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30<sup>th</sup> June 2021

**Subject:** Appeal FAC 859/2020 regarding licence CN86548

Dear [REDACTED]

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 14 A (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.

#### **Background**

A licence for 9.4ha of afforestation in Corderry, Co. Leitrim was issued by the Minister for Agriculture, Food and the Marine on 11 November 2020 with conditions.

#### **Hearing**

A hearing of appeal FAC 859/2020 was held by the FAC on the 22<sup>nd</sup> of June 2021.

In attendance:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Dan Molloy, Mr. Luke Sweetman, Mr. Donal Maguire

Secretary to the FAC: Mr. Michael Ryan

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN86548.

This project comprises 9.4 hectares of afforestation. The predominant soil type underlining the project area is described as being predominantly podzols in nature. The slope on the project site

is recorded as flat to moderate (<15%). The project area does not adjoin or contain an aquatic zone. The vegetation type within the project area is comprised of grass and rushes. A Forest Service Inspector carried out a field visit on the 09/09/2020.

The DAFM documented an Appropriate Assessment screening of the proposal and identified three sites within 15km and further concluded that there was no reason to extend this radius in this case. The identified sites are the Boleybrack Mountain SAC 002032, the Cuilcagh - Anierin Uplands SAC 000584 and the Lough Gill SAC 001976. They were all screened out because the location of the project area is within a separate water body catchment to that containing the Natura sites, with no upstream connection, and thus the subsequent lack of any hydrological connection.

A consideration of other plans and project in combination is dated the 01.10.2020. The record also includes a consideration of the proposal across a range of criteria and a conclusion that the proposal was not required to undergo EIA. The approval decision was issued on the 11.11.2020 with conditions.

The grounds of appeal FAC 859/2020 are summarised as:

1. Breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/152/EU
2. Breach of Article 4 (4) of the EIA Directive 2014/52/EU
3. The information provided with the application did not comply with the requirements of SI 191 of 2017
4. The application indicates that road access is provided. Clarification is required as to whether that road access is sufficient for the whole project, which will include the harvesting, extraction and haulage of commercial timber.
5. There is no evidence in the application that the project has been assessed for its potential impact on
  - habitats protected under Annex I of the Habitats Directive
  - species protected under Annex II of the Habitats Directive
  - species protected under Annex IV of the Habitats Directive
  - species listed in Annex I of the Birds Directive
6. The application was not referred to the NPWS which could have provided important information in respect of the habitats and species of significance on these lands and in the general vicinity
7. NPWS open-source mapping indicates a record of Marsh Fritillary butterfly (Annex II of the Habitats Directive) less than 60m from the project and on similar lands to those of the project site.
8. The project lands have not been assessed as to whether they should be considered as High Nature Value (HNV) farmland.
9. The Areas for Biodiversity Enhancement selected include areas which are required setbacks.

10. The failure by the Department to develop formal procedures to safeguard HNV farmland is not consistent with Rural Development Regulations.
11. The Determination of the Inspector in terms of the requirement for an EIA is inadequately reasoned.
12. Approval is not consistent with the requirements of Article 4 of the Water Framework Directive.
13. Approval is not consistent with the requirements of Articles 5 and 9 of the Birds Directive.
14. The notification of the decision to award the approval of this project was not appropriate, in respect of the Aarhus Convention
15. The Monitoring & Inspection regime implemented by DAFM, is not sufficiently robust.
16. The direct and indirect conditions appended to this approval are not written with sufficient precision.
17. The promotional role and regulatory role of the Forest Service of DAFM involve a conflict-of-interest contrary to the EIA Directive.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with procedures, S.I. 191/2017 and the 2014 Forestry Act. The Department additionally submits that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered within the current procedures. The Department submits that it complied with these requirements by assessing the information submitted by the applicant and which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account of the results of the preliminary verifications or assessments of the effects on the environment carried out under Birds and Habitats Directives and the Water Framework Directive.

It was submitted that the DAFM carried out a full field inspection of the application on 09/09/20 and as there is no hydrological pathway between the afforestation proposal and the SAC's within 15kms there is no possible significant effect on listed qualifying interests and conservation objectives of the SAC's, now or in the future. It is submitted that the proposal does not fall within referral zones employed in DAFM procedures and that given the specific conditions of the site that referrals were not deemed to be warranted in this case.

A hearing of the appeal was held on the 22<sup>nd</sup> of June 2021.

The FAC considered in the first instance the grounds that relate to Environmental Impact Assessment (EIA) Directive and related matters. The FAC considered that the EU EIA Directive sets out in Annex II 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 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 proposed development is a class of development covered by the EIA Directive and transposing Regulations. It is significantly sub-threshold for mandatory EIA but does require screening to determine if EIA is required. In this instance the proposal is considered across a number of criteria including the Project Description, Cumulative effect and extent of project, Water, Soil, terrain, slope and other factors. The DAFM also completed a screening for Appropriate Assessment and considered other conservation sites and issues.

