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29th September 2021

Subject: Appeal FAC049/2021 against licence decision CN86935

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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 the parties to the appeal.

Background

Licence CN86935 for afforestation of 19.64ha at Aghadunvane, Gortnasillagh, Co. Leitrim was granted by the DAFM on 9th February 2021.

Hearing

A hearing of appeal FAC049/2021 was held by the FAC on 1st September 2021. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas, Mr. Seamus Neely & Mr. Vincent Upton

Secretary to the FAC: Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN86935.

The licence decision pertains to the afforestation of 19.64 ha at Aghadunvane, Gortnasillagh, Co. Leitrim. The land is divided into five plots with four being planted with a mixture of native tree species and one remaining unplanted. Three plots would be planted with downy birch, sessile oak, Scots pine, and other broadleaves and one plot would be planted with alder and other broadleaves. Site preparation would be through woody weed removal and invert mounding and slit planting without the use of herbicides or fertiliser or additional drainage being created. The approval includes 2,900 metres of stock fencing. The land is described as enclosed agricultural land on a mineral, peat soil and with a grass, grass rush vegetation type. The land is crossed by a network of hedgerows and existing hedgerows and trees would be retained. Historic mapping of the area shows a history of land management in the area with clearly defined field boundaries. The National Soil map provided by the EPA classify the lands as surface and

groundwater gleys (Acid Deep Poorly Drained Mineral) and peaty gleys with cutover peat at the northern section. The lands have a northerly aspect and fall from approximately 90 metre to 40 metres and are bordered by the R281 to the north, with a small plot lying further north, and a minor road to the south. The lands lie in a rural, agricultural landscape and are directly bordered by pasture with a number of forests in the general vicinity. Part of the southerly section lies in an area of Outstanding Natural Beauty while part of the northerly section lies in an Area of High Visual Amenity as categorised by the Leitrim County Development Plan (CDP). The CDP also includes the view towards Lough Melvin and Donegal Bay from Local Road LS06094-1 and LS06094-2 as Outstanding views and prospects in the County.

There were eight submissions from members of the public raising concerns regarding impacts on dwellings, residential and holiday, and the local environment, including designated areas for nature and landscape conservation. These include Lough Melvin, landscapes designated under the County Development Plan and local amenity and recreational resources. Concerns were also expressed regarding impacts on local dwellings, including recently built properties. More general concerns regarding suggested legal obligations on the Minister for Agriculture, Food and the Marine were also submitted.

The application was referred to An Taisce which, while not raising an objection, submitted the need to assess and consider the application in relation to Appropriate Assessment, water setbacks, landscape designations and high nature value farming. The application was also referred to Leitrim County Council which noted that the lands fall within an area considered to have a low capacity to accommodate forestry and partly in an area of high visual amenity and an area of outstanding natural beauty and considered the public road network to be substandard, and objected to the proposal.

The Biomap submitted with the application shows a number of watercourses running north-south on the lands. Data from the EPA show the stream to the east to form part of the Kinlough 010 waterbody (Unassigned status, Review risk for 2013-2018). The easterly section of the plots lie in the Kinlough 010 sub-basin while the westerly portion lies in the Drowes 010 sub-basin. The streams at the west and middle section flow to the northern boundary from which the Drowes 010 waterbody (Good status, Review risk 2013-2018) flows. The lands lie within the Drowse 010 subcatchment of the Erne catchment. The lands lie on the Largydonnell groundwater body (Good status, Not at Risk). The Biomap also displays hedgerows, two electricity lines crossing the site west-east, public roads and the location of two site notices. There are no recorded monuments on the land as noted by the County Council.

The DAFM undertook a screening for Appropriate Assessment (AA) and identified twelve European sites within 15km of the proposal. These were Lough Melvin SAC, Arroo Mountain SAC, Dunmuckrum Turloughs SAC, Ben Bulbin, Gleniff and Glenade Complex SAC, Glenade Lough SAC, Bunduff Lough and Machair/Trawalua/Mullaghmore SAC, Lough Gill SAC, Durnesh Lough SAC, Lough Golagh and Breesy Hill SAC, Sligo/Leitrim Uplands SPA, Donegal Bay SPA, and Durnesh Lough SPA. A screening is recorded in the Inspectors Certification and a separate AA screening was prepared by an Ecologist on Behalf of the DAFM and dated 27th January 2021. The screening records the submissions and issues raised by

members of the public and referral bodies. A consideration of other plans and projects in-combination with the proposal is also recorded and includes both forestry and non-forestry plans and projects. The screening considers each of the twelve European sites in turn, the sites Qualifying Interests (QIs) and Conservation Interests and distances to the proposal are identified. The screening records conclusions and reasons. It was concluded that three sites should proceed to AA, Lough Melvin SAC, Sligo/Leitrim Uplands SPA and Donegal Bay SPA.

An AA Report was prepared by an Ecologist on behalf of the DAFM and dated 28th January 2021. The Report records each of the screened-in European sites and its associated qualifying interests and conservation objectives, the potential impacts that might occur and the mitigation proposed. In relation to aquatic interests the measures include different widths for setbacks for plot 1 and 2, and 3 and 4. Measures in relation to otter (*Lutra lutra*) include water protection measures and conservation of existing habitat. In relation to Peregrine (*Falco peregrines*) it is identified that the proposal could impact on habitats of important prey species and the retention of existing habitat and the inclusion of a habitat setback are included. A separate AA Determination was prepared by an Ecologist on Behalf of the DAFM and dated 28th January 2021 which details the screening and AA process. The mitigation measures are outlined and the Determination 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.

The licence was approved on 09/02/21 with conditions including a number of specific conditions,

- Consult with Leitrim County Council at all times with regard to usage of public roads and access to same,
- Adhere to conditions and mitigation measures of Appropriate Assessment Determination,
- Dwelling Houses/Buildings Setback 60m,
- All guidelines to apply

There is one appeal against the licence decision from a party which made a submission at the application stage. The full grounds of appeal have been provided to all parties and submit that the application was not referred to the NPWS, Inland Fisheries Ireland or Fermanagh and Omagh District Council. It is submitted that there are three species of fish unique to Lough Melvin that are under threat from industrial forestry plantations in the catchment. Lough Melvin is described as a transfrontier lake. The grounds further submit that there was no consultation with the EPA or Irish Water and that the proposal lies in the Kinlough 010 waterbody and that the status for the waterbody is unassigned. Reference is made to Judicial Review cases 740/2018 (Sweetman V ABP) and the objectives of the Water Framework Directive. It is submitted that the application was not referred to Donegal County Council and that towns in Donegal and areas of North Leitrim receive drinking water from Lough Melvin.

In a statement to the FAC, the DAFM outlined the dates and nature of the processing of the application and submitted that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act.

A submission was made by the Appellant and provided to all parties submitting that there was insufficient evidence that the necessary environmental assessments to ensure compliance with the regulatory environment were conducted. It is submitted that the area within the Kinlough 010 waterbody should not have been licenced as the waterbody is unassigned and the documentation record a connection from the proposal lands. It is submitted that Lough Melvin SAC UK0030047 has not been considered in the AAS and that this SAC has additional QI's to those of Lough Melvin SAC 000428. The in-combination section of the AA is questioned in relation to its preparation and plans and projects in Co. Fermanagh. The forest area in the vicinity is also queried. It is submitted that there is a contradiction between the requirements to retain scrub and the removal of woody weeds and that the mitigation measure in relation to rainfall could not be relied on as it is suggested the Met Eireann forecast was not sufficiently accurate. The submission questions the habitats on site and quotes from the AA that the ecologist had not visited the site. The submission notes that the AA had identified part of the area as flood prone and questions a number of the responses provided in relation to the consideration of the proposal to proceed to the EIA process in relation to fertiliser use and submissions from the local authority. It is submitted that other designated sites were not considered, including Kinlough Wood pNHA.

The FAC considered, in the first instance, the grounds of appeal that relate to the Appropriate Assessment undertaken by the DAFM. The FAC further considered that under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans and projects, having regard to the conservation objectives of that designated site. The proposal is not connected with or necessary to the management of a European site and is not situated within an area designated for conservation. The FAC considered the screening and Appropriate Assessment undertaken and found both to be complete and clear in its findings and conclusions in relation to the sites examined. The appeal highlights the fact that Lough Melvin lies across two jurisdictions and questions why Lough Melvin SAC UK0030047 which covers the northeastern section of the lake was not screened as part of the process while Lough Melvin SAC IE000428 was screened and proceeded to Appropriate Assessment with specific measures attached to the licence through the Appropriate Assessment Determination. DAFM procedures *Appropriate Assessment Procedure Guidance Note & iFORIS SOP for DAFM Forestry Inspectors (v05Nov2019)* states on page 17 states that the DAFM have to consider sites in Northern Ireland. The statement from the DAFM in response to the appeal does not directly address this issue and does not dispute the matter. In these circumstances, the FAC is satisfied that a serious error was made in the making of the decision and is remitting the decision back to the Minister to undertake a new screening and Appropriate Assessment before a new decision is made.

In relation to the accuracy of the Met Eireann forecast, the Appellant made reference and submitted a URL to a dataset of historic weather data for 1981-2010 that has been averaged across the country on a 1km grid. The differences observed by the Appellant do not represent a margin of error and are derived from historic observed data and not a forecast. As stated on the Met Eireann website, forecasts are based on the Harmonie model which is modelled on a 2.5km grid. The FAC considers the Met Eireann forecasting system to be sufficiently robust for the purposes employed in the AA and in the overall context of the range of measures and conditions stated and the nature, scale and location of the proposal.

A number of the grounds of appeal reference referrals to statutory bodies. The Forestry Regulations 2017 provide for the Minister to refer applications to such bodies under specific circumstances and where the Minister believes that they may have an opinion on the application. In this instance the application was referred to An Taisce and Leitrim County Council, both of which responded to the referral. The FAC is not satisfied that any convincing evidence was submitted that shows a significant error was made in this regard.

In relation to other potential impacts of the proposal on the environment, the FAC noted that the EU Environmental Impact Assessment (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. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The decision under appeal relates to a licence for afforestation of 19.64 ha, so is sub threshold for mandatory EIA as set in Irish Regulations.

The 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. In considering the record of the appeal, the FAC noted that a number of considerations were recorded as S/A or self assessed by the Applicant. The proposal is for the planting of mixed species, native woodland on agricultural land without the use of inputs, fertiliser or herbicide, and includes setbacks from existing habitats and environmental features and public roads. While the local authority objected to the proposal it made no reference to the specific nature of the development nor do the lands correspond to the examples provided to have a low capacity to accommodate forestry in its response. The Minister for Agriculture, Food and the Marine is the competent authority for afforestation licences in Ireland. A number of submissions and objections were made on the application but no planting would take place within 60 metres of any dwelling and dwellings in the area are generally at a considerably greater distance than this. Issues related to the making of forest policy do not fall within the remit of the FAC.

The appeal also referred to Kinlough Wood pNHA. This is a proposed Natural Heritage Area and lies c.270 metres to the west. This area is shown as a mixed species woodland on historic Ordnance Survey maps of the area. The FAC does not consider that there is any evidence before it that the proposal as licenced would have an adverse impact on this or any other conservation area. Data provided by the OPW, floodinfo.ie, does not identify the area as being at risk of fluvial or pluvial flooding at any level modelled. Question 26 of the DAFM Assessment to Determine EIA Requirement records a 'no' in relation to whether comments from the Local Authority were received and examined which appears to be an error. However, in the context of the overall decision and the proposal itself and the record maintained by the DAFM, the FAC considers this likely to be an error of a clerical nature. The lands in question have a northerly aspect and slope away from the public road and there is a requirement to include an unplanted setback from the public road. The lands and landscape are generally crossed by existing hedgerows and mature trees, including along the public road. The FAC does not consider that there is any convincing evidence before it that the proposal would result in a significant adverse impact on the landscape. Data from the EPA show the stream to the east of the project area lands forms part of the Kinlough 010 waterbody (Unassigned status, Review risk for 2013-2018). The streams at the west and middle section flow to the northern boundary from which the Drowes 010 waterbody (Good status, Review risk 2013-2018) flows. The grounds suggest that the Minister should not have approved the decision as it would not be possible to assess impacts on the Kinlough 010 waterbody in the absence of a status designation and reference was made to the decision of Justice Hyland in the above referenced Judicial Review and the obligations of the Water Framework Directive. The proposal under appeal does not involve the exploitation of a water body and there is no evidence that the DAFM have employed a proxy status in its processing of the application. The Kinlough 010 waterbody lies at the eastern boundary of the lands in question and an unplanted setback is included in the conditions of the licence. Other watercourses on the site flow northerly to the Drowse 010 waterbody which has been assigned a good status. The DAFM, in addition to addressing other matters related to water quality, recorded a No and Yes response, respectively, to the questions

Does the application and its associated operations threaten the achievement of ?good ecological status? recovery objective set for the underlining waterbody or waterbodies under the WFD River Basin Management Plan?

Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value.

In the context of the proposal as described and its location adjoining an unassigned waterbody and having regard to the Hyland Judgement, the FAC considered that it was necessary to establish that the proposal would not have an impact on the unassigned waterbody before making the decision. The FAC considered, therefore, that the responses recorded were not sufficient to address this matter in these specific circumstances and that this represented an error in the making of the decision. The FAC considers that the Minister in undertaking a new decision should establish whether the unassigned waterbody could be impacted by the proposal.

The FAC does not consider that any convincing evidence was submitted that the proposal as licenced is likely to result in significant effects on the environment and, having regard to the nature, scale and

location of the proposal, is not satisfied that a serious or significant error was made in making the decision with reference to the related grounds of appeal.

The Appellant questions the references to scrub and woody weeds. The FAC understands the terms scrub and woody weeds to be commonly employed on forestry and land management practices generally in Ireland and describe different plants, with scrub typically referring to low growing tree species such as willow (*Salix* spp.) and hazel (*Corylus avellana*) while woody weeds might describe furze/gorse (*Ulex* spp.) or bramble (*Rubus* spp.) amongst other non-tree plants. The FAC is satisfied that the proposal description and processing of the application are clear in this regard.

In relation to the *Landscape conservation for Irish bats & species specific roosting characteristics* model that underpins the bat suitability index referred to by the Appellant, this model shows that broadleaf forest as proposed has a positive impact on habitat suitability across all of the species studied. The model is based on the CORINE dataset which is not suitable for field level analysis. The proposal will retain any existing trees and hedgerows and a condition is to include a 5 metre unplanted, habitat setback. In addition, conditions require the protection of water courses on site and the imposition of a 10 or 20 metre unplanted setback across different plots. There is no convincing evidence submitted that any protected species, bat or badger, is present on the site or would be adversely impacted by the proposal. The conditions include measures in relation to otter which were not referred to in the grounds.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. As outlined in this letter, the FAC is satisfied that a serious error was made in making the decision in relation to the requirements of Article 6(3) of the EU Habitats Directive and the assessment of waterbodies. The FAC is, therefore, setting aside the decision of the Minister and remitting it for a new screening and, as appropriate, Appropriate Assessment of the proposal and an assessment of the potential for the proposed development to have an impact on the unassigned waterbody (Kinlough 010) having regard to the 'Hyland' High Court judgement previously referred to, before making a new decision in respect of the application regarding licence CN86935, in line with Article 14B of the Agricultural Appeals Act 2001, as amended.

Yours sincerely,

A large black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee