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31 August 2021

Subject: Appeal FAC 029/2021 regarding licence LM09-FL0045

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 14A (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

Licence LM09-FL0045 for felling of 12.12ha, in Lannanerriagh, Co Cavan was approved by the Department of Agriculture, Food and the Marine (DAFM) on 19 January 2021.

Hearing

A hearing of appeal FAC 029/2021 of which all parties were notified, was held by a division of the FAC on 20 July 2021.

Presiding:

FAC Members: Mr Des Johnson (Chair), Mr Luke Sweetman and Mr Dan Molloy

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM and the grounds of appeal and all other submissions, before deciding to vary the decision to approve the licence (Reference LM09-FL0045).

The proposed development is for the clearfelling and restocking of a stated site area of 12.12ha at Lannanerriagh, Co. Cavan. The existing stock is stated to be Sitka spruce and Lodgepole pine and Japanese larch (9.94ha) planted 1971 and 1981, and Sitka spruce, Hybrid larch and Alder (2.09ha) planted in 2013. Restocking would be 50% (5.76ha) Lodgepole pine, 50% (5.76ha) Sitka spruce and Open Space of 0.61ha would be provided for. Soils are 87% Blanket Peats and Basin peats, 11% Peaty Gleys, Podzols, Lithosols, and 2% Mineral. The slope is gentle in a south easterly direction.

The DAFM referred the application to the National Parks and Wildlife Service (NPWS). The NPWS responded with no specific comments but attached an appendix of 'General Points'.

The applicants submitted a Natura Impact Statement (NIS), dated 02.09.2020. This notes that the surrounding area supports large areas of Blanket Bog/Wet Heath/Dry Heath with smaller patches of other conifer plantation of various age and classes. The project area is located in an upland landscape. Details of restocking are provided relating to ground preparation, use of chemicals and environmental setbacks. A single site is screened in for Stage 2 Appropriate Assessment - Cuilcagh-Anierin Uplands SAC, and qualifying interests and conservation objectives are listed, and an examination of potential for adverse effects made. Mitigation measures are proposed relating to European Dry Heaths, Blanket Bogs, and Transition Mires and Quaking Bogs. The NIS states that mitigations proposed will ensure that the proposed development itself will not prevent or obstruct the qualifying interests of the Cuilcagh-Anierin Uplands SAC from reaching favourable conservation status. In-combination effects are considered. Non-Forestry projects listed include dwellings, domestic extensions, and an agricultural building (slatted shed). Forestry related projects listed are Coillte harvesting (30) (215ha), private afforestation (3), private harvesting (9) and private roads (4). It is stated that the River Sub-Basin Blackwater (Newtowngore)_010 has approximately 24% forest cover.

A DAFM in-combination report is dated 10.12.2020. This lists non-forestry projects as including dwellings, domestic extensions, and floodlighting. Forestry related projects listed are afforestation (5), forest roads (2), private felling (9), and Coillte felling (8). It is stated that the River Sub-Basin has approximately 21% forest cover.

The DAFM carried out Appropriate Assessment screening (AAS), dated 07.01.2021 (approximately 4 months after the submission of the NIS). This examines Natura 2000 sites within a 15km radius of the project lands. Sites screened out for Stage 2 Appropriate Assessment are Cladagh (Swanlinbar) River SAC, Boleybrack Mountain SAC, and Corratirrim SAC. Reasons are given for the conclusion to screen out these sites as the location is in a separate waterbody sub-catchment with no upstream connection and lack of pathway. Sites screened in for Stage 2 Appropriate Assessment are Cuilcagh-Anierin Uplands SAC, Cuilcagh Mountains SAC and Lough Oughter and Associated Loughs SAC. The reason for this conclusion is stated to be the possible effect due to hydrological connectivity.

An Appropriate Assessment Determination (AAD) was prepared for the DAFM by Environmental Facilitation Limited, dated 13.01.2021, and this evaluated the NIS, together with all other information submitted and all relevant information. The AAD screens out the following sites for Stage 2 Appropriate Assessment - Cladagh (Swanlinbar) River SAC, Boleybrack Mountain SAC, Corratirrim SAC, Cuilcagh Mountain SAC, and Lough Oughter & Associated Loughs SAC. The Cuilcagh Mountain SAC is screened out due to the absence of sufficient hydrological connection, and the lack of a pathway for the transmission of effects. Lough Oughter & Associated Loughs SAC is screened out due to the nature and scale of the activity, the large downstream hydrological separation distance (47km) with sufficient volume and surface area for settlement, dispersion and dilution of any possible sediment or siltation residue from the site. Screened in for Stage 2 Appropriate Assessment is Cuilcagh-Anierin Uplands SAC for reason of the possible effect due to direct hydrological connectivity. The AAD concludes that based on the best scientific knowledge in the field, the proposed development individually, or in combination with other plans or projects, will not adversely affect the integrity of the listed European site, having regard to its conservation objectives, provided mitigation measures are implemented relating to the following:

