



16th December 2022

Subject: Appeal FAC004/2022 against licence decision CN86739

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 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 appeal.

Hearing

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. Appeal FAC004/2022 was considered by a division of the FAC at remote hearings on 9th November 2022 and 7th December 2022. In attendance at both hearings:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC:	Mr. Michael Ryan

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 set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN86739. The reasons for this decision are set out hereunder.

Background

The decision relates to an afforestation licence on 29 hectares at Greenhall, Knockmeale, Co. Tipperary. The lands are described as steep at an elevation of 110 to 230 metres and on a mineral soil and as enclosed, agricultural land with a grass, grass/rush, furze vegetation type and a network of hedgerows. The application included operational and environmental information, copies of the site notice, photos of the erected site notice, and a series of maps including location, fencing and Biomap. The proposal is divided into five plots and plots 1 to 4 would be planted with Sitka spruce and birch at a ratio of 85% to

15%. Plot 5 would be left unplanted and is described as a dwelling setback. Planting would be undertaken using an angle notch method without additional drainage and no fertiliser is proposed. Herbicide weed control would take place in years 0 and 1 and road access is stated to be in place. The application was field and desk inspected by the DAFM.

The application was referred to the Local Authority, National Parks and Wildlife Service, and Inland Fisheries Ireland (IFI). The IFI response which was received after the time period provided stated that it had no objection in principle to the application and requested adherence with stated operational measures and for their office to be contacted one month before the commencement of works. The NPWS responded stating that the proposal was upstream from the Lower River Shannon SAC and that screening for Appropriate Assessment should be undertaken and to adhere with mitigation for biodiversity. The application was open for public consultation over two periods, once with the publication of the application and once in relation to the Appropriate Assessment. There were three submission from members of the public, two were of a general nature and referred to obligations on the Minister in processing the application and one was from the Appellant raising concerns in relation to impacts on land, property and the local road infrastructure.

The DAFM Inspector undertook a screening for Appropriate Assessment and identified ten European sites within 15km of the proposal. The proposal does not lie within a European site. Each European site is considered in turn along with its qualifying interests and conservation objectives and a conclusion and reasons are recorded for each one. It was concluded that an Appropriate Assessment was required in relation to Lough Derg (Shannon) SPA, Lower River Shannon SAC, and Slievefelim to Silvermines Mountains SPA.

An additional AA screening was prepared by an Ecologist on behalf of DAFM and dated 21/01/21. This document describes the nature, scale and location of the proposal and the lands, and reviews the reasons provided for the screening conclusions. The Ecologist expands on the reasons provided and confirms the conclusions in all cases except for Lough Derg (Shannon) SPA where it was concluded that as the proposal lies in a separate sub-basin and given the distance and reference to the Bird Foraging table used by the DAFM, the European site could be screened out. The screening includes a consideration of other plans and projects both forestry and non-forestry, in-combination with the proposal.

An Appropriate Assessment Report was prepared by the Ecologist dated 25/01/21. This considers each of the qualifying interests of the European sites in turn and identifies potential effects and measures to mitigate the effects. In relation to the Lower River Shannon SAC the potential effects are generally indirect effects resulting from possible impacts on water quality and the measures relate to operation measures that would avoid such impacts. In relation to otter, the proximity of the works to a watercourse is referenced and the measures include operational measures to avoid runoff. Measures also relate to the protection of otter. In relation to Slievefelim to Silvermines Mountains SPA and the Hen Harrier it is noted that the lands are comprised of improved grasslands which are sub-optimal for foraging and that the establishment of commercial forest may provide some benefits over the rotation cycles. The general

landscape is considered, and it is concluded that there was no requirement to impose mitigation measures.

The application was also considered across a range of criteria and the DAFM concluded that the application did not need to proceed to an EIA.

The licence was issued on 14/01/2022 with conditions.

Appeal

There was one third party appeal against the decision and the full grounds of appeal have been provided to all parties. In summary, the grounds contended that the planting would impact on natural light, views, traffic risks from deer and potential wildlife impacts on gardens and lawns. It is further submitted that an ornithologist had visited the lands and identified curlews on lands beside the property. It is submitted that there are Hen Harriers at the top of the hill and that afforestation would be to their detriment. It is submitted that another named party had informed them that there were up to 30 people in the area opposed to the afforestation. The Appellant submits that they made a prior appeal. It is submitted that the licence would have a devastating effect on the Appellant's family and the general surrounding area.

