

Coogan, Mary

From: Coogan, Mary
Sent: Wednesday 21 September 2022 16:33
To: forestry agriappeals
Cc: Connaire, Daniel; OBrien, MichaelG; Forestry Support Unit; Coogan, Mary
Subject: DAFM Statement FAC067/2022 CN89137
Attachments: CN89137 DAFM Statement FAC067 2022.docx

Please note that DAFM Statement FAC067/2022 CN89137 (Coillte) has been uploaded to FAC Cloud Link today.

Please note no copy file is provided as IFORIS documentation is visible on the Forestry Licence Viewer for this contract.

Regards,

Mary Coogan,

Forestry Support Unit.

Mary Coogan
Forestry Division, Forestry Support Unit,
Rannóg/Seirbhís Foraoiseachta, Rannóg Cheadúchan,

An Roinn Talmhaíochta, Bia agus Mara
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Forestry Division Statement to the Forestry Appeals Committee

FAC Reference	FAC067/2022
File Reference	CN89137
Scheme	Afforestation (Non grant aid)
Species proposed	GPC 3 & GPC 10 NWE
Approved Area	6.9 hectares

Summary of application:

Date Submitted	22/06/2021
Site Notice date	02/07/2021
Date Application Advertised	09/07/2021
Referrals to referral bodies	National Parks & Wildlife Service 23/09/2021 - Reply 01/10/2021
Date Referred to Inspector	08/07/2021 - Certified 20/09/2021 01/10/2021 - Certified 09/06/2022
Desk Assessment/Desk & Field Assessment	Field & Desk Assessment, Field inspected 30/09/2021
Submissions Received	2 submissions – 25/07/2021 & 11/08/2021 (Received 03/08/2021 – Fee paid 10/08/2021)
Appropriate Assessment Screening	Natura Site 1,2,3, - Screen Out: No likelihood of a significant effect on any European site, and Appropriate Assessment not required.
Recommendation from Inspector	Approve with Conditions
Decision	<p>- 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) Reason: In the interest of clarity and to ensure good forest practice and the protection of the environment.</p> <p>- Condition: A setback with a minimum width of 10 metres shall be installed around the water-related hotspots located ITM Easting: 594737 Northing: 826592, and treated in accordance with Table 5 and Table 6 of the Environmental Requirements for Afforestation.</p>

	<p>Reason: In the interests of protection of the environment, in particular the protection of water quality and aquatic ecosystems.</p> <p>- Condition: A setback with a minimum width of 5 metres shall be installed on one side (if on the outer perimeter) or both sides (if traversing the site) of the relevant watercourse[s] located on boundary of plot 1, and treated in accordance with Table 5 and Table 6 of the Environmental Requirements for Afforestation.</p> <p>Reason: In the interests of protection of the environment, in particular the protection of water quality and aquatic ecosystems.</p> <p>- An unplanted public road setback of a minimum width of 10 metres (as measured from the surfaced edge of the public road) and accompanied by a 10 metre wide strip of broadleaves of native species suited to the immediate site, Birch, rowan, willow, oak where appropriate, shall be installed in all conifer plots adjoining a public road, protect from grazing with adequate fencing and/or tree guards to ensure establishment, in accordance with Tables 5 and 6 of the Environmental Requirements for Afforestation.</p> <p>Reason: In the interests of visual amenity and the safety of vehicular traffic and pedestrians.</p> <p>- Prior to commencement of any work liaise with Leitrim County Council</p>
Date Decision Issued	14/06/2022
Date Decision Advertised	15/06/2022

Administrative Comments:

The decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act.

Name: Mary Coogan

Grade: EO

Date: 21/09/2022

Grounds of Appeal

CN89137 TULLAGHANS

1. Undue process

The licence was issued on the 14th June 2022 but the decision was not made known to the public until the 15th June.

The Aarhus Convention Compliance Committee https://unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_23-2113407E.pdf in

"Findings and recommendations with regard to communication ACCC/C/2015/131 concerning compliance by the United Kingdom of Great Britain and Northern Ireland" Adopted by the Compliance Committee on 26 July 2021"

Paragraph 129 states;

"More generally, however, the Committee considers that a rule that the time frame for the public to challenge a decision is calculated from the date the decision was taken, and not the date when the decision became known to the public, is manifestly unfair. Moreover, it may create an incentive for public authorities not to make decisions under article 6 of the Convention promptly available, knowing that there will then be less opportunity for those decisions to be challenged."

The delayed publication of the decision to award this licence within the already very narrow appeal window is manifestly unfair and contrary to due process.

2. Availability of information on the FLV

The Decision of the FAC on the previous appeal of this licence states;

"Based on the evidence before it, the FAC considers that fair procedures were not complied with in relation to the general public as CN89137 was not viewable to FLV users who may have searched for forestry projects by the "Address" (e.g., Townland) rather than using the specific licence number."

This means that the project was not viewable on the FLV during the time of the initial public consultation on this project. There is no evidence that DAFM has republished the application for public consultation before re-issuing the licence. We contend, therefore that the same issue applies. Public participation has been compromised by an error of the Department.

3. Licence condition 2 cannot be understood by the layperson

2. 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.]

Reason: To ensure good forest practice and the protection of the environment.

The measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual appear to have been amended. Therefore the actual conditions to be adhered to are not directly known as there is no consolidated version of either document. There is no indication as to where on the Department's website the "periodic circulars" can be accessed. It is therefore not possible for the licence conditions to be reasonably understood by the layperson.

Annually, circulars range from 14 to 18 in number. It is manifestly unreasonable to expect the public to access all periodic Circulars dating back to 2015 when the Forestry Standard Manual was first published and assess each one to determine if and how it amends the two documents concerned.

We would question whether the licensee (or the FAC) would be sufficiently well informed to know what is permitted or required by this licence and whether the licence can feasibly be implemented.

A consolidated version of each document has been requested from DAFM but does not appear to be available.

The recognition of a legal right to reasons, as a matter of natural justice, constitutional law, under the European Court of Human Rights, and in EU law, reflects and serves a range of important policy objectives. In summary, reasons enable a person to know whether there are grounds to challenge the decision; enable the decision to be effectively reviewed when challenged, encourage and support better administrative decision-making; and act as a promoter of transparency and a deterrent to arbitrary administrative action or malpractice.

- Condition 2 of this licence cannot reasonably be understood and therefore the licence is not adequately reasoned and is not consistent with the principle of natural justice.

4. Inadequate ecological / environmental assessment

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

The decision of the FAC on the previous appeal of this licence states:

"The FAC considered the appellant's contentions relating to the Hen Harrier. The FAC noted the appellant's statement indicating the importance of the Leitrim uplands to the species based on breeding Hen Harrier distribution data from 2010. The FAC noted the statement from the DAFM confirming that the proposal is within the current distribution of Hen Harrier (based on information supplied to them by the NPWS) but is not within a Red Zone (High Likelihood Nesting Area) or within one of the important non-designated Hen Harrier areas, based on the "most up to date" IFORIS layer that was created after the Hen Harrier National Survey in 2015 referenced by the appellant. The FAC also noted that there are no Special Protection Areas within 15km of the proposal. Based on the evidence before it, the FAC is not satisfied that the DAFM made a serious or significant error in relation to Hen Harrier."

Please be aware that Save Leitrim have contacted and consulted with local people in this area and these resident landowners see the Hen Harrier pair/s every year, not just in the five Hen Harrier survey years. And as the FAC mention the National Parks and Wildlife Service in their decision ; The NPWS responded to this CN file with a "No Comment" reply, not with a document stating "there are No Hen Harriers in this area or Townland". NPWS do not visit this area from one end of the year to the other and did not inspect the lands in question. The locals who objected or appealed do know the lands.

