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27th October 2021

Subject: Appeal FAC119/2021 against licence decision CN86484

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 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 the parties to the appeal.

Hearing

The FAC, having regard to the particular circumstances of the appeal, did not consider that it was necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC119/2021 was held by the FAC on 14th October 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly & Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN86484.

Background

The licence decision relates to 400 metres of forest road works at Shasmore, Faughary, Co. Leitrim. The application states that the road would serve a forest of 9.46 ha planted in 1971 and lies on a peat soil at 200 to 300 metres elevation. The application includes specification details, environmental information and maps showing the proposed route of the road and features on the lands. The specification states that the road would be constructed through excavation on a soil with a peat depth of 800 mm and a gley formation.

The application was referred to Leitrim County Council and a response was provided stating no objection to the proposal and requested that conditions be placed on the licence in regards to communication with the authority and adherence with best practice.

There are two submissions from members of the public on the application which raises issues regarding general obligations of the Minister for Agriculture, Food and the Marine.

The DAFM undertook a screening for Appropriate Assessment and concluded that the proposal should proceed to Appropriate Assessment in relation to Lough Melvin SAC 000428, Lough Melvin UK0030047, and Donegal Bay SPA 004151. The Applicant provided a Natura Impact Statement dated 29th October 2020 which relates to operations in relation to two forest road and three felling licence applications. The NIS describes the proposed operations and considers possible effects and proposed mitigation measures on the qualifying interests of Lough Melvin SAC 000428 and Lough Melvin UK0030047 and considers other plans and projects in combination with the proposal and the potential for residual effects. The DAFM recorded an Appropriate Assessment Determination dated 17th June 2021. This again considers all European sites within 15km of the proposal and the reasons as to how they could be screened out. The DAFM AA concluded that measures were required for Lough Melvin SAC 000428, Lough Melvin SAC UK0030047, and Donegal Bay SPA 004151 on a precautionary basis. The AAD identifies the sources of the information provided.

The decision was issued on 25/06/2021 with a number of general and specific conditions including to Adhere to the mitigation measures set out in the attached Appropriate Assessment Determination, dated 17/06/21.

There is one appeal against the decision and the Notice of Appeal and full grounds of appeal were provided to all parties. The grounds contend that the decision is not consistent with the requirements of Article 4 of the Water Framework Directive. It is submitted that the proposal lies in the river sub-basin of Lattone_010 and that this has not been assigned a status and subsequently the DAFM should not have approved the licence with reference to a decision of the CJEU and a High Court Judicial Review. It is submitted that there is no formal AA Screening Determination for the site and that the in-combination details in the NIS are not consistent with those on Appendix 1 of the AAD and reference is made to text stating that the NIS was sufficient to derive appropriate conditions for a determination. It is submitted that the mitigations of the AAD and NIS are different and that the mitigations of the AA are not sufficiently clear to ensure the necessary degree of certainty that the project will not have a significant effect on a Natura 2000 site. Specific reference is made to measures related to the suspension of operations during and after periods of heavy rainfall. It is submitted that no rainfall data is provided or identified and that a weather forecast cannot be relied upon to be a sufficiently accurate predictor of future events on which to base AA mitigation and the accuracy of station forecasts in relation to the site is questioned. The grounds question the measures in relation to excavation and what features should have been identified prior to works commencing and the nature of the language employed and monitoring of operations. It is submitted that the inclusion of a turning area of a turning circle of 24 metres or a 30 metre long reverse leg in addition to other information lacks sufficient detail. It is submitted that the proximity of Dough/Thur Mountains NHA has not been considered and that Hen Harriers have nested proximate to and within the NHA. It is submitted that a failure of the NPWS to respond does not signify approval. It is submitted that the EIA screening does not include information on

emissions and that the DAFM could not have reached a conclusion in relation to the objectives of the Water Framework Directive.

