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3rd September 2021

Subject: Appeals FAC873/2020 in relation to afforestation licence CN86680

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, has now completed an examination of the facts and evidence provided by all parties to the appeal.

Background

Afforestation licence CN86680 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 8th December 2020.

Hearing

A hearing of appeal FAC873/2020 was held by the FAC on the 22nd July 2021:

FAC Members - Mr Des Johnson (Chairperson), Mr Dan Molloy, and Mr Luke Sweetman

FAC Secretary - Mr Michael Ryan

Decision

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to vary the decision to grant afforestation licence CN86680.

This licence is for the afforestation of 22.39ha and erection of 2000m of Deer fencing in Kilbride, Co. Wicklow. The project area is primarily grassland and scrub habitats (Gorse, Bracken, and Bramble) with some hedgerows/treelines along the boundaries. The predominant soil type is Brown earth and the slope is predominantly flat to moderate (<15%). There are no watercourses within or adjoining the project area. The proposed development is for Native Woodland Establishment across seven plots. Plots 1-4 (totalling 19.14ha) are composed of Pedunculate oak, Birch, Scots pine and Additional Broadleaves. Plots 5-7 (totalling 3.25ha) are to be unplanted Bio plots. The DAFM's approval letter states the ground preparation will be woody weed removal, drainage works and firebreaks will not be required, angle notch and pit planting will be used, road access is provided, and the application of fertiliser of 250kg/ha of Ground Rock Phosphate (GRP) and herbicide (in years 1 & 2) are approved.

The proposal is in the Liffey and Dublin Bay Catchment, the Liffey_SC_010 Sub-Catchment, and the majority of the site is within the Liffey_030 River Sub-Basin. Part of Plot 1 and a small section of Plot 4 (in the north of the proposal) are in the Brittas_020 Sub-Basin. The Liffey_030 Waterbody was assigned

'Good' status and the Brittas_020 assigned 'Moderate' status under the Environmental Protection Agency (EPA) 2013-2018 reporting period.

The application was field and desk inspected. The Inspector's Certification document states that the project area is not prone to flooding, is free of shell marl or highly calcareous soils, is not acid sensitive or sensitive for fisheries and is not within a Freshwater Pearl Mussel (FPM) 6km Zone or within an FPM Catchment. The proposal is within 3km upstream of an NHA, pNHA, SAC, SPA, or National Park and contains an archaeological or national monument site. The project lands are within a Prime Scenic Area as per the County Development Plan but there are no other High Amenity Landscape considerations. The approximate percentage forestry cover within 5km of the application area is 29.01% at present. The application, together with new afforestation of three years or less within 500m is 22.39ha. The application together with other Form 1 (Pre-Approval) applications within 500m and approved but not yet planted is also 22.39ha. The percentage of forest cover currently in the underlying Waterbody is 6.46%.

The application was submitted along with associated maps and an unsolicited Natura Impact Statement (NIS). The NIS was dated 22nd June 2020 and was compiled by the Registered Forester and Kerry Ecological Services. The NIS includes a project description and contains an Appropriate Assessment (AA) AA Screening which screened five Natura sites within 15km of the proposal: (i) Wicklow Mountains SAC, (ii) Red Bog, Kildare SAC, (iii) Glenasmole Valley SAC, (iv) Poulaphouca Reservoir SPA, (v) Wicklow Mountains SPA. All five sites were screened out for Stage 2 AA for reasons including separation distance, lack of hydrological connection (no watercourses or drains on-site with public roads intervening), elevated ground intervening, and no pathway for indirect effects.

The NIS states that no mitigation measures are required as no sites are screened in but lists some standard practices to ensure water quality in the locality will not be detrimentally affected. The NIS contains an in-combination section which reviewed Wicklow County Council (WCC) planning listings and reviewed aerial photography of the area. This section states "both of these indicate low density dwelling houses and agricultural buildings in a rural environment of predominately agricultural grassland fields and some heath habitat, with scattered commercial forestry (conifers)." This section concludes that "cumulative or in-combination impacts are unlikely to ensue".

The Inspector's Certification contains an AA Screening which screened the same five sites as the NIS. All five sites were screened out for Stage 2 AA due to "the absence within and adjacent to the project area, of any habitat(s) listed as a Qualifying Interest of the Natura site."

An AA Screening Determination (AASD) was completed by a DAFM Ecologist on the 8th October 2020. The AASD states "the purpose of this Appropriate Assessment Screening Determination is to identify and characterise any possible implications arising from Afforestation project CN86680, either individually or in combination with other plans or projects, in view of the Conservation Objectives of any European Site(s)." The AASD screens the same five sites as the NIS and screens all five sites out for reasons including the intervening distance, the lack of a hydrological connection, the lack of suitable/optimal foraging or roosting habitat, and the location of the project lands outside the core foraging range for the relevant species.

The DAFM considered the potential for the project to contribute to an in-combination impact on European sites. Various online planning websites were consulted along with the DAFM's internal records for other plans and projects, focusing on the general vicinity of the project area in the River Sub Basins (Liffey_030 and Brittas_020). The in-combination report concluded that the DAFM "excludes the

likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on the European sites listed above.”

An AA Determination (AAD), dated 8th October 2020, was prepared by a DAFM Ecologist. The AAD states that in concluding the AAS, the Minister has determined that there is no likelihood of the Afforestation project CN86680 having any significant effect, either individually or in combination with other plans or projects, on any of the following European site(s), in view of their conservation objectives. The AAD indicates that the Minister determined that Stage 2 AA was not required but that an unsolicited NIS was submitted whereby all Natura sites were screened out but that the submission of an NIS resulted in the file being automatically referred to the Ecology Unit. The AAD states that when a file is referred to Ecology, the initial screening is subject to expert verification but in this case there was no initial screening due to the automatic referral. The AAD states that the application only progressed to AA stage because the applicant submitted an NIS. The AAD concludes that “DAFM has determined that there is no possibility of CN86680 having any likely significant effect, either individually or in combination with other plans and projects, on any European Site. (Determination under Section 42(16) of S.I.477 / 2011: For the purposes of 42(16) of S.I.477/2011, DAFM has determined that the project will not adversely affect the integrity of any European Sites).”

The DAFM referred the application to Inland Fisheries Ireland (IFI), An Taisce, Wicklow County Council (WCC) and the DAFM Archaeologist. There was no reply from IFI or An Taisce. WCC replied stating “Poulaphouca SAC and Dublin drinking water abstraction downstream of proposed forest – checks required to ensure rock phosphate and herbicide applications are carried out in a manner that provides the highest level of protection for water.” The DAFM Archaeologist replied with a report which contained recommended measures (a) – (h) to be attached as licence conditions “in order to safeguard the archaeological heritage of the site and the area and to ensure the identification, recording, further preservation and protection as appropriate, of any other archaeological remains (including low visibility or subsurface remains) that may exist within the site.”

The DAFM issued the licence on the 8th December 2020 with the relatively standard conditions plus Condition 5 which requires strict adherence to all conditions set by the Forest Service Archaeologist, adherence to conditions in the attached AAD, adherence to the Forestry & Landscape Guidelines, and also states “the following specific archaeological requirements shall be fully complied with” and lists (a)-(h) from the Archaeologist’s report.

There is one appeal against the licence. The written grounds of appeal were considered in full by the FAC and are summarised below:

FAC873/2020 –

1. 60m setback required by the Forestry Standards Manual is not shown.
2. Required 60m setback is insufficient (loss of light calculations referenced and included as attachment).
3. Impact on property including grass, existing plants, loss of light, impact on hydrology in area due to proximity of planned afforestation. Deciduous woodland will impact local hydrology due to uptake of soil moisture and high evapotranspiration rate.
4. There will be an adverse effect on the appellants’ property value.
5. There will be an adverse impact on residential amenity.
6. Water abstraction point setback not shown – there are Wells on the appellants’ and neighbouring properties.
7. The area is designated by WCC as an Area of Special Amenity.

