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15th November 2021

Subject: Appeals FAC071/2021, FAC072/2021, FAC073/2021 in relation to afforestation licence CN86376

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.

Hearing

Afforestation licence CN86376 was issued by the Department of Agriculture, Food, and the Marine (DAFM) on the 08/03/2021. A Hearing of appeals FAC071/2021, FAC072/2021, FAC073/2021 was convened by the FAC on the 24/08/2021. The FAC members in attendance were Mr Des Johnson (Chairperson), Mr Dan Molloy and Mr Luke Sweetman. Mr Michael Ryan attended as Secretary to the FAC.

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 CN86376.

Background

This licence is for the afforestation of 10.18ha at Aghalough, Lisgilllock Glebe, Co. Leitrim. The proposal comprises six plots. Plots 1 & 2 (6.02ha) are 90% Sitka spruce with 10% Additional broadleaves. Plots 3-5 (3.04ha) are a mixture of broadleaves with some Scots pine. Plot 6 (1.12) is an unplanted "Bio" plot. The

erection of 1400m of Stock-Sheep fencing is proposed. The predominant soil type is Podzols. The slope is predominantly flat to moderate (<15%). The project site is primarily wet grassland and scrub habitats with some hedgerows/treelines along boundaries. The site is bordered by Lough Cam to the north and Cloone Lough to the south. The Environmental Protection Agency (EPA) mapping shows an unnamed watercourse (Order 2) flows from north to south through the site. The proposal is in the Cloone_010 River Sub-Basin. The Cloone_010 River Waterbody was assigned 'Good' status and deemed to be 'Not at Risk' under the EPA 2013-2018 reporting period. The DAFM's approval letter states that woody weeds will be removed, the site will be mounded, slit planted, 250kg/ha of Ground Rock Phosphate is proposed along with manual weed control. Road access is provided, and drainage and firebreaks are not required.

There are four Inspector's Certification documents on file. The 4th and "Final" document states that the site was field and desk-assessed, is free of shell marl or highly calcareous soils, not prone to flooding, not acid-sensitive or sensitive for fisheries, not within 3km upstream of a pNHA/NHA/Natura site or National Park, not within a Freshwater Pearl Mussel (FPM) 6km zone or FPM Catchment, does not contain an archaeological site or features within intensive public usage, is not within a Prime Scenic Area and there are no other High Amenity Landscape considerations. The approximate percentage forestry cover in the Townland is stated to be 16.92% with 23.38% within 5km of the proposal at present, and 3.29% in the underlying Waterbody. The application, together with new afforestation of three years or less within 500m is 41.68ha. The application together with other applications within 500m and approved but not yet planted is 49.86ha.

In processing the application, the DAFM completed an Appropriate Assessment (AA) Screening which screened two European sites within 15km of the proposal. Both sites were screened out for Stage 2 AA for the following reasons:

- **Lough Oughter and Associated Loughs SAC**
 - The position of the project area downstream from the Natura site, and the subsequent lack of any hydrological connection. The project area is 12km from SAC and will have no effect on any of the qualifying interests (ref habitat table).
- **Lough Oughter SPA**
 - The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site. The project area is 14.2km from SPA and will have no effect on any of the qualifying interests (ref - bird foraging table).

The DAFM completed an AA in-combination report. Online planning systems (and the DAFM's internal records) were consulted on the week of the 17/11/2020 for other plans and projects, focusing on the general area of the Cloone_010 River Sub-Basin. This report states that the River Sub-Basin Cloone_010 has 23% forest cover. This conflicts with the figure of 3.29% listed in the Inspector's Certification. The report states that the "afforestation application adjoins existing forestry". This adjoining plantation comprises 14.28ha of predominately Sitka spruce, planted under CN66871 and is not included in the list of afforestation projects contained in the in-combination report. The report concludes that "this project when considered in combination with other plans and projects, will not give rise to the possibility of an effect on the Natura site(s) listed above."

There were no referrals made by the DAFM. The licence was issued on the 08/03/2021 with conditions 1-4 relatively standard and condition 5:

- Adhere to revised Species and Biodiversity maps,
- Adhere to Environmental Requirements for Afforestation,
- All guidelines to apply.

Grounds of Appeal

There are three appeals against the licence. The written grounds of each appeal were considered in full by the FAC and are summarised hereafter. The common grounds of appeal submit that the licence was granted without considering local objections and without consultation. The proposal will add to the high levels of forestry in the area and have a negative impact on community, digital services, scenic views in the locality, property values, water quality, fish and wildlife around the lakes and related tourism including access to the lakes. It is submitted that CN86376 is the fourth afforestation application in the area from the same appellant and this constitutes project splitting in the context of the EIA Directive.

The grounds specific to individual appeals are summarised below:

FAC071/2021

- Appellant has two young children and existing forestry to the left of her house. There is currently poor signal for phone, internet, or satellite and additional forestry will exacerbate this, impacting her children's connectivity with friends etc.
- The EPA were not consulted. "The waterbody has not been assigned a status". Before planting there must be clarity water quality won't be impacted.

FAC072/2021

- The appellant sold land to the applicant with an understanding that it would not be planted and could not be due to its proximity to the lakes.
- Some of the land proposed is prone to flooding.
- If there had been consultation beforehand compromise could have been reached.
- Planting will restrict light onto my land.

The DAFM provided a response to each appeal in a Statement of Facts to the FAC. The DAFM's statements were considered in full by the FAC and are summarised below. In response to the grounds common to multiple appeals the DAFM stated the following:

- The forest cover in the Townland is currently 16.92% and within 5km of CN86376 is 23.38%. The Forest Service does not consider this to be a high amount of forest cover.
- The effect of afforestation on communities is difficult to assess. Most afforestation is carried out by local landowners and is a form of farm diversification and provides rural employment for forestry contractors.
- The proposal will impact the view from several houses and the road. This was considered during a field visit with the Forest Service, Registered Forester, and the applicant on the 04/02/2021. Subsequently, the proposal was revised to maintain views and vistas from the county road and adjacent dwellings.
- Assessment to determine EIA requirement was carried out as part of the certification process and in accordance with Afforestation Standard Operating Procedure – Step 7.
- The impact of the proposed afforestation on adjacent lakes and streams was assessed and water protection measures (See Environmental Requirements for Afforestation and Forest and Water Quality Guidelines) will be applied.
- The water protection measures and water set-back/buffer areas will maintain (and improve) water quality for fish stocks by reducing the amounts of fertiliser, slurry, and animal poaching of the shoreline. Forestry plantations require very little weedkiller or fertiliser compared to the agricultural land it is displacing.
- The potential for the proposed afforestation to effect habitats and wildlife was assessed and considered prior to Approval. This was done via AA Screening, field inspection and GIS checks for designated and non-designated habitats.

In relation to the grounds of appeal specific to each appellant the DAFM submitted the following responses:

FAC071/2021

- There is currently afforestation (CN66871) to the south of objector's house, 60m set back condition was attached to Approval. The proposed afforestation will be 65m to west of the objector's house, which is on an elevated position above the road. The proposed afforestation is below the level of the road. No details regarding internet/Phone signal directions, suppliers etc. were supplied, so it is difficult to assess the impact of the afforestation.
- The DAFM did not specifically address the first appellant's grounds regarding the 'Unassigned' status of the (unspecified) waterbody.

FAC072/2021

- The Forest Service is not informed on the details of land sales and associated agreements and are not intermediaries for local disputes.
- The area of seasonal flooding is very small and will have little effect on the trees planted.
- The shadowing of adjacent agricultural land was not considered and is not accounted for in any of the Forest Service Guidelines.

Hearing

The FAC convened a Hearing on the 24/08/2021 to consider the appeals against CN86376. Following consideration of the evidence before it, the FAC decided to request further information from the DAFM. In order to facilitate the FAC in adjudicating the appeals, the DAFM were requested to provide further information on the following:

1. The details of any other afforestation licence granted to, or applications submitted by, the applicant in the area (as referenced in the grounds of appeal).
2. The list of projects used to calculate the figures for the cumulative afforestation in the immediate vicinity of CN86376, as referenced in Q4 and Q5 of the Assessment to Determine EIA Requirement in the Inspector's Certification.
3. Confirmation of the details of CN66871 (which adjoins to the south of the proposal) and whether this area belongs to the applicant. Confirmation as to whether this project is included in the area recorded under Q4 (41.68ha).