The potential impact of this project on the Hen Harrier is not confined to whether it would impact on a nest site. There is an obligation on DAFM to assess the implications of the project for the ecological integrity of the area.

Hen Harriers are protected inside and outside of the Natura Network.

Protection of Birds under SI 477/2011 as amended

The protection of Annex I and migratory birds, and other wild birds naturally occurring in the territory, is mostly achieved through the Wildlife Act 1976, as amended by SI 477/2011, as amended. . SI 477/2011 as amended provides for the designation of European sites including SPAs for the protection of Annex I Bird Species and migratory birds and their habitats, in accordance with the Birds and Habitats Directives. As noted, **the protection of birds for which SPAs are designated applies to the entire natural range for each protected species of bird, including undefined areas extending in some cases far beyond the defined boundary of the SPA.**

SI 477/2011 binds all public authorities to comply with the requirements of the Birds and Habitats Directive in the carrying out of their statutory functions, including consent functions. DAFM, as a public authority, is required by Regulation 27(4) of SI 477/2011 as amended, to:

(a) take the appropriate steps to avoid, in candidate special protection areas, pollution and deterioration of habitats and any disturbances affecting the birds insofar as these would be significant in relation to the objectives of Article 4 of the Birds Directive,

This obligation is clearly linked to the species listed in Annex I of the Birds Directive, for which the SPA is designated.

(b) outside those areas, strive to avoid pollution **or deterioration of habitats**

This obligation would cover all wild birds, migratory birds, and including birds listed in Annex I for which SPAs are designated, but the obligation to strive to avoid pollution or deterioration is not limited to the extent of the SPA. **The obligation extends to the natural range of all wild birds, wherever that may be.**

The ongoing Hen Harrier National Survey has recorded birds in this area - the NPWS "no comment" dates from 1-10-21 and that position may well have been superseded by events. There is no evidence that any updated input was sought from NPWS.

5. Inadequate Access

There is no evidence of suitable access to this site. Where a commercial crop is being planted future extraction of that crop must form part of the assessment process. It would be nonsensical to establish a crop where extraction of that crop would be dependent on development consent which may not be forthcoming. The possibility of land-locking should be addressed prior to establishment stage not after.

6. Article 12 of the Habitats Directive (Annex IV species)

The strict protection regime under Article 12 of the Habitats Directive is entirely separate to the Appropriate Assessment procedure under Article 6(3) of the Habitats regime, subject to separate rules and requirements. Forestry applications need to be screened not only for implications for European sites and their species, but also for the potential implications on the Annex IV (a) species known to, or likely to, occur within their natural range and the zone of influence of the proposed forestry activity.

This is implied in Table 2, Question 5 of the Environmental Requirements for Afforestation (ERA) which asks;

5. Is there an Annex IV species or its habitat (if in the species range) known to be present or observed within the plot(s)?

There is no evidence in the project documentation of this question being asked or answered in relation to this project. We note that DAFM's EIA Screening procedure does not reference protected species, only protected habitats.

We would point out, initially, that the question in the ERA is not sufficient to address the legal obligations of the Minister as it does not refer to the likelihood of the Annex IV species occurring within their natural range and zone of influence relevant to the forestry activity.

There has been no assessment of the potential impact on species listed in Annex IV of the Habitats Directive – notably bats. Bats are likely to occur on these lands – refer to the NBDC website.

It is for the Minister to evidence that the necessary assessment has been conducted, not for us, as appellants, to provide evidence of bats on this site. The burden of proof lies with the Minister to ensure that an adequate assessment has taken place – there is no evidence in the project documentation of any such assessment. This represents a serious error in the assessment of this application.

Based on the above and the submissions made we would question why this application was not referred to Forest Service Ecology Unit for assessment.

7. EIA Screening

"The FAC considered the appellant's grounds and additional submission as they relate to the cumulative impact of afforestation in the area on the various species and habitats listed therein. The appellant also references the cumulative impact on the wider landscape, cultural impacts, carbon emissions, and impacts on the local community. Based on the information before it, the FAC is not satisfied that the appellant has substantiated their claims with convincing evidence in relation to these issues."

We enclose a map of the wider area showing the cumulative area of afforestation. The proposal would link in to an area that would, in effect, result in a single block of plantation forest well in excess of 1400 ha. To produce this map we have considered any plantation that is within 20m of the adjacent plantation to be contiguous.

In response to the Screening of Non Designated Habitats the Inspector has responded to the query "Should this application be referred to the Forest Service Ecologist?" with a "No".

There is a submission which points to areas of potentially Non-Designated Annex I habitat on this site. We append photographs to show species characteristic of Annex I Habitat on the site.

Table 2, Question 2 of the Environmental Requirements for Afforestation (ERA) asks;

2. In non-designated areas, is there a habitat listed in Annex I of the Habitats Directive, known to be present or observed within the plot(s)?

There is no evidence in the project documentation of this question being asked or answered in relation to this project.

How can the Inspector justify not referring this project to the Forest Service Ecologist? There is no field report from the Inspector on the file.



Landscape impact

In response to the question;

Is the forest design submitted (and any additional design improvements recommended) sufficient to prevent any significant impact on the landscape and does the design comply with the Forestry and the Landscape Guidelines?
The Inspector has responded with a "Yes" but there is no reasoning given for the response.

How has the Inspector determined the landscape impact of this project and what qualifications does he / she have to make such an assessment? We note that DAFM's Forestry and the Landscape Guidelines were published 22 years ago prior to the adoption of the Florence Convention on the Landscape (2004). In the context of landscape assessment for EIA they cannot be considered to be sufficiently current to provide a sound basis for landscape assessment. Why has Leitrim County Council not been consulted on this application? An explanation that the DAFM protocol does not require it simply will not cut it. A unilateral referral protocol is unacceptable where a more qualified authority on issues of landscape protection is cut out of the consultation loop. Leitrim County Council has carried out a landscape capacity assessment for forestry in the County and it is rank bad planning for that assessment not to be considered by virtue of the arbitrary exclusion of Leitrim County Council from receiving a consultation referral.

We contend that the input of Leitrim County Council is required to properly inform a landscape assessment for this project. The photo below clearly shows that there are landscape issues that need to be addressed. This site is prominent in the local landscape. Is this licence consistent with the County Development Plan?



Accidents

"Is there a significant risk of accidents, having regard in particular to substances or technologies used? If so, describe in Inspectors comments box below".

The Inspector's response to the question is "S/A". We see no self assessment from the applicant regarding potential accidents therefore this question cannot be considered to be answered satisfactorily and is a lacunae in the EIA Screening assessment.

The EIA Screening has not been carried out with the requisite degree of detail to ensure that the Determination can be adequately reasoned.

Peat

Part of the western section of this site (in Plot 2) is on peat soil with peat subsoil. Afforesting this land would not be consistent with Ireland's climate change commitments and is not consistent with the terms of the State Aid decision (underpinned by the Rural Development Regulations).

Afforestation of peat soils results in net carbon emissions.

Referrals

The project has not been referred to Leitrim County Council for comment. We fail to see how a project can be adequately assessed by DAFM, particularly in terms of landscape impact, without feedback from the Local Authority.

The Right Tree in the Right Place for the Right Reasons

'Examine each question in terms of what is ethically and aesthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.' Aldo Leopold

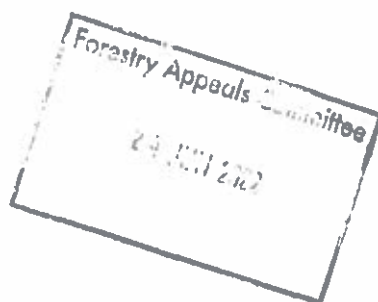
The FAC and DAFM would do well and right if it considered each forestry project in this context.

The impact on the biotic community cannot be known unless the existing biotic community is understood. That is not the case for this project. The superficial and incomplete assessment of the project lands means that we do not know what is being lost and whether integrity, stability and beauty are being preserved.

