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3<sup>rd</sup> August 2021

**Subject:** Appeal FAC048/2021 against licence decision CN86175

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 CN86175 for afforestation of 6.81 ha at Corrigan, Co. Tipperary was granted by the DAFM on 15<sup>th</sup> February 2021.

#### **Hearing**

A hearing of appeal FAC048/2021 was held by the FAC on 23<sup>rd</sup> July 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas, Mr. Derek Daly & Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

#### **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 allow the appeal and set aside the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN86175.

The licence decision relates to an application for afforestation of 6.81 ha at Corrigan, Co. Tipperary. The lands would be planted with 85% Sitka spruce and 15% broadleaf species. The application includes operational proposals, an afforestation plan, environmental considerations and maps. The land is crossed by a network of hedgerows which it is proposed to retain with an unplanted setback. Setbacks from dwellings and aquatic zones are also marked on the Biomap. The Biomap was revised twice following requests from the Department of Agriculture, Food and the Marine (DAFM). The area is bounded to the west and northeast by local roads and unplanted setbacks from these areas are also noted. The area is rural and agricultural with a few one off houses in the area along the public road. The N62 lies c.1.5km to the east. An electricity line crosses the site and an unplanted setback is included on the Biomap. A copy of a site notice dated 25/03/20 is on the record and a location of site notices are

marked on the Biomaps. The Application was referred to the NPWS, Tipperary County Council and An Taisce. The NPWS provided a reply submitting that the land was not within a Freshwater Pearl Mussel Catchment but a sensitive area and that the DAFM whilst undertaking an Appropriate Assessment must ensure that water quality in River Barrow and River Nore SAC and the River Nore SPA is not significantly negatively impacted. It is also submitted that setback planting should limit alder to 40% of aquatic buffers and hedgerows should be retained. The application was desk and field assessed by the DAFM.

There were four submissions from members of the public including from the Appellant. These submissions raised local environmental and residential issues and more general obligations on the Minister in their decision making.

An Appropriate Assessment Pre-screening report (dated 9th October 2020) was submitted by Applicant and prepared by an Ecologist and Forester. This report describes the site and soil conditions and habitats on site. The status of waterbodies in the area are noted as is the location within the Nore Freshwater Pearl Mussel Catchment. It describes that drains on site, if present, are dry and overgrown and do not join streams on the site. The DAFM undertook a screening for Appropriate Assessment (AA) and screened in River Barrow and River Nore SAC 002162 and the River Nore SPA 004233 to proceed to AA. An Appropriate Assessment Report and Appropriate Assessment Determination were prepared by an Ecologist that considers other plans and projects in combination with the proposal and species mitigation measures to be attached as conditions. 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 issued on 05/02/2021 with a number of conditions including those related to the adherence with

- Implement in full the mitigation measures as outlined in the attached Appropriate Assessment Determination by Jean Hamilton senior ecologist dated 12/11/2020,
- Adhere to revised bio map dated 02/12/2020,
- Dwelling Houses/Buildings Setback 60m,
- All guidelines to apply.

There is one appeal against the decision and the Notice of Appeal and full grounds were provided to all parties. The grounds submit that the proposal will block significant light to their dwelling and an important view and that they have received no feedback regarding their objection, letter sent in April 2020. They suggest that the setback should be greater in this instance as it is close to their family home. They submit that the proposal poses a risk of fire to their dwelling and that a fire had occurred 2km from their home in 2018. They query the management of large open areas in line with the Forestry Standards



Manual and how access to the lands will be managed and note its location on a public road describing it as busy and note the location of a school and pitch. The grounds question the maps provided and a number of specific features, including setbacks.

They query whether a copy of the Appropriate Assessment document had been sent to the National Parks and Wildlife service for their approval, given the concerns raised in earlier correspondence. They question the treatment of existing woodland and biodiversity on the lands and submit that the land is overgrown in parts and rich in biodiversity. The grounds submit that there is a stream which feeds into the river Nore running along the south boundary of the property which can be seen on the Ordnance Survey map and that all internal site drainage runs to this point, a photo was also submitted. The grounds submit that there is a Group Water Scheme mains running adjacent to the public road and refer to setbacks in the Forestry Standards Manual.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. The DAFM submit that the licence application was field and desk inspected on 04/06/2020 and that the required referrals to NPWS etc and the screening-in of the application for stage 2 AA was based upon their AA procedures and Guidance. It is submitted that an AA report, AA screening verification leading to an AA Determination were carried out outlining the mitigation measures required to protect the integrity of the relevant Natura 2000 sites and mitigation and guidance measures included as condition of approval. It is submitted that an in-combination/cumulative analysis was also carried out as part of the exercise by the ecological unit and any effect on Natura sites ruled out. The Biomap for the project was revised twice in order to clarify elements emphasising the setback/buffers and existing bio on site as per circular 18/2020 and all DAFM procedures and standards were adhered to in making the decision to recommend approval.

A separate statement was submitted by a DAFM Ecologist which submits that the habitats and species were assessed by an Ecologist as documented in the Appropriate Assessment pre-screening report. It is submitted that water quality will be protected through the measures proposed in the Appropriate Assessment and the licence conditions and that the planting area is, not in a flood area documented by the OPW.

