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23<sup>rd</sup> July 2021

**Subject:** Appeal FAC863/2020 & 866/2020 in relation to afforestation licence CN86198

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 CN86198 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 27<sup>th</sup> November 2020.

#### **Hearing**

A hearing of appeals FAC863/2020 and 866/2020 was held by the FAC on the 13<sup>th</sup> July 2021:

**FAC Members** - Mr Des Johnson (Chairperson), Mr Seamus Neely & Mr Luke Sweetman

**FAC Secretary** - Mr Michael Ryan

#### **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, and all other submissions, before deciding to set aside and remit the decision to grant afforestation licence CN86198.

This licence is for the afforestation of 35.71ha and erection of 4000m of fencing in Carrow, Co. Tipperary. The soils underlying the site are Acid Brown Earths and Brown Podzolics. The project area is primarily improved agricultural grassland with hedgerows present. The land is steeper in the northern section and the overall site falls c.90m from north to south. The proposal is in two plots; Plot 1 is 17.49ha and Plot 2 is 18.22ha and both are GPC3 – Sitka spruce (85%), ADB (15%). Ground preparation will be mounding. Drainage and firebreaks are required. An application of 250kg/ha of Ground Rock Phosphate is proposed along with herbicide weed control in years 1 – 3. Road access is provided and there are housing setbacks in the south of Plot 1. The Inspector's Certification document states that the site is free of shell marl or highly calcareous soils, not prone to flooding, not acid sensitive or sensitive for fisheries, does not contain or adjoin an Archaeological or National Monument site, and is not within a Prime Scenic Area or High Amenity Landscape Area. The proposal is not within, but is within 3km of, a pNHA/NHA/Natura site or National Park. The applicant's Forester submitted that the area is greater than 10ha and within a catchment area of a Local Authority designated water scheme, but the Inspector's Certification states this is not the case.

There are no natural watercourses present on-site, but a tributary stream of the Aughnaglanny River occurs within 50m of the southern tip of the southern plot. There are old drainage channels within the site. Most of these are shallow and discharge into the western boundary ditch. There is a large drain located to the south of Plot 2, described as having a "slow, shallow water flow", which is a Relevant Watercourse (RWC) that flows into another tributary of the Aughnaglanny River. The proposal is within the Suir Catchment, the Multeen[East]\_SC\_010 Sub-Catchment, and the Multeen (East)\_030 River Sub-Basin. The Multeen (East)\_030 Waterbody was assigned 'Moderate' status and deemed to be 'At Risk' under the Environmental Protection Agency (EPA) 2013-2018 reporting period. The significant pressures on this Waterbody are listed as forestry and agriculture. The Inspector's Certification states the approximate percentage forestry cover in the Townland is 32.56% with 13.26% in the underlying Waterbody and 26.42% within 5km of the proposal at present. The application, together with new afforestation of three years or less within 500m is 45.18ha. The application together with other applications within 500m and approved but not yet planted is 35.71ha.

The applicant submitted a Natura Impact Statement (NIS) with their application which was unsolicited by the DAFM. The NIS (dated 28<sup>th</sup> May 2020) was compiled by Kerry Ecological Services and the

applicant's Forester. It includes a project description and contains an Appropriate Assessment Screening (AAS) which screened five European sites. Four of these were screened out for the following reasons:

- **Anglesey Road SAC, Philipston Marsh SAC, Lower River Shannon SAC:**
  - Due to the nature of works (localised impacts only), distance, and no hydrological connection.
- **Slievefelim to Silvermines Mountains SPA:**
  - Due to separation distance (8.7km, Hen Harrier core foraging range is 4km) and lack of suitable nesting foraging habitat for Hen Harrier within the project area.

The **Lower River Suir SAC** was screened in due to a distance of 2.3km from the proposal and a hydrological connection via "potential outflow off-site into a stream within 50m of the southern tip of the site. This flows east into the Aughnaglanny River (SAC) c. 3km downstream. Therefore, there is potential for impacts on aquatic dependant QI habitats and species downstream."

The NIS describes potential impacts and proposed mitigations including aquatic buffers, silt/sediment/pollutant prevention measures, appropriate drainage design and ground preparation, and adherence to relevant guidelines, standards and practices.

The NIS includes Section 8: In-Combination Effects which reviewed Tipperary County Council plans and also completed a "review of aerial photography in the vicinity of the proposed forestry works". This section states that these data indicate the presence of low-density dwelling houses and agricultural buildings in a rural environment of predominantly agricultural grassland fields, with commercial forestry (mostly conifers) and some wet grassland and heath habitats. The NIS states that "in the direct vicinity of the proposed afforestation, conifer woodland is present to the north, south and east. However, in the context of the greater locality, the level of conifer woodland present would be below that found in many other similar rural environments". This section concludes that "with appropriate working practices and mitigation measures, it is considered that this current project is expected to have little impact on the Lower River Suir SAC and any other Natura 2000 site. Any future development will be subject to the Appropriate Assessment (AA) process and, therefore, cumulative or in-combination impacts are unlikely to ensue".

In processing the application, the DAFM completed an AAS, contained within the final Inspector's Certification document which screened out all of the following sites for the same reason:

- **Anglesey Road SAC, Lower River Shannon SAC, Lower River Suir SAC Philipston Marsh SAC, Slievefelim to Silvermines Mountains SPA:**



- “Other factors, As per AAD by Jean Hamilton Ecologist 21/09/2020.”

An AA Screening Report & Determination (AASRD), dated 18<sup>th</sup> September 2020, was completed on behalf of the DAFM by Jean Hamilton, Senior Ecologist with Fehily Timoney & Co. The AASRD screens the same five sites as the NIS and the Inspector’s Certification with four screened out for the following reasons:

- **Anglesey Road SAC, Lower River Shannon SAC, Philipston Marsh SAC:**
  - Due to their distance from project (from 6 - 8km), their location in a separate waterbody catchment, and subsequent lack of hydrological connection.
- **Slievefelim to Silvermines Mountains SPA:**
  - Distance (8km) resulting in no impacts on the Hen Harrier.

The **Lower River Suir SAC** was screened in because “direct hydrological connectivity exists between the project area and this European site. There is a RWC within the site and a natural watercourse approx. 50m to the south which both drain into the European site approx. 3km downstream of the project area.” The AASRD also considered the potential for the project to contribute to an in-combination impact on European sites. Various planning websites were consulted along with the DAFM’s internal records for other plans and projects, focusing on the general vicinity of the project area in the Multeen (East)\_030 River Sub-Basin. The AASRD In-Combination Statement states that at 35.71ha the project is considered large in scale and that the percentage forest cover in the Multeen (East)\_030 is 21%, above the national average of 11%. The AASRD concludes that the proposed development, when considered in combination with other forestry and non-forestry plans and projects, “will not give rise to the possibility of an effect on the Natura site(s) listed above.”

An AA Determination (AAD) was produced by Fehily Timoney & Co., dated 21<sup>st</sup> September 2020. The AAD states that the applicant submitted the NIS, without being requested to do so, to facilitate the Minister carrying out AA. Fehily Timoney & Co., acting on behalf of the DAFM, evaluated the NIS. The AAD states “it is considered the NIS contains a fair and reasonable examination, evaluation and analysis of the likely significant effects of the activity on the environment, in particular the Lower River Suir SAC, and adequately and accurately identifies describes and assesses those effects except in relation to the following point:

- Section 4.3 states that silt traps will be used as a mitigation measure but does not specify where these will be installed. It is recommended that silt traps will be located 10-15m from the receiving watercourse.”

The AAD prescribes mitigation measures including; RWC setbacks, silt trap locations and specifications as per the Standards for Felling and Reforestation (DAFM, 2019), visual monitoring of silt traps/watercourses, retention of hedgerows, adherence to Environmental Requirements for Afforestation (DAFM, 2016) and Forestry Standards Manual (DAFM, 2015).

The AAD states the basis for its determination is:

- Measures to prevent impacts on water quality will ensure works will not adversely impact the integrity of the Lower River Suir SAC and its aquatic Qualifying Interests (QIs) and supporting habitats/species of terrestrial QIs.
- The NIS in-combination assessment was supplemented using DAFM's internal systems. The prescribed measures mean the project will not represent a source and as such there is no potential for the project to contribute to any effects when considered in combination with other plans and projects. Furthermore, it is considered that the regulatory systems in place for the approval, operations (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not cause environmental pollution or give rise to direct or indirect effects on the integrity of any Natura 2000 sites in view of those sites' Conservation Objectives. Therefore, the DAFM deems that CN86198, when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura sites listed above.
- The AAD concludes that based on objective information, no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The DAFM referred the application to the National Parks & Wildlife Service (NPWS), Shannon Region Fisheries Board and Tipperary South County Council. Only the NPWS responded, they stated they had no objection but attached an appendix with general points of relevance. The DAFM issued CN86198 on the 27<sup>th</sup> November 2020 with relatively standard conditions plus condition five which requires the following:

- Implement all mitigation measures as outlined in the AAD by Jean Hamilton dated 21/09/2020.
- Adhere to forestry & landscape guidelines.
- Adhere to forestry & water quality guidelines.

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

**FAC863/2020 –**



- If this afforestation is permitted my home will be enclosed in a forest.
- The evaluation of this project must comply with EU law – the EIA and Habitats Directives.
- Both Directives require that the assessment includes cumulative effects with other existing and/or approved projects.
- Both Directives require screening for AA/EIA.
- The assessment by Fehily Timoney does not take account of the watercourse on the W side of LPIS parcel 187.
- We reserve the right to submit further information for this appeal

**FAC866/2020:**

- If this afforestation is permitted my home will be enclosed in a forest
- The evaluation of this project must comply with EU law – the EIA and Habitats Directives.
- Both Directives require that the assessment includes cumulative effects with other existing and/or approved projects.
- Both Directives require screening for AA/EIA.

The DAFM provided a response to both sets of grounds of appeal, summarised below:

The licence application was field, and desk inspected. The referrals and AAS were based upon Forest Service AA procedures and guidance. An AAD was completed, outlining the mitigation measures required to protect the integrity of the relevant European sites and included as a condition of approval. An in-combination analysis was also carried out by the ecological unit and any effect on European sites ruled out. An updated Bio map as per Circular 18, 2020 was requested to document the setbacks from dwellings and buildings, water courses and mitigation to be employed in addition to the AAD measures. All DAFM procedures and standards were adhered to in making the decision to recommend approval.

The FAC held a Hearing on the 13<sup>th</sup> July 2021 to consider appeals FAC863/2020 and FAC866/2020. The FAC considered, in the first instance, the submission by both appellants that their homes would be “enclosed in a forest” if the project proceeded. The evidence before the FAC does not contain any maps, or other document from either appellant to substantiate these claims. The FAC noted that the southern portion of Plot 1 contains utilised building setbacks in line with DAFM requirements. Based on the information before it, the FAC found no convincing evidence to support the appellants’ claims in this regard.

The FAC considered the first appellant's submission that the assessment by Fehily Timoney does not take account of the watercourse on the western side of LPIS parcel 187 (Plot 1). The appellant did not provide a map delineating the watercourse which is being referred to. The FAC noted that the licence conditions require the licensee to "implement all mitigation measures as outlined in the AAD". The FAC noted there is only one RWC (*relevant* watercourse) specifically referenced by the AAD's mitigation measures, the "large drain in the middle of the site." The FAC noted that the AASRD also references "old drainage channels within the site, most of which are shallow and drain into the western boundary ditch but that these are not considered RWCs.

The FAC considered the submissions by both appellants regarding the EIA Directive and the Habitats Directive, specifically that both Directives require an assessment of the cumulative effects of the proposal with other existing and/or approved projects. The FAC noted that the questions answered in the Inspector's Certification form the basis of the DAFM's EIA screening. The Inspector's Certification contains an approximation of the percentage forestry cover in the Townland as 32.56% with 13.26% in the underlying Waterbody (Multeen (East)\_030). However, the AASRD's In-Combination report states the Multeen (East)\_030 River Sub-Basin has 21% forest cover, above the national average of 11%.

The Inspector's Certification states that the application, together with new afforestation of three years or less within 500m is 45.18ha and the application together with other applications within 500m and approved but not yet planted is 35.71ha. In considering the grounds of appeal, the FAC reviewed publicly available information on the DAFM's Forestry Licence Viewer (FLV). The FLV shows a completed afforestation project, CN80573 (40.69ha), located c.520m to the north-east of the proposed development. CN80573 is included in the In-Combination report in the list of afforestation projects. However, the Inspector's Certification document does not appear to consider this relatively large project because it is not within 500m of the proposed development. The FAC recognises that the consideration of other existing or approved afforestation projects in the Inspector's Certification is usually limited to 500m, but given the particular circumstances of this case, the FAC considers that the large afforestation project at c.520m should have been considered by the DAFM. In these circumstances, the FAC considered this to be a significant error on the DAFM's behalf.

In the particular circumstances of this case, given the nature and scale of the proposed development (85% Sitka spruce and 15% ADB), the amount of existing forestry in the area (and the conflicting information surrounding the percentage forest cover listed in the In-Combination report and the Inspector's Certification), and considering that forestry is listed as a significant pressure on the current 'Moderate' and 'At Risk' status of the Multeen (East)\_030, the FAC considered that the DAFM's EIA



screening was not adequate as to determine the potential cumulative effect of the proposal on the environment. Additionally, the FAC considered the lack of clarity in relation to the percentage of existing forest cover in the vicinity of the River Sub-Basin between the Inspector's Certification and the In-Combination report to be a significant error.

Based on the evidence before it, in the circumstances outlined above, the FAC considers that the DAFM made significant errors in their assessment of the proposed development's potential to contribute to a cumulative effect on the environment and also to contribute to an in-combination effect on the Natura 2000 networks of designated sites. The FAC is not satisfied that the DAFM's EIA screening process was adequate in this instance and decided that the licence should be set aside and remitted to the Minister in order for the DAFM to conduct an EIA screening and, if appropriate, to request an EIA Report to facilitate the DAFM to carry out EIA, if necessary. In addition to this, the FAC concluded that the In-Combination report completed by the DAFM was not adequate to determine the potential for the proposal to contribute to an in-combination effect on European sites. In these circumstances, the FAC decided that the DAFM should reassess the proposal in accordance with Article 6(3) of the Habitats Directive, before coming to a new decision in relation to the proposed development.

Yours sincerely,

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

Luke Sweetman on behalf of the Forestry Appeals Committee