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18 June 2021

Subject: Appeal FAC 690/2020, 713/2020, 714/2020 and 734/2020 regarding licence CN81543

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 14A (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 CN81543 for afforestation of 32.47ha, in Corran, Co Kerry was approved by the Department of Agriculture, Food and the Marine (DAFM) on 26 August 2020.

Hearing

An oral hearing of appeal FAC 690/2020, 713/2020, 714/2020 and 734/2020 of which all parties were notified, was held by a division of the FAC on 9 March 2021.

In attendance

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| FAC Members: | Des Johnson (Chairperson), John Evans, Luke Sweetman and Dan Molloy |
| Secretary to the FAC: | Michael Ryan |
| Appellants: | [REDACTED] [REDACTED] |
| Applicant: | [REDACTED] |
| DAFM Representatives: | Mary Coogan and Eugene Curran |

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to vary the decision to grant this licence (Reference CN 81543).

The proposal is for afforestation on a stated site area of 32.47ha at Corran, Co. Kerry. Fencing of 4350m (Stock) is also proposed. The site is in 8 plots (largest is 22.99ha) and the proposal is for 27.58ha Sitka Spruce (85%) and 4.89ha Broadleaves (15%). Soils are stated to be mineral peat and the aspect is

south. The site is stated to be moderately exposed and vegetation cover is grass, grass/rush, sedge rush, bracken, Molinia, and furze. Woody weed removal is proposed, ground preparation would involve mounding, and trees would be slit planted. It is stated that drainage and firebreaks would be required, together with herbicide control in years 0-3. Ground Rock Phosphate (GRP) at a rate of 250kg/ha would be applied. The site is not acid sensitive and not within a Natural Heritage Area (NHA), not within a Hen Harrier SPA or a Freshwater Pearl Mussel catchment, and not within a Prime Scenic Area as per the County Development Plan.

DAFM carried out a screening for Appropriate Assessment, noting that the site is within the Caragh catchment. The screening concluded that there is the possibility of a significant effect on a Natura 2000 site due to direct hydrological connectivity, and having regard to the nature, size, location and lifecycle of the project and the potential for in-combination effects.

DAFM requested the submission of a Natura Impact Statement (NIS) due to the hydrological connectivity to the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC. An NIS was prepared in January 2019 following a site inspection. The NIS describes the project, legislative background and the ecological status of the SAC. The qualifying interests of the SAC are listed, and priority habitats and Annex I and II species identified. In respect of the project lands, the NIS notes that the principal habitats are wet grassland and scrub. Dense bracken is also present with some areas of wet heath. There is a small stream along the northern boundary, less than 1m wide and 0.5m deep. This has silt substrate and medium flow. There is a small rivulet within the site which runs into a drainage channel along the western site boundary. There is an active Badger Sett on the site. The Otter is unlikely to use the watercourses on the site. There are no large trees suitable for roosting bats. Meadow Pipit and Skylark are likely to be present on the site. In assessing potential impacts the NIS states that there would be some loss of existing habitats. Principal areas of wet heath would not be planted. Sediment run-off into the SAC would not be significant, as long as the run-off is not substantial. If appropriate measures are applied, there is little likelihood of any run-off entering the aquatic environment and negatively impacting on the SAC. Any compaction impacts are likely to be short-term with quick recovery. Appropriate measures are required to protect aquatic habitats from the employment of machinery. The Badger Sett should not be disturbed, and an exclusion zone should be established. Native trees would be preferable in the plot between the Badger Sett and the northern bounding stream. There is no suitable aquatic environment present for the Otter, but the species may occur along the Beheenagh River. The relatively exposed nature of the site is not conducive to bat species. Disturbance factors would be localised and short-term. Work should be carried out outside the bird nesting season.

The NIS concludes that there would be no impact on the conservation objectives of the SAC. The establishment of some native woodland would result in a net ecological bonus to the SAC lands and the Beheenagh River. As the proposal is expected to have little impact on the SAC, it would therefore contribute little to any potential cumulative/combination impacts with other potential developments. Setbacks and the establishment of native woodland would be positive ecological gains. The NIS includes recommendations in respect of silt/sediment screens, soil disturbance, protection of fauna and measures to address potential pollution.

The DAFM requested an independent Appropriate Assessment Report (AAR) and this was prepared by MKO Planning and Environmental Consultants and dated 18.02.2020. This report reviewed the application documentation and the NIS submitted. The report notes that a watercourse, the Corran Stream, a tributary of the Beheenagh River, flows in a westerly direction along the northern boundary of the site. An additional stream runs through the south western portion of the site and discharges to a drainage ditch along the western site boundary adjacent to the existing conifer plantation. The watercourses are classified as eroding/upland rivers. The site is in the Quagmire sub-catchment. There is a hydrological connection with a downstream designated site – Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC (350m downstream). The MKO report screens sites within a 15km radius of the project lands as part verification of the screening for Appropriate Assessment carried out by DAFM. Sites screened out for Stage 2 Appropriate Assessment are Blackwater River (Cork/Waterford) SAC, Mullaghanish Bog SAC, Sheheree (Ardagh) Bog SAC, Old Domestic Building, Curraglass Wood SAC, St.Gobnets Wood SAC, Killarney National Park SPA, Mullaghanish to Musheramore Mountains SPA and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mt Eagle SPA. The reasons for the screening conclusion are stated as lack of hydrological connectivity, nature of the qualifying interests and conservation objectives, nature of the habitats at the project site, and the scale of the development. The MKO report carries out a Stage 2 assessment on Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC. The qualifying interests and conservation objectives are listed, and an examination is made of the potential for adverse impacts. Mitigations are proposed in respect of each qualifying interest broadly relating to sedimentation measures, control measures for chemicals, fuel and machine oil, and in respect of disturbance/displacement. Cumulative impacts considered include dwellings, and forestry projects - afforestation (11), forestry roads (2), felling (11). The MKO report concludes that adherence to best forestry practice (which includes mitigations outlined in the NIS in relation to water setbacks for aquatic zones and relevant watercourses) ensure that there will be no deterioration of water quality or adverse impact on the aquatic qualifying interests of the SAC. There will be no displacement/disturbance related impacts to the Otter as the project will adhere to Forestry Service Otter mitigation measures.

DAFM completed an Appropriate Assessment Determination (AAD) on 08.07.2020. This adopts the screening conclusion of the AAR – listing the sites, separation distances and the reasons for the screening conclusion. The AAD adopts the conclusion to screen in Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC. Overall, the AAD adopts the conclusions of the AAR with a number of specific exceptions, requiring additional measures. In summary, the additional measures relate to exclusion zones from aquatic zones and watercourses for the storage of materials and refuelling, restrictions applying to the application of herbicides and fertiliser, 5m setback from existing treelines and hedgerows, and exclusion zone of 20m (Plot 665) around the Badger Sett. The AAD notes an error in the NIS that states that some of the afforestation works are within a Natura 2000 site (none are within a Natura 2000 site), and an error in the MKO Report that mistakenly states that the separation distance from the SAC is 350m, when the actual distance is approximately 1.1km. It is determined that the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular the Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC, having regard to the conservation objectives, and will not affect the preservation of such sites at favourable conservation status, if carried out in accordance with specified site-specific conditions. The basis for the Determination is

given as - the site is not within the SAC. Site mitigation measures required the completion of works in accordance with the Environmental Requirements for Afforestation (Dec 2016) and Forestry Standards Manual (DAFM 2015) and, while the NIS stated that there are no Otters or signs of Otters on the site, mitigation measures ensure that the Otter would not be adversely affected. It is concluded that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

The DAFM referred the application to Inland Fisheries Ireland (IFI), who responded that approval should only be given where the Department is satisfied that the recommended yield class can be achieved without resort to excessive phosphate application and that established practices are sustainable and will not give rise to sediment/phosphorus run-off. Specific conditions are recommended in the event of approval being granted. The application was also referred to Kerry County Council, but no response is recorded.

A DAFM internal archaeologist's report states that the area proposed is contiguous to a Recorded Monument – a ring barrow (KE 068-012). OS maps also depict a historic limekiln within the development area. Archaeological conditions are recommended for attachment to any letter of approval.

