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7th October 2021

Subject: Appeal FAC 760/2020 and 700/2020 regarding licence CN86832

Dear [REDACTED]

I refer to appeals made to the Forestry Appeals Committee (FAC) in relation to this decision by the Minister for Agriculture, Food and the Marine (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 (as amended), has now completed an examination of the facts and evidence provided by the parties to the appeals.

Background

Licence CN86832 for afforestation of 11.21 ha at Moyne, Co. Roscommon was approved by the Department of Agriculture, Food and the Marine (DAFM) on 7th September 2020.

Hearing

An oral hearing of appeals FAC 700/2020 & 760/2020, of which all parties were notified, and representatives of the DAFM attended, was held by the FAC on 14th June 2021.

In attendance at Oral Hearing:

Department Representative(s):	Ms. Mary Coogan, Mr. Momme Reibisch
Appellant (FAC 700/2020):	[REDACTED]
Appellant (FAC 760/2020):	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.
Secretary to the FAC:	Ms. Ruth Kinehan.

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 the decision of the Minister regarding licence CN86832.

The licence pertains to afforestation at Moyne, Co. Roscommon with a stated gross area of 11.21 ha. The soil type underlying the project is described in the Inspectors Certification documentation on file as being predominantly podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area

is crossed by/adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass and grass/rush.

The project is located in Catchment 26B Upper Shannon with approximately 50% of the area of the proposed development lying in each of two sub-catchments; Lung_SC_010 and Lung_SC_020 and two river waterbody sub-basins; Lung_020 and Lung_030, respectively. The WFD River Waterbody Status 2013 - 2018 for Lung_020 waterbody (IE_SH_26L030200) is classified as 'good' while the status of Lung_030 (IE_SH_26L030275) is unassigned. The main drains lie to the west and southwest boundary of the site. The proposal area encloses two dwellings for which setbacks are proposed.

The DAFM undertook a desk and field assessment of the proposal. Their screening of the proposal for Appropriate Assessment found that there were fourteen European sites (Bellanagare Bog SAC 000592, Bellanagare Bog SPA 004105, Callow Bog SAC 000595, Carrowbehy/Caher Bog SAC 000597, Cloonchambers Bog SAC 000600, Cloonshanville Bog SAC 000614, Corliskea/Trien/Cloonfelliv Bog SAC 002110, Derrinea Bog SAC 000604, Drumalough Bog SAC 002338, Errit Lough SAC 000607, Lough Gara SPA 004048, River Moy SAC 002298, Tullaghanrock Bog SAC 002354, Urlaur Lakes SAC 001571) within 15km of the proposed road and that there was no reason to extend this radius in this case. Each site was considered in turn along with its Qualifying Interests and all fourteen sites were screened out for the purposes of Appropriate Assessment. The reasons for the screening conclusions reached in respect of each site is provided in the screening documentation found on file. The DAFM also recorded other plans and projects that were considered in combination with the proposal. The DAFM considered the environmental effects of the proposal across a range of criteria and determined that the project was not required to undergo the EIA process. The application was not referred to any statutory body; two submissions were received and are stated to have been addressed during the decision making process by DAFM. The licence was approved on 7th September 2020.

There are two appeals against the decision. Appeal 760/2020 submits that the In-Combination Statement shows forestry since 2015 exceeding 65ha and implies that this should trigger an EIA. The site is also said to be within 10km of Bellanagare Bog SPA and that an Appropriate Assessment screening should have been carried out. In appeal 700/2020 the grounds contend that there is; a breach of Article 2(1) and Article 4(3) of the EIA Directive 2014/52/EU submitting that the omission of relevant criteria listed in Annex III from the Appropriate Assessment screening process undertaken by DAFM exceeds the limits of discretion of the Member State; the Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned and the recorded EIA determination contains errors and unqualified uncertainties; the EIA screening is inadequate as there is insufficient evidence of consideration of the potential impact on protected species and habitats and the project area adjoins an area of semi-natural habitat but the NPWS has not been consulted ; the details in the application are not an accurate representation of those required under Regulation 5(2) of the Forestry Regulations (2017). The application was not legally complete and could not have been processed legally; the Areas for Biodiversity Enhancement selected do not provide the best opportunity for enhancing the biodiversity within the forest area - see Circular 10/2009. The areas selected are required setbacks whereas Plot 3, which contains scrub / transitional woodland habitat and adjoins an area of scrub woodland and other semi-natural habitat, has been

