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26<sup>th</sup> October 2021

Subject: Appeal FAC 096/2021 regarding licence CN84986

Dear [REDACTED]

I refer to the 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 and Hearing**

Licence CN84986 for afforestation of 9.38 ha at Sliganagh, Co. Leitrim was approved by the Department of Agriculture, Food and the Marine (DAFM) on 14<sup>th</sup> May 2021. The approval as issued is for planting on 8.25 ha and the balance as Bio area. A hearing of appeal FAC 096/2021 was held by a division of the FAC on 14<sup>th</sup> October 2021. The FAC members in attendance at the hearing were Mr. Des Johnson (Chairperson), Mr. Luke Sweetman, and Mr. Seamus Neely. The secretary to the FAC was Mr. Michael Ryan.

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the grounds of appeal, and all other submissions, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN84986.

The licence decision in this case pertains to the afforestation of lands on a stated site area of 9.38 ha at Sliganagh, Co. Leitrim. The species as approved (as set out in the 'species areas' in the schedule in the approval letter) are 6.46 ha Sitka spruce, 1.2 ha Pedunculate Oak and 1.44 ha Additional Broadleaf trees. There appears to be an error in this as the total area for 'species areas' and 'Bio areas' seems to exceed the project area by some .85 ha. (This matter will be addressed later in this letter). The land is described on the file as predominantly blanket peat with some basin peat, rendzinas, lithosols, acid brown earths and brown podzolics on Plot 1, mostly blanket peat, rendzinas and lithosols on Plot 2, mostly surface water gleys and ground water gleys, basin peat, blanket peat, acid brown earths and brown podzolics on Plot 3 and rendzinas and lithosols on Plot 4. The slope is predominantly flat to moderate (circa 7%) and there are said to be several artificial drainage channels (relevant watercourses) present in and around the project area. The vegetation type(s) within the project area comprises grass and grass rush. The

documents on file also state that the section at the far southwest of Plot 1, which is surrounded by trees and scrub not within the project boundary, is within a 1-in-10 years fluvial Flood Hazard Area (FHA) as is a very small section at the northeastern corner of Plot 2. The project is in the sub basin of the GARAVOGUE\_010, the waterbody has a poor status assigned to it for the 2013-18 Water Framework Directive assessment period (and is recorded as being at risk).

The project was referred to the Inland Fisheries Ireland (IFI) on 12.11.2019 and a reply was received on 14.02.2020. The IFI reply states that the lands lie in the River Bonet Catchment, that it provides important salmon and trout spawning and references the river as part of Lough Gill system which is designated for Atlantic salmon, white-clawed crayfish, and lamprey species. It states that the catchment is under pressure and has poor status. The submission makes a number of recommendations including an indication of a favour for native species. The project was referred to the Leitrim Co. Council on 12.11.2019 and a reply was received on 27.11.2019. The Council's reply stated that the lands are in a High Capacity / Low Sensitivity area in terms of landscape capacity to accommodate forestry and that works do not appear to impact on any Recorded Monument. It also recommends suggested conditions for the licence and references requirements should material (road / entrance) widening works be needed. There is an Archaeology Report (DAFM) dated 06.05.2021 on file which contains conditions as recommended and these were agreed with the National Monuments Service on 07.05.2021. There were two submissions made to the DAFM by members of the public in relation to the project.

The Inspector's Certification on file (marked third and final) noted that the application was desk and field (29.04.2021) assessed, that it is not within a hen harrier zone, that it is not within an NHA, pNHA, SAC, SPA, or National Park, and that it is not within a FWPM catchment nor in a Prime Scenic Area as per the County Development Plan. Drainage is said not to be required, and road access is said to be available. Slit planting is proposed, ground preparation is to be by mounding / ripping with manual herbicide weed control in years 0,1, 2, and 3, standard stocking will apply, and 250 kg/ha of Granulated Rock Phosphate is to be applied. The Inspector's certification document shows that there is no forest cover in the townland, 16.23% forest cover within 5kms, and 2.35% forest cover in the underlying waterbody. It is also stated that there would be no impact on any Way-Marked Way, no impact on any densely populated area, and that the area is not commonly used by the general public for recreation.