In responding to the appeal the DAFM submitted that the decision was made in accordance with their procedures, the Forestry Act 2014 and Forestry Regulations 2017. The statement further submits, with reference to the Judgements identified in the grounds, that forest road works does not involve any canalisation or abstraction, and due to the various safeguards including (inter alia) setbacks and silt traps, the DAFM is satisfied that there will be no deleterious effect on water quality arising from the operations. It is submitted that the DAFM undertook a consideration of other plans and projects to ensure that the most recent information was available since the NIS. It is submitted that the SAC is greater than 8km downstream and joined by numerous sources of water flow and that the Standards for Felling and Reforestation and the Coford Roads Manual set out acceptable practice in relation to water monitoring. It is submitted that the difference between a turning circle of 24m radius or a 30m long reverse leg, is in total approx. 3 metres as the centre point for the radius that both are contained within the same footprint and that the measures are sufficient. It is submitted that the project falls within an area of mature conifer forest with no open heath and that records of Hen Harrier nests are provided to the DAFM by the NPWS. The statement further submits that the measures specific are sufficient to prevent any deterioration of water quality and that the Lattone_10 is not listed as being under significant pressure by the EPA and that there is no ambiguity to the extent or nature of the project.

Considerations of the FAC

The FAC considered, in the first instance, the grounds of appeal that relate to the Appropriate Assessment undertaken by the DAFM. The FAC further considered that under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans and projects, having regard to the conservation objectives of that designated site. The proposal is not connected with or necessary to the management of a European site and is not situated within an area designated for conservation. The FAC examined publicly available information provided by the EPA and NPWS and identified the same European sites within 15km of the proposal and the noted the location of Donegal Bay SPA some 20km from the proposal and at a significantly greater distance hydrologically and through Lough Melvin. The proposal lies in Drowes_SC_010 of the Erne (36) catchment and the Latone 010 sub-basin. The proposal crosses the Lisdarush stream which forms part of the Latone 010 waterbody. Continues north and joins Lattone 35 which flows into the Rosfriar that flows westerly into the boundary of Lough Melvin SAC.

A Natura Impact Statement (NIS) was submitted by the Applicant and relates to three felling licences and two forest road works licences, including CN86484. This document describes the details of the works in detail both in the document and in an Appendix, identifies European sites which are considered could be affected by the works and the nature of the effects, and proposed mitigation measures are described to protect specific qualifying interests of the sites in question.

The DAFM record contains a number of versions of screening for Appropriate Assessment with the final version referring to the reasons recorded in the AA Determination. This records that the proposal should proceed to AA in relation to Lough Melvin SACs (000428 and UK0030047) due to direct hydrological connection and distance and Donegal Bay SPA 004151 due to an indirect hydrological connection and on a precautionary basis. The reasons for screening out other European sites are recorded and relate to the distance from the proposal lands and the absence of a hydrological connection. The FAC confirmed these details having regard to the record and publicly available information from the EPA and NPWS and considers that there is no potential for these other sites to be impacted by the forest road works.

As noted in the AAD, the potential for Donegal Bay SPA to be impacted is very low given the degree and nature of separation and the measures proposed relate to the protection of water quality. The measures proposed in relation to Lough Melvin also relate to the protection of water quality through the implementation of setbacks and other good practice and specific measures that relate to Otter (*Lutra lutra*) which is a qualifying interest of the SAC. The AA Determination also includes measures with reference to heaths and related open habitat features. Other plans and projects considered in combination with the proposal are recorded and include both forestry and non-forestry projects.

The AA Determination provides further details as to the background of the measures and concludes, *Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.*

The grounds of appeal question the screening, in-combination considerations and mitigation measures in relation to the AA. In relation to the screening, the record includes a number of versions of the screening with the final one referring to the reasons outlined in the AA Determination. The FAC considers that the reasons provided for determining which sites require AA and which do not, can be readily and clearly interpreted from the record of the decision. The grounds do not challenge or suggest that other European sites should have been subject to AA and the FAC does not consider that there is any evidence that this should have been the case. The FAC does not consider that an error occurred in this regard.

In relation to the consideration of other plans and projects in combination with the proposal, the ground appear to contend that if the NIS contained sufficient information it would not be necessary for the Minister to undertake a new consideration of plans and projects. In responding to the appeal, the DAFM submitted that they undertake a new consideration to ensure that the most recent plans and projects were assessed. The FAC considers this to be reasonable and in keeping with good practice and is not satisfied that an error occurred in this regard.

