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22nd March 2021

Subject: Appeals FAC 194/2019, & FAC 243-255/2019 regarding licence CN83585

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

Licence CN83585 for afforestation of 3.58 ha at Drumhierney, Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 26th August 2019.

Hearing

An oral hearing of appeals FAC 194/2019, & FAC 243-255/2019, of which all parties were notified, was held by a division of the FAC on 10th March 2021.

In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. James Conway, Mr Vincent Upton and Mr. Seamus Neely.

Secretary to the FAC: Ms. Marie Dobbyn.

Applicant's representative:

[REDACTED]

Appellants:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DAFM Representatives:

Mr Seppi Hona and Ms. Mary Coogan.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision regarding licence CN83585 back to the Minister.

The licence decision pertains to afforestation of 3.58 ha at Drumhierney, Co. Leitrim. The land is described in the Inspectors Certification as having a soil type underlying the project area which is predominantly podzols in nature and the slope is described as being predominantly flat to moderate (<15%). The project is located in the Shannon Upper _SC_ 020 and the Shannon (Upper)_040 waterbody for which the WFD status for 2013-2018 is moderate. The proposed species are (approximately) Sitka Spruce (49%), pendunculate oak (34%) and birch (17%). The project was referred to Leitrim County Council by correspondence dated 28th March 2019 who responded and raised no specific objections but highlighted certain requirements on the Council's part relating to road usage, the need for adherence to certain best practice and highlighting amendments made to Article 8(f) and (g) of the *Planning & Development Regulations 2013* relating to "Exempted Development" and how this relates to access to the public road. The project was also referred to the NPWS by correspondence dated 9th May 2019 who also responded with no specific objections and to the DAFM Archaeologist who responded and suggested standard conditions to attach to the licence.

The DAFM recorded an Appropriate Assessment screening of the proposal and determined that it did not require an Appropriate Assessment. DAFM also confirmed that the Appropriate Assessment process used at the time assessed Natura 2000 Sites within a 3km radius. It further recorded a consideration of the application for EIA and determined that it did not require an EIA. The approval was issued on 26th August 2019 with a number of conditions attached.

Fourteen appeals were lodged against the decision (FAC 194/2019, & FAC 243-255/2019) which submitted grounds including those summarised below.

- The grounds of appeal in the case of appeals FAC 194/2019, FAC 243/2019, FAC 244/2019, FAC 245/2020, FAC 246/2020, FAC 247/2020 and FAC 248/2020 include: submission that no risk assessment has been carried out and that there is no risk rating associated with the project with regard to issues such as fire breaks and impact and consideration to the local community, submission that there is a lack of detail in the inspectors report with respect to conclusions on environmental considerations, in particular regarding Natural Heritage Areas (NHAs) and proposed Natural Heritage Areas (pNHAs), submission that reference is made in the Inspector's Report to a REPS plan habitat which has been replaced by the GLAS scheme with more stringent conditions, concerns in relation to firebreaks, and the accuracy of forest cover figures, submission that the Code of Practice for Managing Health and Safety in Forestry may not have been adequately considered, raised concerns in relation to the capacity of the public road to service the site during operations and in relation to the use of herbicides for weed control,

concerns in relation to run off from the site with respect to the Lough Allen Canal and other water bodies in relation to flooding risk, water quality and drinking water, submission that the land in question is of High Nature Value and should not be planted, and concerns with regard to the potential for impact on an initiative to regenerate endangered fish species funded by Inland Fisheries Ireland,

- The grounds of appeal in the case of appeals FAC 249/2020, FAC 251/2019, FAC 252/2019, FAC 253/2019 and FAC 254/2019 include; concerns that the DAFM did not consult with a number of state bodies including the Environmental Protection Agency, Inland Fisheries Ireland and Irish Water in relation to various aspects of water quality in the River Shannon, submission that the Inspector's Report is inaccurate, and that the Inspector's notes have not been provided preventing preparation of thorough arguments for appeal, queries the treatment of issues relating to Drumhierney Wood pNHA, fertilisers, weed control and herbicides, firebreaks, land use, social impact, and road access in relation to the report and application.
- The grounds of appeal in the case of appeals FAC 250/2019 include; submission that the plantation will have a detrimental impact on the habitats and feed grounds of species of birds and insects and the protected species of bats which are found in the adjacent pNHA site, concerns relating to social and environmental aspects of the surrounding area and disputes the Inspector's percentages in relation to forest cover in the area, submission that an Appropriate Assessment should have been carried on the site for cumulative impacts on pNHA sites (Drumhierney Wood and Drumharlow Lough), concerns relating to impacts on domestic water supply and absence of consultation with the EPA, submission that the lands would be considered HNV and should be protected, concerns as to the absence of the views of the local community being taken into account in the licensing process, concerns with regard to the response of NPWS and Leitrim Co. Co. and queries why the application was not referred to the EPA and IFI, and submission that the cumulative impacts of afforestation on the area warrant Appropriate Assessment.

In the statement provided to the FAC, the DAFM confirmed that the decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act, and that the Department is satisfied that all criteria as outlined in the standards and procedures (listed in the statement) have been adhered to in making a decision on the application. The statement sets out that the proposal is adjoining Drumhierney Estate and that it (the estate) has a long and rich history of forestry and woodlands in the area. It submits that the proposal does not impact the area negatively from a landscape point of view as it will adjoin an old forest estate. It indicates that the Appropriate Assessment screening procedure at the time was applied and that there is no hydrological connection to any Natura site and there is no risk of run-off of any type. According to the statement the file was not referred to the EPA as referral is not required as per internal (DAFM) standard operating procedures and that the file was not referred to IFI as the area is not fisheries sensitive. It sets out that the Forest Service does not consider that there is a fire risk from the proposal and notes that there are two plots of oak between the Sitka Spruce and the public road. It also sets out that forest fire risk is associated with marginal type bog land with a vegetation type dominated by heather and molinia grasses as these dry out easily and can increase risk and notes that none of these habitat types are found in any area of this

site or adjoining lands. The statement asserts that the land is not High Nature Value (HNV) farmland and that it is in grass / rush and is used to cut silage. It sets out that during the field inspection it was noted that the land lacks floral diversity which would indicate that no further assessment was required by an ecologist from a HNV point of view.

At the oral hearing the DAFM representatives updated the FAC on relevant dates, referrals to consultation bodies, that the application was desk and field assessed, that an Appropriate Assessment screening for sites within 3 km was carried out (based on the procedure at the time), that the FAC had sought additional information which had been submitted to it on 23rd March 2020 and that the licence was issued on 26th August 2019. It was submitted at the hearing that the field assessment was carried out on 9th May 2019 which included walking the land, assessing the boundaries, assessing the local environment, the location of dwellings and the soil. It was also asserted that the application was then also desk assessed which included reviewing maps and submissions received. It was also asserted that an Appropriate Assessment screening was carried out and that it was determined that the project would not proceed to Appropriate Assessment. It was also set out that the form of Appropriate Assessment screening used at the time is different to the procedure currently used by DAFM and does not meet the requirements of the Habitats Directive with regard to Appropriate Assessment. The DAFM representative pointed out that a post decision Appropriate Assessment screening had been carried out and submitted, together with an In Combination report and determination, to the FAC as part of the further information supplied on 23rd March 2020.

At the oral hearing the applicant's representative gave details of the application, the land subject of the proposal, and indicated that the applicant had decided to go with a mixed forest referencing the adjacency to Drumhierney wood which is submitted as also being a mixed forest / wood. He indicated that the soil was heavy and drumlin clay like and that on plantations like this there would only be one application of herbicide and submitted that this would be less than if it was in agricultural use. He set out that he does not believe that the proposal presents a fire risk and that it is well set back from the road and houses. He referenced an ESB line on the lands and that a buffer would be in place under it.

The appellant in the case of appeal FAC 194/2019 addressed the hearing and briefly contextualised the grounds of her appeal. She advised that she was happy that the appellants' representative in attendance would cover the points in her grounds. The appellants' representative addressed the hearing and advised that she was speaking for / represented a number of the appellants including those in the case of FAC 194/2019, FAC 243-249/2019 and FAC 251-255/2019. She raised concerns with the capacity of the access route identified in the application (L7381) and submitted that same has a ten ton weight restriction applied to it. She also raised concerns with the capacity of the alternative route (L7379) which leads to the regional road R280 and submitted that its junction with the R280 was blind. She submitted that a tractor and trailer would weigh ten tons on their own. She submitted that the right of the applicant to use the road should not be at the expense of others. While citing her 28 years experience as a chartered engineer she submitted that she surveyed the existing entrance to the land from the public road, submitted that same was four metres wide and submitted an opinion that same would require widening to accommodate the forestry operations. She also referenced that the Leitrim Co. Council

submission pointed out that such improvement would require planning permission. She submitted that the whole project assessment should include at least a preliminary view of impacts of things like access improvement. She referenced the requirements of Article 6 of the Habitats Directive with regard to Appropriate Assessment and highlighted the Leitrim Co Council reference in its submission to Appropriate Assessment. She also made reference to the record on file regarding the DAFM Assessment to determine the need for EIA and pointed out that a number of questions on the screening record provided were not completed. She referenced that 47% of Drumhierney is under forest, referenced twenty eight objections to the proposal and raised concerns on the impact of the proposal on recreation, tourism, water quality, submitted that the site has a hydrological connection to the canal and references that the Shannon_040 waterbody has been assigned a moderate WFD rating in the 2013-2018 assessment, that it is listed as being at risk of not meeting good status and makes reference to the recent judgement of the High Court in relation to impact on water quality and the matter of assignment of status. She asserted that a submission from a consultation body that does not include an objection shouldn't be taken as agreement.

In response to questions at the oral hearing the appellant in the case of FAC 243/2019 provided some clarification regarding the layout of their lands and their adjacency / nearness to the lands subject to the licence application. They pointed out that they owned four parcels of land in the middle of forestry including the 15 acre meadow beside the lands which are subject to the application. They raised concerns regarding impact on silage and cited that they'd like to see the land bought for agriculture. It was noted that the appellant in the case of FAC 248/2019 was not in attendance and it was further pointed out by the appellant in the case of FAC 194/2019 that the appellants' representative in attendance spoke for this appellant. The appellant in the case of appeal FAC 246/2019 addressed the hearing briefly and confirmed that the appellants' representative in attendance spoke for him. The appellant in the case of appeal FAC 250/2019 addressed the hearing and contextualised the grounds of the appeal to which he was a party. He confirmed his agreement with what the appellants' representative has set out, submitted that it was good to hear the locals are being heard, referenced the population of Leitrim Village as being around 600 persons and referenced potential impacts on them submitted that the forest comes in to the back of their houses. He referenced a fire that occurred a few miles away in Drumshambo, submitted that he feels that the application should have been submitted to the EPA and the IFI. The appellant in the case of appeal FAC 255/2019 raised concerns with the haul route and the possible alternative, referenced the blueway that now runs along the canal, and submitted that a lot of native oak in hedgerows might have to be removed if improvements had to be made to the roads. He referenced that he (and family) farm 4 hectares along the eastern boundary of the project lands and raised concerns regarding shadowing, moss and water quality.

In response to matters raised at the hearing by appellants and in response to questions from the FAC the DAFM representative acknowledged the submission of the appellants that the project site has a hydrological connection. He advised that the DAFM had considered the matter of fire risk and had concluded that the general area would not be considered of high risk and that the proposal met the requirements of the DAFM in this regard while pointing out the species mix and that the management of the operations of the forest including with regard to fire risk is a matter for the owner. He also set out

the consideration given to the potential inclusion of some conditions in the licence as suggested in the Co Councils submission and that he considered that their inclusion as not required. In relation to questions regarding the access and future haul route and its suitability the DAFM representative pointed out that this is an application for afforestation of the lands and not a felling application. In response to questions from the FAC the applicant's representative set out the type of machinery (and likely duration of works) to be used in the various stages of the forestry establishment and management. He submitted that the establishment of the forest could be done with the use of a 5 to 6 ton digger and the site would be accessed by jeeps and vans from time to time and that management works would generally be for about one week each year and that the volumes expected to be removed at thinning would be of the order of about 20 tons per acre. He asserted that the applicant was aware of the access constraints at the location and would be exploring collaboration opportunities with neighbouring forests to facilitate harvesting. He further responded to questions regarding the impact of certain water sets backs as provided for in the application / licence. He also responded to clarifications sought with regard to his assessment of soil type on the land and the apparent discrepancy between the view he presented at the hearing regarding the frequency of use of herbicide and that included in the application. The DAFM representative commented that extraction could be achieved on the public road within the weight constraints by using smaller than normal loads. In response to questions at the hearing the appellants' representative clarified that the particular impact on water quality that she had raised was the impact on the Lough Allen Canal and the River Shannon and submitted that she doesn't see that forest operations are being managed so that there is no risk to water. In relation to a request for clarification the appellant in the case of FAC 194/2019 set out the location of the photos that she had submitted.

In relation to the various grounds generally regarding the impact of the development on views and the potential shade caused by the forestry as it matures, the FAC, having considered the proposal, the related grounds of appeal, submissions made including at the oral hearing concluded that the setbacks imposed on / included in the proposal together with the requirement to plant broadleaf species in certain places adequately addressed these matters. In reaching this conclusion the FAC noted that a 10 metre unplanted setback from the public road would be provided and that adjoining this setback would be some 100 metres of mixed species native, deciduous woodland. It is evident from aerial imagery that the mature hedgerows, trees and forests form part of the local landscape with particular reference to Drumhierney Wood pNHA which is documented as a mixed woodland on historic Ordnance Survey maps of the area. The FAC considered that the planting of mixed species forest adjacent to the pNHA would not pose any real threat to that site and would likely provide some benefits through the increase in similar habitat. The closest dwelling lies to the northwest and is c.50 metres to the field boundary and a 10 metre unplanted setback will be required from the public road. It is a requirement of the licence not to plant within 60 metres from a dwelling without permission. Direct light levels into the dwelling should not be impacted by the forest and the view would be comprised of mixed broadleaf species and would be separated by the public road and existing mature hedgerows. A number of appeals were submitted from a dwelling to the west. This dwelling appears to lie over 300 metres from the boundary of the proposed forest. Approximately 90 metres of the forest boundary will be visible from the dwelling which is separated by an existing mature hedgerow, from which a setback is also proposed and the edge would be divided by a 20 metre unplanted buffer for the ESB line. This portion of the forest will be comprised

of mixed, deciduous, broadleaf tree species. While this may increase the shading of land adjacent to this portion, the FAC concluded that this would not be significant given the scale and nature of this section of forest and having regard to the existing hedgerow and trees. The boundary with the agricultural land to the west lies at a southeast – northwest orientation and direct impacts on light levels to this land would not be considered to be significant. The FAC concluded that there was no convincing evidence before it that the forest would result in a significant detrimental impact on dwellings or agricultural land in the area.

In relation to the grounds raised regarding roads and road safety and having regard to the nature, scale and location of the proposal, the submissions made including at oral hearing, the related grounds of appeal and that the application is for afforestation, that the land adjoins the public road and that possible haulage routes are present and any future roading, including widening of access if required, and felling operations would be subject to a separate permission and that some of the issues raised by the Appellants relate to the management of the public road network by separate authorities, the FAC concluded that it is not satisfied that the DAFM made an error in its consideration of the application for a licence in respect of these grounds of appeal. In relation to the grounds of appeal regarding the non referral of the application to the Environmental Protection Agency, Irish Water and the Inland Fisheries Ireland the FAC finds that the referrals in this case are in accordance with the DAFM procedures in this regard and therefore concluded that it is not satisfied that the DAFM made an error in its consideration of the application for the licence in respect of this ground of appeal. At oral hearing, it was clarified that the Appellants had concerns regarding possible sedimentation of watercourses resulting from the planting. The FAC considered the measures proposed in the application, notably the provision of a 10 metre setback from the watercourse and the planting of c.100 metres of mixed native broadleaves adjacent to this setback, and the nature and scale of the proposal being for tree planting of a small scale and on mineral soil. While the use of fertiliser and herbicide is proposed to establish the forest this would be regulated by the licence and relevant national legislation and would be in keeping with the current use of the land and would not be applied on a regular basis after tree establishment. In addition, the fertiliser proposed is of a slow-release type and, as with other inputs, would be required to be applied in line with the licence conditions. The FAC concluded that there was no convincing evidence before it that the proposal as licenced poses a threat to above or below ground water quality. Having regard to the nature and species mix provisions in the licence and that the requirements of the DAFM *Forestry Standards Manual (November 2015)* in relation to fire risk have been followed by the Inspector, and while noting that there is no high-risk bog land connected to the site, and that the prescribed setback requirements have been met, the FAC is satisfied that DAFM have adequately addressed the grounds regarding fire risk in this case.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds, the EU EIA Directive sets out in Annex II 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. 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. Article 4 of the EIA Directive requires that a determination be made available to the public and, where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment. In response to a question at oral hearing as to the absence of responses to a number of questions on DAFMs screening report, being part of the assessment to determine EIA requirement, the DAFM representative indicated that the answers to those questions would have been known to the author of the screening when it was being done but that the current absence of entries for those questions was due to the implementation by DAFM of a new version of the IT-assisted screening process since the time when these data were first calculated. This omission in the screening record on file at the time of oral hearing, which is relied on to determine the need for an EIA, is considered by the FAC to be an error in this case. While this missing data may have been known to the author of the screening report at the time of the decision, the error is regarded as significant, particularly given the absence of a consideration of other plans and projects in combination with the proposal being on the file at the time the decision was made, and closely relates to the grounds in this case. While noting the submissions made by DAFM at the Oral Hearing, the FAC concluded that a new assessment to determine whether an EIA is required should be undertaken regarding this proposal. The DAFM undertook and documented an Appropriate Assessment screening of the proposal that found no Natura 2000 sites within 3km of the proposal. The record does not contain a consideration of other plans and projects in combination with the proposal. The FAC is satisfied that this constitutes a serious error in the making of the decision and while noting the submissions made by DAFM at the Oral Hearing, the FAC concluded that a new screening of the application for Appropriate Assessment is required and should be undertaken regarding this proposal.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. The FAC is satisfied that a significant error or series of errors was made in making the decision and is setting aside and remitting the decision back to the Minister to carry out a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive and to undertake an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive before a new decision is made.

Yours sincerely,


Seamūs Neely On Behalf of the Forestry Appeals Committee