



[REDACTED]

27th August 2021.

Subject: Appeal FAC 860/2020 regarding licence CN84374

Dear [REDACTED]

I refer to your 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 14 A (1) of the Agriculture Appeals Act 2001 2001, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN84374 is for the afforestation in relation to an area of 10.51 hectares and which also provides for 600 metres of fencing at Boleyboy, Co. Leitrim which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 20th November 2020 subject to a number of standard conditions in addition to a specific condition which included that Appropriate Assessment Report and Appropriate Assessment Determination from Ecologist should issue with approval and adhere strictly to same.

Hearing

A hearing of appeal FAC 860/2020 was held by a division of the FAC on the 23rd July 2021. The FAC members in attendance at the hearing were Mr. Donal Maguire (Chairperson), Mr. Vincent Upton, Mr. Iain Douglas and Mr Derek Daly.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal and all submissions received, and, in particular, the following considerations, the FAC has decided to aside and remit the decision of the Minister regarding licence CN84374.

Licence

The licence pertains to the afforestation in relation to an area of 10.51 hectares at Boleyboy, Co. Leitrim. The application also provides for 600 metres of fencing. Documentation submitted includes site notice, permission from landowner, environmental and operational details and mapping including a fencing map and biomaps. The species to be planted are Sitka Spruce (80%) on an area of 8.38 hectares and ADB on 2.1 hectares based on licence approval. The applicant also submitted a document relating to Environmental considerations which indicates *the site is within 3km Buffer referral zone for Dough Thur Mountains NHA and that the northern section of the site bounds this NHA. It is proposed not to have any*

mound drains within 30m of the boundary so as not to increase any drainage from the designated lands. Scrap mounding will be the cultivation type used in this 30m buffer zone. The site is also within a buffer referral zone for Lough Gill SAC. The stream on the western boundary feeds into a river 2km downstream that is within the SAC. It is planned to have an increased watercourse setback from this stream of 20m. A further 20m will be planted with additional broadleaves to make up a riparian woodland with an undulated edge along the unplanted setback. All riparian planting will take place on scrap mounds. No mound drains will run into the riparian area. All mound drains will have silt traps in place at the end of every drain and every 70m along drains to reduce the chances of any siltation leaving the site. The site has landscape sensitivity and is classed by Leitrim LCA 2002 as high landscape sensitivity to Forestry. This has been taken in to account and the percentage of broadleaves on the site has been increased to address this. Reference is made to the Biodiversity/Operational map for areas highlighted.

Documentation on file refers to the site consisting of mainly Wet grassland (GS4) on mineral soil. Aquatic zones adjoin and flow from within the site. The watercourses which leave the site provide surface water connectivity with the Lough Gill SAC 2km downstream. Soils at the site have been mapped by the GSI as Mineral poorly drained (Mainly acidic), Shallow, rocky, peaty/non-peaty mineral complexes (Mainly basic) and Shallow peaty poorly drained mineral (Mainly basic). The gradient of the site is described as flat to gently sloping, with slopes approximately 10% (Moderate).

The licence application was referred to Leitrim County Council who in a response indicate an objection to the development referring to part of the lands as located within a low capacity/high sensitivity in terms of landscape capacity to accommodate forestry also referring to the lands as within a high amenity designation. Conditions are indicated should a licence be granted.

The licence application was also referred to Inland Fisheries Ireland and An Taisce with no response received.

The assessment of the licence application by DAFM included a desk and field assessment. In relation to Appropriate Assessment screening there are a number of documents. An Appropriate Assessment Report (AAR) was prepared by a consultant ecologist dated 31/07/2020 and further reviewed dated 07/09/2020. In the introduction it is indicated that the proposed afforestation project (CN84374) is not directly connected with or necessary to the management of any European Site. Having carried out an Appropriate Assessment screening, it has been determined, on the basis of objective scientific information, that the project, individually or in combination with other plans and projects, is likely to have a significant effect on Lough Gill SAC (001976). Lough Gill SAC 0019760 was assessed based on qualifying interests and mitigation measures are outlined in section 4 in relation to a number of these interests. No other Natura site is referred to or considered in the report. Assessment of Potential Residual Impacts and In-Combination Effects are also set out. The In-combination statement concluded that the proposed afforestation project, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of Lough Gill SAC. It is noted that section 3 of the report refers to the site is within the Bonet SC 010 WFD sub-catchment and the in-combination refers to Owenmore (Manorhamilton)_020 WFD sub-catchment.