The ground question the nature and specificity of a number of grounds of appeal. In relation to water hotspots, it is noted that no hot spots were recorded on the Biomap, which is correct. However, the FAC does not consider that this necessarily evidences a deficiency of some sort and instead considers that this appears to be a good practice measures that is included for completeness. The FAC does not consider that this constitutes an error. A number of concerns are raised in relation to measures that relate to the cessation of works during periods of heavy rainfall and the reliability and interpretability of the measure is questioned in addition to the suitability of a weather forecast as a measure. Firstly addressing the latter point, the FAC are satisfied that the use of a weather forecast is suitable for these purposes and that it would provide a sufficient degree of certainty and accuracy but is not the only standard stated in the condition. In relation to the data itself, the FAC notes that Met Eireann employs the HARMONIE AROME model in its forecasts and models weather across a 2.5km grid providing for a forecast for the location of the works. In addition, the nature of the measure is related to the mobilisation of silt and sediment rather than solely in relation to forecasted figures. The grounds question the nature of this aspect of the measure as well and in particular the language *sufficiently heavy to result in the loss of nutrients and/or the mobilisation of sediment, fine organic matter and debris into receiving waters*.

The FAC considers that this measure is of importance in the overall context of the potential effects identified in the NIS and AA and that the language employed having regard to the nature of the proposal and the lands themselves is not sufficiently clear to ensure a consistent and objective interpretation that would ensure the implementation of the measure for the identified purpose. Therefore, the FAC is satisfied that this is a serious and significant error in the making of the decision and that the decision should be set aside and remitted to the Minister for Agriculture, Food and the Marine to address this matter.

Furthermore, in considering the record of the decision the FAC noted that the Natura Impact Statement contains a contradiction in relation to the operations that would be undertaken. The main body of the NIS specifies that three water crossings will be employed in the operations (page 21) which is reflected in the AA Determination while the construction management plan in Appendix 3 of the NIS specifies that there would be two water crossings. This discrepancy is not addressed in the AA Determination. The construction management plan in Appendix 3 is directly referred to in the mitigation measures proposed in the NIS and is not referred to in the AA Determination. Given the specific nature of the operations outlined in this Appendix, the FAC considers that it should have formed part of the AA Determination and that the nature of the proposed operations should have been clarified in light of the contradiction contained in the NIS. Furthermore, the NIS includes a measure to adhere with *CIRIA Control of water pollution from linear constructions projects. Site Guide (C949D)*, while this was not adopted in the AA Determination. While considering that it is for the DAFM to identify the necessary measures, the FAC considered that the specific operations as described in the NIS and Appendix 3 were of such a nature that, in this instance, the AA Determination should provide a reason for not adopting this specific measure in the context of the AA and the operations as proposed. The FAC considers these constitutes additional errors which should be addressed in the making of a new decision.

In relation to the specification of a turning area that will either comprise a turning circle 24m in diameter, or a 30m long reverse leg before the end of the road. The FAC considers that either approach is reflective of standard practices and the option is clearly identified in the NIS and would have been available to the DAFM early in its assessment and is referenced in the AA Determination. No evidence was submitted that either approach might constitute a greater threat and the FAC does not consider this to be the case. Both approaches would occur within the same general footprint and involve similar operations. The FAC is not satisfied that this constitutes an error in the making of the decision.

A number of other comments are made in the Notice of Appeal regarding the specification of mitigation measures and language employed and maps provided. The FAC considers that the DAFM had sufficient information to make the decision having regard to the maps, specification, environmental information and Natura Impact Statement, the processing by the DAFM and information in the public domain. The FAC considered that while the decision must take account of the NIS submitted that it is for the Minister for Agriculture, Food and the Marine to ultimately determine what are the necessary licence conditions to be attached to the licence while noting the errors identified. In relation to other measures that relate to good practice the FAC considers this to be of a standard nature and interpretable and comprehensible to the Applicant and could be confirmed by the DAFM. Monitoring standards are outlined in the COFORD Forest Road Manual. The FAC is not satisfied that these other matters represent errors in the making of the decision.