The letter of technical approval issued dated 26.08.2020. It is subject to standard conditions plus the following:

- Public road setback, Broadleaves 10m, conifers 20m.
- All Guidelines to apply
- Specified Archaeology conditions – 30m exclusion zone from the outermost extent of the adjoining Ring Barrow and 10m buffer around any upstanding remains of the historic limekiln that may survive on the site.

While not listed as a condition of the technical approval, the letter includes the following: - "adhere to the conditions in the attached AA Determination, dated 08.07.2020".

There are four appeals against the decision to issue the letter of approval. In summary, the grounds of appeal refer to the loss of biodiversity in the time of a biodiversity crisis, the planting of non-native trees in vast quantities is irresponsible and detrimental to the natural habitat and biodiversity of the area, during the processing of the application reports were prepared in respect of Badgers and Otters but there are more than Badgers and Otters in the area – birds, animals, bees, insects, mosses, ferns, trees, shrubs, flowers and earth and the eradication of species would be for short-term gain for a few, the area is a natural habitat for Pheasants and Hares, Bog Orchid, Sheeps Bit Flower/Corn Flower, this area is close to the Paps Mountains and the surrounding landscape is protected as a burial and natural landscape. The area is partly within the marked zone of potential around the Barrow Ke 06012. The area contains a lot of bog and this is a major carbon absorber, flooding has been a problem on this road and this problem will be exacerbated by bog disturbance, there would be danger to biodiversity, human health and the earth from biocides, the proposed development would constitute a fire hazard, there is concern for the blocking of telephone and internet access, scenic views would be obstructed and there would be a psychological impact on the local population with devastating consequences for

mental health. Two of the appellants have a house 20m from the boundary of the proposed development, and they would suffer a loss of amenity – peace and quiet. The boundary ditch is constantly under pressure due to flooding. The site is exposed to high winds and storms. There would be a loss of natural light and shadowing. The proposed development is excessive and dark. There is concern for spraying and the impact on health and wellbeing, concern for noise and physical impact from machinery and extra vehicles as the road is substandard. The proposed development would enclose the road and endanger the public. Local children live in the area and would be negatively impacted by the proposed development.

In response, the DAFM state that fire lines will be put in place to reduce the risk of fire. Drainage works will minimise any runoff from the forestry works. Noise will be minimal, and traffic will be less than would be generated by agricultural use of the lands. Spraying, if required, may occur once in 30 to 40 years and would be applied manually. The volume of forestry in the area is within acceptable levels. Forestry would be set back 60m from dwellings. Flora and fauna were considered in the NIS and there would be no impact on any Natura 2000 site.

The FAC convened an Oral Hearing on 9 March 2021 and all parties were invited to attend. The FAC sat remotely. The applicant's representative (AR), the DAFM and two of the appellants participated remotely. The DAFM detailed the procedures adopted in the carrying out of the Appropriate Assessment screening (AAS), consideration of the NIS, and the production of an AAR leading to an AAD. The AAD was considered before the making of the decision. The NIS was requested by the DAFM. The AAR was prepared by independent consultants. The first appellant questioned how regularly the Forestry Guidelines were reviewed. Guidelines and procedures need to take into account the biodiversity crisis currently being experienced. Drainage would be a major problem on this site, which experiences flooding issues. The AAD is restricted in the extent of flora and fauna addressed. Forestry in the wider area has already replaced the Curlew and other flora and fauna. The area is being surrounded by forestry and this is having a psychological impact on local residents. There is concern that the proposed development represents a fire hazard and a health hazard. Existing forestry attracts undesirable and anti-social activities. Responding to FAC questions, the appellant did not have specific details of flora and fauna in the area and stated that the written ground of appeal in respect of obstruction of telephone and internet signals was a "personal opinion". The second appellant stated that the proposed forestry would be only 40m from the boundary of their house. There is a 20m setback on the appellant's land, which is opposite Plot 140. If the appellant wanted to build an extension to the house, the forestry would be right on top of this. There is real concern the proposal would represent a fire hazard in this rural area, where there are no hydrants present. The roads in the area are narrow and could be damaged by heavy vehicles. There is a wide range of wildlife in the area, including Pheasant and Cuckoo. Their demise would be a loss to the local children. Forestry has attracted illegal dumping. The setting back of the proposed forestry to 60m from the appellants boundary may alleviate some concerns. The AR detailed the background to the making of the application. A Biodiversity map had been submitted. Some sections of farmland had been omitted from the application. An NIS was prepared in February 2019. A vegetation survey had been carried out. A total of 15% of the site would be open space and 15% would be planted with Broadleaves – Birch, Alder, Oak and Mountain Ash. In response to the FAC, the AR stated that there was no document to show where the broadleaves are to be planted. The AR stated that these features and others would be shown on more recent Bio Maps but were not required at the time. DAFM rules for Broadleaf

