspected in the field and that DAFM is satisfied that the access complies with the Forestry Standards Manual 2015. The FAC are not in a position to adjudicate on legal entitlements on ownership of land or a right to access to a public road but noted that any decision to grant a licence does not in itself confer any recognition of the ownership of the land or the presence of an access or the right to carry out the project in the absence of a legally available right of access and that it is a matter for the applicant to secure this. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

### Licence should have been referred to Leitrim County Council.

This ground of appeal contends that the licence should have been referred to Leitrim County Council to inform the assessment of the impact of the proposal on the landscape. The FAC noted that the publicly available mapping on the Leitrim County Council website<sup>2</sup> shows the site to be outside of areas classed as areas of High Visual Amenity or Areas of Outstanding Natural Beauty in Leitrim CDP 2015-2021 and that almost all of the site is classed as having a High Capacity/Low Sensitivity for forestry. The FAC further noted that the DAFM SoF in response to this ground of appeal indicates that 40% of the site is to be planted as native woodland which will screen the remainder of the site. The FAC noted that the DAFM is the competent authority for issuing forestry licences and that referrals to local authorities and other bodies is a matter for the DAFM. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

### The Inspector's response to Accident Risk in the Certification.

This ground of appeal contends that the Inspector's response S/A to the question "Is there a significant risk of accidents, having regard in particular to substances or technologies used? If so, describe in

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<sup>2</sup> <https://leitrimcoco.maps.arcgis.com/apps/webappviewer/index.html?id=8645fc340c8d457b99ce71ce20bd79f1>

*Inspectors comments box below.*" has resulted in an incomplete assessment of the environmental impacts. The FAC noted the DAFM SoF in response to this ground of appeal was that it assessed the potential of the proposal regarding the risk of environmental accidents and that the S/A response refers to the risk during forestry operations which is the responsibility of the forestry works manager.

*Planting of the western section of Plot 2.*

This ground of appeal contends that planting on the western section of Plot 2 is not consistent with climate change commitments & state aid. The FAC noted that the DAFM SoF in response to this ground of appeal stated that the site was inspected in the field and that the western section of Plot 2 was found to be made up mainly of mineral soils with small areas of peaty gley soil that are located within the 10m setback for the relevant watercourse and the mapped water hot-spot and will not be planted. The fact that the area referred to will not be planted and that research has shown afforestation on mineral soils sequester carbon, the FAC considers the proposal is not inconsistent with national climate change commitments. State Aid commitments lie outside the remit of the FAC. The FAC is not satisfied that the DAFM has erred regarding this ground of appeal.

**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. The FAC considers that the decision should be set-aside and remitted for the Minister to re-advertise the application on the FLV in accordance with Part 6 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) and to carry out a new screening for Appropriate Assessment, and Appropriate Assessment as required, before a new decision is made. The screening should consider the potential for significant effects to arise from the afforestation application itself and in-combination with other plans and projects.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee