



[REDACTED]

22<sup>nd</sup> November 2021

**Subject:** Appeal FAC 864/2020 regarding licence CN86751

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 as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Background**

Licence CN86751 for the afforestation of 11.73 ha at Corrala, Co. Leitrim was issued by the Department of Agriculture, Food and the Marine (DAFM) on 21<sup>st</sup> of November 2020.

#### **Hearing**

A hearing of appeal FAC 864/2020 was held by the FAC on the 23<sup>rd</sup> of August 2021. The FAC Members in attendance at the hearing were Mr. Myles Mac Donncadha (Deputy Chairperson), Mr. John Evans, Mr. James Conway and Mr Derek Daly.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions received and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine regarding licence CN86751.

#### **The application and DAFM File**

This project comprises a licence application for GPC3 afforestation in relation to an area of 11.73 hectares at Corrala, Co Leitrim. The licence also provides for 1,453 metres of fencing. The site is divided into two plots and the species to be planted are Sitka Spruce and Additional Broadleaves. Submitted mapping indicates the presence of a ESB High Voltage Line and the proximity of a watercourse. The application was submitted on the 25th June 2020 and advertised on the 17<sup>th</sup> July 2020. Documentation submitted includes site notices and mapping including a fencing map and biomaps. Also included is a pre-screen report

provided by the applicant that includes consideration of issues relating to Natura Sites. It also specifies that: planting is to be by mounding with conifers planted (85%); pit planting of native broadleaves 3 rows along road setback and set backs from features including water hot spot and well; fertiliser is to be granular formulation 250KG granulated rock phosphate in conifers.

On file is an Inspector's Certification report, which describes the site as:

*This project comprises 11.73 hectares of afforestation. The predominant soil type underlining the project area is predominantly podzols in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush.*

Also on file is an AA Pre-Screen report, prepared by a consultant Ecologist, this describes the project and site as follows:

*The proposed afforestation of a moderately-sloped, enclosed, greenfield site is located at approximately 80-100m OD over peat and peaty gley soils. The project area is dominated by small fields of semi-improved acid, wet grassland (GS3/ GS4 )and hedgerows (WL1) with earthbanks (BL2) and associated drainage ditches (FW4). It is currently grazed by livestock. There are no relevant watercourses within the project area but it drains into a relevant watercourse across the road which eventually flows into the Lough Oughter and Associated Loughs SAC (0000007) and Lough Oughter Complex SPA (004049) approx. 13.91km to the east within the same WFD sub catchment Cullies\_SC\_010.*

The Inspector's Certification report indicates a desk and field assessment as having taken place on the 26<sup>th</sup> of November 2020, however a comment box in the report states "Site not inspected Nov 2020". The report includes a screening for Appropriate Assessment detailing two European sites with 15km of the site (Lough Oughter and Associated Loughs SAC (0007) and Lough Oughter SPA (4049). Both are screened out, and reference is made to an Appropriate Assessment Report (AAR). There is also a consideration of requirement for EIA contained within the report in which DAFM recorded a consideration of the application across a range of criteria, including existing land use, cumulative effect and extent of project, designated and non-designated habitats, archaeology, and landscape and determined that the project was not required to undergo the EIA process following a referral to the DAFM ecology section.

A Natura Impact Statement (NIS) submitted by the applicant is on file dated the 15<sup>th</sup> of October. This was prepared by a Consultant Ecologist and considers the Special Conservation Interests (SCIs)/Qualifying Interests (Qis) for the two sites and recommends mitigations relating to water quality, and finds no possibility of residual or in-combination effects because of mitigations. Preparation of the NIS included an ecological survey and site investigation.

An Appropriate Assessment Screening (AAS) report is on file, prepared by a consultant Project Ecologist on behalf of DAFM, dated 18<sup>th</sup> November 2020. This report also includes an in-combination assessment stating that a spatial search of Local Authority, DAFM, An Bord Pleanála and EPA planning systems took

place on the same date. The AAS identifies the same sites listed in the certification and screens both sites in for Stage 2 Assessment due to reasons relating to possible hydrological connection (direct effect or, in the case of the SPA, indirect effect on prey species).

There is an Appropriate Assessment Determination (AAD) dated the 18<sup>th</sup> of November 2020 on file which relies on the NIS. The AAD was prepared by the same consultant project ecologist as prepared the AAS on behalf of DAFM. The AAD states that the NIS represents a

*...fair and reasonable examination, evaluation and analysis of the likely significant effects of the activity on the environment, in particular on Lough Oughter And Associated Loughs SAC 000007 and Lough Oughter SPA 004049, and adequately and accurately identifies, describes and assesses those effects..."*

The AAD then highlights and corrects two deficiencies in the NIS:

- *The soil type underlining the project area is stated in the NIS as being peat and peaty gleys. However, EPA GIS data (Irish Soil Information System National GIS layer), iFORIS (soil coverage layer), and the Registered Forester (contacted 18/11/2020) confirm that the project area is on mineral soil*
- *In the NIS it states that there are no relevant watercourses present on site, despite the fact that FW4 drainage ditches are shown to be present within the proposed afforestation area (see Section 2.0 and Section 3.2 of Appendix 2 in the NIS).*

The AAD then makes a number of mitigations which are reflective of the NIS, but are more detailed, and also specifies adherence to a number of forestry related standards and guidelines.

Three submissions were made to DAFM including one from the appellant. These are summarised in the AAD as follows:

- *On 28/07/2020, an objection to the proposed project was received from Save Leitrim Group on the basis that afforestation is having a negative effect on town lands and rural communities within the county.*
- *A third party submission, received on 29/07/2020, called for evidence that the project has been evaluated by the developer in respect of the likely significant effects on the environment, particularly in respect of the presence of, or potential impact on, any protected species or habitats, internal and external to the project area. Where no adequate evidence is provided by the applicant, then the Forest Service should undertake (or cause to be undertaken) appropriate surveys before making an assessment of the application or should include conditions within the licence to ensure that the activities permitted by the licence are fully in conformance with National and European Law in respect of the protection of wildlife and the habitats that support them. Additional requirements in relation to climate change, mapping, biodiversity*

*protection, biosecurity, consultation, inspection/monitoring, and licence/approval conditions were outlined.*

- *An additional third party submission was received on 04/08/2020, which emphasized the need for Appropriate Assessment Screening prior to the granting of a forestry licence.*

The decision was to approve and the licence was issued on the 21<sup>st</sup> of November 2020 subject to standard conditions, a requirement to notify DAFM at the commencement of work on site, and adherence to the mitigations specified in the AAD dated the 18<sup>th</sup> of November 2020.

### **Appeal and Statement of Fact**

There is one appeal to the decision by DAFM to grant the licence by the Save Leitrim Group. The grounds are detailed and are available on file. They can be summarised as:

1. Breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/52/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 /2017. The application was not legally compliant and should not have been accepted / processed by DAFM without rectification of the legal deficiencies.
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. No road access point is indicated on the project mapping.
5. There is insufficient evidence in the application that the project has been properly or fully assessed for its potential impact on:
  - 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 project lands have not been adequately assessed as to whether they should be considered as High Nature Value Farmland, particularly in terms of native scrub, hedgerow and semi-natural grassland cover.
7. The failure by the Department to develop formal procedures to safeguard HNV farmland is not consistent with the Rural Development Regulations (1305/2013), their supporting regulations (807/2014) or the commitments made in the Forestry Programme 2014-2021.
8. The Areas for Biodiversity Enhancement selected include areas which are required setbacks (public road) which do not represent the best opportunity for enhancing the biodiversity

within the forest area as is stated in Section 6.2 of the Forestry Standards and Procedures Manual.

9. The project proposal indicates Woody Weed removal but the site details- vegetation types does not indicate the presence of scrub or furze. This anomaly should be explained.

- 11 Approval is not consistent with the requirements of Article 4 of the Water Framework Directive.

- 12: Error in the AA Determination — the wrong project has been referenced Section 4. Appropriate Assessment Determination.

13. The Mitigations presented in the AA determination are not sufficiently detailed.

14. The AA Determination is flawed as it is based on an assumption that the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. There is no evidence to substantiate this assumption. The number of licences set back and remitted by the FAC indicates that DAFM has not been consistently implementing the regulatory provisions correctly in the forestry sphere and it would be a very safe bet that flawed licences have passed through the system un-appealed. On this basis alone the assumption must be considered to be unjustified.

- 15: The In-Combination Effect section of the NIS, on which the AA Determination has relied, contains no details of any other Forestry related project in the vicinity. The FLV indicates numerous projects in the vicinity including within the same catchment of the relevant SAC / SPA, as does the AA Screening Report, but this document is not mentioned in the AA Determination so cannot be considered to apply as it is a separate document to the actual Determination and is unreferenced by it.

- 16: Approval is not consistent with the requirements of Articles 5 and 9 of the Birds Directive

17. The notification of the decision to award the approval of this project was not 'appropriate' in respect of Article 6 (9) of the Aarhus Convention.

18. The Monitoring & Inspection regime implemented by DAFM is not sufficiently robust to ensure that any conditions appended to this licence will be carried over in to action and

therefore it cannot be assumed that there will be practical conformance of this development with the overall environmental regulatory framework.

19. The direct and indirect conditions appended to this approval are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the overall environmental regulatory framework.

20. The promotional role and regulatory role of the Forest Service of DAFM involve a conflict of interest which is in conflict with Article 9a of the EIA Directive 2014/52/EU.

DAFM provided the FAC with a Statement of Fact (SoF) dated the 14<sup>th</sup> of May 2021. This states that the decision to issue a licence was in accordance with DAFM procedures, SI 197/20217 and the Forestry Act. A chronology of events is included and this indicates that a field inspection was carried out by representatives of the applicant. The SoF also includes DAFM responses to the majority of the grounds of appeal.

#### **Consideration of the appeal by the FAC**

In considering the grounds of appeal consulted with several publicly available information sources provided by bodies such as the EPA, the OSI and DAFM to confirm various details of the application and DAFM file. A local road bounds both plots to the north, with established forestry on the northern side. EPA mapping indicates the watercourse shown in the biomap to be the Laheen\_stream\_010, which flows on the north side of the road (i.e. not entering the site). WFD 2013-2018 Cycle monitoring indicates this to have a Poor/At Risk Status and to be part of the 36\_19Cullies\_SC\_010 and 36\_Erne sub-catchment/catchment. Following Cycle 2 of the WFD, the EPA reported that the Laheen\_stream\_010 was subject to Forestry and Hydromorphology pressures. At the southwest corner of the site ca. 1.7 ha can be seen from EPA mapping to be within the Cloone[LoughRinn]\_SC\_010 sub-catchment, which is part of the 26C\_UpperShannon catchment. The Cloone\_10 river drains this sub-catchment, including a small lake called Kilameen Lough (ca. 20 ha) that lies to ca 230m from the project site at its closest point. The Cloone\_10 river has a Good/Not at Risk Status under the WFD 2013-2018 Monitoring Cycle, while no specific pressures on the waterbody are recorded by the EPA following Cycle 2 of the WFD. OSI mapping confirms the slope details in the certification, with the slope observed to be at it is at its steepest on the north of the site. There are no drains visible on the base map or historic mapping. The slope is towards the road.

The FAC considered, in the first instance, the contentions in the grounds in relation to the Environmental Impact Assessment (EIA) Directive and related matters. In this context the FAC considered whether the proposed development should have been addressed in the context of the Environmental Impact Assessment (EIA) Directive. 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 are 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 Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence applications, require mandatory EIA 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 before the FAC relates to afforestation of an area of 11.73 ha which is substantially sub-threshold for mandatory EIA as set in Irish regulations.

The grounds of appeal assert that there is a conflict of interest for DAFM in contravention of Article 9a of the Directive, but do not specify how such a conflict may have arisen with respect to the licence under consideration or how the DAFM have not acted in an objective manner. The FAC note that DAFM is not the developer, and that in the SoF provided to the FAC DAFM have submitted that the DAFM inspectorate are required to comply with Civil Service codes of ethics and have to submit declarations annually regarding any conflicts of interest. The FAC is not satisfied that there is an error in the processing of the licence in this regard.

In relation to the appellant’s contention that a licence is open to challenge where mitigations considered in determining a requirement for EIA are not subsequently carried out, the FAC notes that enforcement of licence conditions as part of a monitoring and control regime is not a matter for the FAC.

In considering these grounds of appeal, the FAC had regard to a number of matters. These include the SoF in which it is submitted that the EIA assessment was carried out correctly, that site was field and desk assessed which formed the basis of the EIA assessment, that Forest cover in the townland at time of assessment was 7.66%, that Forest cover in the waterbody was calculated as 13.67%, and that these figures in conjunction with other environmental, social & cultural receptors are not cause for concern and the approval was screened out for sub-threshold EIA. The FAC also had regard to the project location in an area within the catchments of both the Laheen\_stream\_010 and the Cloone\_10 river waterbodies, and data from the EPA which indicate that the Laheen\_stream\_010 was subject to pressures which include Forestry following Cycle 2 of monitoring for the WFD.

In relation to the submission in the SoF that the site was field and desk assessed, the FAC noted that while the Inspector’s Certification includes a tick-box answer stating “Field and Desk” associated with an

inspection date of the 26<sup>th</sup> of November 2020, it also includes a text-box note stating “Site not inspected Nov 2020”. Furthermore, in the chronology of the processing of the file provided in the SoF, the licence is noted as having been Desk Assessed only. While the FAC does not regard this as an error, the committee is of the view that the field inspection likely refers to the Site survey conducted as part of the preparation of the NIS for the purposes of informing Appropriate Assessment.

The FAC considered the issue of forest cover in the vicinity of the proposed project which are addressed in the Inspector’s Certification report in questions 3 to 11 relating to the Cumulative effect and extent of project. These questions are answered in respect of a spatial run that was conducted on the 26<sup>th</sup> of November 2020. An increase of 388 ha (as submitted by the appellant) represents an increase of ca. 10.3% in the EPA given area for the Laheen\_stream\_010 of 3761ha. The Inspector’s Certification indicates that forest cover is approximately 13.67% which represents an increase of 10.3% in the underlining waterbody, but does not state the waterbody considered. The FAC considers that the increases recorded in the Inspector’s Certification are consistent with the Laheen\_stream\_010 only, indicating that the assessment for requirement for EIA did not consider the Cloone\_10 river waterbody in which a portion of the site lies. The FAC further note that the AA Screening Report and Determination, states that:

*This project lies in a rural landscape in Corrala, County Leitrim, in the River Sub Basins LAHEEN STREAM\_010 and CLOONE\_010. The River Sub Basins LAHEEN STREAM\_010 and CLOONE\_010 have approximately 23% forest cover each, which is higher than the national average of 11%.*

The FAC is of the view that the figure of 23% forest cover quoted for both water bodies is significantly higher than the 13.67% referenced in the consideration for EIA requirement in the Inspector’s certification report. The FAC is of the view that in the context of forestry being listed as a pressure for the Laheen\_Stream\_010, this inconsistency is sufficient to introduce doubt as to the adequacy of consideration of the level of forest cover in the river waterbodies in the Inspector’s Certification and that in conjunction with a failure to consider all waterbodies in which the project area lies this represents an error in the consideration for requirement for an EIA.

The appellant submits in the grounds of appeal that the approval is not consistent with the requirements of Article 4 of the Water Framework Directive, and highlights the status under the most recent WFD monitoring cycle of the Laheen Stream\_010 (Poor) and the Derreskit Lough (Unassigned) in that regard, citing also the Case C-461/13 (the Weser Case). In its SoF, DAFM submits, while noting that the River Sub-Basin Laheen Stream (010) has Forestry and Hydromorphology are listed as risks by the EPA, that the 10m setback applied to the public road and an additional 10m buffer together with conditions on site are sufficient protection to the stream. In considering this ground of appeal, the FAC also had regard to the nature of the site, the submissions made, and also to the provisions of the judgement of Ms. Justice Hyland in the case 2018-740 JR Sweetman v An Bord Pleanala (the Hyland Judgment) delivered in January 2021.

