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19th October 2021.

Subject: Appeal FAC 007/2021 regarding licence CN86659.

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Licence CN86659 is for the construction of forest roads 668 metres in length at Inchinapoagh, Brosna, Co. Kerry which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 29th December 2020 subject to conditions. Condition 13 of the approval provides for additional Environmental & Silvicultural requirements to be applied to the proposal as follows:

- Adhere to Coford Road Manual Specifications.
- The road construction type is excavation. The pavement base material must be at least 350 mm of broken 4 / 6 inch limestone or local stone.
- The pavement surface material must be at least 100mm of 804 limestone and compacted with a vibrated roller., Two roadside drains are required.
- Tree Clearance is recommended minimum width of 15 metres.
- Gradient must be a Maximum 1 in 10.
- ESB Overhead powerlines must be relocated as per pervious correspondence.
- All guidelines to apply.

A hearing of appeal FAC 007/2021 was held by a division of the FAC on 19th July 2021. The FAC members in attendance at the hearing were Mr. Seamus Neely (Deputy Chairperson), Mr. James Conway and Mr Derek Daly.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN86659.

Licence

The licence pertains to the construction of forest roads 668 metres in length at Inchinapoagh, Brosna, Co. Kerry to serve a forest of 12.7 hectares planted in 1999. The type of construction is indicated as excavation. The project consists of two distinct areas of forestry which are not contiguous, and which will be served by two different roads. One plot is being facilitated by an improvement of the access point onto the public road and the other plot will be served by a new/upgraded section of road which is an extension of an existing roadway that has an access onto the public road. Documentation submitted includes site notice, road specification, management plan, agreement with ESB in relation to relocation of transmission lines if required and mapping, including a fencing map and biomap which were revised in the course of the assessment of the licence by DAFM. The site is within the FEALE_40 River Waterbody WFD, the EPA records the status is good and in terms of risk is indicated as not at risk.

The inspector certification refers to soil type underlying the project area as being predominantly podzols 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 comprise wet grassland.

The licence application was referred to Kerry County Council and no response was received. There is a Section 5 Planning and Development - Kerry County Council response received through the applicant on the 15th September 2020 indicating works were considered exempted development. Inland Fisheries Ireland in a response of the 5th August 2020 outline conditions in particular in relation to the use of road making materials and avoiding discharge to the Owveg River an important salmonid river which is a tributary of the River Feale. ESB responded in relation to relocation of power lines as required to facilitate the development. A submission was also made by the appellant.

The DAFM Inspector recorded a screening for Appropriate Assessment in which four European sites are recorded within 15 kilometres of the project area and were screened out. Blackwater River (Cork/Waterford) SAC 002170; Lower River Shannon SAC 002165 and Moanveanlagh Bog SAC 002351 were screened out due to the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site. Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 was also screened out with no finding stated in the screening documentation on file.

An In Combination report on file is dated the 27th November 2020 and Planning in Kerry and Limerick County Councils are referred to therein. Section 1.1.5 indicates Forestry projects in the general vicinity of the project and several projects are listed. The report concludes indicating no effects on any Natura site.

Appeal

There is one appeal against the decision to grant the licence.

The grounds of appeal refer to;

1. Before approval can be duly awarded it must be assured that the original afforestation of the project area was done in conformance with the law, The Minister cannot legally award, and the

FAC cannot legally affirm approval of a development that was not initiated in compliance with EU law. It is the responsibility of the FAC to investigate and confirm the facts surrounding the original afforestation of the project areas in 1999 in respect of European law before it is in a position to affirm the approval.