planting along roads etc would dictate where these Broadleaves go. The AR and the DAFM indicated that an increased setback from the 2nd appellants house would be acceptable and noted that a greater proportion of Broadleaves could be planted in the setback. The AR stated that spraying would only take place in years 0-4, if required. Responding to the FAC, the AR stated that drainage would be provided in two sections of the site – the southern section drains towards the public road whereas the remainder of the site drains westwards. Silt traps would be provided every 50m. Sections of Wet Heath had been excluded for biodiversity reasons. The DAFM stated that the road network is in good condition with very little traffic. If the land remained in agricultural use this would also attract traffic on the local roads. The first appellant raised concern with the volume of forestry in the area as well as the type of trees being planted. Current forestry practices were out of date. The second appellant stated that the granting of the licence was ignoring the biodiversity crisis. Open space was being provided on lands that cannot be planted. No forestry should be permitted within 60m of the appellant's boundary ditch.

In considering the appeal, the FAC noted that issues had been raised by the appellants relating to Forestry policy, and Guidelines applied by the DAFM and required by way of licence conditions. The FAC is not a policy making body but does consider Government policy relating to forestry in deciding appeals against forestry licenses. The options open to the FAC in making its decision following consideration of an appeal are as set out in Section 14B (13) of the Agriculture Appeals Act 2001, as amended by the Forestry (Miscellaneous Provisions) Act 2020.

The proposed development is for the afforestation of a stated site area of 32.47ha and 4350m of fencing. The proposed species is 27.58ha of Sitka spruce (85%) and 4.89ha of Broadleaves (15%). Initial afforestation is a class of development to which the Environmental Impact Assessment (EIA) Directive applies, and the transposing Regulations set a threshold of 50ha for mandatory EIA. Projects that do not meet the threshold size are subject to screening to determine if EIA is required. The proposed development, while significantly below the threshold set in the transposing Regulation, is sizeable and, as such, is subject to EIA screening. In order to carry out EIA screening there is a requirement for information on the type and characteristics of the proposed development, the location, and the type and characteristics of potential impacts arising from the proposed development. The FAC is satisfied that there was adequate information before the DAFM to carry out screening for EIA. The Inspector's certification includes an assessment to determine if EIA is required. It is stated that the existing land use was examined, the proposed development together with afforestation of 3 years or less within a 500m radius would be 41.54ha. and together with projects approved but not yet carried out within the same radius would be 43.46ha. The percentage cover in the townland is 15.56%, and the percentage forest cover in the underlining waterbody is 0.07%. This is not an acid sensitive area but does contain fisheries sensitive watercourses. It is not a high nutrient sensitive area. No Freshwater Pearl Mussel catchment would be affected. The site does not contain an archaeological site or feature with intensive public usage but does adjoin a listed archaeological site. This is not a Prime Scenic Area or have other High Amenity Landscape status. There would be no impact on any Way-Marked Way, no impact on a densely populated area, and is not in an area commonly used by the general public for recreation. A separate assessment under the Habitats Directive concludes that the proposed development individually, or in combination with other plans or projects, would not adversely affect the integrity of any European site, subject to compliance with recommended site-specific conditions. The appellants contend that other flora and fauna on the site have not been considered but have not

provided any convincing documentary evidence in this respect relating to the subject lands. While accepting that the proposed development would result in a change of land use and potential reduction in biodiversity, the FAC noted that the existing ground cover as described in the NIS is of wet grassland and scrub, with dense bracken also present in some areas. Based on the information before it, the FAC finds no reason to consider that the DAFM conclusion that the proposed development individually, or cumulatively with other plans or projects, would not be likely to have significant effects on the environment, is incorrect.

