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26<sup>th</sup> October 2021

**Subject:** Appeals FAC117/2021 and FAC118/2021 against licence decision CN87255

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and 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 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 appeals FAC117/2021 and FAC118/2021 was held by the FAC on 13<sup>th</sup> October 2021. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & 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 CN87255.

#### Background

The licence decision pertains to an afforestation licence for 21.99 ha at Tullynahaw, Co. Roscommon. The proposal is divided into ten plots, two plots totalling an area of 1.6 ha would remain unplanted, two plots totalling an area of 1.83 ha would be planted with birch and other native, broadleaf species, and the remaining seven plots totalling an area of 18.56 ha would be planted with a mixture of Sitka spruce and broadleaf species, stated in the licence conditions to be birch, rowan and oak. No additional drainage or mounding is proposed while invert mounding, woody weed removal and planting through angle notch and slit planting is proposed. No fertiliser or use of herbicide is proposed and weed control would occur through manual methods. The licence includes 3,100 metres of stock fencing.

The proposal was referred to An Taisce, Roscommon County Council and the NPWS and a response from the County Council only is recorded. The County Council submitted that the Roads section had no

objection to the proposal subject to conditions and the submission goes on to describe the obligations of the Water Framework Directive, submitted details of the local waterbody and suggested conditions in relation to setbacks from water courses and other matters. There are five submissions from members of the public, including the Appellants, on the application which include objections to the proposal on the basis of impacts on landscape, local amenity, heritage and biodiversity and requests for information.

The DAFM, through a further information request, required an Archaeological Impact Assessment to be undertaken in relation to monuments in the general area and the suggestion that historic mines may be present on site. The survey included both a desktop and field walkover survey. Specific regard was given to a promontory fort to the west of the proposal lands in Greaghmaglogh. The survey noted no recorded monuments on the lands and four within 500 metres, comprising the fort, two sweat houses and a rath. The report notes that a number of coal pits at the north of the townland are identified on historic ordnance survey mapping and marked as unused. The report also notes no protected structures or records of architectural heritage on the lands or surrounds. The Assessment did not note any significant visual impact on the fort and recommended that the groundworks be subject to a programme of intermittent monitoring and a 10m unplanted buffer be established around the historic farmyard in the east plot and around the ruinous building in the west plot. The DAFM Archaeologist considered that the proposed setback in plot 6 was not sufficient and extended this and included the boreen and mapped the required setback. This was considered appropriate with reference to the description of the cottage and was agreed with the National Monument Service, Department of Housing, Local Government and Heritage. A setback from the derelict buildings in plot 3 and monitoring was also required.

The DAFM recorded a screening for Appropriate Assessment (AA) and identified six sites and all six are screened and reasons are provided. A consideration of other plans and projects in-combination with the proposal was recorded and dated 21/06/21. The DAFM also recorded a consideration of the proposal across a range of criteria and concluded that it would not be required to undergo the Environmental Impact Assessment process.

The licence was approved on 22/06/21 with a number of conditions including specific conditions,

- *Conditions of the attached Archaeology report are to be strictly adhered to at all times. Please contact the Forest Service Archaeologist prior to commencing operations.*
- *Adbs are to consist of Birch, Rowan and Oak.*
- *Please contact District Inspector prior to commencing operations.*

There are two appeals against the decision and the Notices of Appeal and full grounds of appeal were provided to all parties. The grounds of FAC117/2021 submitted that the Appellant's submission on the application was not acknowledged and that they were not informed of the decision. They submit that they were not consulted with and they are situated between parts of the proposal. They submit that works at a specified windfarm had caused damage to their land and the land on which the proposal would occur and questioned how the works could take place. They raise concerns about the loss of views from their lands and impacts on amenity and submit that an old farmstead on their land would be impacted by the proposal. The grounds also comment on the Appellant's personal circumstances. The appeal included a



copy of the original submission said to have been emailed to the DAFM on 8th October 2020. This included issues in relation to a Natural Heritage Area on Arigna Mountain, the Arigna river and local wells, an altar (sic) stone on the lands which is said to be visited regularly and archaeological sites in the area, water damage and landslide attributed to wind farm works in the area, corncrake habitat, and the Miners way and disused coal mines in the area. The appeal also included an email attributed to the DAFM informing the Appellant of their right of appeal and stating that their submission had not been acknowledged or informed of the decision prior to the date of the email, 16th July 2021.