In the case of afforestation with exotic coniferous species the precautionary principle should apply and in the absence of incontrovertible evidence of preservation of those qualities, it should be assumed that the biotic community will not be preserved and the project is wrong.

This project is not proven to be consistent with the Government's principle of the Right Tree in the Right Place for the Right Reasons.

If DAFM has a better definition of what is "Right" let it come forward and show its colours.



Statement from Inspectorate.

Assessment Criteria	
Was the AA screening procedure at the time of approval applied? (Y/N)	Yes
What version of the AA procedure?	Nov 19
Standard Operating Procedures applied? (Y/N)	Yes

Based on the information supplied by the appellant, do you recommend any change to the original decision?

(Tick as appropriate)

No change	<input checked="" type="checkbox"/>	Confirm recommendation to grant licence	<input type="checkbox"/>	Revise conditions of licence	<input type="checkbox"/>	Remit licence for reassessment	<input type="checkbox"/>	Revoke licence	<input type="checkbox"/>
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- Approval issued on Tuesday 14th June 2022 and the decision issued on Wednesday 15th June 2022. This is standard practice.
- DAFM contend that the licencing conditions as presented are clear well reasoned and follow standard operating procedures.
- Regarding Hen Harrier, the Forestry Appeals Committee has already commented on this issue in detail in appeal 135/2021. Further appeals on a DAFM licencing decision is not the correct forum to query the decisions of the Forestry Appeals Committee.
- Licence CN89137 borders a public road this is clearly indicated on the bio map and confirmed via field inspection, adequate access exists as per section 5.3.2 of the Forestry Standards Manual.
- Site field inspected on the 30/09/2021, potential bat roosting areas such as veteran tress or roofed derelict buildings were not noted during the inspection. Hedgerows present on site are retained under condition "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). Reason: In the interest of clarity and to ensure good forest practice and the protection of the environment. "specifically section 2.5.4 Hedgerows. Potential disturbance of bat roosting sites if present was considered to be negligible.
- Regarding EIA screening, the Forestry Appeals Committee has already commented on this issue in detail in appeal 135/2021. Further appeals on a DAFM licencing decision is not the correct forum to query the decisions of the Forestry Appeals Committee.

Regarding landscape approximately 40% of the licence area is native woodland located to the south of the project area following the course of a relevant water course and screening the majority of the protect area. The licence area is outside areas classed as areas of High Visual Amenity or Areas of Outstanding Natural Beauty in Leitrim CDP 2015-2021

and did not require a referral to Leitrim County Council. The Department of Agriculture Food and the Marine is the Competent Authority regarding the issuing of forestry licences.

Regarding accidents the project was assessed for the potential of environmental accidents as per the requirements of the EIA directives. Self-assessment relates personal accidents with health and safety being the responsibility of the forestry works manager who commissions the work. Self-assessment was selected as part of the EIA screening for the original decision. This was not changed during the fresh EIA screening once the file was remitted in appeal 135/2021.

Regarding peat, this site was field assessed the majority of the area referenced by the appellant are mineral soils with small areas of peaty gley soil occurring near the relevant watercourse this area is not intended for planting and falls within the 10m setback proposed for the relevant watercourse and the mapped water hotspot. Soil maps are indicative only. Research has shown afforestation on mineral soils sequester carbon.

Regarding referrals, the licence area is outside areas classed as areas of High Visual Amenity or Areas of Outstanding Natural Beauty in Leitrim CDP 2015-2021 and did not require a referral to Leitrim County Council. The Department of Agriculture Food and the Marine is the Competent Authority regarding the issuing of forestry licences.

The application incorporates approximately 40% native woodland as well as additional broadleaf planting set backs and opening areas all of which are beneficial to the long term biodiversity value of the site.

DAFM would like to request an in person oral hearing for this appeal.

Name: Daniel Connaire

Role: Forestry Inspector

Date: 25/07/2022