A statement was provided by the DAFM in response to the appeal and was provided to the parties. This statement outlines the processing of the application including the dates of application and advertisement and details of submissions made. It is submitted that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act. The statement goes on to submit that Curlew (*Numenius arquata*) is not designated as a Special Conservation Interest (SCI) of any Natura 2000 site within 1km of the project. It is submitted that aside from an Appropriate Assessment an Ecology Report can be prepared but that in this case that the lands do not intersect with a "Curlew Breeding Buffer" layer in the DAFM system. The statement later describes this information as being provided by the NPWS and that the closest former nesting site was 10 km away. The statement submits that potential effects on Hen Harrier are addressed through the Appropriate Assessment undertaken and that the current habitat is sub-optimal for the species. In relation to impacts on the Appellant's dwelling it is submitted that planting will not take place within 60 metres of their dwelling and that there will be a further 20 metre corridor of native broadleaf planting.

The DAFM published the documents related to the decision on their Forestry Licence Viewer (FLV) and, in responding to the appeal, referred to these documents as the documents relevant to the decision. The FAC informed the parties that the documentation could be accessed through the FLV.

The FAC sought further information from the Appellant on 8th November 2022 in relation to the location of the dwelling that they referred to in their grounds of appeal. The Appellant responded on 22nd November 2022 providing this information and submitting that the building was his family home and he hopes to move back to it in the future while he is living at a different address at present. The response was circulated to the other parties.

Considerations of the Forestry Appeals Committee

While the FAC noted that the Appellant had made an appeal on a previous decision on the lands in question, the FAC considers that the decision of 14th January 2022 to represent a new decision and that each decision and appeal must be considered on its own merits.

The FAC considered in the first instance the grounds related to the potential for the planting to have a direct impact on the building identified by the Appellant. The FAC noted that the planting would not take place directly south of the building but would occur to the southeast, east and northeast in fields adjoining the field in which the building is situated. The conditions attached to the licence include the following,
- Install a 60m bare setback from the dwelling house and landscape an additional 20m corridor adjoining the bio plot with widely spaced, slow growing broadleaf , to comply with the decision of the Forestry Appeals Committee (FAC).

While this condition was referred to by the FAC in a previous decision letter, similar conditions appear to have been included in the decision of 2nd February 2021. The Minister is required to provide reasons for conditions under the Regulation 21 of SI 191 of 2017. Of more significance is the fact that the condition is not stated to relate to the building of concern to the Appellant. The Biomap submitted with the application includes a setback around a dwelling to the south of the proposal and does not identify the building referred to by the submissions and appeal of the Appellant. The grounds suggest that the building is not inhabited and does not have an Eircode but neither would it be considered to be derelict. The building is outside of the lands, which appear to be almost entirely situated more than 60 metres away in any case but a small section would likely have to remain unplanted and the condition to extend the setback with 20 metres of broadleaf planting would likely impact on the adjoining section of the proposal. The building has no Eircode and does not appear to be inhabited and the FAC does not consider that the failure to identify the building on the application could be considered a serious or significant error.

It appears from the statement responding to the appeal, that it was intended by the DAFM that the condition be directed at the building referred to by the Appellant in addition to other dwellings. The inclusion of a setback from this building or its description by the Appellant has not been challenged by the Applicant or the DAFM. The condition itself refers to a 20 metre corridor adjoining the bio plot which would suggest that it relates to the dwelling and setback/bio plot identified on the application. The FAC considers that it could be reasonably concluded by the Applicant and their agents that the setback related to the dwelling identified on the application and not the building of concern to the Appellant. While they may be satisfied to implement the setback in both cases, the condition as stated does not provide clarity that the concerns raised by the Appellant during the application process had been considered in the manner intended by the DAFM. The FAC is satisfied that the condition in this instance lacks clarity as it does not identify whether the setback and 20 metre broadleaf planting relates to the dwelling identified in the application, the dwelling referenced by the applicant, or both, and that this constitutes a serious error. Having regard to further errors identified below the FAC considered that the

decision of the Minister should be set aside and remitted and that in making a new decision the Minister should ensure that this condition is specified in a clear and unambiguous manner.

It is a requirement in adhering to the *Environmental Requirements for Afforestation* that a 60 metre unplanted setback is imposed around all dwellings. The FAC considers that the setback of 60 metres is of sufficient distance to minimise any direct effects on the building of concern to the Appellant and that the further planting of 20 metres of broadleaf species would provide visual complexity and greater light penetration to the adjacent lands. The FAC also considered the relative aspect of the building and lands of concern to the Appellant and that the mapping provided shows the building in question to be separated from the proposal by existing trees and hedgerows. The FAC accepts that the forest will be visible from the Appellant's property and may result in some shading of lands adjoining the forest but it does not consider that the proposal would result in any significant adverse impacts such that it might substitute a decision to refuse the application.

In relation to curlew, the DAFM submitted that there are no records of curlew nesting in or around the lands and that the closest former nesting site is some 10km away. This is based on survey information provided by the NPWS. No convincing evidence has been provided to challenge the statement from the DAFM. As noted, the lands are improved pasture. The FAC considers that the management of the public road is the responsibility of the Local Authority. The application submits that the lands are currently in agricultural use and that access to the public road is in place. Traffic is likely to increase during operations on the lands, but this would be limited in scale and duration, and the FAC does not consider that the planting of the lands could be considered to have a significant effect in terms of nuisance or pollution.