#### **Appropriate Assessment Screening Report (AASR)**

An Appropriate Assessment (AA) screening as prepared by Fehily Timoney & Company on behalf of the Minister for Agriculture, Food & the Marine and dated 11.05.2021 examines the same Twelve Natura 2000 sites as an earlier screening carried out by the DAFM Inspectorate. Eleven sites ( Ballysadare Bay SAC 000622, Ballysadare Bay SPA 004129, Ben Bulbin, Gleniff And Glenade Complex SAC 000623, Boleybrack Mountain SAC 002032, Cummeen Strand SPA 004035, Cummeen Strand/Drumcliff Bay (Sligo Bay) SAC 000627, Lough Arrow SAC 001673, Lough Arrow SPA 004050, Sligo/Leitrim Uplands SPA 004187, Union Wood SAC 000638 and Unshin River SAC 001898) are screened out and Lough Gill SAC 001976 is screened in to proceed to stage 2 AA. The reasons for the screening conclusion reached for all sites examined in the report are recorded.



### **Appropriate Assessment Determination (AAD)**

An AAD on file, which is dated 11.05.2021 records the 11 screened out sites and the screened in site (Lough Gill SAC) as per the AASR. The AAD sets out that the Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity/project on the European site 'screened in' and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under CN84986, individually or in combination with other plans or projects, will not adversely affect the integrity of the aforementioned European site, having regard to its conservation objectives, and will not affect the preservation of this site at favourable conservation status, if carried out in accordance with specific mitigation (set out in the report) to be attached as conditions to the licence (if issued).

### **The Appeal**

There is one appeal made against the issue of the licence. The full grounds of appeal are to be found on file and have been fully considered by the FAC. The grounds of appeal include;

1. Lough Gill is a Priority Area for Action under the Water Framework Directive. The objectives of the WFD (2000/60/EC) are to protect all high-quality status waters and prevent further deterioration of all waters and to restore degraded surface and ground waters to good status by 2021. Lough Gill is the supply source for 30,000 people and the water quality is poor and at risk and forestry is a pressure. Submits that the systems of protection for forestry are not 100% effective.
2. Submits that Q4 (in the Inspector's report) regarding flooding likelihood must be considered applicable and submits that the answer N/A is an error.
3. Submits that the fertilizer and chemical application proposed present additional risks to water quality.
4. Submits the answer to Q11 in EIA screening (No) does not reflect the concerns of the people of Leitrim towards forestry and contends that this is an error.
5. Submits that EIA is required based on Inspector's responses.

### **DAFM Statement to the FAC**

The DAFM provided a statement to the FAC regarding this appeal which includes a confirmation relating to the processing of the application and that this was done to the requirements of the law and procedures. It also sets out the various processing dates and includes a response to the grounds which sets out that;

- Mitigations as set out in the Appropriate Assessment Determination dated the 09.05.2021 together with the water setbacks and safeguards set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual provide robust protection of water quality.
- There is no local source of potential flooding, the site is not prone to flooding as per iFORIS OPW flood map layer therefore the question was marked N/A.

- Chemical weed control and the application of granulated rock phosphate are generalised crop maintenance operations and may or may not be carried out depending on the needs of the crop. Operational safeguards as set out in Environmental Requirements for Afforestation section 3.7.2 provide effective protection of water quality.
- No submissions or objections were received from residents in the locality of the application.