In addressing the grounds of appeal, the FAC considered, in the first instance, as to the potential impacts on dwellings and adjoining land. The lands are situated in a rural area with a dwelling to the north on the opposite side of the public road. The Environmental Requirements for Afforestation (DAFM, 2016) require a minimum setback of 60 metres from dwellings or 30 metres with the written agreement of the neighbouring dweller. The Biomap submitted following revision requests by the DAFM mark a dwelling setback and adherence with the Environmental Requirements for Afforestation and Biomap and the imposition of a 60 metre setback are all conditions of the licence. The proposal further includes unplanted setbacks from the public road and broadleaf planting adjacent to the dwelling and public road setbacks. The land to the southeast of the dwelling would be let unplanted as part of the unplanted corridor around the electricity line. There are a number of existing hedgerows and mature trees which will be maintained and a 5 metre unplanted setback is required in the Appropriate Assessment



Determination. The FAC consider that the proposed design, in particular the substantial dwelling setback of 60 metres in which no trees would be planted and broadleaf planting adjoining this area, is acceptable and would not result in any major negative direct impacts on residential amenity. In relation to more general landscape considerations, the application was referred to the County Council and An Taisce and no response was received. The lands lie within the Templemore Plains as classified in the County Development Plan which are considered to be compatible with forestry. The FAC is not satisfied that the Minister has erred in this regard.

The lands surrounding the forest are agricultural pasture with a stream to the south and public roads to the north and west. The proposal provides for a setback of 60 metres from dwellings and the planting of broadleaf species and unplanted setbacks from public roads. While all landowners must be conscious of and prepared for the risk of fire, the FAC does not consider that the proposal as specified would represent a significant risk of fire in the locality and is not satisfied that an error was made on this matter.

The DAFM issued two requests for further information in relation to the maps provided with the Application which resulted in an improved Biomap being submitted. The Biomap dated 02/12/20 provides the scale and identifies a number of features including dwellings, hedgerows and aquatic zones and proposed setbacks. However, none of the Biomaps provided identify the access to the site, while a symbol is noted in the legend of the maps. This was raised in a submission on the application and in the grounds of appeal and is stated to be a mapping requirement in the Forestry Standards Manual (2015). This information would be assessed as part of the DAFM considerations and might also be of relevance members of the public as part of the consultation process. In this instance, a submission was made on the issue. The FAC is satisfied that this represents a serious error.

In relation to the suggested group water scheme, the FAC was not provided with any evidence of a mains water in the vicinity of the proposal and could not identify such in publicly available information. It is a requirement of the Forestry Standards Manual (2015) to provide a 15 metre corridor in relation to a major water mains. The FAC considers that the DAFM in processing the application should have requested details of the water mains from the individuals making submissions and/or from the local authority to clarify the matter and to decide whether an unplanted corridor was required or whether, for example, the setback from the public road would suffice.

Regarding the grounds that refer to the nature of the land, the land is described as private, enclosed, agricultural land and an assessment of the habitats was submitted with the application. The land is agricultural with a network of hedgerows that would be retained and provided with unplanted setbacks. The FAC is satisfied that the land is suitable for planting trees and does not consider that there is any convincing evidence before it that the planting might significantly impact on biodiversity in general.

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 6.81 ha, so is substantially sub threshold for mandatory EIA as set in Irish Regulations.

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 DAFM recorded a screening for Appropriate Assessment and determined that the proposal should proceed to Appropriate Assessment in relation to the River Barrow and River Nore SAC 002162 and the River Nore SPA 004233. While both European sites are noted in the Appropriate Assessment Report, there is no assessment of the significant effects or measures on the River Nore SPA. The FAC is satisfied that this represents a serious error in the making of the decision and that a new Appropriate Assessment would be required to be completed should such a proposal and screening be considered again. The grounds also queried whether the Appropriate Assessment was agreed with the NPWS. The FAC considers that the Minister and their Authorised Officers are the competent authority for afforestation licences in Ireland. Nevertheless, should a new assessment be undertaken the FAC considers that the DAFM should note Regulation 9 of the Forestry Regulations 2017 and ensure that appropriate information is provided in notices made to consultation bodies.

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, in particular in relation to questions 10, 11, 17, 18, 19 20, 28, 36 and 40. While the FAC is of the opinion that a number of these considerations would be made based on information provided by the Applicant, the DAFM, in fulfilling its obligations, should have recorded their own consideration of the matters and, if appropriate, recorded the source of the self-assessment referred to. A number of the matters are required to be considered by the DAFM, including those that relate to water, and some relate to issues raised during the application process. The FAC concluded that the *Assessment to Determine EIA Requirement* had not been recorded appropriately and that this constituted a serious error in the making of the decision.

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 number of serious errors were made in making the decision both at the application and assessment stages. The FAC is, therefore, allowing the appeal and setting aside the decision of the Minister regarding licence CN86175, in line with Article 14B of the Agricultural Appeals Act 2001, as amended.

Yours sincerely,

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

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Vincent Upton, On Behalf of the Forestry Appeals Committee