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31<sup>st</sup> May 2021

**Subject:** Appeals FAC554/2020 in relation to afforestation licence CN84079

Dear [REDACTED]

I refer to your 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

Afforestation licence CN84079 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 27<sup>th</sup> July 2020.

#### Hearing

An oral hearing of the appeal listed above was held by the FAC on the 15<sup>th</sup> April 2021.

#### Oral Hearing Participants:

<b>FAC:</b>	Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Pat Coman & Mr Luke Sweetman
<b>Secretary to the FAC:</b>	Mr Michael Ryan
<b>Applicant's Representative:</b>	[REDACTED]
<b>DAFM representatives:</b>	Ms Mary Coogan, Mr Donal Keegan, Ms Katharine Duff

#### 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 affirm the decision to grant afforestation licence CN84079.

This licence is for the afforestation of 7.23ha and 1,015m of sheep fencing in Ballintava, Co. Galway. 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 grass, and access is provided. The species to be planted are 85% Sitka spruce and 15% Additional Broadleaves. Ground preparation is to include woody weed removal and mounding with slit planting proposed. There will be no additional drainage or firebreaks created. Fertiliser application of 250 kg/ha of Ground Rock Phosphate and manual vegetation control plus herbicide applications in year zero are planned. The proposal is in the 30 Corrib Catchment, the Sinking\_SC\_010 Sub-Catchment, and the Sinking\_020 River Sub-Basin. The Sinking\_020 Waterbody currently has 'Good' status which is deemed to be 'At Risk' under the Environmental Protection Agency (EPA) 2013-2018 reporting period. The nearest EPA-mapped

watercourse is c.400m to the north-west and the Bio Map shows an existing drain is a relevant watercourse (RWC) along the proposal's western boundary.

The Inspector's Certification document states that the site area is not prone to flooding, is free of shell-marl or highly calcareous soils and is not acid sensitive. The proposal is within 3km upstream of an NHA, pNHA, SAC, SPA, or National Park 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 as per the County Development Plan and there are no High Amenity Landscape considerations. The approximate percentage forestry cover in the Townland is 0% and 12% within 5km of the application area.

The application was submitted on the 23<sup>rd</sup> May 2019, along with associated maps, and was referred to An Taisce and Galway County Council with no response from either body. The DAFM completed an initial Stage 1 Appropriate Assessment (AA) screening which screened all 10 European sites within 15km of the proposal in for Stage 2 AA due to "insufficient and/or conflicting information that prevents a sound judgement being reached as to whether or not the possibility of a significant effect arises". An AA Report (AAR) was prepared by external consultants. The AAR contained a review of the District Inspector's AA screening conclusions and screened out the following European sites: **Coolcam Turlough SAC, Corliskea/Trien/Cloonfellov Bog SAC, Croaghill Turlough SAC, Derrinlough (Cloonkeenleananode) Bog SAC, Kilsallagh Bog SAC, Levally Lough SAC, Lisnageeragh Bog and Ballinastack Turlough SAC, Lough Lurgeen Bog/Glenamaddy Turlough SAC, Williamstown Turloughs SAC.** The reasons for screening out included; the location of the European sites upstream from the proposal and the subsequent lack of a source-receptor pathway, the terrestrial nature of certain Qualifying Interests, the distance between the proposal and the European sites, and the location of the proposal in a separate WFD Sub-Catchment to the European sites. The AAR screened in the following European sites:

- **Lough Corrib SAC:**
  - Due to the potential hydrological connectivity between the proposal and the SAC, via drainage ditches, and tributary streams of the Sinking River. Also due to the potential for deterioration in water quality as a result of sedimentation and hydrocarbon pollution during forestry activities and the potential for indirect impacts in the form of disturbance to the Otter.
- **Lough Corrib SPA:**
  - Due to the potential hydrological connectivity between the proposal and the SPA, via drainage ditches and watercourses. On an extremely cautious basis, there may be potential for deterioration in water quality as a result of sedimentation and hydrocarbon pollution during "construction activities."

The AAR describes site-specific measures to mitigate potential adverse impacts of the proposed development on the screened-in European sites. The AAR also considers the potential for the project to contribute to an in-combination impact on European sites. Various planning websites were consulted along with DAFM records for other plans and projects in the vicinity of the project's Townland (Shrule) before concluding 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 a significant effect on any Natura site."

The DAFM produced an AA Determination (AAD) document which lists the same screened-out European sites as the AAR but also screens out Lough Corrib SPA stating "on further consideration, given the hydrological distance from the application site, no significant adverse impact is likely, therefore it is



screened out for AA.” The AAD states that, in undertaking the AA of the likely significant effects of the activity on European sites, the DAFM considered the following documentation:

- The initial application, one submission from a 3<sup>rd</sup> Party, and the AAR which was reviewed by a DAFM Ecologist.
- Further clarification was sought from the applicant’s Forester regarding soil and drains/RWCs on the site. The Forester confirmed that the soil is reclaimed peat that has been improved for agriculture over a long time and is more mineral than peaty in nature. The RWC along the western boundary is well vegetated with no flow at the time of survey. The internal field boundaries are dry ditches. Further information and maps were received from the applicant on 13<sup>th</sup> July 2020 clarifying the soil type and classifying the ditches.

The AAD states that it is considered that the activity, if managed, operated and controlled in accordance with specific conditions to be attached to the licence will ensure protection of the environment, in particular preservation of water quality and will ensure that there will be no adverse effect on European sites. The AAD includes an annotated map of the drains on-site and lists the mitigation measures which include water and habitat setbacks, adherence to the Environmental Requirements for Afforestation (DAFM, 2016), the banning of the cleaning of existing drains, and the requirement to submit a revised Bio Map at Form 2 stage showing all RWCs, setbacks and other mitigations applied.

The basis for the AAD is stated to be:

- The location of the project outside of any European site.
- The implementation of specified mitigation measures related to protecting water quality.
- The lack of suitable habitat for the Otter on-site. There will be no disturbance to the boundary drains and one small tree line along the western boundary – no other specific mitigation measures for the Otter are required.
- The completion of works in accordance with the Environmental Requirements for Afforestation (DAFM, 2016), the Forestry Standards Manual (DAFM, 2015), and Forestry and Otters Guidelines (DAFM, 2009).

The AAD concludes that based on objective information, no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

The DAFM issued the licence on the 27<sup>th</sup> July 2020 with relatively standard conditions 1 - 12 plus an additional condition stating “adhere to the conditions in the attached AAD dated 16<sup>th</sup> July 2020”.

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

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- By requesting further information from DAFM, the FAC has upheld the appeal. Incomplete decisions should be returned to the Forestry Service.
- There is a duty on the FAC to carry out a full screening under the Habitats and EIA Directives.
- There is an obligation on the FAC, as a public authority, to comply with all European Directives.
- Details of all forestry operations in the area should be listed to see if the cumulative forestry exceeds 50ha. Also necessary to give total km’s of forest roads in the area and show that no roads that are not included in the application will be needed to carry out this development – including thinning and clearfell.
- The catchment the proposed development is in should be stated.



- The decision does not comply with the Habitats, Birds and EIA Directives or the basic guidelines of the NPWS.
- If the development is within 15km of a Natura site it has been screened in.
- There is no need to establish a significant effect to trigger AA - it is merely necessary to determine that there may be a significant effect (*Kelly v An Bord Pleanála*).
- It is not appropriate at screening stage to take account of measures intended to avoid or reduce the harmful effects on a European site.
- The assessment carried out in accordance with the provisions of the Habitats Directive must not have lacunae and must be capable of dispensing with all reasonable scientific doubt as to the effects on a Natura 2000 site.
- No reliance should be placed on the fact that the NPWS did not make an individual objection.
- A map showing all relevant SACs and SPAs should be submitted.

The DAFM provided a written response to the grounds of appeal in the form of a Statement of Fact to the FAC, summarised below:

The site was identified as a site where normal mitigation might be sufficient to offset any effects on downstream Natura sites and was field inspected on that basis by external consultants, MKO, on 24<sup>th</sup> October 2019 accompanied by the Registered Forester, as a test site for revised AA *Procedure - AA Guidance note and IFORIS S.O.P. for DAFM Forestry Inspectors*. The file was then desk assessed and screened in for stage 2 AA and referred to ecology for AA/Natura Impact Statement on the 2<sup>nd</sup> December 2019 as per revised AA procedure. Notes on file: *"Approval recommended and questions answered on basis of forester's information as supplied. Mineral site but drains to Lough Corrib c. 5km away. Mounding and fertiliser required, main drain well vegetated, normal setbacks as per Procedures. AA determination required."*

The District Inspector was contacted by a Forest Service Ecologist to discuss the proposed plantation, the MKO AAR, and the site. There was an apparent lack of clarity as to the extent of peat soil on part of the site, and the nature of existing field drains. The Registered Forester was contacted and revisited the site, and provided detailed maps and photographs and a basic soil survey, by email, on 13<sup>th</sup> July 2020.

The Forest Service Ecologist made an AAD on the 16<sup>th</sup> July 2020, concluding that *"DAFM has determined that the project will not adversely affect the integrity of any European site"*. On this basis approval was recommended on the 21<sup>st</sup> July 2020.

The FAC held an Oral Hearing on the 15<sup>th</sup> 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 the appellant did not participate. The DAFM detailed their procedures in processing the application and stated that this application had been used to guide the development of their current AA procedures. The DAFM confirmed the in-combination report formed part of the AAR prepared by MKO and that it had been considered prior to making the decision to issue CN84079. Responding to FAC questions, the DAFM confirmed that the licence conditions require the licensee to adhere to the mitigation measures prescribed by the AAD and that the proposal is not within a Prime Scenic Area as per the County Development Plan. The FAC queried the screening of Lough Corrib SAC and SPA and the DAFM stated that the SAC is c.2km from the proposal and there is no hydrological connection by EPA watercourses but there are a series of drains on-site. They stated that following the receipt of the further information provided by the Registered Forester, relating to the nature of these drains, they were able to make their decision to screen out. Regarding Lough Corrib SPA, the DAFM stated that the proposal is 33km from this Natura site and 75km by hydrological distance. They stated that due to the separation distance and the fact that the project lands did not contain suitable habitat for the Special Conservation Interests of the SPA, which are mainly aquatic species, the SPA was screened out for Stage 2 AA. Responding to FAC



queries the AR confirmed that the site is accessed via a track that runs from the sheds to the east of the proposal. He stated that a turning area may need to be put in but that logs could be forwarded to the yard where there is an existing turning area. The AR confirmed that he had visited the site in July but also around January or February to accompany the external consultants on their site visit and the same state of affairs applied to the drains on-site on both occasions.

The FAC considered the 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 CN84079.

The FAC considered the contention that the decision does not comply with the Habitats, Birds and EIA Directives or the basic guidelines of the NPWS. The FAC noted that this application was not referred to the NPWS. Regarding the EIA Directive, 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, 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 7.23ha 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.

In regard to the appellant's submission related to the Habitats Directive, the FAC considered the AA procedures adopted by the DAFM in processing this licence application. Following an initial AA Screening, an AAR was compiled by an external ecological consultant who screened the European sites within 15km, along with the Lough Corrib SPA (at a distance of c.33km). This resulted in two European sites being screened in for Stage 2 AA and site-specific mitigation measures being prescribed. The AAR also considered the proposal's potential to contribute to an in-combination impact on European sites along with other plans and projects. The DAFM Ecologist considered the AAR, amongst other information, before concluding that mitigation measures were required to be attached to the licence in order to prevent the likelihood of the proposal from having a significant effect on the Lough Corrib SAC. The DAFM concluded that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site. The FAC noted that the licence conditions of CN84079 require the licensee to adhere to the conditions listed in the AAD. Based on the evidence before it, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in the AA procedures applied and considers the DAFM's approach to be in line with the requirements of the Habitats Directive. The FAC considers the overall conclusion reached by the DAFM on this issue to be sound. Regarding the appellant's other grounds of appeal related to AA, 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 as contended by the appellant. The FAC noted that the AAR and the AAD list the European sites (including site codes) which were screened for AA and does not consider it a necessary requirement that these sites be shown on a map as contended by the appellant. Based on the evidence before it, the FAC does not consider that the DAFM took into account, at screening stage, measures intended to avoid or reduce the harmful effects on a European site. Based on the evidence before it, and in the particular circumstances of this case, the FAC is satisfied that the AA completed by the DAFM does not contain *lacunae*. The FAC is satisfied that no reasonable scientific doubt remains as to the absence of any significant effect on the screened European sites.

Regarding the Birds Directive, the appellant did not specify which element(s) of the Birds Directive they contend the decision to grant afforestation licence CN84079 does not comply with. There is no evidence before the FAC in respect of the existence of wild birds 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, the FAC is satisfied that the DAFM did not make a serious or significant error, or series of errors, in deciding to issue CN84079 and did so in compliance with fair procedures. In deciding to affirm the decision of the Minister, the FAC considered that the proposed development is in line with Government policy and good forestry practice.

Yours sincerely,

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

Luke Sweetman on behalf of the Forestry Appeals Committee