The grounds of FAC118/2021 submit that the proposal could not proceed as an area excluded under the archaeological conditions traverses the site and would result in future felling not being able to occur. The grounds question whether mines are present on the site and make reference to a specific text which is submitted to state that three coal mines were present in the townland and that not all mines are recorded on maps. It is submitted that works in relation to a windfarm had negative impacts on the hydrological conditions or neighbouring land. It is submitted that a landslide occurred, that the lands are unstable and that the area is at high risk of landslides. It is submitted that there are endangered species of bird in the area and that, under the Birds Directive, SPAs must be designated for these species. It is submitted that the NPWS has not been consulted and that there has been no ecological input and that there may be areas of Annex I habitat in the area. It is submitted that parts of the area already contain trees and might qualify as forest and should not have been licenced or granted state aid. It is suggested that the Bio map failed to identify a right of way or all trees and hedgerows. It is submitted that there has been no visual assessment of the proposal and no images of the project area have been submitted. It is submitted that the conditions require a setback of 2/3 metres while a project suggested 7 metres. It is submitted that the proposal encircles a farm. It is submitted that plot 4 is indicated as both CHF and BHF and that this is an error. It is submitted that this would contribute to the cumulative effect of commercial forestry and that the local infrastructure is not adequate. It is submitted that timber could not be harvested from plot 9 without crossing native woodland plot 8. The grounds included parts of the DAFM Archaeological Report.

In a statement to the FAC in response to the appeal, the DAFM submitted the details of the processing of the application and that the decision was made in line with their procedures, Forestry Act 2014 and Forestry Regulations 2017. The statement further submits that all water/environmental features and water quality concerns are addressed in the Environmental Requirements for Afforestation document. It is submitted that archaeology has been addressed by Forest Service archaeologist. An Archaeological Impact Assessment was carried out by the applicant and reviewed by the Forest Service Archaeologist. It is submitted that the site was desk and field assessed by the DAFM inspector and that the site was approved adhering to all standard operating procedures and guidelines at the time of approval. It is submitted that the issues raised by the appellant do not provide sufficient grounds for DAFM to change its conditions of approval.

The statement also included a response from a DAFM Archaeologist confirming that the submission made by the Appellant of FAC117/2021 had not been acknowledged and had not been made available to the District Inspector or the Archaeologist and suggested that the decision could be varied, if appropriate, to address the suggested presence of an altar stone on the lands and that this issue had not been expressly

brought to the attention of the archaeologist who had undertaken the survey. It is further submitted that an unplanted setback would be established from a shed or building beside plot 9 as a result of the relevant watercourse setback and that the conditions could be varied to confirm this. This statement submits that the exclusion zone around the derelict cottage would not result in the complete exclusion of future felling works from the area and that such works would be subject to a felling licence which would be assessed and would be subject to conditions which could address potential impacts on the site and the DAFM have granted such licences in the past. It is submitted that one of the reasons for requiring the Archaeological Impact Assessment was to consider the matter of coal mines and other mining heritage and that no sites were identified in the survey. The statement submits that there are no recorded monuments in the lands as documented and no unrecorded monuments identified in the walkover survey.

### **Considerations of the FAC**

The FAC considered, in the first instance, the grounds of appeal contained in appeal FAC117/2021 in relation to a submission said to have been made on the application. The Appeal included a copy of an email dated 8<sup>th</sup> October 2020 which included an objection to the application CN87255. While this document is redacted (in the version available to the FAC) such that the details of the submitter cannot be confirmed, it appears accepted by all parties that this submission was made by the Appellant. The submission appears to have been made within the time frame set out in Part 6 of the Forestry Regulations 2017. The FAC also noted that the submission was from a member of the public with lands adjoining the proposal lands and concerns of a specific and local nature. Part 10 of the Forestry Regulations 2017 state, 20. (1) *The Minister, after expiration of the consultation periods referred to in Regulations 9 and 10 and having regard to the following-*

...