### **Consideration by the FAC**

The FAC in the first instance considered the grounds in the appeal relating to EIA and related matters and if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the provisions of the EIA and Habitats 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 afforestation of 9.38 ha (the approval as issued seems to overstate the area by some .85 ha) with a combination of planting on the majority of the project area with the balance (1.13 ha) as Bio area, 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 17 a 'No' answer to the question *'Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value'*. The FAC further finds that the DAFM recorded at question 36 a 'S/A' answer to the question *'Is there a significant risk of accidents, having regard in particular to substances or technologies used?'*. The FAC also finds that the DAFM recorded in the Assessment to Determine EIA Requirement at question 12, that the current forest cover in the underlying waterbody is 2.35% 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 river sub-basin is approximately 12%. The FAC concluded that in proceeding to make a Determination regarding the Requirement for an EIA, having recorded a 'No' answer to question 17 and a 'S/A' answer to question 36 in the Assessment to Determine EIA Requirement, and in the absence of a documented reconciliation of the apparent differences in the forest cover percentages as recorded at question 12 in the Assessment to Determine EIA Requirement and that recorded in the In-Combination report, the DAFM made a serious error in the processing of the application in this case as it related to the EIA Directive.

In its consideration of the appeal in this case the FAC noted that the approval as issued includes in 'Appendix A' a schedule setting out the species approved for afforestation. In relation to Plot 2 which has



an area of .65 ha, it specifies the species areas as being for 1.2 ha PO and .3 ha ADB which totals 1.5 ha and exceeds the area of the Plot by .85 ha. The FAC concluded that this is an error and should have been rectified, such that the area specified for species is consistent with the plot area and that there is clarity as to the amount / breakdown of species specified.

Regarding AA and related matters, the FAC finds that following a screening of the proposal an Appropriate Assessment Screening Report (AASR), as prepared by Fehily Timoney & Company on behalf of the Minister for Agriculture, Food & the Marine and dated 11th May 2021, examines twelve Natura 2000 sites together with their qualifying interests and conservation objectives and that all are screened out except Lough Gill SAC. The FAC noted that the reasons for the screening conclusion reached for all sites examined in the report are recorded. The FAC finds that the AASR at section 3 includes an incorrect 'total project area' but gives the correct areas for each plot. The FAC concluded that the inclusion of an incorrect 'total project area' was an error of a minor / clerical nature and did not undermine the report itself or the accuracy of the screening conclusions reached in same. The FAC finds that an Appropriate Assessment Determination (AAD) on file records the 11 sites as screened out in the AASR and the screened in site (Lough Gill SAC). The AAD sets out that the Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity/project on the European sites 'screened in' and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under CN84986, individually or in combination with other plans or projects, will not adversely affect the integrity of the aforementioned European site, having regard to its conservation objectives, and will not affect the preservation of this site at favourable conservation status, if carried out in accordance with specific mitigation (set out in the report) to be attached as conditions to the licence (if issued). The AASR is found to include as an appendix an In-Combination report and statement for the project.

The FAC examined publicly available information from the NPWS and EPA and identified the same twelve Natura 2000 sites. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC considered that the procedures adopted by the DAFM in their assessment are considered acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding AA in this case and concurs with the conclusions reached.

The FAC considered the grounds in the appeal relating to the status of Lough Gill, the submission that it is a Priority Area for Action under the Water Framework Directive, the objectives of the WFD (2000/60/EC), and related matters. The FAC finds (and as alluded to earlier in this letter) that the DAFM recorded at question 17 in the Assessment to Determine Requirement for EIA a 'No' answer to the question *'Will adherence of this proposal to the Forestry and Water Quality Guidelines, and any additional conditions attached to the approval be sufficient to prevent any potential significant impact to aquatic zones and their Q value'*. The FAC concluded, that in light of the answer recorded for question 17 as described above

and having regard to the status assigned to the waterbody (in the 2013-18 WFD assessment period) within which sub-basin the project area is located, that the DAFM erred in its processing of the application for the licence in this case as it relates to these grounds of appeal. The FAC also concluded that this error constitutes a serious error.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a series of significant errors was made in the making of the decision in respect of licence CN84986. The FAC is therefore setting aside and remitting the decision regarding licence CN84986 to the Minister to carry out and record a new assessment to determine whether the application should be subject to the EIA process under the EU EIA Directive, to assess any potential significant impact to aquatic zones and their Q values and to have regard to the error referenced earlier in this letter in relation to the total area specified for species to be planted, before a new decision is made.

Yours sincerely,

On behalf of the Forestry Appeals Committee