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29th June 2021

Subject: Appeals FAC542/2020 & FAC557/2020 in relation to afforestation licence CN86658

Dear [REDACTED]

I refer to the appeals 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

Afforestation licence CN86658 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 20th July 2020.

Hearing

An Oral Hearing of appeals FAC542/2020 and FAC557/2020 was held by the FAC on the 22nd April 2021.

Oral Hearing Participants:

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| FAC: | Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Pat Coman & Mr Luke Sweetman |
| Secretary to the FAC: | Mr Michael Ryan |
| Applicant's Representative: | [REDACTED] |
| DAFM representatives: | Ms Mary Coogan, Mr Momme Reibisch |

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to set aside and remit the decision to grant afforestation licence CN86658.

This licence is for the afforestation of 11.32ha and 1,580m of stock/sheep fencing in Cloonree, Roscommon. The DAFM Inspector's Certification states the soil type is predominately modified peat and peaty Podzols, the slope is predominantly flat to moderate (<15%), the existing vegetation cover is Grasses and Rushes, and road access is provided. The species to be planted are 85% Sitka spruce and 15% Additional Broadleaves (ADB). Ground preparation is to include mounding and slit planting with no additional drainage, with pit planting of broadleaves proposed. A firebreak will be created on the western boundary with existing forestry. There will be no fertiliser applied and herbicide is planned for year zero with manual vegetation cleaning also planned.

The proposal is in the Upper Shannon Catchment, the Suck_SC_010 Sub-Catchment, and the Francis_020 River Sub-Basin. The Francis_020 Waterbody currently has 'Good' status which is deemed to be 'Not at Risk' under the Environmental Protection Agency (EPA) 2013-2018 reporting period. The project area is crossed by/adjoins three drains which form relevant watercourses (RWCs), one through the northern

section and another along the southern boundary of the proposal. Another RWC forms part of the western boundary. These drains result in a hydrological connection to the Francis River, located c.210m to the west of the proposal at its nearest point.

The Inspector's Certification document states that the site area is not prone to flooding, is free of shell-marl or highly calcareous soils, is not acid sensitive or sensitive for fisheries. The proposal is within 3km upstream of an NHA, pNHA, SAC, SPA, or National Park (Drumalough SAC at 2.6km) but is not within a Freshwater Pearl Mussel Catchment or Hen Harrier SPA and does not contain or adjoin an archaeological or national monument site. The site is not within a Prime Scenic Area and there are no High Amenity Landscape considerations. The approximate percentage forestry cover in the Townland is 30.99% and 16.59% within 5km of the application area. The application, together with existing afforestation of three years or less within a 500m radius constitutes an area of 21.77 ha. The application, along with approved afforestation applications within 500m which are not yet planted amounts to 23.36ha.

The application was submitted on the 9th June 2020, along with associated maps. The DAFM did not make any referrals in this case. The DAFM completed a Stage 1 Appropriate Assessment (AA) Screening (AAS) which screened 17 European sites within 15km of the proposal and all were screened out for the following reasons:

- **Bellanagare Bog SAC, Carrowbehy/Caher Bog SAC, Cloonshanville Bog SAC, Cloonchambers Bog SAC:**
 - The position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection.
 - The unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site.
- **Bellanagare Bog SPA:**
 - The unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site.
 - Other factors, Bellanagare Bog SPA (004105) – the generic conservation objective of this designated site is: to maintain or restore the favourable conservation condition of the bird species listed as Special Conservation Interest (SCI) for this SPA Greenland White-fronted Goose (*Anser albifrons flavirostris*) [A395] (Wintering). Wintering populations of this species are traditionally known to winter on peat-land habitats, though now are more commonly recorded on wet grasslands and intensively managed agricultural fields where they feed on plant material including roots, shoots, tubers and leaves. The species is listed on Annex I of the Birds Directive and is on the Birds of Conservation Concern in Ireland Amber List as the majority of the winter population is located at less than 10 sites with the majority occurring in the Wexford slob. Bellanagare Bog SPA is not one of these 10 overwintering sites. A review of literature pertaining to the Bellanagare Bog SPA was conducted. The Natura 2000 Standard Data Form, as updated in 2017, states "in the past, the bog was used by wintering *Anser albifrons flavirostris* from the population that is centred n Lough Gara. However, the Geese now feed mainly on intensively managed grassland and seldom use the bogs in the area". The international Single Species Action Plan for the Conservation of Greenland White-fronted Goose (GWFG) (AWEA, 2012 Technical Series No.45) identifies that the Bellanagare Bog population have abandoned the SPA.
- **Callow Bog SAC:**