earmarked for exotic conifers; submits that no setback has been specified for hedgerows; this should be informed by the quality of the hedgerow (in terms of its age, species composition and structure), its landscape importance and other attributes; the licence and its associated operations threaten the achievement of the objectives set out for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland (2018-21); submits that there is direct hydrological connectivity between the proposal site and three Natura 2000 sites and that forestry is listed as a Negative pressure on all three sites. A lawfully conducted appropriate assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt that the proposed development will not adversely impact on any European sites in question. Where there are lacunae the precautionary principle applies; there is insufficient detail and clarity in the In Combination information to enable a definitive position to be reached on the cumulative effect of this project with other plans and projects; licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; that the licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article 1 of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests; submits that there was inadequate consideration of the contents of a submission from a member of the public.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with the procedures, S.I. 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 also provides a response to the grounds of appeal. At the oral hearing the DAFM representative outlined the processing of the application, the information submitted by the applicant and that the project was desk and field assessed. The DAFM described the Appropriate Assessment and EIA considerations undertaken and the conclusions reached and reiterated the broad content of the statement of facts provided to the FAC.

The FAC, in the first instance, considered the Environmental Impact Assessment (EIA) and related matters in the grounds of appeal, the FAC notes that the EU EIA Directive sets out, in Annex I a list of projects for which EIA is mandatory. Annex II contains 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. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as “initial afforestation and deforestation for the purpose of conversion to another type of land use” (Class 1 (d) of Annex II). 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. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the

Irish regulations (S.I. 191 of 2017). The decision under appeal relates to afforestation of 11.21 ha, and so is sub threshold for mandatory EIA as set in Irish Regulations. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The oral hearing established that one of the grounds of appeal centred on a percentage of 0.25% being cited as the extent of forestry in the underlying waterbody. The FAC heard at oral hearing that this percentage was taken 'at face value' as was expected when following DAFM procedures in relation to EIA screening and that the Inspector could not be expected to make a judgement by visual estimate as to the veracity or otherwise of this figure.

In considering the Appropriate Assessment screening undertaken by the DAFM, the FAC finds that the screening of the proposal for Appropriate Assessment established that there were fourteen European sites within 15km of the proposal and that there was no reason to extend this radius in this case. Each site was found to have been considered in turn and all sites were screened out for the purposes of Appropriate Assessment. The FAC finds that the reasons for the screening conclusions reached in respect of each site are provided in the screening documentation on file and that the DAFM also recorded other plans and projects that were considered in combination with the proposal. The DAFM representative in response to query at oral hearing, confirmed it was the contention of the DAFM that the Appropriate Assessment screening carried out and conclusion reached in relation to these European Sites was in compliance with the requirements of the law and relevant procedures. The FAC examined publicly available information from the NPWS and EPA and identified the same fourteen European sites. The DAFM in their considerations on the potential for an in-combination effect, concluded that the cumulative effect of this proposal was not likely to have a significant impact. In contrast to the information appraised as part of the EIA screening, in the in-combination report the underlying river waterbodies is stated to have approximately 11% and 13% forest cover.

The FAC having considered all of the evidence before it, is satisfied that the difference in values of 0.25% in the Inspectors Certification AA Screening and 11% or 13% in the in-combination report represents an error in the information used in the decision making process regarding screening for EIA. Each approval decision requires the considered opinion of the Inspector as to the veracity of the percentages being proposed by IFORIS for the extent of tree cover in each locality and significant differences between in-combination and EIA spatial analysis must be questioned by the inspector. Based on the information available to it, the grounds of appeal, submissions made at the oral hearing and all observations made, the FAC concluded that the errors made by the DAFM in the processing of the application as it related to the grounds of appeal relating to EIA were serious errors.

The FAC considered the contention in the grounds of appeal that there had been an inadequate consideration of the objectives of the WFD River Basin Management Plan. In doing so the FAC noted the content of the DAFM statement and the submissions made at oral hearing. The Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways potentially impacted by the proposal. The FAC finds that the Lung_020 River waterbody has been assigned a 'good' WFD status by the EPA in the 2013-18 assessment period and forestry is not listed as a pressure.

While the Lung_030 River waterbody was not assigned a status in the 2013-18 assessment the DAFM Inspector stated that the site all drained to the Lung_020 River waterbody. The FAC found that EPA mapping of streams, contour data and evidence of drains support this contention. While three Natura 2000 sites of Tullaghanrock Bog SAC 002354, Lough Gara SPA 004048 and Callow Bog SAC 000595 were said by the appellant at Oral Hearing to be hydrologically connected to the proposal site no specific evidence was offered to contradict the Foraging Table or distance guidelines used by DAFM that the current proposal on its own or in combination with other proposals could have a significant effect on them or their qualifying interests.

Although the on-site drain was dry on the date of inspection in applying the precautionary principle the inspector assumed a hydrological connection could occur but concluded that in the event of water flow it would not have any impact on either waterbody. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality, nor could the proposal have any effect on the waterbodies located in the same sub-basins of the proposal. The FAC concluded that DAFM did not err in its processing of the application as it relates to this ground of appeal.

Addressing the ground of appeal regarding an accurate representation of relevant features under Regulation 5(2) of the Forestry Regulations (2017), the FAC is satisfied that the biomap in this case has mapped the existing hedgerows adequately, as this feature was established at oral hearing as the specific cause for concern of the ground of appeal. Further expanding on the treatment of hedgerows, the DAFM inspector outlined how they are protected with 3m setbacks as default and that at 'Form 2' stage in the grant approval process, the security of hedgerows are confirmed, whether or not they have been mapped in the biomap at application stage. The approval for the activity of 'Woody Weed Removal' in the licence relates to removal of species such as gorse but would not apply to the trees or native scrub that is currently 8-10 metres in height. The FAC concluded that DAFM did not err in its processing of the application as it relates to this ground of appeal.

With respect to the area identified as Plot 3 on the biomap (dated 10/07/2020) the DAFM inspector stated that no referrals were made as none were triggered by the IFORIS referrals layer and that there was no recorded valuable habitat as for example, curlew nesting sites, for which he needed to take cognisance. From aerial photography it appears to the FAC that plot 3 contains tree or shrub cover which is not recorded as hedgerow, ABE or a biodiversity feature. The DAFM Inspector outlined how such trees would be retained under normal procedures. The applicant outlined how any excess of 15% ABE is not grant funded and that declaring all of plot 3 as ABE represents a financial loss to the applicant. The biomap lists plot 3 as a 'bio plot' of 1.38 ha in extent although in the approval letter plot 3 is described as where 85% spruce and 15% Additional Broadleaves will be planted. It may also be the case that the two numbered sets of data bear no relationship. During the oral hearing the DAFM Inspector agreed that the "Species Approved" table in the licence approval letter contradicted the biomap. The FAC is of the view that there is no map on the record that matches the species approved table. The FAC concluded that these errors were significant and that the DAFM erred in its processing of the application as it relates to this ground of

appeal and that the status of plot 3 on the biomap (and its exclusion from any planting) needs to be firmly established.

Regarding the ground relating to inadequate consideration of public submissions the appellant was able to clarify the main areas of concern during oral hearing, including poor hedgerow mapping, proximity of an area of high nature value, no mention of potential for curlew nesting and other perceived faults in the application. The Inspector outlined his handling of these issues at the oral hearing and the FAC concluded that DAFM did not err in its processing of the application as it relates to this ground of appeal.

Regarding the contention in the grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive and related grounds in the appeal, the FAC noted that the grounds had not provided any specific information regarding the presence of any species or habitats in the area. The FAC considered the existing legislative safeguards in place with regard to the matters raised in these grounds and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC further considered the nature, scale and location of the proposal being for afforestation of 11.21 ha. The FAC finds that the granting of the licence in this case does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of a condition as raised in these grounds of appeal in this case, was not required and that an error had not been made by the DAFM in the processing of the application as it relates to this ground of appeal.

In considering the appeals against this licence the FAC had regard to the record of the decision and the submitted grounds of appeal, and all submissions received including at the oral hearing. The FAC concluded that there were significant and serious errors made in the making of the decision to grant the licence, as detailed above, and in these circumstances has decided to set aside the decision of the Minister to grant the licence in the case of CN86832.

Yours sincerely,

A large black rectangular box redacting the signature of Myles Mac Donncadha.

Myles Mac Donncadha On Behalf of the Forestry Appeals Committee.