2. The appellant contends there is a breach of Article 2(1) and Article 4(3) of the EIA Directive 2014/52/EU as Article 4 (3) of the EIA Directive (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014) requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account. A number of criteria set out in Annex III do not form part of the standard FS screening assessment. A Member State exceeds the limits of its discretion under Article 2(1) and 4(2) of the EIA Directive in circumstances where it does not take into account all relevant selection criteria listed in Annex III. The construction of a Forest Road is an activity which will result in carbon emissions. The developer has provided no description of any likely significant effects of this project resulting from the expected emissions and hence the contribution of the project towards the impact on climate change.
3. The appellant contends there is a breach of Article 4 (4) of the EIA Directive 2014/52/EU as the developer has not provided all of the information required under Annex II A; a feature of cultural / historical interest has not been identified, notably a Townland boundary; the Forest Road, by itself, is not the whole project and it should be noted that the whole project area includes a portion of the townland of Meenyvoughaun which is not stated in the application, on the Site Notice or on the published details for the project.
4. There is no indication that a Site Notice was placed at the location of the more northerly of the two road locations and this is in breach of 11 (1) (b) of SI 191/2017 and constitutes a serious error.
5. The information provided with the application did not comply with the requirements of SI 191/2017. The application was not legally compliant and should not have been accepted / processed by DAFM without rectification of the legal deficiencies. DAFM's approval of this application in the absence of a map or maps which were compliant with Article 6 (2) of SI 191 (2017) was an error in law. Reference is made to hedgerows have not been identified and clearly shown on the BioMaps. Since the proposal indicates that drains will be required to be constructed in the making of the road it would imply a possible additional threat to the hedgerow. Rights of Way indicated on Land Direct are not marked on the BioMaps. The FAC is obliged to make a de novo assessment of this application and cannot make a legally compliant decision to affirm or vary DAFM's decision in the absence of a map or maps which are compliant with Article 6 (2) of SI 191 (2017). If the FAC intends to seek legally compliant maps from the applicant these maps must be made available to any party who received deficient maps in the first instance with the opportunity for the parties to make comment on the same. The FAC must have regard to any such comments in making its decision on this case.
6. The Determination of the Inspector in terms of the Requirement for an EIA (based on a Desk Only Inspection) is inadequately reasoned. In this regard the appellant contends that forest cover within 5km of the project area has increased by 231 ha in the last 5 years. The forest cover in the underlying waterbody is stated as 2.33% in the IFORIS screening but as 18% in the In-Combination Statement and on this basis, including conflicting data, how does the Inspector justify his response to Q.9 that the cumulative effect of this proposal is not likely to have a significant impact? In response to Q14 the Inspector has indicated that the proposed forest road is not in an area designated as being sensitive to fisheries. The project was referred to IFI for

comment which implies that it is. The River Feale is included in the Salmonoid River Regulations. The significance of the local waterbodies for fisheries is stated in the response from IFI. In addition, the project site is at a higher elevation and less than 170m from an SAC which includes *Salmo salar* as a Qualifying Interest. In response to Q 18, the application contains no details on the source of the aggregate material for the road the Inspector is not in a position to give a definitive answer to this question. The Inspector's response to Q23 is affirmative but there is no evidence that a response was received from Kerry County Council. Given that the response to Q.26 is a Yes, the Inspector needs to justify his discretionary decision not to refer the project to NPWS. The project is within the same River Sub Basin as an SAC; it is at a higher elevation and <170m from the SAC. The Inspector has responded to Q.27 with a 'No' on the basis of a Desk only inspection. In the absence of a field inspection the accuracy of this response cannot be confirmed. There is mapped hydrological connectivity from the (whole) project area to the SAC. On this basis the response to Q.28 is highly questionable. The project approval conditions (13) indicate that "Two roadside drains are required". The EIA screening must assess not just existing hydrological connectivity but any connectivity created by the project itself. The IFORIS Screening checkbox questions represent validations in respect of the screening assessment. EU Guidance on carrying out EIA screening using a checkbox system states *"In theory, if there is one 'Yes' answer to the question 'is it likely to result in a significant effect?', EIA may be required, however, as a general principle, the greater the number of 'Yes' answers and the greater the significance of the impacts identified, the more likely it is that EIA is required. '?' answers, indicating uncertainty about the occurrence or significance of impacts, should also point towards a positive Screening Decision (i.e. that EIA is required) because the EIA process will help to clarify the uncertainty."* Any error in the response to the EIA screening questions invalidates the determination reached by the Inspector. (Note the % Forest Cover in the underlying waterbody). Mitigation and avoidance measures can be taken in to account as part of the EIA screening decision. However, the responsibility remains on the competent authority to ensure that these mitigations, if relied upon to screen out EIA, are then carried into the awarded licence and are monitored and enforced. If a competent authority screens out EIA for a development, based on mitigations proposed at screening, and those mitigations are not subsequently carried out, then the licence is open to challenge on the basis that it required EIA (even though it has a letter screening EIA out - if that decision was based on commitments to mitigations that were not carried out). EIA screening is not just a tick box exercise; it is a formal, legally required assessment. The EIA screening in respect of this application is inadequate and the determination cannot be relied upon.

7. This project is within a discretionary referral zone for NPWS and that the failure by DAFM to refer to NPWS represents a serious error on the part of the Inspector.
8. Approval is not consistent with the requirements of Article 4 of the Water Framework Directive. Reference is made to Case C-461/13 The Weser Case; the mitigations for protecting water quality contained in the COFORD Forest Road Manual are not written with sufficient precision and clarity regarding their requirements and permitting procedures to ensure that they will eliminate or reduce the adverse impacts of this project and result in compliance of this development with Article 4 of the WFD; in the absence of an adequate assessment of the cumulative impact of this project with other projects approved or planned in the same catchment the compliance of this project with Article 4 of the WFD cannot be assured; unless DAFM can be certain that this project and its implementation will not result in any deterioration to the status of any water body the project must be refused and in terms of ensuring that the

project will not jeopardise water quality in the context of the WFD there needs to be a requirement for monitoring and enforcement included in the conditions of the approval.

9. Approval is not consistent with the requirements of Article 6 of the Habitats Directive. The AA screening conclusion for this project for Natura 2000 Site 2165 (Lower River Shannon SAC) concludes that there is no potential for significant effects on the European Site due to the following reasons *the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site* and this is an entirely inadequate basis for screening out this project for an SAC which has OI's that are habitats as well as species. The screening has not eliminated the possibility of hydrological impact. The BioMap clearly indicates an aquatic zone linking the project area to SAC 2165. The project approval (13) indicates that *"Two roadside drains are required"*. If the project requires drains where will the drains ultimately drain to if not the SAC (2165) which is <1 70m downslope? AA screening must assess not just existing hydrological connectivity but any additional connectivity created by the project itself. There is more than sufficient doubt to call in to question the validity of the AA screening conclusion (based on a Desk only assessment) for Site 2165. The failure by DAFM to require an AA for this project represents a serious error. The AA In-Combination assessment is flawed as it is based on an assumption that the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. There is no evidence to substantiate this assumption. Comments in the Annex 2 document state *"The above specification may slightly vary depending on the ground bearing capacity"*. If the project specification is varied then a new AA screening would be required.
10. Approval is not consistent with the requirements of Articles 5 and 9 of the Birds Directive as the approval conditions do not provide a general system of protection for wild birds as would be required by Article 5 of the Birds Directive. To permit the deliberate destruction of the nests and eggs of wild birds would require Derogation under Article 9 of the Birds Directive. No derogation has been acquired or sought for this project.
11. Approval is not consistent with the requirement of Articles 12 (1) of the Habitats Directive as Article 12 (1) requires Member States to implement a strict system of protections 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. There is no evidence that the approval of this project has involved any assessment of potential impacts on species listed in Annex IV of the Habitats Directive.
12. The Monitoring & Inspection regime implemented by DAFM is not sufficiently robust to ensure that any conditions appended directly or indirectly to this approval will be carried over in to action and therefore it cannot be assumed that there will be practical conformance of this development with the overall environmental regulatory framework.
13. The conditions directly and indirectly appended to this approval are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with the overall environmental regulatory framework.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act; correct EIA data was supplied on IFORIS on

15/06/2020 and formed the basis of the DAFM decision and all criteria and guidelines were fully adhered to.

It is further stated that

1. The approval for this plantation was granted with the relevant regulatory process. This application is for a Forest Road.
2. The Department submits that the relevant selection criteria set out in Annex III of the EIA Directive, which are referenced in Article 4(3) in relation to projects that should be subject to an EIA screening, are adequately considered within the current procedures as detailed below. The application for 668 m of Forest Road was considered under a detailed process which included; the *Assessment of Afforestation Proposal for EIA Requirement Form* as completed by the certifying Inspector and recorded on iFORIS* and the findings and conclusions therein and approved by District Inspector with conditions 9th December 2020 and these findings and conclusions are informed by consideration of the documentation, reports, and materials submitted by the applicant and received on 22nd June 2020; the documentation, reports and materials submitted as part of the Consultation process with relevant bodies. In this application the Kerry County Council & Inland Fisheries Ireland were consulted and the IFI responded 5th August 2020.
3. The reasoned decision to grant the licence includes conditions with reasons prepared by the certifying Inspector informed by the documentation and the Department submits that the content and consideration of the documentation listed above is sufficient for the purposes of identifying which of the criteria set out in Annex III of the Directive (and Schedule 3 of the Forestry Regulations 2017) were deemed relevant in this particular case and thus taken into account by the certifying Inspector in his considerations; and the reasoning by the certifying Inspector for his determination an environmental impact assessment (EIA) was not required.
4. As regards the specific point as the consideration given to the cumulation of any impact from this application for 668 m of Forest Road with any impact of other existing or approved projects. As part of its consideration of the application and pursuant to the requirements of the Birds and Habitats Directives (as transposed), the Department undertook a Stage 1 Appropriate Assessment of the implications of the project for European Sites. In the course that process an assessment was, based on the best scientific knowledge and in view of the conservation objectives of the European Site[s] in question, to determine if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site(s). This assessment resulted in the production of a detailed list of existing or approved projects around the application, approved under the statutory frameworks and within spatial and temporal envelopes specified therein.
5. As set out in Recital 29 and Article 4(5) of the EIA Directive, the Competent Authority, is also required in applying a screening procedure for sub-threshold EIA and making its determination there under, to take into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than EIA Directive. That detailed list of existing or approved projects around the application (although created primarily for other reasons specified above) was taken also into consideration

by the certifying inspector in the making of their determination that an environmental impact assessment (EIA) was not required for this application and provided the reasons for reaching that conclusion. District Inspectors carry out an assessment of possible in-combination impacts of all forest related plans/projects in the vicinity of the application.

6. The Department submits that the legal requirements of Article 4(3) of the EIA Directive have been fulfilled and reference is made to the matters and guidance in informing this position.
7. The proposed road does not adjoin or cross any relevant watercourse or stream. The DAFM argue that in light of this fact there cannot be deterioration in water quality as a result of this proposal.
8. It's a principle of law that unless the grant of a first statutory licence, permit, permission, lease or consent, expressly exempts the holder thereof of any obligation to obtain a second licence, permit, permission, lease or consent required or to adhere to any other restrictions on the timing of activities or similar where such is set out by statute elsewhere, those other obligations and restrictions apply.
9. The measures described in the application documentation, together with adherence to relevant environmental guidelines/requirements /standards and to the granted licence ensure that the proposed forest road will not result in any adverse effect on any European Site or its qualifying interests.
10. The site was field inspected at approval stage and is also marked for inspection at first instalment stage. These inspections will ensure regulatory compliance with the scheme.
11. There are also specific responses to matters raised in the grounds of appeal.
 - The harvesting of the timber and tree felling will be assessed through the felling licence, this licence is for the forest road project solely.
 - The site notices were located at both proposed forest road entrances at the public road and their location is marked on the biodiversity map.
 - The proposed forest route from C-D will be placed on a pre-existing farm service road, this farm service road will be replaced with a forest road. The pre-existing drainage network will be used and so limits are possibility of a negative effect of any hedgerow in the vicinity.
 - A field inspection was carried out on the 08/07/2020 as recorded on IFORIS.
 - In conjunction with the EIA screening the total road length did not exceed 2000 meters to trigger an EIA. The in-combination report dated 27/11/2020 stated that this project when considered in-combination with other plans and projects would not give rise to the possibility of an effect on the Natura sites listed. The application is not within the Inland Fisheries Ireland sensitive GIS Layer, however the application was still referred to IFI.
 - The project did not lie within 200 meters of a listed archaeological site or monument.
 - The field inspection found there to be no hydrological connection to the Lower River Shannon SAC and it did not overlap the project and as a result it was deemed unnecessary to refer this application NPWS.

- All remaining Natura 2000 sites within 15 km(s) were screened out during the appropriate assessment screening.

Assessment of Appeal.

In addressing the grounds of appeal, the FAC considered the requirements of the Habitats and EIA Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The grounds of appeal make a number of references to the absence of a field inspection in the assessment of the licence and in this regard, it is noted that the SoF submitted by DAFM indicates that the site was field inspected and the Statement responses also reflect issues raised were responded to which are based on the field inspection and other assessments carried out.

The FAC considered if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the EIA Directives. Regarding Environmental Impact Assessment (EIA) and related matters, 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. The Irish Regulations, in relation to forestry licence applications, require mandatory EIA 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 proposal as described is for the construction of 668 metres of forest road and is sub-threshold for the mandatory submission of an EIA report. In this case the FAC found that the DAFM assessed the proposal and considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process.

The FAC finds that in the course of this Assessment to Determine EIA Requirement that the DAFM recorded at question 5 (in the Assessment to Determine EIA Requirement) that the current forest cover in the underlying waterbody was 2.33% and that this is at variance with the comparable figures as quoted in the In-Combination assessment report wherein it is recorded that the forest cover in the underlying waterbody sub-basin is approximately 18%. The FAC concluded that in proceeding to make a determination regarding the requirement for an EIA in the absence of a documented reconciliation of the apparent differences in these forest cover percentages, the DAFM made a serious error in the processing of the application in this case as it related to the EIA Directive.

In considering the appeal the FAC examined the Appropriate Assessment Screening undertaken by the DAFM as it related to the construction of forest roads 668 metres in length. Having examined the documentation submitted, the FAC identified the same four Natura sites as the DAFM within 15km from the proposal and the FAC is satisfied that there was no need to extend the radius in this case. The FAC

considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment with the exception of the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 which was screened out with no finding stated in the screening documentation on file. Details of other plans and projects were also examined. The proposed works are located outside of any European site, the project site was the subject of a field inspection and there is no evidence of a pathway of effects to a European site. Neither is there evidence of protected habitats or species on the site. An issue, however, as identified by the FAC in relation to Appropriate Assessment Screening is that the Inspector Certification in screening out sites does not state any finding as to why the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 was screened out. The FAC is therefore satisfied, having regard to the record of the decision, that a serious or significant error was made in the decision regarding Appropriate Assessment screening.

In relation to potential hydrological impacts on Natura 2000 sites and on water quality generally it is noted that in relation to the western plot no road construction is proposed other than upgrading the access point to the public road. There is a major watercourse to the west which is not adjoined by the woodland and an examination of mapping and other data does not indicate any direct hydrological connection to this watercourse which merges with the River Feale at Glashaconcore Bridge. In relation to the second plot of land the proposed road runs southwards from the public road on an existing road serving a farm. The area to be served by the road does adjoin a watercourse and has a watercourse crossing it. The proposed road, however, does not extend to this woodland. The proposed forest road follows the alignment of an existing track/road. An examination of the maps of the area do not indicate any watercourse adjoining or crossing the road. The DAFM SoF indicates that the proposed forest route from C-D will be placed on a pre-existing farm service road, this farm service road will be replaced with a forest road. The pre-existing drainage network will be used and that the field inspection found there to be no hydrological connection to the Lower River Shannon SAC. Reference is made to additional drains constituting part of the road scheme and the FAC noted that culverts form part of the road construction and the existing road drains into the farmyard. Any road scheme in particular where excavation occurs will provide for drainage works. The FAC also noted that the licence was referred to IFI and notwithstanding the recognition of the importance of the Owveg River/ River Feale as a Salmonoid river, it raised no objection other than requirements to be adhered to in the construction of the road itself. The FAC note that the issue of potential effects and impacts on aquatic zones and watercourses is assessed and addressed in the documentation including mitigation measures to protect same. The FAC has examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area and is satisfied based on the submissions received that the proposed project will not impact on any Natura 2000 sites or any receiving waters. The FAC note that the issue of potential effects and impacts on aquatic zones and watercourses is assessed in the documentation including the requirement of applying measures by way of condition to protect

same. Having examined the matters raised the FAC concluded that the proposed road will not impact on a Natura Site or qualifying interests in relation to potential hydrological impacts.

In relation to WFD the project is within the FEALE_40 River Waterbody WFD, the status of which is good and in terms of risk is indicated as not at risk. Based on assessment of the project including assessment of potential hydrological impact, the scale and nature of the project and connectivity it is considered that the licence will have no effect on receiving waters.

The FAC noted that the project was not referred to the NPWS which is also referred to in the grounds of appeal. Regulation 9 of the Forestry Regulations 2017 that where the Minister receives an application under Regulations 5, 6 or 7 and it appears to him that the proposed development may cause an adverse impact on the environment, or is located in or likely to have a significant effect on a European site, land established or recognised as a nature reserve, land designated as a refuge for flora or fauna under section 17 of the Act of 1976, land subject to a natural heritage area or compliance with the quality standards set out in the European Communities Environmental Objectives (Surface Water) Regulations 2009 (S.I. No. 272 of 2009), the Minister shall consult with any consultation body that the Minister believes may have an opinion on the proposed development and ensure that appropriate information is provided in notices made to consultation bodies. The FAC considers that the DAFM is the competent authority for afforestation licences in Ireland. The FAC noted that the licence application was the subject of desk and field assessment, that the field inspection found there to be no hydrological connection to the Lower River Shannon SAC and that this Natura site and the other Natura sites assessed did not overlap the project and as a result it was deemed by the DAFM as unnecessary to refer this application to the NPWS. In this instance and having regard to the provisions as stated and the assessment carried out, the FAC considers that no error has occurred in the processing of the application as it relates to this ground of appeal