- The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection the subsequent lack of any hydrological connection.
- The unsuitability of the project area for use by any species listed as a Qualifying Interest of the Natura site.
- **Urlaur Lakes SAC, Kilsallagh Bog SAC, Errit Lough SAC, Drumalough Bog SAC, Derrinea Bog SAC, Corliskea/Trien/Cloonfelliv Bog SAC, Mulligollan Turlough SAC, Coolcam Turlough SAC, Croaghill Turlough SAC:**
 - The position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection.
- **Lough Gara SPA:**
 - Other factors, distance (c.13.1km) from Natura site.
- **Tullaghan Rock Bog SAC:**
 - The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection the subsequent lack of any hydrological connection.

The DAFM considered the potential for the project to contribute to an in-combination impact on European sites. Various planning websites, along with DAFM records, were consulted on the week of the 19th June 2020 for other plans and projects in the vicinity of the Francis_020 River Sub-Basin before concluding that “this project, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura site(s) listed above.”

The DAFM issued the licence on the 20th July 2020 with relatively standard conditions 1 - 12 plus condition 13: “Additional Environmental & Silvicultural Conditions:

- ADBs are to consist of Birch and Rowan
- Adhere to Forestry & Water Quality Guidelines
- Adhere to Environmental Requirements for Afforestation”

There are two appeals against the licence. The written grounds of appeal were considered in full by the FAC and are summarised below:

FAC542/2020 –

- There is a breach of Article 2(1) of the EIA Directive - The competent authority has established thresholds and screening criteria at a level and in such a manner such that, in practice, all afforestation projects are being exempted from the requirement of an impact assessment. In so doing the competent authority has exceeded the limits of discretion available to it.
- There is a breach of Article 4(4) of the EIA Directive. Details of the whole project are not given
- There is a breach of Article 4(5) of the EIA Directive. The whole details of the project have not been considered.
- The EIA screening conclusion is inadequately reasoned – no basis for decision and subsequent error in law.
- Inadequate consideration was given to potential impacts on protected species and habitats.
- Licence conditions do not provide for a system of strict protection on Annex IV species in their natural range
- Licence conditions do not provide for the protection of bird species, prohibiting deliberate destruction or damage to their nest, eggs or removal of their eggs.

FAC557/2020:

- By requesting further information the FAC has upheld the appeal.
- Incomplete decisions should be returned to the Forestry Service.
- The fact that the National Parks and Wildlife Service (NPWS) did not make an individual objection should not be relied upon.
- The decision does not comply with the provisions of the EIA, Habitats or Birds Directives.
- It is merely necessary to determine that there may be a significant effect to trigger Appropriate Assessment.
- If the proposed development is within 15km of a Natura 2000 site it is screened in for Stage 2 assessment.
- It is not appropriate to consider mitigation measures at AA screening stage.
- The assessment carried out under Article 6(3) of the Habitats Directive must not have lacunae and must contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.
- The catchment that the application is in should be stated.
- A map showing relevant SACs and SPAs should be attached.
- Details of all forestry operations in the area should be given.
- It is the duty of the FAC to carry out screening for EIA and AA.
- There is an obligation on the FAC to comply with European law and to achieve the result envisaged in the Directives.

The DAFM provided a written response to the grounds of appeal which was considered in full by the FAC and is summarised below:

FAC542/20:

Regarding Article 4(3) of the EIA Directive:

The DAFM submits that the relevant selection criteria set out in Annex III, which are referenced in 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered within the current procedures as detailed below:

1. The *Assessment of Afforestation Proposal for EIA Requirement Form* as completed by the certifying Inspector and recorded on iFORIS and the findings and conclusions therein and approved by the District Inspector with conditions 16/07/021;
2. The reasoned decision to grant the licence includes conditions with reasons prepared by the certifying Inspector informed by the documentation cited at paragraph 1 above.

The DAFM submits that the content and consideration of the documentation listed above is sufficient for the purpose of identifying –

- Which of the criteria set out in Annex III of the Directive (and Schedule 3 of the Forestry Regulations 017) were deemed relevant in this particular case and taken into account by the certifying Inspector in his considerations and,
- The reasoning by the certifying Inspector for his determination that an EIA was not required.

The DAFM undertook a Stage 1 AA of the implications of the projects for European sites. An assessment was made based on the best scientific knowledge and in view of the conservation objectives of the European site(s) in question, to determine if that plan or project, individually or in combination with other plans and projects is likely to have a significant effects on the European site(s). This assessment resulted in the production of a detailed list of existing or approved projects around the application, approved under the statutory framework and within spatial and temporal envelopes specified therein.

As regards Article 4(4):

As part of its consideration of this application pursuant to the requirements of the Birds and Habitats Directives, a detailed list of existing or approved projects around the application was available to and also taken into consideration by the certifying Inspector in the making of his determination that an EIA was not required.

As regards Article 4(5):

The DAFM submits that it complied with these requirements by assessing the information submitted by the applicant and which it considers compliant with the requirements set out in Article 4(4) and Annex IIA, while taking into account the results of the preliminary verifications or assessments of the effects on the environment carried out under Birds and Habitats Directives and the WFD.

The protection of wild birds and mammals is governed under the remit of the Wildlife Acts for which the NPWS is responsible. It is for landowners and their agents to ensure they carry out their operations within the law. The DAFM is not the regulatory agency responsible for enforcing the Wildlife Acts.

The AA screening procedure relevant at the time was applied. The proposal was screened out using the Habitat Table 18Dec19 and the Bird Foraging Table 06Jan20. In-Combination assessment was carried out. All relevant information can be found on file.

FAC557/2020:

The AAS procedure relevant at the time was applied. The proposal was screened out using the Habitats Table 18Dec19 and the Bird Foraging Table 06Jan20. In-Combination assessment was carried out. All relevant information can be found on file.

The FAC held an Oral Hearing on the 15th April 2021, of which all parties were notified. The FAC sat remotely at this hearing. The applicant's representative (AR) and the DAFM participated remotely while neither of the appellants attended. The DAFM detailed their procedures in processing the application. The DAFM stated that the application had been desk and field assessed and confirmed the in-combination report had been considered prior to the decision to grant CN86658 had been made. Responding to FAC questions about the relevance of some of the projects listed in this report dated as far back as 2015, the DAFM Forestry Inspector stated that he had not carried out an individual assessment but that the in-combination report had been completed centrally and that it includes details on existing afforestation in the area. The Inspector confirmed that the in-combination report had been considered prior to the making of the decision to grant the licence. The Inspector stated the application had been selected by iFORIS for inspection and that he had inspected the same area under a previous contract number which had subsequently been withdrawn. The AR confirmed that this previous contract belonged to the same owner but it had been withdrawn as it was under appeal and had been processed under the DAFM's old AA procedure. Responding to FAC queries, the DAFM stated that the figures for percentage Townland forest cover were automatically generated by iFORIS. The FAC queried several details of the Inspector's processing of the application which were answered satisfactorily. The FAC also queried the reason for Birch and Rowan to be specified as ADB species. The Inspector indicated that this was to encourage a range of broadleaf species being planted and to increase the biodiversity value of the proposal.

The FAC queried the reasoning for the screening-out of Bellanagare Bog SPA for Stage 2 AA. The DAFM Forestry Inspector stated that the GWFG no longer uses the site. He stated that he had received this information with MKO; the DAFM's contracted planning and environmental consultants, and checked it with the Forestry Inspectorate's Head of Ecology. He also stated the habitat within the project lands is under Rushes and that the GWFG prefers more open foraging habitat to enable a view of potential

predators. Following FAC questions, the Inspector stated he had received the information about the GWFG from MKO on the 29th November 2019 and that this was before the processing of the application but the information was on file for use in relation to the Bellanagare Bog SPA. The DAFM confirmed that this Natura site would be screened in based on the DAFM Bird Foraging Table alone. Responding to the FAC, the DAFM stated that there is a section of peat soils in the southern section of the project lands, below the relevant watercourse which runs west to east but that the ground above this watercourse rises and is mineral soil. The FAC queried if the potential Annex 1 bog habitat to the south of the proposal had been considered and the Forestry Inspector stated that this area was not on any of the DAFM's GIS layers for protected areas and that he was not an Ecologist and had not checked this area. The FAC queried the road access and if the application should have been referred to the County Council. The DAFM confirmed that referrals of afforestation applications to the County Council are generally triggered when the proposal is within an area of high landscape sensitivity and that a forest road would be dealt with at harvesting stage.

The FAC considered the submitted grounds of appeal. The FAC noted that a number of grounds are related to the obligations and functioning of the FAC and are not grounds related to the decision of the DAFM to grant afforestation licence CN86658. The FAC noted that referral to the NPWS is referenced by the second appellant but that the DAFM did not refer the application to any Statutory Bodies in this case.

The FAC considered the grounds common to both appeals related to the EIA Directive. The first appellant submitted a ground of appeal related to the thresholds and screening criteria established by the Competent Authority to trigger EIA. The FAC considers that this is a matter of Government policy. The FAC noted that the proposal was assessed by the DAFM to determine the requirement for EIA using the criteria set-out in the Inspector's Certification document before the FAC. The DAFM considered the nature and scale of the proposal and recorded, *inter alia*, that the application site is not prone to flooding, is free of shell-marl or highly calcareous soils, and is not sensitive for fisheries or in an area designated as potentially acid sensitive. The application site is not within (but is within 3km upstream of) a pNHA, NHA, SAC or SPA and not in a National Park, is not within a Freshwater Pearl Mussel 6km zone, is not within a Hen Harrier SPA and does not contain or adjoin a listed archaeological site or monument. The DAFM confirmed that the proposal is not within a Prime Scenic Area or an area with other High Amenity Landscape considerations. The DAFM considered the amount of afforestation within 500m of the application in the last three years, and currently approved, and the percentage forest cover in the underlying Waterbody. The proposal, for 11.32ha of afforestation, is considerably sub-threshold for mandatory EIA under Irish Regulations where the threshold for such mandatory assessment is set at 50ha. Having considered the written evidence submitted by the DAFM and further submissions at the oral hearing, and having regard to the nature and scale of the proposal, and the screening procedures followed by the DAFM before concluding that an EIA is not required in this case, the FAC is satisfied that the DAFM had adequate information before it to enable a preliminary screening for EIA and concurs with the DAFM's conclusion in the particular circumstances of this case.