The proposal is for the afforestation of improved, enclosed agricultural land which was field inspected by the DAFM and subject to an Appropriate Assessment by a qualified Ecologist. The grounds raise concerns in relation to wildlife both in terms of having the potential to impact negatively on any future garden and in relation to the protection of curlew and hen harrier. While the Appellant contends that they visited the lands with a named individual and discussed species in the general area, they provided no evidence of this or any report or other documentation and the FAC cannot consider this to represent any real evidence of the proposal having a possible effect on a protected species or European site that is not addressed in the Appropriate Assessment and processing of the application. Furthermore, the grounds and submission do not challenge the Appropriate Assessment undertaken.

The DAFM procedure included a screening for Appropriate Assessment regarding the requirements of Article 6 of the EU Habitats Directive and the Forestry Regulations 2017. The DAFM Forestry Inspector identified ten European sites within 15km of the proposal, Bolingbrook Hill SAC (002124), Clare Glen SAC (000930), Glenstal Wood SAC (001432), Keeper Hill SAC (001197), Lough Derg (Shannon) SPA (004058), Silvermine Mountains SAC (000939), Silvermines Mountains West SAC (002258), Slieve Bernagh Bog SAC (002312), Lower River Shannon SAC (002165), Slievefelim to Silvermines Mountains SPA (004165). Each site is considered in turn and reasons are provided for the screening conclusion. In the first instance, the screening was undertaken by the Forestry Inspector before an Appropriate Assessment Screening Determination, dated 18/10/2021, was prepared by an Ecologist. The Forestry Inspector had initially

recommended three sites proceeded to AA while the Ecologist excluded Lough Derg (Shannon) SPA 004058 having examined the location of the proposal relative to the SPA in a separate sub-catchment and with reference to the foraging distances of the species related to the SPA. The Ecologist concluded that an Appropriate Assessment was required in relation to Lower River Shannon SAC (002165) and Slievefelim to Silvermines Mountains SPA (004165). The submission from the NPWS had recommended that screening for Appropriate Assessment be undertaken in relation to Lower River Shannon SAC (002165).

The FAC reviewed the record of the decision and publicly available information on European sites on the websites of the NPWS and EPA and identified the same sites within the stated proximity of the proposal. The Appropriate Assessment Screening Determination in considering other plans and projects in combination with the proposal makes the following conclusion,

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 project.

Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure they too do not give rise to adverse effects on the integrity of any European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any of the above Screened Out European Sites.

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. Whether the proposal, with relevant measures imposed, might impact on the integrity of a European site should be determined in completing the Appropriate Assessment. For this reason the FAC considers that the screening should be undertaken again.

An Appropriate Assessment Report, dated 18/10/2021, was prepared that described the lands and operations in detail and considered potential effects on each of the qualifying interests of the European sites. In relation to the Lower River Shannon SAC (002165) the effects identified relate to indirect effects on aquatic species and habitats and potential direct effects on the foraging of otter. In relation to Slievefelim to Silvermines Mountains SPA (004165), the distance to the SPA is considered and it is

described how the lands, as improved pasture, provide sub-optimal foraging habitat for the Hen Harrier and that the proposal would provide suitable habitat at stages over its cycle. The AAR considers other plans and projects, forestry and non-forestry, in combination with the proposal and provides reasons as to why in-combination effects can be excluded with reference to the proportion of forest cover in the landscape and the nature of the lands and current land use and that there is no potential for residual impacts to occur following the implementation of the mitigation measures. The AAR concludes,

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.

A separate Appropriate Assessment Determination was prepared and dated 05/01/2022 which provides an overview of the process and specifies the measures required and concludes,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The FAC considered the record of the decision and assessment undertaken and reasons provided and the nature, scale and location of the proposal. The FAC is satisfied that the Appropriate Assessment undertaken by the Minister in relation to the two European sites specified was undertaken correctly. The FAC is not satisfied that a serious or significant error was made in the making of the decision in relation to the Appropriate Assessment undertaken but this is without prejudice to the conclusions of the new screening in relation to any other European site.

In the context of the grounds that relate to other effects on the environment, the FAC considered the record of the decision and the Assessment for EIA Requirement document dated 12th January 2022, in particular. 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.

The record includes a number of documents that describe the likely effects of the proposal on the environment including the application and maps, and screening and Appropriate Assessment Documents. The Appropriate Assessment describes the likely significant effects on European sites and sets out mitigation measures related to these effects. The FAC understands that the reasons for the decision not to proceed to EIA might be read across different documents on the record.