The procedures adopted by the DAFM in carrying out screening for Appropriate Assessment, the requesting of an NIS and the examination and analysis of that document including the Appropriate Assessment, and the making of the AAD is detailed above in this report. The FAC finds no reason to conclude that the outcome of the DAFM screening for Appropriate Assessment was incorrect. The FAC noted that the AAD was made following an assessment of an independent Report (by MKO consultants) which included a Stage 2 Appropriate Assessment of the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, and concluded that additional mitigation conditions should be applied to the licence, if issued. Based on the information before it, the FAC finds no reason to conclude that the procedures adopted by the DAFM are not consistent with the requirements of Article 6(3) of the Habitats Directive or that the concluding Determination is incorrect. The appellants contend that this area is close to the Paps Mountains and that the surrounding landscape is protected as a burial and natural landscape. The FAC notes that the application was submitted to the DAFM Archaeologist and that the subsequent report recommended conditions in respect of Ring Barrow and possible upstanding remains of a historic limekiln. There is no convincing evidence before the FAC to indicate that the subject lands are part of a designated burial or natural landscape.

There is no convincing evidence before the FAC to conclude that there is a flooding problem on the project lands or that the proposed development would block telephone and internet signals. There is no evidence that there would be obstruction of designated public views and prospects. Any spraying of chemicals is controlled by way of Statutory Instrument and there is no reason to conclude that the proposed development would have an adverse impact on public health or on traffic safety. The FAC considered that the licensed development would not interfere with natural light or give rise to overshadowing.

Having regard to the nature and scale of the proposed development, and to its orientation relative to the nearest adjoining dwelling to Plot 140, the FAC concluded that it would be reasonable to require that the setback from the north eastern boundary of Plot 140 should be 60m.

Notwithstanding the above conclusions, the FAC has concerns that the Bio Map submitted does not sufficiently record important aspects of the proposed development in a manner which would aid future inspection and compliance. Having regard to the nature and scale of the proposed development and to its location, the FAC concluded that the DAFM should have required essential information to be recorded and precise details agreed prior to the commencement of any development on the site. The FAC concluded that this is an error in this case. Furthermore, the FAC concluded that the licence granted should have included a numbered and reasoned condition requiring adherence to the conditions in the Appropriate Assessment Determination, dated 08.07.2020.

The FAC concluded that the Minister made a series of errors in the making of the decision to grant the licence in respect of CN81543. The FAC decided to vary the decision by requiring the addition of the following conditions to the licence:

Before any operations commence on the site, the applicant shall submit for the written agreement of the Minister, an annotated scaled drawing clearly showing the following features:

- Badger Sett and the required exclusion zone
- The areas to be planted with Broadleaves
- The location of the proposed silt traps
- The sections of Wet Heath on the project lands to be retained
- Areas of open space proposed
- The rivulet/watercourse flowing towards the western site boundary
- All hedgerows on the project lands to be retained
- All buffer/exclusion zones
- A 60m buffer from the north eastern boundary of Plot 140

The development shall be carried out in accordance with the agreed annotated scaled drawing. The drawing and written agreement of the Minister shall be placed on the case file.

Reason: In the interest of clarity, to ensure that features of the proposed development are adequately recorded and agreed prior to the commencement of development, and in the interest of amenity.

The recommended mitigation measures, as detailed in the Appropriate Assessment Determination dated 08.07.2020, shall be fully adhered to in the carrying out of the development.

Reason: To protect the qualifying interests of the Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC, water quality and other identified flora and fauna on the project site.

Yours sincerely

A large black rectangular redaction box covering the signature of Des Johnson.

Des Johnson, on behalf of the Forestry Appeals Committee