



17th January 2023

Subject: Appeal FAC 061/2022 relating to Licence CN85225

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, and submissions received, 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 CN85225.

THE LICENCE.

Licence CN85225 is for 6.29 Ha. of GPC 3 afforestation in the townland of Kilmoon East, Co. Clare, and was submitted to the DAFM (covering an area of 18.23 Ha) on the 12th of November 2019. On the 20th of May 2022 a decision approving the licence was issued with conditions including adherence to conditions in the ecology report attached to the decision and retention of all trees & hedgerows on the site.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC held on the 10th 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 20th May 2022. The FAC members present were: Mr. M. MacDonncadha (Deputy Chairperson), Mr. V. Upton, Mr. D. Daly and Mr. I. Douglas. Secretary to the FAC: Mr. Michael Ryan.

BACKGROUND.

The proposal consists of the planting of 6.29 Ha. of forestry, in two blocks at Kilmoon East, Co. Clare. Block 1 (comprising two parcels) is separated from block 2 (comprising 5 parcels) by a local public road. The application included silvicultural and environmental information, operational details and a series of maps. The DAFM requested further information in the form of a vegetation survey and assessment.

The Inspector's Appropriate Assessment Screening (AAS) Report dated the 31st of March 2022 (based on a project area of 17.97 Ha) indicates that the soil types underlying the project area include mineral, peat and lithosol soil types. The slope is predominantly flat to moderate. The vegetation type(s) within the project area comprise semi-natural grassland, scrub, hedgerows, treeline, including Annex 1 habitat (Molinia meadows).

Ecology and Archaeological Reports were prepared by the DAFM with specific measures recommended. The Applicant was requested to submit an ecological survey in relation to specified habitats and species. A report based on an ecological survey prepared by qualified ecologists was provided by the Applicant. A second Ecology Report was prepared that excluded a substantial portion of the lands that were identified as containing an Annex I habitat. Additional environmental measures were also recommended.

The licence was referred to Clare County Council on the 21st of November 2019 and to An Taisce on 11th March 2020 for whom no responses were received. The licence also referred to the DAFM archaeologist who reported on the 10th March 2020 proposing archaeological conditions for the licence which were confirmed by the National Monuments Service on the 24th of March 2020.

The AAS considered eleven sites within 15km and that there was no need to extend that distance in this case. The European sites considered were Ballyteige (Clare) SAC IE0000994; Black Head-Poulsallagh Complex SAC IE0000020; Moneen Mountain SAC IE0000054; Ballyvaughan Turlough SAC IE0000996; Cliffs of Moher SPA IE0004005; Galway Bay Complex SAC IE0000268; East Burren Complex SAC IE0001926; Inner Galway Bay SPA IE0004031; Inagh River Estuary SAC IE0000036; Corofin Wetlands SPA IE0004220; Inisheer Island SAC IE0001275. The overall conclusion was to screen out 10 sites due to the nature of the proposed works (including associated operations and ancillary works) and location, the relevant European site together with its QIs and conservation objectives, and the potential sources and pathways relevant to each European site. For the remaining site (Ballyteige (Clare) SAC IE0000994), the site was said to be located upstream of a downstream confluence and so was ruled out as having the potential to be affected to a significant degree by the project.

The DAFM prepared an In-combination Statement on the 30th of March 2022 on the proposal's potential to impact on the eleven 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 19th of May 2022 is on file, including an Assessment to Determine EIA Requirement that 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 three third-party submissions received following the licence application.

THE APPEAL.

There is one third-party appeal (dated June 2nd 2022) against the decision to approve the licence. The grounds of appeal are summarised as follows:

1. The high intrinsic value of the area as part of the Burren landscape, its ancient history as a native woodland and the rich biodiversity of the upland area which is the subject of the application to establish non-native forestry.
2. The proposed forest will create a sterile ecology; the needles of Sitka spruce get stuck in the gills of fish and it has a dark and depressing effect on inhabitants, who are already flanked by such forests on one or more sides.
3. The type of forestry proposed does not battle climate change.