8. Increased risk of fire. The forest will come to the boundary of the appellants' property.
9. Interruption of phone and internet services.
10. Introduction of invasive and destructive species e.g. rodents.
11. Isolation from neighbours.
12. Ground disturbance of levelling works associated with Deer fencing.
13. Old unauthorised landfill site on proposal. Excavation may disturb hazardous waste.
14. The appellants contend they have been afforded insufficient time to prepare an appeal due to postage dates (Christmas etc).
15. Article 6(3) of the Habitats Directive. The AA process is non-compliant:
 - a. Screening should include a full project description including intended use (public use, hunting etc). Clarity sought on intention for public use – if so, further grounds surrounding traffic management, parking, privacy etc.
 - b. Plans and projects that are proposed but not yet approved should be considered in assessing cumulative effects. All likely sources of effects arising from the plan or project under consideration should be considered together with other sources of effects in the existing environment and any other effects likely to arise from proposed or permitted plans or projects.
 - c. The unsolicited NIS was considered. The fact that it was considered at all questions the conclusions of the DAFM's AA screening. If effects on European sites are uncertain, the project must progress to AA. The greatest level of evidence and justification should be provided. It has not been.
16. The appellants state that this application did progress to AA Stage and an AAD was made. However, full AA did not take place. The District Inspector has not yet assessed the file. AA Screening has not been completed by the District Inspector and expert verification has not been applied. The NIS and the AA must be completed before any decision is made.
17. The appellants state that they initially only objected to part of two plots. They stated that had the applicant liaised with them this might have been resolved through compromise. The appellants also note that they had tried to purchase the project lands, as had other neighbours, and that if this had been considered, it may have "avoided unnecessary objection and appeals processes and related time and costs."

The DAFM provided a written response to the grounds of appeal in the form of a Statement of Facts to the FAC. This response was considered in full by the FAC and is summarised below:

1. The revised Bio map, dated 14th October 2020, clearly indicates a 60m setback from dwelling houses (Plots 5, 6, and 7).
2. All setbacks are in accordance with the Forestry Schemes Manual, Forestry and Landscape Guidelines and Circular 12/2016 - Buildings Setbacks.
3. All setbacks are in accordance with the Forestry Schemes Manual, Forestry and Landscape Guidelines and Circular 12/2016 - Buildings Setbacks. In order to address the concerns raised regarding the potential impact of the proposed afforestation on light entering the appellants' property, appropriate dwelling house setbacks of 60m will be installed as per Environmental Requirements for Afforestation (2016) as a condition of this approval.
4. It was deemed that the appropriate dwelling house setbacks of 60m were sufficient to address concerns in relation to potential impact on property value.
5. The DAFM did not respond to this ground of appeal in their Statement of Facts.

6. The proposed afforestation is for Native Woodland establishment. The ground preparation will be pit planting which will prevent any issues of siltation. The site will not require fertilizer due to the good quality soil on site.
7. The project is in an area of High Landscape Sensitivity, it adjoins a number of already established Conifer Forests and WCC had no issue with landscaping of the project. The proposal will sit well in an already forested landscape.
8. There is very low risk of fire happening within the project area. Broadleaf trees carry no risk of a fire hazard as the leaf litter is usually quite wet and breaks down quickly. Most fires spread from adjoining lands into forests. The potential fire risk to the proposal has been assessed and, based on the vegetation present; the DAFM is satisfied that the risk of fire is low to very low. The proposal itself is not a fire risk and no additional measures are required. The project site is not bounded on any side with unenclosed land that is frequently burnt thus providing no risk of fire spreading from adjoining land. Additional to this there is a Bio area between the trees and neighbours' boundaries. The Bio area consists of improved grassland species which are very green and are not very combustible.
9. Satellite dishes receive their signal from above, not horizontally along the land surface, and the further a tree is from the dish the less likely it is to interfere with a signal. The standard 60m setback from the dwelling will be applied as a condition of approval which will ensure no interference of your satellite signal from above. Broadband signal is an issue for suppliers.
10. Although the potential of the proposal to provide habitat for disease and vermin was considered, it was not deemed to require a specific condition of approval. The project area will be Deer-fenced to help ensure the local Deer populations cannot enter the property and consequently it will not act as a refuge for Deer.
11. The DAFM did not respond to this ground of appeal in their Statement of Facts.
12. Aerial photography has been reviewed as far back as 2001 and the project area has been under permanent pasture since then. The project is agricultural land and therefore is eligible for afforestation. The proposed cultivation and planting method is invert mounding and pit planting. Therefore this project poses no risk of unearthing any materials.
13. No levelling or ground disturbance takes place when erecting Deer fencing.
14. Applicants, Registered Foresters and Third Parties are afforded the same period of time in which to appeal any decision on a forestry licence.
15. The relevant AA procedure was applied in approving this licence. The screening information can be found on file. An in-combination assessment was also carried out for this application. Using the current AA procedure in conjunction with the Habitat & Foraging guidance tables all Natura 2000 sites have been screened out as outlined on file.
16. The DAFM did not respond to this ground of appeal in their Statement of Facts.
17. The DAFM did not respond to this ground of appeal in their Statement of Facts.

In addition to the Statement of Facts, the DAFM also responded via a statement from the DAFM Ecologist. This statement describes the project briefly and states that there are no watercourses on site and therefore no risks of sediment mobilisation. It also states that ground preparation will be carried out using pit planting and invert mounding, both of which are low-impact methods and require no associated drainage. The Ecologist's statement also reiterates the explanation provided in the AAD which described how the submission of an NIS by the applicant triggered an automatic referral to the Ecology Unit and resulted in the application proceeding through the AA process although no European sites were screened in for Stage 2 AA.

A response to the grounds of appeal was submitted by the Forestry Company involved in the application on the 23rd June 2020 and a response to the DAFM's Statement of Facts was submitted by the appellants on the 28th June 2020.

The FAC convened a Hearing on the 22nd July 2021 to consider appeal FAC873/2020. The FAC considered the appellants' submissions regarding the 60m setback from their house. The FAC noted that a Revised Bio Map is on file which shows 60m planting setbacks from the dwelling houses adjoining the proposed development and that Plots 5, 6 and 7 are to be unplanted Bio plots. The FAC noted that Condition 2 in the approval letter requires adherence to the requirements of the Forestry Standards Manual which stipulates a 60m setback from dwelling houses (or 30m with the written consent of the owner).

The FAC considered the potential for the proposal to intercept light reaching the appellants' property and considered the 'Loss of Light' calculations submitted by the appellants. The FAC noted that the species to be planted are predominately slow-growing native broadleaves and the proposed plantation will be located to the north and west of the appellants' property. The FAC observed that, based on publically available aerial photography imagery, the appellants' home is currently surrounded by what appears to be a mixture of mature broadleaf and coniferous trees which are particularly well developed to the south and south-west of the appellants' property. The FAC is satisfied that the proposed development will not give rise to an unreasonable reduction in light reaching the appellants' property.

The FAC considered the potential for the proposal to impact on the appellants' property. The FAC noted there are no watercourses on or adjoining the project lands. The FAC also noted that there are no planned drainage works. The FAC acknowledges that growing trees will give rise to evapotranspiration and that, over time, the development of forest canopy will intercept a proportion of precipitation, preventing it from reaching the forest floor. However, there is no convincing evidence before the FAC that the proposed development would give rise to impacts on local hydrology to the extent that there would be a significant effect on the existing grass, plants and trees on the appellants' property.

The FAC considered the appellants' contentions surrounding impact on property value and residential amenity. The appellants have not provided any evidence to substantiate their claims in this regard. The FAC considers that the value, amenity or otherwise, of having a native woodland established adjacent to a property is subjective. The FAC noted that the planned development will be to the north and west of the appellants' property and that the path of sunlight to their garden from the south will not be impacted. The FAC noted that the DAFM referred the application to WCC and no concerns around landscape impacts were raised in the reply from WCC. The FAC finds no reason to conclude that the DAFM made a serious or significant error or series of errors in relation to property value and residential amenity.

Regarding water abstraction point setbacks, the FAC noted that the Environmental Requirements for Afforestation (2016) require a 20m setback from drinking water abstraction points. The FAC also noted that the appellants have not identified the location of any of the wells referenced in their grounds of appeal or provided any evidence that water abstraction points are present within 20m of the planned forest edge. In these circumstances, the FAC found no reason to conclude that the DAFM had made a serious or significant error in this regard.

The FAC considered the appellants' grounds relating to the threat of fire damage. The FAC considered the species of trees to be planted, the 60m planting setback from dwelling houses, and the fact that the surrounding areas appear to be dominated by improved agricultural land. The FAC noted the appellants'

submission that the proposed plantation will border their property along a small section at their western boundary. The FAC noted that the applicant's forester made an additional submission in support of their application stating that there will be a 10m planting setback from the appellants' property in this section. This submission also states that "greenways and vehicle access tracks will be included throughout the site for emergency services to use in the unlikely event of a fire".

The FAC had regard to the appellants' submissions relating to potential interruption to phone and internet signal due to the proposed development. The FAC noted the 60m dwelling house setback required by the licence. The FAC found no convincing evidence that the DAFM made a serious or significant error in granting the licence in relation to this issue.

The FAC considered the appellants' submission regarding the introduction of invasive and destructive rodents. The appellants did not submit any convincing evidence to support this contention and the FAC found no reason to conclude that the DAFM had erred in this regard.

The FAC had regard to the appellants' contention that the proposal would lead to their home being isolated. The FAC noted that the view from the appellants' home to their neighbours' homes will not be obstructed and there will be no planting to the south or east of their property, along the public road.

Regarding ground disturbance associated with Deer fencing and the risk of unearthing hazardous materials during "excavation" of the site. The FAC is of the opinion that the installation of Deer-fence posts and the invert mounding of the areas to be planted are relatively low impact operations in a similar class to many routine agricultural practices. There is no convincing evidence before the FAC that invert mounding the project area presents a risk of unearthing hazardous materials.

The FAC considered the appellants' ground of appeal relating to fair procedures and the time allowed to make an appeal. The FAC noted the appellants' submission that they received communication from the DAFM one week after the decision to approve CN86680 had been made. The FAC is also mindful that the Christmas period can cause delays in corresponding with Government Departments and other office workers. However, the FAC noted that the appellant has availed of their opportunity to make an appeal in the first instance and the FAC has also had regard to the additional information submitted by the appellants in response to the DAFM's Statement of Facts. In these circumstances, the FAC is satisfied that the DAFM complied with fair procedures in their correspondence with the appellants and in the making of the decision at issue and also that the appellants have had sufficient opportunity to exercise their right to appeal.

The FAC considered the appellants' submission that the decision does not comply with Article 6(3) of the Habitats Directive. The FAC considered the AA procedures adopted by the DAFM in processing the licence application. The FAC noted that the unsolicited submission of an NIS by the applicant appears to have dictated how the application was processed. The evidence before the FAC is that, although out of sequence, the DAFM did carry out an AA Screening and concluded that the proposal would not give rise for the potential of significant effects on the screened Natura sites. The DAFM also considered the proposal's potential to contribute to an in-combination effect on the Natura 2000 sites cumulatively, along with other forestry and non-forestry plans and projects, before excluding "the likelihood of this project, either individually or in combination with other plans and projects, having a significant effect on the European sites listed above." The FAC concluded that the submission of an unsolicited NIS resulted in a procedural error by the DAFM which was immaterial to the outcome of their AA process. The FAC is satisfied that, although the DAFM's AA process was completed somewhat out of sequence (and included

the making of an AAD which was superfluous in these particular circumstances), the DAFM did not make a serious or significant error or series of errors in completing their AA procedures. The FAC is satisfied that the DAFM's AA procedures, and their conclusions, are in compliance with the requirements of the Habitats Directive.

An issue arises in relation to Condition 3 of the afforestation licence which states "All works to adhere to the specific Operational Proposals set out in Appendix A." The Operational Proposals in Appendix A of the licence state that 250kg/ha of fertiliser will be applied. The Afforestation Plan, submitted by the Forestry Company, states that "Where fertilizer is required it is not to exceed 350kg per hectare." The DAFM's Statement of Facts, in response to ground of appeal no. 6 states "The site will not require fertilizer due to the good quality soil on site." The FAC noted that the application of fertilizer in the context of Native Woodland Establishment is atypical. In these circumstances, the FAC considered that the requirement for compliance with the Operational Proposals in Appendix A of the approval letter (which would require the application of 250kg/ha of GRP) to be a significant error on behalf of the DAFM.

Based on the information before it, and in the circumstances outlined above, the FAC decided to vary the licence conditions of CN86680. Condition 3 of the afforestation licence shall be replaced with the following condition:

"All works to adhere to the specific Operational Proposals set out in Appendix A, except in relation to the application of fertiliser. No fertiliser is to be applied to the licenced area without written approval from the District Inspector following the submission of soil/foliar analysis results. A record of the correspondence between the Registered Forester and the District Inspector shall be retained on the public file.

Reason: in the interest of clarity."

The FAC is satisfied that this variation to afforestation licence CN86680 will result in the licenced operations being consistent with Government policy and good forestry practice.

Yours sincerely,

A black rectangular redaction box covering the signature of Luke Sweetman.

Luke Sweetman on behalf of the Forestry Appeals Committee