*(d) written submission or observation received under Part 6,*

...

*capacity of the applicant to carry out the development may, in whole or in part, grant a licence.*

While the failure of the DAFM to acknowledge the submission made by the Appellant may be considered poor administrative practice, the FAC did not consider that this in itself could be considered to be a serious or significant error. However, based on the statement provided to the FAC in response to the appeal it is clear that the submission was not available to relevant DAFM personnel involved in the making of the decision. Furthermore, it is suggested that, should the information have been available, it may have influenced the decision-making process and the decision itself through the specification of licence conditions. The FAC is therefore satisfied that the decision was made without having regard to a written submission provided within the required timeframe. The FAC is satisfied that this constitutes a serious and significant error in the making of the decision. The FAC concluded that given the nature of the error and the point at which it occurred and the nature of the submission and the response from the DAFM, that, in relation to this specific matter, that the decision should be set aside and remitted to the Minister for Agriculture, Food and the Marine.



In relation to the provision of documentation, it appears that the DAFM provided documents to the Appellant on the 16<sup>th</sup> July 2021 and an appeal was made within the timeframe provided for in the Agriculture Appeals Act 2001, as amended. The FAC provided documentation to the Appellant on 14<sup>th</sup> September 2021 and no further correspondence was received.

In relation to consultation, the record includes documentation of the erection of two site notices at the public road and notice was published on the DAFM website. This does not appear to be contested by the Appellants and the FAC considers such provisions for public engagement to be appropriate. Both Appellants made submissions on the application but as noted the FAC considers that the submission from Appellant FAC117/2021 does not appear to have been sufficiently considered in the making of the decision.

Both appeals refer to the nature of the lands and the capacity to undertake the works. While reference is made to suggested damage to lands by works associated with a windfarm it is also submitted that legal proceedings may be ongoing and the FAC does not consider it appropriate to comment on such matters. In relation to proposal CN87255, this relates to the planting of trees on agricultural land. Such operations would not normally involve deep excavations or the use of concrete or the importation of stone or other materials. In this specific case no additional drainage is proposed and mounding and the digging of mound drains would not take place. Instead invert mounding would be proposed. Existing hedgerows and trees would be retained and a steep section to the west of the lands would remain unplanted. An appeal submits that the area is classified as high risk on the Geological Survey of Ireland (GSI) landslide susceptibility mapping. The FAC reviewed the maps provided by the GSI and noted that the land proposed for planting are mostly classified as having a low and moderately low susceptibility while a very small section does have a high classification. The FAC note the distinction drawn by the GSI between susceptibility and risk, and does not consider that there is any convincing evidence before it that the proposal as licenced would pose a risk of landslide having regard to the nature and operational details as specified. The FAC does not consider that an error occurred in the making of the decision in relation to these matters

In relation to the archaeological setbacks stated, the FAC noted that minimum setbacks from designated and non-designated monuments and built heritage are outlined in the *Environmental Requirements for Afforestation* (DAFM, 2016). This includes a 10 metre setback from non-designated built heritage structures such as derelict dwellings and farm buildings. It is suggested in the grounds that the setback stated in Plot 6 would prevent future harvesting from taking place as it bisects the plot, while the DAFM contend that, while it is generally intended that operational activities are excluded from such unplanted archaeological exclusion zones/setbacks, the DAFM could, and has in other circumstances, licenced felling across such areas, in some cases with specific operational conditions. The setback proposed in relation to Plot 6 does cross the entirety of this section of the land and includes a derelict cottage, breen, and open space. The FAC considered that this setback is specified in relation to an unplanted setback at the afforestation stage to which the licence pertains. Future forest road works or felling would require separate approval by the Minister for Agriculture, Food and the Marine at which time conditions could be placed on the operations if considered appropriate. However, The FAC considered that doubt still remains