- Protection of the site against the spread of invasive species
- Restriction on forestry operations to within the boundary of the forest area in order to protect the qualifying interest as per the AAD
- When replanting, no opening of new drains within 50m of the SAC qualifying interest
- Control of the natural regeneration of non-native trees where necessary
- All open habitat within the project area resembling the listed habitats listed above to be retained as open habitats
- Water setbacks at reforestation is 20m
- Adherence to all water protection measures guidance relating to sediment management, felling, cultivation, herbicide application, location of on-site storage depots, and dispersal of waste.

The basis for the AAD is that this blanket peat project area sits on a moderate slope in a south-eastern direction, directly adjacent and slightly overlapping with Cuilcagh-Anierin Uplands SAC, and appropriate mitigations are set out. The Muineal River flows along the SW boundary of the project area and eventually connects to Coologe Lough. While there are downstream connections, there is sufficient buffering along the connection not to require aquatic measures.

The licence issued on 19.01.2021. It is subject to standard conditions with additional conditions relating to mitigations contained in the AAD, and the adherence to specified Regulations, Standards & Guidelines.

There is a single appeal against the decision to grant the licence. In summary, the grounds of appeal contend that there is an existing forest road evident that is not contained in the in-combination document. The length of the shared forest road exceeds 2km and there is no evidence that EIA has been carried out. Ortho-imagery from 1995 and 2005 points to the road being constructed post 1995 and within the timeframe of the EIA Directive. The proposed development would be serviced by a road that does not comply with the law. EIA requirements have not been met. The proposed development has the potential to have a significant effect on the environment. This is deforestation and could be considered to represent a change of land use. The location of the Open Space has not been identified. The requisite information has not been submitted by the developer in accordance with the requirements of the EIA Directive. There is no indication that adequate EIA screening was undertaken for the original afforestation, and the FAC should establish this before making a decision on this appeal. The proposed development represents project splitting. Multiple forest applications have been submitted with no cross referencing of the individual applications. The approval is not consistent with the requirements of Article 4 of the Water Framework Directive (WFD). The site is 86% blanket peat and is highly susceptible to the release of silt. The appellant refers to the Weser case. Conditions of the licence are not written with sufficient precision and clarity or substantiated with adequate scientific evidence to ensure mitigations will eliminate or reduce adverse impacts. Condition 11, in particular, is too vague. There is no adequate assessment of in-combination effects and conformance with the WFD cannot be assured. The approval is not consistent with the requirements of Article 6 of the Habitats Directive. The Forestry Inspector screened in three sites for Stage 2 Appropriate Assessment. The AAD screens out two of these sites – Cuilcagh Mountain SAC and Lough Oughter & Associated Loughs SAC, and these are not covered in the Appropriate Assessment. This is a fundamental anomaly. The NIS was produced before the Appropriate Assessment screening and is deficient. The Appropriate Assessment has not assessed the restocking of the site. The potential for

natural regeneration of non-native tree species to impact on the SAC is acknowledged but the Precautionary Principle has not been applied. Methods for 'appropriate control' are not defined. This 'control' may extend beyond the site boundaries on to lands in different ownership and may not be enforceable. The in-combination assessment is inadequate. Approval is not consistent with Articles 5 and 9 of the Birds Directive. This area is known to support breeding Hen Harriers. The Golden Eagle Trust has confirmed 4, possibly 5 breeding pairs of Hen Harrier. Licence conditions make no reference to this protected species and the Precautionary Principle should apply. The Harvest Plan is not consistent with Interim Standards for Felling & Reforestation. The monitoring and inspection regime is not sufficiently robust. The promotional role and regulatory role of the Forest Service of DAFM involve a conflict of interest in conflict with Article 9a of the EIA Directive.

In response, the DAFM state that the forest road was substantially constructed by 2000. The road was extended after 2005 (c. 600m). The proposed development is not a class of development covered by the EIA Directive or the transposing Regulations. The DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water. The Interim Standards for Felling and Reforestation set out a wide range of operational measures to prevent direct and indirect impacts on water quality arising from operations. Standards for Reforestation stipulate water setbacks adjoining aquatic zones and those, together with silt trapping and slow-drain damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. There will be no adverse effect on any European site, nor on water quality or the waterbody status, regardless of hydrological connectivity. AAD mitigations were included as conditions of the licence. In-combination effects were considered. The AAD underwent an Ecological review, and the Appropriate Assessment is consistent with the requirements of the Habitats Directive. Conditions attached to the licence are consistent with best forest practice, national forest policy and the protection of the environment. The conditions are enforceable, precise and reasonable. The granting of the licence does not prevent the holder from meeting any legal requirements set out in any other statute and this is not necessary as a condition of the licence. The policy and regulatory roles of the Forestry Service/DAFM are not relevant to the decision to award this licence.

In a supplementary submission responding to the DAFM response, the appellant states that the DAFM response does not contradict anything in the grounds of appeal. It confirms that over 2km of forest road is serving the project area, but it is not explained why any EIA has not been conducted. The proposed development is reliant for extraction on an unapproved section of forest road. The DAFM has not addressed the fact that the area of Open Space has not been identified and could represent a reduction in the forest area. The DAFM are relying on generic mitigation measures. The NIS contains inadequate information. The conflict between the AAS and AAD is not explained, and no Appropriate Assessment exists. There is no assessment of the reforestation element. There is confusion because there are 2 In-combination documents – one in the NIS and another is a separate DAFM document. The potential for the proposed development to impact on the SAC through natural regeneration of non-native trees is recognised but not adequately addressed. The issue relating to the Birds Directive is not adequately addressed. The inadequacies of the Harvest Plan are not addressed. There is a fundamental gap in the monitoring and enforcement procedures operated by the DAFM. Ultimately the burden of proof on the assessment of the adequacy of this project lies with the DAFM as a consenting body, or with the FAC.

The FAC heard the appeal on 20.07.2021. The proposal is for the clearfelling and restocking of a stated site area of 12.12ha. The application documentation does not indicate a forest road within the site boundary but does show a forest road connecting to the site from existing adjoining forestry to the south. The appellant contends that the length of the existing forestry road exceeds 2km, that it was constructed post 1995 and that it should have been subject to Environmental Impact Assessment. The DAFM accept that the road was substantially constructed by the year 2000 and extended by c.600m after 2005. The appellant contends that a section of the existing road, on which the proposed development would rely for the transportation of felled timber from the project site, is unapproved. The FAC noted that the forest road leading southwards from the project site boundary does not form part of the development, the subject of this appeal. The construction of a forest road of this nature requires a licence prior to construction. There is no convincing evidence before the FAC to indicate that the existing forest road was not subject to licensing or that the proposed development would be dependent on an unapproved section of road for the transportation of felled timber. Having regard to the nature and scale of the proposed development, the location and characteristics of the surrounding area, and to the nature and scale of the adjoining forestry road, the FAC finds no reason to conclude that, in-combination, there is a likelihood of significant effects on the environment arising. On this issue, the FAC concluded that there was no significant or serious error made in the making of the decision to grant the licence.

A portion of the existing forestry to be felled (2.09ha) dates from 2013 (the majority of the site (9.94ha) was planted in 1971 and 1981). The appellant contends that this should have been subject to EIA screening at the time of planting. The FAC notes that initial afforestation constituting a change in land use is a class of development covered by the EIA Directive and the transposing Regulations. The threshold for mandatory EIA as specified in the transposing Regulations is 50ha. There is no information before the FAC to indicate that the planting in 2013 was initial afforestation constituting a change in land use and that it should have been subject to EIA screening with no such screening for EIA carried out. The proposed development for the clearfelling and reforestation of 12.12ha, as part of a forestry management project and with no change in land use, is not a class of development covered by the EIA Directive or the transposing Regulations. Notwithstanding this conclusion, and based on the information before it, including the details of the proposed clearfelling and restocking contained in the application documentation and the NIS, the screening and determination carried out in respect of Appropriate Assessment, and the DAFM 'in-combination report', the FAC concluded that the proposed development, individually or cumulatively with other projects, would not be likely to have a significant effect on the environment. In these circumstances, the FAC found no reason to conclude that a sub-section of the overall development (the 2.09ha planted in 2013) would individually, or cumulatively with other projects, be likely to have a significant effect on the environment.

The FAC addressed the procedures followed by the DAFM in respect of the provisions of Article 6(3) of the Habitats Directive. The FAC noted that the applicants had submitted an NIS subsequent to the making of the application, and this included a Stage 2 Appropriate Assessment for one Natura 2000 site – the Cuilcagh-Anierin Uplands SAC. The DAFM subsequently carried out a screening for Appropriate Assessment and screened in three sites for Stage 2 assessment – Cuilcagh-Anierin Upland SAC, Cuilcagh Mountain SAC and Lough Oughter and Associated Loughs SAC for reason of possible effect due to hydrological connectivity. An independent AAD was prepared for the DAFM, which

evaluated the NIS submitted, and screened out the Cuilcagh Mountain SAC for reason of the absence of sufficient hydrological connectivity, and the Lough Oughter and Associated Loughs SAC for reason of the nature and scale of the proposal, the large downstream hydrological separation distance (47km) with sufficient volume and surface area for settlement, dispersion and dilution of any possible sediment or siltation residue from the site. The FAC noted that the EPA publicly available website shows no hydrological connection to the Cuilcagh Mountain SAC and having considered the qualifying interests, conservation objectives and main threats to the SAC, concluded that the reasons given for screening out the Cuilcagh Mountain SAC and the Lough Oughter and Associated Loughs SAC are sound. The FAC considered that the Stage 2 assessment carried out in respect of the Cuilcagh-Anierin Uplands SAC is consistent with the requirements of Article 6(3) of the Habitats Directive. The FAC noted that the DAFM had considered other non-forestry and forestry related projects, before concluding that, subject to the implementation of specified mitigation measures, the proposed development individually, or in combination with other plans or projects, would not adversely affect the integrity of the listed European site, having regard to its conservation objectives. On this issue, the FAC found no reason to conclude that the DAFM had made any significant or serious error in the making of the decision to grant the licence.

The appellant contends that the approval is not consistent with the requirements of Article 4 of the Water Framework Directive (WFD). It is argued that the site is 86% blanket peat and is highly susceptible to the release of silt. The appellant has not specified how the approved development would be inconsistent with the requirements of the WFD. The FAC noted that there are conditions attached to the licence for reason of the protection of water quality and the environment during harvesting and restocking. Based on the information before it, the FAC finds no reason to conclude that there was any significant or serious error in the making of the decision to grant the licence relating to this issue.

The appellant contends that the approval is not consistent with the requirements of Article 5 and 9 of the Birds Directive. In particular, the appellant contends that, based on information supplied by personal contact with the Golden Eagle Trust, this area is known to support breeding Hen Harriers with 4, possibly 5, confirmed breeding pairs. Licence conditions make no reference to these protected species and the Precautionary Principle should apply. The FAC noted that there is no information to indicate that there are any Hen Harriers on the project lands, and that Hen Harriers are not included as a qualifying interest for the Cuilcagh-Anierin Uplands SAC. There is no convincing information submitted to indicate how the proposed development would be likely to have an adverse impact on any Hen Harriers in this area, or on any other species of wild birds. Noting that it is a condition of the licence granted that there is adherence to Appendix 21 of the Forestry Services Manual, which sets out an agreed protocol for Hen Harrier regarding potential disturbance operations, the FAC finds no reason to conclude that there was any significant or serious error made in the making of the decision to grant the licence in respect of this issue.

The appellant contends that there are conditions attached which lack precision and clarity. In particular, reference is made to Condition 11 of the licence granted. Condition 11 requires "appropriate control of natural vegetation of non-native tree species will be undertaken, where necessary" for reason of protecting the qualifying interest of the Cuilcagh-Anierin Uplands SAC as per the AAD for LM09-FL0045, and Condition 12 requires "all open habitat within the project area

resembling the listed habitats above will not be planted and will be retained as open habitat" for the same reason as Condition 11. The FAC concluded that the wording of these conditions lacks precision and clarity, and that the information required by the conditions should be agreed in advance of any operations commencing on the site. In this regard, the FAC concluded that this lack of precision and clarity represented a significant error in the making of the decision.

The FAC noted that the 'Harvest Plan' is an operational document for the developer carrying out the operations licensed and that all operations are required to comply in full with the terms of the licence granted. The FAC concluded that the monitoring and inspection of operations carried out on foot of the licence are the responsibility of the DAFM who are given the appropriate legislative powers. The appellant's contention that there is a conflict of interest between the promotional and regulatory roles of the Minister is not a matter for the FAC in terms of its deliberations on this appeal.

The FAC concluded that a significant error was made in the making of the decision in respect of LM09-FLO045, in that conditions were attached to the licence which lack precision and clarity. In deciding to vary the decision to grant the licence, the FAC determined that Conditions 11 and 12 of the licence, as worded, should be omitted and replaced by the following conditions:

Condition 11

Before any operations commence on the site on foot of this licence, the developer shall submit for the written agreement of the DAFM, details of measures proposed to control any natural regeneration of non-native tree species from the site. A copy of the written agreement shall be placed on the case file.

Reason: In the interest of protecting the conservation status of the qualifying interests of the Cuilcagh-Anierin Uplands SAC.

Condition 12

Before any operations commence on the site on foot of this licence, the developer shall submit for the written agreement of the DAFM, a map clearly identifying all open habitat within the project area resembling the listed habitats above which will not be planted, and which will be retained as open habitat. A copy of the written agreement shall be placed on the case file.

Reason: In the interest of protecting the conservation status of the qualifying interests of the Cuilcagh-Anierin Uplands SAC.

Yours sincerely

A black rectangular redaction box covering the signature of Des Johnson.

Des Johnson on behalf of the Forestry Appeals Committee