The FAC understands that the DAFM employs a Geographic Information System and multiple spatial datasets as part of its acceptance, processing and assessment of an application as described in the Forestry Standards Manual (DAFM, 2015) and Forests & Water Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (DAFM, 2018).

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. While this might be reasonably interpreted as the Applicant being of the view at the application stage that there are no likely significant effects arising from the proposal, the FAC considers it would have been clearer if this was stated.

Article 4(5) (b) of the EIA Directive states, in relation to a sub-threshold Determination that,

where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

Regulation 21 requires the Minister to provide reasons for their decisions in relation to applications for licences.

The FAC understands that the record of the decision, including the maps and Appropriate Assessment, and in particular the Assessment for EIA Requirement determination and licence provide these reasons. Furthermore, the FAC understands that such reasons and information should allow members of the public to check whether an adequate screening for EIA was carried out, and to enable interested parties to decide whether to appeal against the decision.

In this instance, a number of responses are recorded in the Assessment for EIA Requirement document as N/A which the FAC understands to represent Not Applicable. While the form provides for further

commentary and reasons to be provided none were included in this case. The FAC considers that some of the matters that appear to be errors might have been addressed had further written reasons been provided.

Amongst the criteria to be considered in the screening is the cumulation of the project with other plans and projects, both in relation to the characterisation of the project and in terms of likely significant impacts. 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 existing and approved projects was included.

The grounds raise specific concerns about impacts on the landscape. The Forestry and Landscape Guidelines do not appear to have been included in the conditions of the licence while they are relied upon in the EIA screening. While there is a reference to the Department's environmental and silvicultural guidelines this would appear to refer to the stated conditions. Adherence with the Environmental Requirements for Afforestation have been included and page 2 of that document states,

The Environmental Requirements for Afforestation replace those measures relating to afforestation contained within the following Forest Service Environmental Guidelines: Forestry & Water Quality Guidelines, Forestry & Archaeology Guidelines, Forestry & the Landscape Guidelines, and Forest Biodiversity Guidelines. (Note, however, that these guidelines still apply to other Forest Service regulated activities, as specified in any approval, consent or licence issued.)

While it appears to the FAC that both documents contain many of the same requirements and most if not all of the main operational requirements, the reliance on the Forestry and Landscape Guidelines is technically an error and introduces confusion into the screening process. For the same reason the reliance on the Forestry and Water Quality Guidelines and Forestry and Archaeology Guidelines would represent an error although not one of a serious nature in this instance given the overall assessment undertaken and the details of the proposal.

In responding to the appeal, Officers of the Minister provide reasons as to why it was considered that significant effects on landscape would not occur. While these matters, such as the imposition of setbacks are specified on the record by the Applicant, it would be clearer if such reasons were incorporated into the processing of the application and the Determination reasons, as relevant. Furthermore, as noted, the condition as specified lacks clarity.

In relation to designated and non-designated habitats, it is recorded that the application should not be referred to a DAFM Ecologist, whereas it is noted that a referral did occur and in relation to recommendations all are recorded as Not Applicable. In this instance the site was considered by a DAFM

Ecologist and an Appropriate Assessment under Article 6 (3) of the Habitats Directive were recorded and attached as conditions on the licence.

The FAC considers that the Minister is required in considering the likely significant effects of a sub-threshold proposal to take account of the environmental sensitivity of geographical areas likely to be affected by projects and to have particular regard to European sites, and the related habitats and species, and to consider the likely significant effects on biodiversity. Furthermore, the Minister must take into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out under other EU legislation. The FAC considers that the fact that the referral to the Ecologist and the Appropriate Assessment is recorded as not being considered as part of the Determination is a serious error.

As noted, the Minister is required to have regard to the relevant criteria identified in Schedule 3 of the Regulations. While the FAC considers that the matters addressed on the record, both in the application and the assessment of the application by the DAFM, reflect a consideration of the relevant criteria in Schedule 3, the FAC considers that it would be clearer if the Minister employed the exact language of the relevant criteria as headings or another form of identification in the application and assessment process. Furthermore, while it can be reasonably interpreted that in concluding that the proposal should not be subject to the EIA process the Minister considers that the proposal is not likely to have significant effects on the environment taking into account the criteria set out in Schedule 3, the FAC considers that it would be clearer if this language was employed.

For these reasons the FAC is of the view that the Minister should undertake a new determination as to the likely significant effects on the environment and whether an EIA is required in keeping with the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

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. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN86739 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to clarify that the licence condition in relation to dwelling setbacks, the undertake a new screening for Appropriate Assessment and to undertake a new determination in keeping with the requirements of the Forestry Regulations 2017 and the EU EIA Directive as to whether the proposal is likely to have significant effects on the environment.

Yours sincerely,

Vincent Upton, On Behalf of the Forestry Appeals Committee