as to how this exclusion zone is to be treated during afforestation operations. The zone bisects Plot 6 and there is no alternative access to the northern section of Plot 6 or to Plots 8 and 9 identified. While the operations involved in planting the lands would be of a substantially lesser scale than felling, the proposal still provides for the use of invert mounding to plant the lands. Table 6 in the *Environmental Requirements for Afforestation* clarify that machine traffic, and other operations, must be excluded from Archaeological setbacks during site works and the licence conditions do not appear to have addressed this, while they do state that the setback does not require fencing. Thus, it appears to the FAC, based on the information before it, that the operations as licenced could not proceed in keeping with the conditions specified as it appears that no provision has been made for limited crossing of the setback during afforestation works and there is no evidence of an alternative access to the lands to the north of this setback. The FAC is satisfied that this constitutes a serious and significant error in the making of the decision and the FAC considers that the decision should be set aside and remitted to the Minister for Agriculture, Food and the Marine to address this matter.

It is submitted that there are rights of way on the lands which have not been identified although the specific location, nature or evidence of these rights of way was not submitted. The Forestry Regulations 2017 require that wayleaves be shown on a map with the application. The FAC examined the folios of the lands on landdirect.ie. It appeared to the FAC that there are no rights of way on the lands in question and that rights of way appear to be in place on folios adjoining but not within the proposal lands. The FAC is not satisfied that an error was made in this regard.

The FAC considered the grounds that referred to habitats and species in the area and the obligations under the Habitats Directive. 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, these are 000584 Cuilcagh - Anierin Uplands SAC, 002032 Boleybrack Mountain SAC, 001673 Lough Arrow SAC, 001898 Unshin River SAC, 001656 Bricklieve Mountains and Keishcorran SAC, and 004050 Lough Arrow SPA. The DAFM considered each site in turn and listed its qualifying interests and conservation objectives and recorded the reasons for the decision not to proceed to Appropriate Assessment in each case. A detailed consideration of other forestry and non-forestry plans and projects considered in-combination with the proposal was recorded. The FAC considered the nature, scale and location of the proposal and the details recorded. The proposal is outside of and at a considerable distance from any European site with the closest being 000584 Cuilcagh - Anierin Uplands SAC which is c.8km from the proposal and 002032 Boleybrack Mountain SAC which is 11km and the qualifying interests of both relate primarily to upland terrestrial habitats and species. 001673 Lough Arrow SAC, 001656 Bricklieve Mountains, 001898 Unshin River SAC and Keishcorran SAC, and 004050 Lough Arrow SPA are all situated in a separate catchment, Sligo Bay, and at a considerable distance from the proposal. There are no SPAs



in the area or that might be effects by the proposal. The FAC did not consider that there was any pathway of effects from the proposal to any European site such that significant effects could arise.

Corry Mountain Bog NHA lies to the north of the proposal and covers an area of 286 ha and the NPWS identify its qualifying interest as peatlands, with the site synopsis identifying the primary habitat as upland blanket bog. The application was referred to the NPWS which did not make a submission. The proposal lies outside of the NHA at a distance of over 150 metres and downslope of the NHA. It is separated by an area of rough grazing. The closest lands within the NHA contain wind turbines and associated roads. A hedgerow borders the north boundary of the proposal and a setback would be required. The FAC does not consider that there is any evidence that proposal would have a significant adverse impact on the NHA or that the DAFM erred in relation to these matters.

In relation to the suggestion that protected species or habitats may be present on the lands, no evidence of this was presented with the appeal. The granting of the licence does not remove any obligations on the landowner or contractors or existing protections provided for species under any other legislation. Hedgerows and watercourses are marked on the Biomap provided, which includes an aerial image of the lands, and are addressed in the application, licence conditions and through the *Environmental Requirements for Afforestation and Forestry Standards Manual*, adherence with which is a condition of the licence.

The FAC considers that there is no convincing evidence that the proposal has the potential to have a significant effect on any European site itself or in-combination with other plans and projects or a significant adverse impact on nature conservation and is not satisfied that an error was made in the making of the decision in this regard.

The proposal lies in the Arigna[Roscommon]\_SC\_010 subcatchment of the Upper Shannon (26A) Catchment and in the Arigna (Roscommon) 20 sub basin. The stream to the west of the lands, named as the Giddaun by the EPA, forms part of the Arigna (Roscommon) 020 waterbody. This waterbody has been assigned a Good status and considered Not at Risk regarding the objectives of the Water Framework Directive by the EPA. The proposal is for the planting of trees using invert mounding and without additional drainage. There would be no use of fertiliser or herbicide. As documented in the Biomap there are a number of drains and streams on the land and these would require setbacks and operational considerations as outlined in that map and specified in the *Environmental Requirements for Afforestation* adherence with which is a condition on the licence. The soils are described as primarily mineral and the proposal is not with an area considered as fisheries or acid sensitive in the DAFM procedures. The application was referred to the County Council which recommended conditions which are reflective of those in the *Environmental Requirements for Afforestation*. The FAC is not satisfied that an error was made in the making of the decision in relation to these matters.

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 afforestation of 21.99 ha, 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 existing land use, cumulative effect and extent of project, designated and non-designated habitats, archaeology, and landscape. As noted an Archaeological Impact Assessment was prepared and considered by the DAFM and this resulted in specific conditions being attached to address these matters which, as noted, the FAC considered acceptable. The DAFM completed a screening for Appropriate Assessment and considered other designated sites and concluded that these would not be impacted. The DAFM concluded that the proposal was not required to proceed to Environmental Impact Assessment. The FAC does not consider that there is any evidence that the proposal as licenced is likely to result in significant effects on the environment and the FAC is not satisfied that the DAFM erred in this regard.

A number of matters raised in the grounds of appeal relate to policy and state aid and the FAC considers that the making of forest policy and issues related to grant aid do not fall within its remit. Regarding the specification of the species to be planted, the FAC considers these to be clearly stated in the proposal and licence conditions.

A number of grounds refer to potential impacts on archaeology and heritage in the area. The DAFM required the submission of an Archaeological Impact Assessment (AIA) as previously described in order to process the application and this was prepared by an independent consultant and submitted to the DAFM. As noted, this examined a number of matters including those raised by the Appellants and identified to the Applicant by the DAFM. There is no evidence of recorded or unrecorded monuments on the lands and the licence conditions include monitoring of the works. The grounds question the presence of mines on the lands but this matter is explicitly addressed in the AIA, which notes the location of the mines to the north of the townland as mapped on historic Ordnance Survey maps. The AIA also describes and addresses the fort that lies outside of the proposal lands and derelict farm buildings within the proposal area. As noted the AIA considers a wide variety of archaeological and heritage data sources and considers potential impacts on the wider landscape and includes a number of photographs of the site. The DAFM recorded specific considerations in relation to these matters and agreed conditions that were referred to and agreed with the National Monuments Service.

In relation to more general heritage and landscape matters, the lands do not appear to lie on the Miners Way directly but are within the general area. The FAC examined the Roscommon County Development Plan 2014-2020 (the 2021-2027 plan being currently under public consultation), and particularly the



Landscape Assessment which does not suggest the proposal would impact directly on a scenic view or a scenic route. The County Council did not raise any concerns in relation to these matters. The proposal requires a 60 metre setback from any dwelling unless agreed with the owner and the proposal includes an unplanted area from the public road at the eastern section while the western section includes a watercourse and hedgerows which would provide further screening and setback. In this instance, there is a dwelling situated between the two sections of the proposal but no planting would occur to the south, or directly north, of the dwelling and visual connectivity with the public road would be maintained. Planting cannot take place within 10 metres of the public road. The FAC considers that the matters as outlined here have been addressed sufficiently in the making of the decision but this is without prejudice to any further information that the DAFM may attain or consider in making a new decision on the application.

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. 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, to address the matters related to the specification of archaeological licence conditions and to have regard to written submissions and observations made within the timeframe provided for in the Forestry Regulations 2017 before a new decision is made.

Yours sincerely,

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

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Vincent Upton, On Behalf of the Forestry Appeals Committee