The project was the subject of Appropriate Assessment Determination (AAD) by DAFM dated 7th September 2020. Section 2 refers to Screening for Appropriate Assessment and that the Minister, undertook a screening for Appropriate Assessment and nine European Sites are identified. Eight sites are screened out for the reasons set out: Arroo Mountain SAC [001403] as the site is upgradient and no hydrological connection exists; Benbulbin, Gleniff and Glenade Complex SAC [000623] as the site is upgradient and no hydrological connection exists; Boleybrack Mountain SAC [002032] as the site is upgradient and no hydrological connection exists; Glenade Lough SAC [001919] as the SAC is up-catchment and no hydrological connection exists; Lough Melvin SAC [000428] as the SAC is located in a separate surface water catchment and no hydrological connection exists; Sligo/Leitrim Uplands SPA [004187] as the proposed project site is located outside the core foraging range of the SCI species; Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC [000627] as the proposed development site is located over 40km hydrological distance from the SAC and is separated from the SAC by Lough Gill and Cummeen Strand SPA [004035] as the proposed development site is located over 40km hydrological distance from the SPA, is separated from the SAC by Lough Gill and is outside the core foraging range of the SCI species. One site was screened in Lough Gill SAC [001976] as a hydrological connection exists between the proposed project site and the SAC. Mitigation measures are set out in relation to the prevention of silt and sediment run-off from the project area and also to protect the Otter species. The AAD 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”.

There are a number of Inspector Certifications on file reflecting different periods and the chronology of the assessment of the application with the final reflecting a date of the 19th November 2020. All the certifications including the final Certification record seven Natura sites within 15kms of the project site namely Arroo Mountain SAC 001403, Ben Bulbin, Gleniff And Glenade Complex SAC 000623, Boleybrack Mountain SAC 002032, Glenade Lough SAC 001919, Lough Gill SAC 001976, Lough Melvin SAC 000428 and Sligo/Leitrim Uplands SPA 004187 and in the final Certification all seven sites are screened out with no findings stated in relation to screening out.

Appeal

There is one appeal against the decision to grant the licence.

The grounds of appeal refer to;

- Article 4(3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account. A number of criteria set out in Annex III do not form part of the standard FS screening assessment. A Member State exceeds the limit of its discretion under Article 2(1) and 4(2) of the EIA Directive in

circumstances where it does not take into account all relevant selection criteria listed in Annex III.

- The information provided with the application did not comply fully with the requirements of Article 5(2) of SI 191/2017. The application was not legally compliant and should not have been accepted/processed by DAFM without rectification of the legal deficiencies.
- The appellant notes the Planning Authority of Leitrim County Council's objection to this afforestation licence as part of the lands are identified as Low Capacity/High Sensitivity and all lands are within a designated Area of High Visual Amenity. The Forest Inspector states No Objection.
- Why was this application not referred to NPWS for comment despite being in a referral zone (identified as such in the Inspector's Certification)? A portion of these lands are part of Dough Mountain NHS and this site is hydrologically connected to Lough Gill SAC and the failure of the FS to refer this application for comment represents an omission in the environmental oversight, as the NPWS is the competent authority for the Natura 2000 sites likely to be impacted. Also why was this application not referred to the EPA for comment as the site is hydrologically to Lough Gill the water source for 30 000 residents in Sligo and North Leitrim as Lough Gill current water status is poor.
- In the absence of comments from the NPWS the AA Determination in respect of this project cannot be considered to be adequate or complete.
- The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned. There is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries (which includes unqualified uncertainties) or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application.
- In relation to the Assessment to Determine EIA Requirement
The answers provided to Q.6 and 7 is incorrect so on what basis has the Inspector concluded that a No response to Q.10 is justified?
There is no qualification of the S/A responses to Q's 11,18 and 19.
The IFORIS Screening checkbox questions represent validations in respect of the screening assessment. EU Guidance on carrying out EIA screening using a checkbox system states "In theory, if there is one 'Yes' answer to the question 'is it likely to result in a significant effect?', EIA may be required, however, as a general principle, the greater the number of 'Yes' answers and the greater the significance of the impacts identified, the more likely it is that EIA is required. '?' answers, indicating uncertainty about the occurrence or significance of impacts, should also point towards a positive Screening Decision (i.e. that EIA is required) because the EIA process will help to clarify the uncertainty."
- Any error in the response to the EIA screening questions invalidates the determination reached by the Inspector.
- Mitigation and avoidance measures can be taken in to account as part of the EIA screening decision. However, the responsibility remains on the competent authority to ensure that these mitigations, if relied upon to screen out EIA, are then carried into the awarded licence and are monitored and enforced. If a competent authority screens out EIA for a development, based on mitigations proposed at screening, and those mitigations are not subsequently carried out, then the licence is open to challenge on the basis that it required EIA (even though it has a letter

screening EIA out- if that decision was based on commitments to mitigations that were not carried out).