In relation to water quality, the grounds submit that there is no evidence that the Lattone 010 waterbody has been assigned a water quality status in line with the Water Framework Directive by the EPA and that in the absence of a status it is not possible for the DAFM to validate the impact of any water quality measures and that the application should have been refused. Reference is made to the C-461/13 judgement by the CJEU and the High Court Judgement in Case 280 (Sweetman v An Bord Pleanala) 2018. In relation to the latter, the FAC could not identify a Judicial Review that accorded with this reference but it did consider 2018 740 JR (Sweetman v An Bord Pleanala), which addressed the Water Framework Directive in the context of a development that would impact an unassigned waterbody.

The DAFM submits that in the “Weser” CJEU case and 2018 740 JR the operations would have an impact on a waterbody as it involved canalisation and abstraction respectively. It submits that in this instance the operations would not involve such activities and that, due to the safeguards, the proposal would have no deleterious effect on water quality arising from the operations and it does not jeopardise the attainment of good status.

The FAC noted that the DAFM did not employ a proxy status to assess possible impacts on the status of the waterbody and that they contest that the operations are fundamentally different from those in the two identified judgements and would not impact on the status of the waterbody. The FAC did not consider that the grounds contended that the waterbody would be impacted by the proposal but rather noted its position in the sub-basin and referenced the identified judgements. The FAC noted the nature and localised scale and the limited time scale of the operations. However, having identified the errors as

noted in the AA Determination and licence conditions that relate to the carrying out of the operations and potential impacts on European sites through the system of watercourses the FAC considered that it could not be reasonably concluded that the proposal would not impact on the waterbody. Thus, the FAC considered that in undertaking a new Appropriate Assessment and making a new decision, the DAFM should consider potential impacts on the Lattone 010 of the proposal and conditions attached and having regard to the Water Framework Directive, National Legislation and relevant Case Law, including the decision of Judge Hyland in 2018 740 JR.

Dough/Thur Mountains NHA lies c.900 metres to the east at its closest point and is separated by areas of existing managed forest, forest roads, and streams. The NPWS record the qualifying interest of the NHA as peatlands. The streams that drain from the proposal lands does not enter the NHA and the proposal would occur in a mature coniferous forest. The proposal is outside of the boundaries of the NHA and at a remove such that no significant effects are likely. The AA Determination includes measures to protect local habitats but these are not associated with European sites in the area. While it may be preferable to include such measures in a separate document, the FAC does not consider that their inclusion constitutes any real error in the making of the decision. In relation to Hen Harrier, there is no Special Protection Area which has been designated for this species that might be impacted by the proposal and the proposal lands do not appear to be comprised of habitat associated with the species. The FAC are not satisfied that the Minister has erred in this relation to these grounds of appeal.

In relation to other potential impacts of the proposal on the environment, the FAC noted that the EU Environmental Impact Assessment (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. 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 decision under appeal relates to a licence for forest road works of 400 metres, 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 cumulative effect and extent of project, water, soil, terrain and slope designated and non-designated areas, archaeology, and landscape and visual amenity and determined that the project was not required to undergo the EIA process. Having regard to the nature, scale and location of the proposal, the FAC did not consider that any convincing evidence was submitted that would suggest that the proposal is likely to have significant effects on the environment and should proceed to the EIA process. However, this is based on the available information and is without prejudice to any further consideration, including any new information, by the Minister for Agriculture, Food and the Marine in making a new decision.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and other submissions received. As outlined in this letter, the FAC is satisfied that serious and significant errors were made in making the decision CN86484. The FAC is, therefore, setting aside and remitting the decision of the Minister for Agriculture, Food and the Marine in line with Article 14B of the Agricultural Appeals Act 2001, as amended, addressing the matters outlined in this letter before a new decision is made.

Yours sincerely,

A black rectangular redaction box covering the signature of Vincent Upton.

Vincent Upton, On Behalf of the Forestry Appeals Committee