The FAC reviewed publicly available information from the EPA and confirmed the information in relation to the water quality status of the two surface water bodies submitted by the appellant. With regard to

the Derreskit Lough, the FAC note that this waterbody is at a distance of ca. 16km distance and forms the view that consideration of the requirements of Article 4 in the first instance should focus on the relationship between the proposed project and the Laheen Stream\_010.

The FAC also noted the statement in both the NIS and pre-screen report submitted by the applicant that:

- *There are no relevant watercourses within the project area, but it drains into a relevant watercourse across the road which eventually flows into the Lough Oughter and Associated Loughs SAC (0000007) and Lough Oughter Complex SPA (004049) approx. 13.91km to the east within the same WFD sub catchment Cullies\_SC\_010.*

In addition, the AAD prepared on behalf of DAFM states:

*In the NIS it states that there are no relevant watercourses present on site, despite the fact that FW4 drainage ditches are shown to be present within the proposed afforestation area (see Section 2.0 and Section 3.2 of Appendix 2 in the NIS).*

The Inspector's Certification report, while stating that the slope of the site is predominantly flat to moderate, also states that the project area is crossed by/adjoins an aquatic zone. The FAC reviewed publicly available information from the OSI, and this confirms that the slope of the site is toward the Laheen Stream\_010. Based on the above information, it would appear that the project may have the potential to impact on the water bodies concerned (regardless of whether that impact is negative, positive or neutral with respect to the water quality of the water body).

The FAC notes that the obligations of public authorities arising from Article 4 of the WFD have been clarified by the Hyland Judgment, and that the decision for this licence was made prior to the delivery of that judgment. In the Judgement, Justice Hyland writes:

*The decision of Weser considered above makes it clear that when authorisation is sought for a project that will impact upon a surface water body, authorisation must be refused if the project will cause a deterioration of the status of the body of surface water or if it would jeopardise the attainment of good surface water status, having regard to the existing status of the water body as designated in accordance with the Directive.*

The FAC considered the licence, and the conditions attached, which make general reference to standards and best practice, and do not contain specific conditions relating to water draining to the waterbody as noted in the NIS or the presence of drainage ditches as noted in the AAD.

In light of the above, and having regard to the Hyland Judgment, and to the fact that there is direct connectivity between the project lands and the Laheen Stream\_010 arising from its immediate adjacency to the project, the FAC is not satisfied that, based on the information before it, a proper assessment has been made to the risk that the proposal presents to the water framework directive status of Laheen Stream\_010. The FAC considered this to be a significant error in the making of the decision to grant the

licence and that the licence should be remitted for consideration of possible impact on a surface waterbody or waterbodies in light of the Hyland Judgment.

In considering those grounds of appeal that relate to that relate to the adequacy of the application of SI 191/2017, the adequacy of mapping, and also those grounds that relate to mapping of hedgerows, the FAC had regard for the SoF provided by DAFM. This states that the mapping submitted as part of the application was deemed sufficient in assessing the proposal, that all environmental features required to make an objective assessment of the application have been included, and that the DAFM considers that all requirements relating to the mapping submitted conforms to Article 5(2) of SI 191 (2017). The appellant submits that the information with the application did not comply in full with the requirements of SI 191/2017 in relation external boundary hedgerows. The FAC note that the NIS submitted by the applicant includes various mapping, including a map showing the location of hedgerows. The appellant had not provided details of what hedgerows are absent. The FAC is not satisfied that an error has occurred in the processing of the licence with respect to the requirements of SI 191 of 2017, the adequacy of mapping of the site, or in the identification of hedgerows in the processing of the licence.

The appellant submits that no road access point is indicated on the project mapping, and that clarification is required as to whether the road access is sufficient for future activities such as harvesting and extraction of timber. The SoF provided by DAFM indicates submits that public road access in the form of a gated entrance is sufficient for accessing the site for forest establishment and management purpose and that forest road access for the purpose of building a forest road for the purpose of timber extraction falls under another consent process. The FAC notes that the NIS states that access to the site is by way of the public road, and that section 5 of SI 191 of 2017 sets out the required features for an application for an afforestation licence. The FAC is not satisfied that the DAFM have made an error in relation to the clarification of road access.

The FAC considered those grounds of appeal relating High Nature Value (HNV) Farmland, which suggest that as the majority of the site was surveyed as part of the Irish Semi natural Grassland Survey (ISGS), the decision to grant the licence is at variance with the requirements of member states to ensure Rural Development Programmes prioritise HNV farmland, and that DAFM have not developed formal procedures to protect such lands consistent with the Rural Development Regulations (1305/2013), their supporting regulations (807/2014) or the commitments made in the Forestry Programme 2014-2021. The FAC note that the Rural Development Regulations relate to the provision of state funding and that the remit of the FAC is confined to licencing and not to any grant schemes. The FAC reviewed the publicly available mapping data provided by the NPWS in relation to the ISGS, and noted that the majority of the site is recorded under Fossett Code GS4 (wet grassland). The FAC had regard to the SoF provided by DAFM that states that a site visit was carried out by a qualified ecologist, that this provided site-specific information on habitats present on site, and that DAFM therefore deemed it not necessary to use ISGS data in this instance, and that issues in relation to rural development programmes are of a policy nature. The FAC examined the NIS provided by the applicant, which provides details of a site survey carried out,

and records that the site is dominated by small fields of semi-improved acid, wet grassland (Fosset codes GS3/GS4), provides photos of these land types, and records details of species found. The FAC is satisfied that the NIS provided DAFM with adequate and current data on the nature of the site, and is satisfied that no error was made in this regard.

In relation to the ground of appeal that the Areas for Biodiversity Enhancement (ABE) selected include areas which are required for setbacks which do not represent the best opportunity for enhancing the biodiversity within the forest area as is stated in Section 6.2 of the Forestry Standards and Procedures Manual, the FAC had regard for the SoF provided by DAFM. This submits that Setbacks to public roads are considered eligible for ABE as per Section 6.3 of the Forest Standards Manual 2015. The FAC reviewed the documents referenced by the appellant and DAFM, and notes that the "Forestry Standards and Procedures Manual" is dated January 2015, while the "Forest Standards Manual" is dated November 2015. The FAC notes that in the case of the former document section 6 relates to "Unplanted Areas, Biodiversity and Setback Distances" and the latter document relates to "Biodiversity and Setback Distances". Both documents share an identical introductory paragraph for this section 6, the opening line of which reads:

*For the purposes of the Afforestation Schemes at least 85% of the site submitted for grant aid must be planted with trees.*

Having regard for the submission by DAFM in the SoF, and the fact that the FAC has no role in relation to financial incentives or schemes relating to Forestry, the FAC is satisfied that no error has been made by DAFM in the issuing of the licence in relation to this matter.

The grounds of appeal state that there is an anomaly between the project proposal indicating Woody Weed removal and the site details which do not indicate the presence of scrub or furze. In the SoF provided by DAFM it is submitted that while the project proposal prepared by the forester indicated the presence of such materials, but that a site inspection noted that there is no scrub on site that needs to be removed. The SoF acknowledges that fencing works may require access through hedges to facilitate fence lines but submits that this is routine to fencing works in agriculture generally. The FAC is satisfied that no error has been made in the issuing of the licence in relation to this matter.

It is submitted by the appellant in the grounds of appeal that the notification of the decision to award the approval of this project was not 'appropriate' in respect of Article 6 (9) of the Aarhus Convention. The appellant cites issues surrounding the posting of the decision to the DAFM website, and the period of notification for an interested party to take an appeal. The FAC note that the appellant in this case made a submission in relation to DAFM prior to the making of the decision and there is correspondence on file of notice of this decision to the appellant dated the 27<sup>th</sup> of November 2020. The appellant submits that the full period for submission of an appeal to the FAC were not provided as 28 days from that date was the 25<sup>th</sup> of December 2020, there being no postal service or the offices of the FAC not being open on that date. The FAC notes that the Forestry Appeals Committee Regulations contained in SI 418 of 2020 stipulate solely that an appeal should be made within a "period of 28 days beginning on the date of the decision", and that within such period there would normally be days without public offices being open or

a postal service, and as a consequence the FAC is satisfied those regulations refer to calendar days. The FAC further notes that in this instance the appellant has submitted 20 grounds of appeal. The FAC is not satisfied that the appellant has been disadvantaged with regard to the submission of an appeal regarding the decision of the Minister.

The appellant submits that direct and indirect conditions appended to the licence are not written with sufficient precision, without providing details of where any deficiencies might arise. In addition to reviewing the conditions, the FAC has regard for the SoF provided by DAFM which states that the conditions are provided with the required clarity and that material referenced as part of approval is publicly available for anyone to view including all ecological outputs. The FAC finds that no error has occurred in the manner in which conditions to the licence have been provided.

The FAC considered the various grounds of appeal that relate to the Habitats Directive and the Birds Directive. The committee notes that the Appellant draws attention to an apparent error in the AAD where a reference is made to another project. The Committee is satisfied that this is a clerical error, that the AAD makes several other references to the project site and is clearly dealing with the site under consideration, and that this is a minor error that has not impacted the decision of the minister.

The chronology of the Appropriate Assessment is as set out in the summary of the application and the DAFM files provided above. The FAC has reviewed publicly available information and has confirmed details such as the number and location of European sites within 15km of the project site.

The appellant had raised concerns in relation to the assessment of impact on species protected under Annexes of the Habitats and Birds Directive and has highlighted concerns in relation to bat species. The FAC has regard to the SoF provided by the DAFM which notes that none of the sites within 15km were designated for bats. DAFM also submit that the project site was not in a mandatory referral zone to NPWS, and that the field survey was conducted one day outside of the typical botanical and habitat survey season and that this did not represent a constraint on the assessment. The FAC is not satisfied that an error has occurred in relation to the consideration of species protected by the Habitats and Birds Directives.

The appellant suggests that mitigations presented in the AAD are not sufficiently detailed and highlights possible shortcomings in relation to the impact and assessment of rainfall. Specifically, the appellant points to ambiguity in a mitigation relating to forecast rainfall over a 3- or 6-hour period. The FAC finds that this mitigation is ambiguous, and that this constitutes an error in the conduct of the appropriate assessment. As a result, the FAC finds that the decision of the Minister should be remitted to Stage 2 appropriate assessment.

In relation to the appellant's submission that the in-combination assessment in the NIS provided by the applicant is deficient when considering forestry related projects, the FAC notes that this was not the in-combination assessment relied upon by the Minister in making a decision.

In relation to the submitted 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, the FAC notes that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. The FAC also notes that the licence conditions contain reference to standards of good forestry practice. Based on the evidence before it, the FAC concluded that no error arose in relation to the licence conditions of the nature described by the appellant.

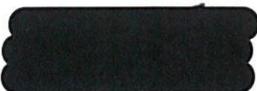
The Forestry Appeals Committee (FAC) was established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended by the Forestry (Miscellaneous Provisions) Act of 2020. Section 14B (13) provides that the FAC may –

- a) affirm a decision of the Minister
- b) where it is satisfied that a serious or significant error or series of errors was made in making the decision the subject of the appeal or that the decision was made with complying with fair procedure –
  - i. vary the decision,
  - ii. allow the appeal and set aside the decision,
  - iii. set aside the decision and remit it, for stated reasons to the minister, or
  - iv. where the Committee considers it appropriate to do so, by reference to submissions, documents or evidence before it which were not considered by the Minister or for other good reason, substitute its decision for the decision of the Minister.

The FAC considers that several other of the grounds as submitted have presupposed a particular determination by the FAC in relation to *De Novo* assessment, and that these grounds are not applicable in light of the decision of the FAC as summarised below.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was a serious or significant error or series of errors made in the making of the decision to grant the licence in this case. As a result, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN86751 for re-consideration of the requirement for EIA assessment, Stage 2 Appropriate Assessment, and consideration of the potential for the proposed development to have an impact on an “unassigned” waterbody or the achievement “good” status of a waterbody currently assessed as “poor” having regard to the ‘Hyland’ High Court judgement previously referred to, before making a new decision in respect of the application.

Yours sincerely,



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John Evans On Behalf of the Forestry Appeals Committee