4. The type of forest proposed will raise fire risk, increase insurance premiums and depress property prices.
5. Water quality will be negatively impacted.
6. Landscape design principles are not followed, only one type of broadleaf tree is used and littering accompanies afforestation, undermining the impression that they adhere to any regulations.
7. An old map is in use that does not reflect the up to date situation regarding areas already planted or proposed.

DAFM STATEMENT OF FACT.

The Statement of Fact (SoF) provided by the DAFM for the appeal and dated the 16th of June 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 28th of October 2020. 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 8th of June 2022 from the Forestry Inspector confirming that the AA process was carried out using the most up to date procedures (November 2019), that the standard operating procedures were applied and it also contained a response to the grounds set out in the appeal.

FURTHER SUBMISSIONS.

The Appellant made a further submission in response to the DAFM statement which was received by the FAC on 16th September 2022. The submission related to the processing of the application and the Ecology Report in particular and included a number of maps and articles. A responding submission was made by the DAFM on 27th September 2022 and the Appellant made a further submission on 12th October 2022. All submissions were provided to the parties.

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.

Appropriate Assessment.

Screening for Appropriate Assessment

In considering the appeal the FAC examined the AAS undertaken by the DAFM. The FAC identified the same five sites as being within 15km from the proposal as the DAFM: Ballyteige (Clare) SAC IE0000994; Black Head-Poulsallagh Complex SAC IE0000020; Moneen Mountain SAC IE0000054; Ballyvaughan Turlough SAC IE0000996; Cliffs of Moher SPA IE0004005; Galway Bay Complex SAC IE0000268; East Burren Complex SAC IE0001926; Inner Galway Bay SPA IE0004031; Inagh River Estuary SAC IE0000036; Corofin Wetlands SPA IE0004220; Inisheer Island SAC IE0001275. 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 noted that the DAFM considered each site in turn and that all but one of the sites were screened out due to the nature of the proposed works (including associated operations and ancillary works) and location, the relevant European site together with its QIs and conservation objectives, and the potential sources and pathways relevant to each European site. For the remaining site (Ballyteige (Clare) SAC IE0000994), the FAC noted its location upstream of a downstream confluence and the assertion that it could not be affected to a significant degree by the project. The FAC noted that the DAFM concluded that Stage 2 AA was not required.

In-combination Statement.

The FAC considered the In-Combination Report dated 3rd March 2022 and noted that the conclusion of the AA In-combination Statement states

“It is concluded that there is no likelihood of the proposed afforestation project CN85225 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.”

The FAC understands 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.

Assessment to Determine EIA Requirement.

In considering the appeal the FAC considered the requirement for EIA. 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 6.29 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 19th of May 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.

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.

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. The grounds of appeal raised specific concerns in relation to the cumulative impact of the proposal. While the Minister recorded a separate characterisation of plans and projects in the area for Appropriate Assessment, this is not explicitly cross-referenced in the Determination of the Assessment to Determine Environmental Impact Assessment (EIA) Requirement which itself only refers to forestry projects. The FAC noted that in the Assessment to Determine Environmental Impact Assessment (EIA) Requirement the Inspector records a response of "N/A" (not applicable) to the question "*Is the cumulative effect of this application likely to have a significant impact?*". While the FAC considers 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. An assessment of "N/A" for cumulative effect is also not useful in this context; if the reasoning is given in other documents then reference should be made to same by way of comment.

The application was referred to the Forest Service archaeologist and specific conditions were imposed in advice received on 24th March 2020 and endorsed by The National Monuments Service. The majority of these condition related to an area ("plot 7") which was subsequently dropped from the application and does not appear in the approval. It is possible that the conditions are not referred to in the approval letter for this reason but it should be clearly documented. An entry of "N/A" is made in the EIA Requirement question relating to Archaeology with no explanation given.

It is recorded that the application should not be referred to the DAFM Ecologist but a referral did take place and an Ecology Report was prepared. All recommendations are recorded as "No" while adherence with the Ecology Report was required as a condition of the licence. In making a determination as to the likely significant effects on the environment and whether to proceed to an EIA, the decision maker is required to have regard to the relevant criteria identified in the Forestry Regulations 2017 and the EU EIA Directive. The determination also relies on guidelines which have been replaced by the Environmental Requirements for Afforestation.

The FAC concluded that a series of serious and significant errors had been made in the screening for EIA and that the decision should be set aside and remitted to addresses this matter through the undertaking of a new screening for EIA in line with the requirements of the Forestry Regulations 2017 and the EU EIA Directive.

Other Grounds of Appeal.

Public Consultation

The grounds question the extent of public consultation that was undertaken in making the application. Part 6 of the Forestry Regulations 2017 addresses public consultation in relation to afforestation licence applications. In this instance a site notice was erected and a copy, photos and a map showing the location were provided and are included in the decision documents. Following receipt of the application, the DAFM published a notice of the application and a period public consultation was provided. Three submissions from members of the public were made and are recorded as having been considered in the making of the decision. The FAC is not satisfied that a serious or significant error was made in this provision of public consultation.

Landscape value

The applications are considered on their own merits and on a site-by-site basis in the context of the prevailing guidelines. The scale of this application has been reduced from over 18 hectares to 6.29 Ha and contains an unplanted area which is in excess of 21% (where 15% is the guide). Setbacks from dwellings, public roads and watercourses are a condition of the licence, a number of plots would not be planted and the proposal includes a mixture of conifer and broadleaf species. The land is currently in agricultural use for the raising of livestock. The FAC does not consider that the DAFM has erred regarding this ground of appeal.

Impact on ecology, fish and human inhabitants

The project is approved to be implemented according to the measures set out in the Environmental requirements for Afforestation and the Forestry Standards Manual (as may be amended by periodic circulars). The Applicant submitted a detailed Ecological Report on the lands and the DAFM Ecologist prepared conditions specific to the lands and the proposal. This included the removal of a substantial portion of the original application that was found to include Annex I habitat. The areas to be excluded are clearly mapped in the Ecology Report. In addition to the Applicant's Ecologists the lands were site inspected by the DAFM. The FAC considered that the grounds submitted by the Appellant included matters that were primarily related to wider policy and were of a general nature. However, as noted the FAC considered that the screenings for Appropriate Assessment and Environmental Impact Assessment included errors and should be undertaken again.

Climate change

The proposal is in alignment with forest policy and the relevant guidelines in place. The land applied has been subject to drainage and agricultural use and is currently employed for the rearing of livestock. The FAC considers that afforestation is a measure under climate action in Ireland. The application was subject to assessment which included vegetation and habitat mapping and the exclusion of a significant area of existing habitat. The FAC does not consider that the DAFM has erred regarding these grounds of appeal.

Increased fire risk, decreased property values

The proposal is in alignment with forest policy and the relevant guidelines in place, including those for fire risk and minimum setbacks from dwellings. It is a requirement of the licence conditions that planting would not take place within 60 metres of a dwelling. The FAC does not consider that the DAFM has erred regarding these grounds of appeal.

Water quality

The project is approved to be implemented according to the measures set out in the Environmental requirements for Afforestation and the Forestry Standards Manual (as may be amended by periodic circulars). This includes operational setbacks from watercourses and other measures. The Ecology

Report also includes a number of measures related to the protection of water quality. The FAC does not consider that the DAFM has erred regarding this ground of appeal.

Landscape design and overall compliance

The project is approved to be implemented according to the measures set out in the Environmental requirements for Afforestation and the Forestry Standards Manual (as may be amended by periodic circulars). Compliance with project approval, guidelines and related conditions are a matter for operational monitoring and any non-compliance (observed directly or established by third parties) is dealt with according to established rules. The FAC does not consider that the DAFM has erred regarding this ground of appeal.

Old mapping

It is the understanding of the FAC that all information reasonably available is used in decision making. The additional application referred to in the appeal appears to have been submitted after the in-combination statement was completed in this case (March 31st 2022). The FAC does not consider 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, the Statement of Fact submitted by the DAFM and submissions received. 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 carry out a new screening for EIA and a new Appropriate Assessment Screening (and Appropriate Assessment and Environmental Impact Assessment if required), before a new decision is made. The AA 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,

Myles Mac Donncadha On Behalf of the Forestry Appeals Committee