The FAC considered the second appellant's submissions related to the Habitats Directive. The FAC considers that European sites should only undergo AA as a result of a Stage 1 Screening procedure and does not consider that the location of a European site within 15km of a proposed development necessitates that site being screened-in for Stage 2 AA. The FAC noted that the DAFM completed a Stage 1 AAS which screened 17 European sites within 15km of the proposal and all were screened out with reasons given. The FAC gave particular consideration to the DAFM's reasons for screening out the Bellanagare Bog SPA. The FAC noted that this site had been screened out for two reasons – firstly, due to the unsuitability of the project area for use by the GWFG. The DAFM stated at the Oral Hearing that

the presence of Rushes on the application site made this habitat sub-optimal for use by the GWFG, which prefers more open feeding grounds, such as intensively managed grassland, due to the increased risk of predation arising from the cover provided by Rushes. The DAFM's second reason for screening out this European site is based on information obtained following a review of literature pertaining to the Bellanagare Bog SPA. The DAFM screen-out conclusion states the bog was used, in the past, by wintering *Anser albifrons flavirostris* from the population that is centred in Lough Gara but that the Geese now feed mainly on intensively managed grassland. Subsequent to the Oral Hearing, the FAC wrote to the NPWS and requested their response to the DAFM's reasons for screening out Bellanagare Bog SPA. The FAC specifically requested the NPWS's opinion on the possibility of the proposed development giving rise to a significant effect on the SCI of this SPA. Following an initial reply, the FAC responded to the NPWS, supplying a copy of afforestation licence CN86658 and reiterated a request for the NPWS's response as to whether the DAFM's reason for screening out Bellanagare Bog SPA is accepted or contested by the NPWS, and that any explanations might be provided. The NPWS replied to the FAC but the specific question posed by the FAC was not responded to. The FAC reviewed the information available on the NPWS website relating to Bellanagare Bog SPA. The sole SCI listed for this is the "Greenland White-fronted Goose (*Anser albifrons flavirostris*) [A395]". The Site Synopsis Form, dated 24th April 2012, states that "at the time this site was designated as an SPA it was known to be utilised by part of an internationally important GWFG population. The geese appear to have since abandoned the peatland sites in favour of grassland sites elsewhere. GWFG is regarded as a special conservation interest for this SPA. In the past, the bog was used by wintering GWFG from the internationally important population that is centred on Lough Gara. However, the geese now feed mainly on intensively managed grassland and have not been recorded at the site in recent years." The FAC noted that, while indicating that the Natura site has not been frequented by the GWFG in recent years, the NPWS information also states that the species is still regarded as an SCI of the Bellanagare Bog SPA and that the SPA's Conservation Objective is to maintain or restore the favourable conservation condition of the GWFG. The FAC is conscious that, although the Grass/Rush vegetation present within the project area could now be considered sub-optimal for the GWFG, the possibility of this habitat being utilised by the species still exists. Furthermore, the FAC noted that the proposal is c.3.5 km from the Bellanagare Bog SPA and well within the 8km foraging range for the GWFG. In these circumstances, and with regard to the precautionary principle, the FAC considered that it can not be concluded, at Stage 1 AA Screening stage, that there is no possibility of the proposed development having a significant effect on the Bellanagare Bog SPA, in view of its Conservation Objectives, and that the DAFM erred in screening out this SPA for Stage 2 AA.

Regarding the Birds Directive, the second appellant did not specify which element(s) of the Birds Directive he contends the decision to grant afforestation licence CN86658 does not comply with. The first appellant submitted grounds related to Article 5 of the Birds Directive and also to the protection of species listed in Annex IV of the Habitats Directive but did not substantiate these grounds with site-specific details. There is no evidence before the FAC in respect of the existence of bird or animal species likely to be affected by the proposed development. In these circumstances, the FAC concludes there is no related reason on which to affect the decision.

Based on the information before it, as outlined above, and with regard to the precautionary principle, the FAC concluded that the DAFM made a significant error by screening out the Bellanagare Bog SPA for Stage 2 AA. The FAC decided to set aside and remit the decision of the Minister in order for the DAFM to complete a Stage 2 AA of the proposed development's potential to give rise to a significant effect on the Bellanagare Bog SPA before making a new decision in respect of this licence application.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on behalf of the Forestry Appeals Committee