- The EIA screening in respect of this application is inadequate and the determination cannot be relied upon.
- The mitigations contained in the AA Determination are not written with sufficient precision and clarity regarding their requirements and permitting procedures or substantiated with adequate scientific evidence to ensure that they will eliminate or reduce the adverse impacts of this project and result in compliance of this development with Article 6 (3) of the Habitats Directive or the overall environmental regulatory environment.
- Residual effects from this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed.
- The AA Determination has relied on the completely inadequate In-Combination Effect section of the NIS. The significant increases in forest cover within 5km and within the underlying waterbody (see EIA screening) have not been addressed in that document. The spatial and temporal range of the In-Combination effect is inadequately defined and what has been included is not sufficient to reach a conclusion that meets the degree of certainty required by Article 6 (3) of the Habitats Directive.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act; correct EIA data was supplied on IFORIS on 15/06/2020 and formed the basis of the DAFM decision and all criteria and guidelines were fully adhered to.

In addressing the grounds of appeal, the FAC considered the requirements of the Habitats and EIA Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In considering the appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation which involve 50 hectares or more and 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 proposal is for the afforestation of 10.51 hectares which is substantially sub threshold for mandatory EIA as set in Irish Regulations. The DAFM recorded a consideration of the proposal across a series of criteria including the Project Description, Existing Land Use, Cumulative effect and extent of project, Soil, Water and Landscape. The DAFM also recorded a separate Appropriate Assessment and recorded information provided by the Applicant in relation to the scale, nature and location of the proposal. Having regard to the record of the decision and the

submitted grounds, and the nature, scale and location of the proposal, the FAC is satisfied that the DAFM did not err in its decision concerning EIA.

In considering the appeal the FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the afforestation of 10.51 hectares. Having examined the documentation submitted the FAC note that the AAD identified nine Natura sites and the Inspector Certification seven sites. The Inspector Certification identifies sites within a 15 kilometre radius. The additional two sites referred to in the AAD are Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC [000627] Cummeen Strand SPA [004035] are located over 40km hydrological distance from the project site. Based on the publicly available information from the EPA and NPWS the FAC has identified the same seven sites as the DAFM within 15km from the proposal. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment (as stated in the AAD). Details of other plans and projects were also examined. The proposed works are located outside of any European site and there is no evidence of a pathway of effects to a European site. Neither is there evidence of protected habitats or species on the site.

The main issue however as identified by the FAC in relation to screening is that there is no clear chronological sequence in relation to when the initial screening of the proposal itself and in-combination with other plans and projects was carried out and reasons were recorded. The only documentary evidence of screening is at AAD stage which is post the Appropriate Assessment Report. The Appropriate Assessment report predating AAD assesses one site having identified that other sites were screened out and there is no documentary information relating to screening prior to this report. The basis of why only one site was considered in the AAR the documentation considered and the criteria applied is unknown by on the documentation available to the FAC. The Final Inspector Certification screens all sites out and this certification postdates the AAD and earlier certifications do not have a definitive screening stated. It is also noted by the FAC that the final certification in screening out sites does not state any finding as to why the seven Natura sites are screened out. The FAC is therefore satisfied, having regard to the record of the decision, that a serious or significant error was made in the decision regarding Appropriate Assessment screening.

In relation to other matters, it is noted that the applicant also submitted a document relating to Environmental considerations which indicates the site is within 3km Buffer referral zone for Dough Thur Mountains NHA and that the northern section of the site bounds this NHA. Arising from this consideration the applicant proposed not to have any mound drains within 30 metres of the boundary so as not to increase any drainage from the designated lands and that scrap mounding will be the cultivation type used in this 30m buffer zone. The document also indicates that the site is also within a buffer referral zone for Lough Gill SAC and that the stream on the western boundary feeds into a river

2km downstream that is within the SAC; it is planned to have an increased watercourse setback from this stream of 20m; a further 20m will be planted with additional broadleaves to make up a riparian woodland with an undulated edge along the unplanted setback; all riparian planting will take place on scrap mounds; no mound drains will run into the riparian area and all mound drains will have silt traps in place at the end of every drain and every 70m along drains to reduce the chances of any siltation leaving the site. The Appropriate Assessment Report or the AAD do not reference or evaluate the matters outlined by the applicant for planting, buffers and setback in their assessment and although mitigation measures in relation to the prevention of silt and sediment run-off from the project area are proposed as conditions these differ significantly from the those proposed by the applicant and there are no reasons stated for overruling the measures proposed by the applicant. Furthermore, the measures proposed do not appear to fully reflect the varying slope of the land as provided for in, for example, the Environmental Requirements for Afforestation. The FAC also notes that the measures proposed by the Applicant appear to be reflective of the Requirements and Standards of the DAFM. The FAC is satisfied that the measures and reasons provided do not appear to reflect DAFM Requirements and do not appear to have had due regard to the more cautionary measures proposed by the Applicant and that this represents a serious error.

The FAC noted that the project was not referred to the NPWS in spite of the proximity of the NHA and the proposed measures to address the proximity and the Appropriate Assessment undertaken in relation to Lough Gill SAC which is also referred to in the grounds of appeal. The FAC considers that the Minister and their Authorised Officers are the competent authority for afforestation licences in Ireland. Nevertheless, should a new assessment be undertaken the FAC considers that the DAFM should note Regulation 9 of the Forestry Regulations 2017 and ensure that appropriate information is provided in notices made to consultation bodies. In this instance and having regard to the proximity to an NHA, measures proposed for the NHA and the Appropriate Assessment undertaken in relation to an SAC, the FAC considers that the application should have been referred to the NPWS. The DAFM if it considers the measures appropriate should also require adherence with the measures specified by the Applicant in relation to the NHA as a licence condition.

In relation to visual impact, the site has landscape sensitivity and it is noted in this regard that Leitrim County Council objected to the project. The project was also identified by the applicant as located in an area of high landscape sensitivity to Forestry which was noted by the Applicant and the percentage of broadleaves on the site increased to address this. In the assessment by DAFM the scenic amenity of the landscape is noted in the Inspector Certification and in relation 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 this is responded to in the affirmative in the certification. The record does incorrectly state that the County Council had submitted no objection to the proposal whereas an objection stated to be based on

the designation of the lands as having a low capacity to accommodate forestry in the County Development Plan was submitted. While this constitutes an error the FAC in considering the application details and reference to the designation of the lands and the considerations recorded by the DAFM in relation to Landscape is not satisfied that this would constitute a serious or significant error. In relation to this matter, the FAC had regard to the fact that the Minister for Agriculture, Food and the Marine is the competent authority for afforestation licences in Ireland, while also considering the requirements placed on the Minister under the Forestry Act 2014 and Forestry Regulations 2017 in relation to their decision making.

In relation to potential hydrological impacts on Natura 2000 sites and on water quality generally it is noted that specific drainage works are proposed by the applicant given the proximity of the site to an NHA and hydrological connection to Lough Gill and the AAD also specifies conditions in relation to avoidance of run off and prevention of sedimentation. This project lies in the River Sub-Basin Owenmore (Manorhamilton)_020 River Waterbody WFD Status: Good and in terms of risk is indicated as not at risk. The reference to a different waterbody in the Assessment to a different waterbody is noted but the in-combination does correctly assess the River Sub-Basin Owenmore (Manorhamilton)_020 River Waterbody WFD. The FAC note that the issue of potential effects and impacts on aquatic zones and watercourses is assessed and addressed in the documentation including mitigation measures to protect same. The FAC has examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area. The FAC note that the issue of potential effects and impacts on aquatic zones and watercourses is assessed in the documentation including mitigation measures to protect same but the measures as proposed by the applicant and the reasons for not implementing them expressly are not outlined in the assessment by DAFM nor do they appear to reflect the DAFM Requirements.

In relation to the reference to Article 5(2) of SI. 191 of 2017 in the grounds of appeal and that the application did not comply fully with the requirements of Forestry Regulations the appellant has not stated specific details in relation to this. Having reviewed the documentation, the FAC have not identified an error in this matter and is satisfied that the Minister had sufficient information to make the decision.

In relation to the references to S/A in the certification for questions to 11, 18 and 19 a definitive response as this section of the certification is an assessment to determine EIA requirement would be appropriate but does not constitute a significant error considering the overall processing and assessment of the proposal including the fact that an Appropriate Assessment was undertaken and the nature, scale and location of the proposal.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal. As outlined in this letter, the FAC is satisfied that a number of serious errors were made in making the decision at the assessment stages. The FAC is thus setting aside and remitting the decision of the Minister regarding licence CN84374 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to refer the application to the NPWS and to complete a new screening for and Appropriate Assessment of the likely significant effects of the proposal itself and in-combination with other plans and projects on European sites before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of the sender.

Derek Daly On Behalf of the Forestry Appeals Committee