In relation to the reference to Article 5(2) of SI. 191 of 2017 in the grounds of appeal and that the application did not comply fully with the requirements of Forestry Regulations the appellant has made reference to hedgerows that have not been identified and clearly shown on the BioMaps and also that Rights of Way indicated on Land Direct are not marked on the BioMaps. There is also reference in the appeal grounds to the 'Production of a post licence bio-map'. In relation to the latter the FAC sought clarification from DAFM in relation to this contention and established that no bio-map was received after approval for this application.

In relation to hedgerows, sections of the proposed forest road will be placed on a pre-existing farm service road with the existing drainage network retained. It is noted by the FAC, having examined mapping, it does not indicate the presence of a continuous but an intermittent presence of vegetation along sections of the current road. There is also nothing to suggest that a new drainage scheme will be

necessary to replace the existing drainage or to imply a possible additional threat to current hedgerows or necessitate removal of current hedgerows.

In relation to the contention regarding right of way, the Land Direct maps do indicate the presence of a right of way and Article 5(2) of SI. 191 of 2017 requires that an application for afforestation licence shall be accompanied by a map which, among a range of matters to be included, clearly delineates wayleaves. This has not occurred in the submitted documentation and the FAC identifies this as a serious error. Reference is also made in the grounds of appeal that the whole project area includes a portion of the townland of Meenyvoughaun which is not stated in the application, on the Site Notice or on the published details for the project. The FAC has noted that part of the woodland of one of the plots is situated in the townland of Meenyvoughaun, however the road which is the subject of this application for a licence is wholly within the townland of Inchinapoagh. The FAC also noted that the maps indicate two site notices relating to the licence.

In relation to grounds of appeal relating to the Inspectors Certification as not being reasoned and as already indicated, the FAC finds that the licence was desk and field assessed. It is noted that the Forest Cover in the underlying waterbody is stated as 2.33% in the IFORIS screening and is recorded as 18% for the area examined in the In-Combination assessment and as set out in the In Combination Statement. The EIA process and any assessment to determine EIA requirement as outlined in the Inspector Certification requires a robust assessment based on data which is clear and unambiguous and which is not significantly at variance with other recorded data recorded in the assessment of the project including the In-Combination Statement. Clarity on base line data is therefore required on this matter to enable a robust assessment to determine EIA requirement. Therefore, in proceeding to make a determination regarding the requirement for an EIA in the absence of a documented reconciliation of the apparent differences in these forest cover percentages the FAC has concluded that the DAFM made a serious error in the processing of the application in this regard.

The response in Q14 the Inspector that has indicated that the proposed forest road is not in an area designated as being sensitive to fisheries however it is noted that notwithstanding this response the licence was referred to IFI. In relation to Q23 the licence was referred to Kerry County Council and notwithstanding what is stated in the SoF there is no evidence available to the FAC that a response was received from Kerry County Council

The grounds submit that the decision is not in compliance with Articles 5 and 9 of the Birds Directive and that Section 22 of the Wildlife Act does not represent a faithful transposition of the Birds Directive and further suggests that this is acknowledged by the NPWS. The FAC does not consider that determining whether Ireland has faithfully transposed the EU Birds Directive in the Wildlife Act falls within its remit.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal. As outlined in this latter, the FAC is satisfied that a number of serious errors were made in making the decision both at the application and assessment stages. The FAC has therefore decided to set aside and remit the decision of the Minister regarding licence CN86659 in line with Article 14B of the Agricultural Appeals Act 2001 as amended, to carry out a new screening of the proposal itself and in combination with other plans or projects under Article 6 of the EU Habitats Directive, to undertake a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive, and to establish as part of the file record a map that clearly shows any rights of way as they affect the project, before a new decision is made on the application.

Yours sincerely,

A black rectangular redaction box covering the signature of Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee