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29th January 2021

Subject: Appeal FAC184/2019, FAC185/2019, FAC186/2019 regarding licence CN80638

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

Background

Licence CN80638 for afforestation of 12.44 ha at Tullylackan More, Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 10th July 2019.

Hearing

An oral hearing of appeals FAC184/2019, FAC185/2019, FAC186/2019 was held by the FAC on 15th January 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Mr. Mary Lawlor, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

FAC184/2020 Appellant: [REDACTED]

FAC185/2020 Appellant: [REDACTED]

FAC186/2020 Appellant's Representative: [REDACTED]

Applicant's Representative: [REDACTED]

DAFM Representatives: Mr. Martin Regan, Ms. Mary Coogan, Ms. Eilish Kehoe

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other 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 regarding licence CN80638.

The licence decision pertains to 12.44 ha of afforestation at Tullylackan more, Co. Leitrim. The site is described as enclosed, agricultural land on a mineral soil with a grass rush, grass sedge vegetation type that is exposed and at an elevation of 200 to 230 metres. Planting would be of Sitka spruce, pedunculate

oak, birch and other broadleaves. Areas to the north and at the centre of the site would be retained as open space without planting as biodiversity enhancement areas and there would be unplanted setbacks from a public road, river and archaeological features. An ESB line crosses the site and an unplanted buffer would be retained around the line. Existing hedgerows and trees would be retained. Site preparation would be through mounding with no additional drainage and woody weed removal with herbicide use in years 0-3 and 250kg/ha of granulated rock phosphate employed. The original application for 13.05 ha was referred to a DAFM Archaeologist who attached specific conditions in relation to exclusions and buffers around a recorded monument, a sweathouse, and historic buildings and infields on the site. The original application was also referred to Leitrim County Council which replied that the proposed planting is situated in an area with high landscape sensitivity and low capacity to absorb afforestation. Concern was expressed regarding other planting in area and the cumulative effects of the proposal and the County Council objected to the proposal. The application was also referred to An Taisce which submitted that the proposal should proceed to Appropriate Assessment, that water setbacks were required and that the site was in a landscape sensitive area, amongst other issues raised. The DAFM undertook and documented an appropriate assessment screening, identifying Cuilcagh Anierin Uplands SAC within 3km, and screened the proposal out for Appropriate Assessment. The DAFM sought amendments to the original proposal and the submission of further landscape and species information and an area of 12.44 ha was approved on 10th July 2019 with conditions which included

- Plant as per Landscape Design Plan and Plant a minimum of 30% appropriate broadleaves in pockets and adjacent to setbacks.,
- In order to avoid clearfell in the future, manage and plan area as Continuous Cover Forest. Retain all existing broadleaves and hedgerows and plant appropriate broadleaves adjoining same,
- No conifers within 30m of public road. Adhere strictly to Archaeologist's report attached. All Bio areas to be mapped accurately at Form 2 stage.,
- Adhere to forestry & water quality guidelines,
- All guidelines to apply,

Specific Archaeological Conditions:

20m wide exclusion zone/setback required to be established from the outermost extent of the sweathouse, as illustrated. Plus fencing. 10m wide unplanted buffer zones required around the remains of the lime kiln and the farmhouse, and 5m wide unplanted buffer zone required either side of the access lane network, as illustrated. These latter unplanted archaeological buffer zones /setbacks do not require to be fenced in their own right. See attached archaeological report and accompanying illustrative map for further details.

There were three appeals against the decision. FAC184/2019 submits that the application was not made in compliance with Regulation 5(2) of the Forestry Regulations 2017 in relation to the submission of a biomap. Records provided did not contain a Biomap. Further grounds were submitted with reference to the Aarhus Convention and the provision of information to the public and the facilitation of participation in decision-making. A number of grounds are submitted in relation to State Aid Rules, including that the lands are of High Nature Value. It is submitted that the cumulative impact of the proposal has not been considered. It is submitted that the decision does not comply with Article 12(1) of the Habitats Directive

and that the area is otter habitat and that before issuing a licence an ecological report should have been required. It is submitted that there are invasive species in the area and may be present on the site and that their spread has not been considered. It is submitted that the application does not comply with the Environmental Requirements for Afforestation in relation to Water, Landscape and Biodiversity. It is submitted that there are errors on the application, including in relation to elevation and vegetation. It is submitted that the cumulative effect has not been considered regarding obligations under Article 6(3) of the Habitats Directive.

FAC185/2020 submits that the lands should not be afforested as it would damage the open nature and high nature value of the upland environment causing loss and displacement of habitats and species. It is submitted that the cumulative impacts of the afforestation is damaging and causes further loss of habitats. It is submitted that the lands are of few open lands that provide a link corridor from the habitats of the Cuilcaigh Anierin SAC to the lower hillsides for foraging by Hen Harrier. It is submitted that environmental conditions, safeguards and regulations may not have been met in the assessment and that Merlin, Otter and Dipper use the lands and stream.

FAC186/2020 contended that the application should have been referred to the NPWS in relation to Cuilcagh-Anierin Uplands SAC. It is submitted that the proposal is in close proximity to an SAC and that no appropriate assessment was carried out. The appeal questioned the EIA consideration undertaken and the consideration of cumulative effects. It is submitted that the County Council objected to the proposal and noted that the cumulative effects of the proposal must be considered. It is submitted that the land is on a steep gradient and straddles the Yellow River which is a priority action to improve water quality and that the application contravenes the EU Water Framework Directive. It is submitted that the lands are considered to be High Nature Value and rich in Biodiversity.

In a statement to the FAC, the DAFM submitted that they carried out a desk audit and field inspection of the proposal and they are satisfied that all criteria were adhered to. The FAC sought additional information from the DAFM regarding other plans and projects considered in combination with the proposal in relation to the likelihood of significant effects arising on a European site.

An oral hearing of the appeals was held and attended by Representatives of the DAFM and the Applicant, and the Appellants. The DAFM outlined their processing of the application and the assessments undertaken. They submitted that further information had been requested from the Applicant in relation to landscape design and amendments were required and that the Biomap dated 4th March 2019 was the version on which the decision was made. It was submitted that the site was field inspected and that the DAFM is satisfied with its final decision and that all procedures were adhered to. It was submitted that a consideration as to whether the proposal should undergo the EIA process was undertaken but that due to a technical issues the details were not recorded. The Appellant's submitted much of their written grounds and contended that the site was used by a number of protected species including otter, Hen Harrier and a number of bird species associated with wet grassland habitats. The EIA consideration undertaken by the DAFM was queried, in particular in relation to cumulative effects. It was submitted that the proposal would threaten the Yellow River and that the proposal is within a

Priority Area for Action and that forestry is a threat to water quality. The Applicant's Representative submitted that the Applicant had been farming the land for many years and considered planting trees to be a good option for the land. It was submitted that the proposal considered the sensitivities of the site and included setbacks and the pit planting of broadleaves on steep slopes. It was submitted that all hedgerows and mature trees would be retained and that there would be fewer inputs used in forestry than in agriculture.

The FAC considered in the first instance the information requested by the DAFM and submitted by the Applicant. While a Biomap had been provided with the application and a revised map had been requested by the DAFM, the provision of a 10 metre buffer as reflected in the Biomap was queried at the oral hearing and it was submitted that the buffer would be wider in this case. The FAC could not identify information to this effect in the maps, documentation or licence conditions provided to it, while wider buffers would be required on steep slopes in line with the Environmental Requirements for Afforestation. In addition, the FAC considers that the landscape design plan is not sufficiently detailed to provide for consideration of the proposal and effective implementation, having regard to the landscape sensitivities of the area and the responses provided by referral bodies. The FAC concluded that the DAFM should request a new design plan and Biomap that identifies where forest types are proposed to be planted and the final buffer proposed from the Yellow River, in addition to other standard mapping requirements, and ensure that it is satisfied that the application is sufficiently detailed to consider these issues before a new decision is made. This should identify the proposed planting of broadleaves on steep slopes. The current plan proposes the planting of red oak (assumed to refer to *Quercus rubra*) alongside mixed native species. While this species is listed as an acceptable species under the Forestry Standards Manual and is employed generally for amenity purposes, it is not a species native to Ireland. It is not clear whether this was included in error but, in the context of the proposal to plant mixed native species on steep slopes close to the river, the FAC considers that the use of a native oak species would be more appropriate in this instance.

The FAC did not consider that any convincing evidence was provided to it of the presence of protected species or habitat on the area under appeal. However, as noted in the DAFM Forestry and Otter Guidelines, otters are widespread throughout Ireland. The proposal area adjoins some 600 metres of river which appears to be bordered in parts by mature trees, scrub, wet grassland and hedgerow and areas of steep slopes. Based on the information before it and having regard to the Forestry and Otter Guidelines, the FAC considers that it can not be discounted that the proposal contains suitable otter habitat. In that regard, the proposal should adhere to the Forestry and Otter Guidelines. In addition to the information previously noted, the new Biomap and landscape design plan should indicate what operations are proposed within 50 metres of the watercourse to include any proposed felling or scrub removal and any planting of conifers. In light of the submitted information, the DAFM should assess whether an ecological report is required.

The FAC has no remit in relation to grants arising under DAFM Forestry schemes and can not address grounds that relate to these issues. Regarding the stated elevation of the proposal area, the FAC considered publicly available information and considers that land to the south and west of the proposal

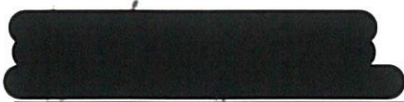
appears to fall below 200 metres. However, the FAC considered that the general location of the proposal is not in doubt and could be readily identified from the submitted maps and that a field inspection had been undertaken by the DAFM and, correspondingly, that there was no significance to this mistake. A photo of a site notice dated 31st January 2018 and a photo of a site notice in place were provided to the FAC. A number of submissions by members of the public were made on the application and the FAC does not consider that there is any reason to consider the public consultation process to have been inadequate in this case.

The FAC further considered the grounds that related to the provisions of Article 6(3) of the Habitats Directive under which 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 projects, having regard to the conservation objectives of that designated site. The DAFM identified one specific site in its screening, Cuilagh Anierin Uplands SAC (000584), and screened the proposal out for Appropriate Assessment due to its location downstream from the SAC. The SAC lies to the north of the proposal and the closest point to the boundary of the proposal is c.1.3km. The SAC covers a large area and its qualifying interests are a number of upland, primarily terrestrial habitats and one species, Slender Green Feather-moss. No evidence was provided that the DAFM undertook a satisfactory consideration of other plans and projects in-combination with the proposal in its screening. Therefore, the FAC is remitting the decision back to the Minister to undertake a new screening for Appropriate Assessment before a new decision is made.

As noted the DAFM submitted that a technical error had resulted in their consideration of the proposal for EIA not being recorded. As a result the FAC could not examine this consideration in detail and the failure to retain a record of the decision is considered to be an error. The FAC concluded that the DAFM should undertake and record a new consideration of the proposal and assess whether it should undergo the EIA process.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that a series of errors were made in making the decision regarding CN80638 and is setting aside and remitting the decision back to the Minister to address the issues outlined. This should include a request and consideration of a new Biomap and Landscape Design Plan as described, to undertake an appropriate assessment screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive and a new consideration to determine whether the application should be subject to the EIA process under the EU EIA Directive before a new decision is made.

Yours sincerely,

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

Vincent Upton On Behalf of the Forestry Appeals Committee