4. An explanation as to how the figures for the approximate percentage of forest cover currently in the underlying waterbody in the Inspector's Certification (3.29%) and the percentage forest cover in the general vicinity of the project area in the River Sub-Basin in the in-combination report (23%) are calculated and explanation of the apparent discrepancy between the two.
5. An elaboration on how the potential for the forestry projects listed in the in-combination report to contribute to an in-combination effect on Natura 2000 sites was assessed.
6. The grounds of appeal for FAC071/2021 state that "the water body was not assigned a water quality status". The appellant provides no clarification as to which water body is being referred to. Does the DAFM wish to comment on this ground of appeal?

The DAFM provided a response to the FAC's further information request which included the following:

1. The applicant has four afforestation licences within 1km of CN86376. The DAFM information showed the average area of these four licences is 7.69ha. One of these projects remains approved but unplanted while premiums have been paid on the other three.
2. A table was provided showing the "cumulative afforestation within the relevant townlands." This table shows five afforestation contracts (including CN86376) with a total area of 21.64ha. This table was accompanied by a map (in an attached "Appendix 2") highlighting the location of the listed contracts within a 500m buffer surrounding CN86376. The FAC noted that sizeable parts of four separate blocks of mature/semi-mature forestry are also present within this 500m buffer but were not included in the DAFM's tabulation of cumulative forestry in the area apparently because they were not planted within the last three years.
3. It was confirmed that CN66871 is a 14.28ha block of Sitka spruce/Birch planted in 2014 and that it does not belong to the same applicant as the licence under appeal.
4. The DAFM indicated that the EIA query was not returning the correct results at the time of the original certification although "the query for the Townlands has since been corrected (as per Appendix 2)". The DAFM state "where a forest contract straddles two townlands, the forest areas across the two townlands are summed to determine percentage forest cover for those townlands. It is only when Form 2's have been paid in full that they are counted as planted forest in the EIA query tallying existing forest area."
5. The DAFM contend that each of these projects, where licensed, has gone through its own assessment process, including AA Screening and if necessary, Stage 2 AA. The DAFM stated "given our focus on ensuring that (in the context of screening) there is no likelihood of a

significant effect arising from this project *on its own* (and in-combination), or that (in the context of AA) there is no possibility of an adverse effect arising from this project *on its own* (and in combination), there is no potential for any of these projects to contribute to an in-combination effect on Natura 2000 sites has been assessed.”

6. “The Forest Service assumes that the appellant is referring to Lough Cam to the north of CN86376 and Cloone Lough to the South of CN86376. These lakes have not been assigned a water quality status but are protected by the “Forest and Water Quality Guidelines” and “Environmental Requirements for Afforestation” which will apply to all afforestation operations to be carried out under CN86376.”

The DAFM’s response and Appendix 2 was circulated amongst the appellants who were given an opportunity to respond. Two appellants responded with observations on the response from the DAFM, requests for further information from the FAC, a request for an Oral Hearing, and also comments on the processes of the FAC. The FAC took these responses into account in considering the grounds of appeal.

Considerations of the FAC

In the first instance, the FAC considered the grounds of appeal related to the EIA Directive. The FAC noted that the DAFM conducted an EIA screening using the Inspector’s Certification process in iFORIS. The DAFM considered the nature and scale of the proposal and its potential to have an impact on the environment. A range of criteria was assessed including the potential effects on water quality, designated sites, protected species, archaeological and landscape considerations, and the amount of existing forest cover. As detailed above and confirmed in the DAFM’s response to the FAC’s further information request, the level of forest cover in the Cloone_010 Waterbody was not accurately recorded by iFORIS at the time of processing this application. Given the amount of existing forest cover in the vicinity of the proposal, the FAC considered this to be a significant error. In the particular circumstances of this case, the FAC considered that the DAFM should have taken into account the potential cumulative impact on the environment of the entirety of the forest plantations in the vicinity of CN86376 and not just the areas planted within the last three years. There is a significant amount of existing forestry within 500m of the proposal, including the adjoining CN66871, that was not considered by the DAFM. Given that the cumulative figure recorded for Q5 (49.86) is only marginally less than 50ha, the FAC concluded that this represents a significant error on behalf of the DAFM.

The FAC considered the DAFM's processing of the application regarding Appropriate Assessment (AA) requirements. The FAC noted that two Natura sites within 15km of the proposal were screened for Stage 2 AA and both were screened out with reasons recorded. The FAC consulted publicly available information on the EPA website and found the same two Natura sites within 15km of the proposal. The DAFM also completed an in-combination report with a view to assessing the potential for the proposal to contribute to an in-combination effect on Natura sites. Noting the relatively high number of afforestation projects listed in this in-combination report, the FAC requested further information from the DAFM regarding the assessment that was carried out to determine the potential for an in-combination effect on Natura sites. The FAC is not satisfied that the DAFM's response demonstrates that sufficient assessment was carried out in this instance. In these circumstances, the FAC concluded that the DAFM made a significant error in this regard.

The FAC considered the grounds regarding public consultation and local objections. The FAC noted that the applicant erected a site notice which notified the public of the planned project. The FAC observed that the DAFM recorded the submissions made on the application in the Inspector's Certification and stated that these had been considered. The FAC noted that in considering the application, the DAFM Inspector completed a site visit with the Registered Forester and the applicant which resulted in the submission of revised Species Map and Bio Map which include measures to protect the view of the lake from the road and the adjacent dwellings. The FAC considered that this action indicates the DAFM had considered local impacts and had regard to the requirements of the Leitrim County Development Plan (CDP) 2015-2021. In relation to approval of new afforestation, the CDP states that "attention will be paid to retaining (or restoring) views to the water and valley approaches to the hills. This applies particularly to the following areas: around the shores of Lough Melvin, Lough Gill, Lough Allen & the smaller loughs around Ballinamore." The FAC noted that the revised Bio and Species Maps show that a channel of unplanted land will be retained in a Bio plot to maintain a view to the water from the road. This channel will be flanked by planting of low growing shrubs and trees in Plots 2, 4 & 5 which will "create a tiered effect accentuating the view". Based on the information before it, the FAC is satisfied that the DAFM did not make a significant or serious error, or series of errors, in relation to public consultation, local objections or impact on views.

The FAC considered the grounds relating to the proposal's potential impact on the nearby 'Unassigned' lake waterbodies of Lough Cam and Cloone Lough. The FAC noted that the DAFM did not employ a proxy

status to assess possible impacts on the status of these waterbodies and that they contend in their response to the FAC further information request that “these lakes have not been assigned a water quality status but are protected by the “Forest and Water Quality Guidelines” and “Environmental Requirements for Afforestation” which will apply to all afforestation operations to be carried out under CN86376.” The FAC is mindful of the judgment in 2018 740 JR (Sweetman v An Bord Pleanála), the ‘Hyland’ judgement, which addressed the Water Framework Directive in the context of a development that would impact an unassigned waterbody. The FAC considered the particular details of the proposal under appeal to be fundamentally different to the project at issue in the Hyland judgement. That judgement was in relation to a project with a direct impact on an unassigned waterbody (including water abstraction). The proposal under appeal is for the afforestation of 10.18ha on a site that is moderately sloped and underlain by Podzols, with a significant proportion of broadleaf planting and with water protection measures applied including 10m planting setbacks from aquatic zones and installation of silt traps. In addition to this, the proposal is located downstream of Lough Cam. However, given the FAC’s conclusion regarding the errors contained in the DAFM’s EIA screening (which includes potential cumulative impact on water quality), the FAC considered that, based on the assessments carried out, it could not be reasonably concluded that the proposal would not impact on Cloone Lough. Therefore, the FAC considered that in undertaking a new EIA screening and making a new decision, the DAFM should assess the potential for the proposal to impact on water quality in Cloone Lough.

The FAC considered the remaining grounds of appeal. The FAC noted that the licence conditions require adherence to the Environmental Requirements for Afforestation which includes standard setbacks for various features, including dwelling houses and public roads. The FAC concluded that there was no convincing evidence that the DAFM made a serious or significant error, or series of errors in the decision to grant CN86376 in relation to interruption of communication services, property values, flooding, tourism, or restriction of light onto adjoining lands. The FAC also considered that the issue of land being sold under the understanding that it would not be planted is not an issue related to the DAFM’s decision to grant CN86376.

Based on the evidence before it, as outlined above, the FAC concluded that the DAFM made a series of errors in the making of its decision in respect of this application. In these circumstances, the FAC decided to set aside and remit the decision of the Minister to grant CN86376 for the DAFM to complete a new EIA screening and, if required an EIA, a new assessment of the potential for the proposal to

contribute to an in-combination effect on Natura sites and, if required a Stage 2 AA, and an assessment to determine if the proposed development would be likely to have an impact on the water quality of Cloone Lough, before making a new decision in respect of this application.

Yours sincerely,

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

Luke Sweetman on behalf of the Forestry Appeals Committee