The project area adjoins a small watercourse, running for approximately 110m along on the eastern boundary, which is shown on the OS 6" maps but is not mapped as an EPA watercourse. This stream drains to Lough Allen, approximately 1.1km downstream. Lough Allen is located in the Upper Shannon Catchment 26A and the Shannon [Upper]\_020 sub-catchment and is currently assigned Moderate Status. The significant pressures on Lough Allen are characterised by the EPA as coming from Agriculture and threats from Invasive Alien Species.

The licence as granted stipulates adherence with the Environmental Requirements for Afforestation. This requires that setbacks be adhered to and a minimum setback of 10 metres is to be applied to the stream to the east. The project site is flat in this area and the water setback will remain unbroken by drainage or cultivation, ensuring no direct connection to the watercourse. The FAC considered that there was no evidence that the proposal as licenced would present a risk to water quality or to the achievement of the objectives of the Water Framework Directive. The EIA considerations of the DAFM also document a consideration of this issue.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The proposed afforestation project is not situated within any European site and is not directly connected with or necessary to the management of the site. As noted, the DAFM recorded a screening for Appropriate Assessment that included plans and projects considered in-combination with the proposed forest road works.

The FAC considered the range and type of plans and projects considered in-combination with the proposed afforestation project and concluded that they were acceptable. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same three sites, as the DAFM, within 15km of the proposal. Having regard to the record of the decision and the grounds of appeal the FAC does not consider that there is any convincing evidence that the DAFM Appropriate Assessment screening contains serious or significant errors and concurs with the

conclusions reached. The EIA considerations of the DAFM also record that no Natural Heritage Area or other designated site would be impacted by the proposal.

The DAFM had completed each section of its EIA determination and the responses appeared to the FAC to be largely in keeping with the facts of the matter. As noted, the DAFM considered the proposal across a range of criteria and recorded its reason to conclude that the proposal should not proceed to EIA. The FAC considered that the criteria considered, in addition, to the screening and other parts of the record, were appropriate in this case and that the reasons are recorded and display sufficient reason for the conclusion reached that the proposal should not be subject to the EIA process and are appropriate having regard to the nature, scale and location of the proposal.

Regarding consultation with referral bodies and public submissions. The FAC considered that the DAFM had desk and field assessed the application and established an absence of pathway of effects to a watercourse. The FAC considered this stance to be reasonable having regard to the nature of the proposal and the assessments undertaken by the DAFM. Further, the FAC did not consider that there was any evidence that the DAFM did not have regard to a submission made by the Appellant. This submission was provided to the FAC and contains a number of issues raised regarding obligations on the DAFM and the Applicant and conditions that should be attached to the licence. The DAFM have maintained a record of its considerations and assessments of the proposal.

As noted, the application included *inter-alia* planting design and details, environmental considerations and maps. The FAC considered this information and concluded that there was no reason to conclude in this case that the information provided was inadequate to facilitate the considerations of the DAFM which were supplemented with field inspection. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion regarding EIA is sufficiently reasoned and the FAC concurs with the conclusion reached and did not consider that any convincing evidence was provided to it that the proposal would be likely to have a significant effect on the environment.

In relation to the appellant's stated grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM record, including the screenings and assessment undertaken. The FAC noted that no details or evidence of the presence of species actually on the site was provided by the Appellant. The FAC considered that the granting of an afforestation

licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is not satisfied that an error was made in making the decision in this regard.

The FAC noted the appellant's citing of NPWS records concerning sightings of the Marsh Fritillary butterfly in the vicinity of the project site, no evidence was adduced to the FAC that the proposed activity would have a negative impact on the core area of any significant habitat for this species or indeed on individuals of the species itself.

The appellant contended that the DAFM had made a serious error by not recording a consideration as to whether or not the project site should have been considered as potentially being High Nature Value (HNV) farmland, in making their decision to approve the proposal. HNV farmland, according to Teagasc 'is typically characterised by low-intensity farming associated with high biodiversity and species of conservation concern'. It is clear from the record that a DAFM inspector did visit the site and did record its characteristics, which did not accord with the Teagasc definition. No evidence was adduced to the contrary and the FAC is not satisfied that the DAFM evaluation of this particular site contained a serious error.

Regarding the appellant's contention that certain additional conditions should attach to the licence regarding inspections and notifications and that the DAFM enforcement regime might be considered inadequate. The FAC noted the response provided to it by the DAFM and considered that the Minister has the vires to attach such conditions, concerning environmental or silvicultural requirements, as the Minister considers appropriate.

The FAC also took the view that matters concerning enforcement of licence conditions, arising subsequent to the issuing of the relevant licence, are outside of the FAC's remit. The FAC is satisfied, based on the information available to it, that the inclusion of any additional conditions relating to the appellant's grounds in this appeal is not warranted in this instance.

The appellant contended that the DAFM had a conflict of interest concerning its role as regulator of the forestry licensing regime, this is a matter for national policy consideration and does not fall within the ambit of the FAC. Under legislation, the FAC is required to be independent and impartial in its functions and acts accordingly.

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 not satisfied that a serious error or series of errors were made in making the decision or that fair procedures were not followed. The FAC is thus affirming the decision of the Minister regarding licence CN86548 in line with Article 14B of the Agricultural Appeals Act 2001. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely,

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Donal Maguire on behalf of the forestry Appeals Committee

