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15th July 2021

Subject: FAC003/2021 in relation to licence CN84424

Dear [REDACTED]

I refer to the appeal 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.

Background

Licence CN84424 for afforestation of 12.47 hectares at Reaskrevagh, Co. Galway was granted by the DAFM on 14th December 2020.

Hearing

A hearing of appeal FAC003/2021 was held by the FAC on 25th June 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, 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 vary the decision of the Minister for Agriculture, Food and the Marine in relation to licence CN84424.

The licence decision relates to 12.47 hectares of afforestation at Reaskrevagh, Co. Galway. The land is divided into three plots. Plot 1 would be planted with birch and broadleaf species with an area left unplanted, plots 2 and 3 would be planted with Sitka spruce and broadleaf species. The licence includes 1,745 metres of fencing. The proposal was referred to Galway County Council and An Taisce and no response is recorded from either body.

The Application was received by DAFM on 15th July 2019 and includes site, operational and environmental information and maps. The Applicant also submitted an Appropriate Assessment Pre screening report and a Natura Impact Statement prepared by Ecologists and Foresters and dated 14th September 2020.

The DAFM Inspector recorded a screening for Appropriate Assessment in which seventeen European sites are recorded and considered in turn alongside their qualifying interests and conservation objectives. Screening conclusions and reasons are recorded. The DAFM Inspector determined that the proposal should proceed to Appropriate Assessment in relation to the following European sites, Slieve Aughty Mountains SPA (004168), Carrowbaun, Newhall and Ballylee Turloughs SAC (002293), Lough Coy SAC (002117), Coole-Garryland Complex SAC (000252), Peterswell Turlough SAC (00318), Lough Rea SPA (004134), Coole-Garryland Complex SPA (004107), Rahasane Turlough SPA (004089), Ballinduff Turlough SAC (002295), Kiltiernan Turlough SAC 00128 (001285), and Lough Fingall Complex SAC (000606). The record also includes a separate consideration of other plans and projects, both forestry and non-forestry, in-combination with the proposal. The record includes a number of versions of the Inspector's Certification and the final version notes that the European sites were "functionally screened out" to progress through the DAFM's iFORIS system. The Certification also includes a consideration of the proposal across a series of criteria and determines that the proposal should not proceed to the EIA (Environmental Impact Assessment) process.

The Appropriate Assessment Pre-screening report submitted by the Applicant describes the site and operational proposals in detail and provides operational, habitat and site maps. An ecological and habitat survey undertaken by an Ecologist is recorded. This includes a record of species and suitable habitats recorded on site and in the general area. It is noted that badger is present. The pre-screening submitted identifies the same seventeen sites within 15km of the proposal, each is considered in turn and considers that the possibility for significant effects would arise in relation to Peterswell Turlough SAC (00318), Coole-Garryland Complex SAC (000252), Lough Coy SAC (002117), Carrowbaun, Newhall and Ballylee Turloughs SAC (002293), and Slieve Aughty Mountains SPA (004168).

A Natura Impact Statement was submitted by the Applicant and prepared by an Ecologist and two Foresters. The details of the authors, site and operations are provided. The European sites and the associated qualifying interests/special conservation interests are recorded alongside the potential effects and mitigation measures. In relation to the qualifying interest 3150 Natural eutrophic lakes with Magnopotamion or Hydrocharition -type vegetation, 3180 Turloughs, 3270 Rivers with muddy banks with *Chenopodium rubri* p.p. and *Bidention* p.p. vegetation water protection measures are outlined including setbacks, operational exclusions and no fertilisation. In relation to the Slieve Aughty Mountains SPA it is noted that the area lies outside of the SPA and in a "Green Area" in relation to A082 Hen Harrier (*Circus cyaneus*) based on the protocol outlined in the *Forestry Standards Manual* and data from the NPWS. Where the DAFM inform the Applicant of a nest within 1.2km of the proposal disturbance operations would cease during the period 1st April to 15th August, inclusive. It is proposed that no mitigation is required for A098 Merlin (*Falco columbarius*). The NIS considers other plans and projects in-combination with the proposal and concludes,

It is objectively concluded, in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project, individually or in combination with other plans and projects, will not have an adverse effect on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge.

The DAFM recorded an Appropriate Assessment Determination (AAD) prepared by a DAFM Ecologist, which includes screening conclusions and reasons regarding European sites within 15km. It is concluded in the AAD that Ballinduff Turlough SAC 002295, Kiltiernan Turlough SAC 00128 and Lough Fingall Complex SAC 000606 and Coole-GarrylandComplex SAC (000252) can be screened out and reasons are recorded. The AAD concludes that mitigation measures in relation to Merlin are required and reasons are recorded. The AAD describes the sources of information and reasoning on which it is based. The AAD concludes that,

The Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' (as listed above) and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under CN84424, individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, if carried out in accordance with the Environmental Requirements for Afforestation (DAFM, 2016), Forestry Standards Manual (DAFM, 2015), Conditions for Forestry Operations in areas with Merlin (DAFM 2019), and provided the following mitigation is implemented:

The AAD specifies a number of conditions to be attached to the licence including that *No disturbance operations associated with this license are to take place during the Merlin breeding season (1st March to 31st August)* and setbacks and operational exclusions in relation to the protection of water quality.

A DAFM Ecology report was also recorded and dated 9th December 2020 and describes the site and potential impacts on Badger (*Meles meles*) and Freshwater White-clawed Crayfish (*Austropotamobius pallipes*). It is concluded that existing measures would be sufficient to protect Freshwater White-clawed Crayfish while specific measures are outlined in relation to Badger.

The licence was approved on 14th December 2020 with conditions which include adherence with *all conditions as per Appropriate Assessment Determination, 9/12/2020, attached* and *Adhere to all conditions as per Ecological Report, attached.*

There is one appeal against the decision and the Notice of Appeal was provided to all parties. The grounds contend that the proposed development and the listed in-combination afforestation (since 2015) exceeds 50ha and therefore EIA is required and that the AA decision is invalid in that it contravenes Article 6(3) of Directive 92/43/EEC in failing to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works. The grounds quote from the AAD

"No planting to occur within the area identified with a High-Water Table (see approximate location in contacts dated 09/12/2020" AAD

Approximate location is not precise

"A water setback a minimum of 5 metres in width (from both sides) shall be installed adjoining relevant watercourses (see figure Habitats Map within Appendix I of NIS). NIS

This condition is neither precise nor definitive.

"Silt traps will be installed within relevant watercourses (see revised Biomap, dated 23/11/2020)." AAD

This is neither complete, precise nor definitive.

The AAD contains the following statement

"An Ecology Report has been prepared by DAFM to assess potential impacts on these species and outline mitigation measures to present any adverse impacts. The ecology report should be read in conjunction with this AAD."

It is submitted that this statement shows that the Appropriate Assessment Contravenes Article 6(3) of Directive 92/43/EEC in failing to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works.

The grounds quote text attributed to "Regulation 42 (18)a"

"A public authority shall make available for inspection any determination that it makes in relation to a plan or project and provide reasons for that determination, as soon as may be after the making of the determination or giving the notice, as appropriate, by members of the public during office hours of the offices of the authority and shall also make the determination or notice available in electronic form including by placing the documents on the authority's website."

and contends that the Minister has failed in their obligations in relation to placing on a website.

In response to the appeal, the DAFM provided a statement including responses from DAFM Administration, Inspector, Ecologist and Archaeologist. The DAFM outlined their processing of the application and the stages followed and submitted that their decision was issued in accordance with their procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act. The Inspector described their input to the decision including a field inspection and site characteristics and discussions regarding potential risks of flooding with the Applicant and a DAFM Ecologist. It is submitted that it had been agreed with all parties to leave part of plot 1 unplanted due to the presence of a high water table at the centre of the plot. The DAFM Ecologist also describes the site and proposal. In response to the grounds they suggest that there may be some variation in the water table on the ground and that the reference to approximate reflects this. They submit that a 5 metre setback is also required and other operational measures and that there will be no deterioration in water quality. Regarding the Ecology Report and the requirements to adhere with the mitigation measures contained within, it is submitted that this relates to protections of species under National legislation and is separate and distinct from the AAD and that both are conditions on the licence. The DAFM Archaeologist noted that there are no recorded monuments within or contiguous to the proposed works while a recorded monument, a 'tomb stone', is located some 80m to the north. It is submitted that there was no requirement to refer the proposal to the National Monuments Service (NMS) but that a discretionary referral could have been made. In reviewing the file, the DAFM Archaeologist considered that the standards conditions of adherence with DAFM guidelines and requirements was appropriate and referred this conclusion to the NMS which agreed with the conclusion.

In addressing the grounds of appeal, the FAC considered, in the first instance, as to the completeness of the assessment to determine EIA requirements. In considering this aspect, the FAC notes that the EU EIA Directive sets out, in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. 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 12.47 hectares, so is sub threshold for mandatory EIA as set in Irish Regulations.

The land to be planted is described as private, enclosed, agricultural land which has been employed for the rearing of livestock. 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 and determined that the project was not required to undergo the EIA process. It is recorded that the proposal should be referred to the DAFM Ecologist and that standard guidelines and supplementary operational conditions are recommended. The Appellant submits that as the area of afforestation recorded in the “in-combination” assessment since 2015 is greater than 50 ha that an Environmental Impact Assessment is required.

The FAC considered the updated in-combination consideration dated 26th November 2020 which was recorded in the AAD as being the basis of the decision. This records nine afforestation projects in addition to other forestry and non-forestry projects. The afforestation projects in total cover an area of 45.59 ha, although a small area is still under consideration, and with the addition of the proposal would total 58.06 ha.

Regulation 13 (2) of the Forestry Regulations 2017 (SI 191 of 2017) state,

The Minister shall ensure that an environmental impact assessment is carried out in respect of an application for a licence for—

(a) afforestation which would involve an area of 50 hectares or more,

(b) forest road works which would involve a length of 2000 metres or more,

(c) afforestation which does not exceed an area of 50 hectares but which the Minister considers likely to have significant effects on the environment taking into account the criteria set out in Schedule 3,

(d) forest road works which does not exceed a length of 2000 metres but which the Minister considers likely to have significant effects on the environment taking into account the criteria set out in Schedule 3.

Schedule 3 (Criteria to determine if a sub-threshold project should be subject to an Environmental Impact Assessment) includes *(b) cumulation with other existing and approved projects* amongst the characteristics of the project to be considered.

The grounds of appeal do not submit any evidence regarding the likely significant effects on the environment of the proposal. The FAC does not consider that the total cumulative area of afforestation proposals since 2015 within the general vicinity of the proposal under appeal being greater than 50 hectares would require proceeding to EIA in all cases without having regard to the likely significant effects on the environment. In this instance the DAFM recorded a consideration of effects on the environment across a range of criteria following Appropriate Assessment and ecological assessment. The FAC does not consider that any convincing evidence has been provided to it that the proposal as licenced would be considered likely to have significant effects on the environment that would require the undertaking of an Environmental Impact Assessment. The FAC is not satisfied that an error occurred in the making of the decision in regards to this ground.

In addressing the Appropriate Assessment grounds of appeal, the FAC 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 grounds identify four measures outlined in the AAD and submit that the Appropriate Assessment decision is invalid in that it contravenes Article 6(3) of Directive 92/43/EEC in failing to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works.

The grounds identify the measure *“No planting to occur within the area identified with a High-Water Table (see approximate location in contacts dated 09/12/2020”* in the AAD and contend that approximate location is not precise. The FAC considered the records provided to it which include a communication from the Applicant in relation to the High-Water Table on 9th December 2020 indicating the approximate location of the area and that the precise area could be mapped using GPS. It is clear from the record and statement provided that this area was considered by the DAFM Inspector and Ecologist and discussed with the Applicant’s Forester and formed part of the assessment process. However, the FAC considers that the inclusion of the word approximate could introduce a lack of clarity in the implementation of the measure and that the boundary of this area should be agreed between the DAFM and the Applicant before operations commence while the record shows an assessment of the measure was undertaken. The FAC is satisfied that this represents an error in the making of the overall decision but that it can be readily addressed through a variation of the licence decision to include an additional condition,

The High-Water Table area in Plot 1 that will be left unplanted must be marked and agreed with a DAFM Ecologist following a site inspection before any works commence. Reason: For clarity and to ensure proper implementation of measures identified in the Natura Impact Statement and Appropriate Assessment.

The marking of environmental setbacks is identified as good forest practice in section 3.5.1 of the *Environmental Requirements for Afforestation* and the FAC considers this measure is in keeping with good forest practice and standards.

The grounds further submit that the measure, *“A water setback a minimum of 5 metres in width (from both sides) shall be installed adjoining relevant watercourses (see figure Habitats Map within Appendix I of NIS).”* is neither precise nor definitive. A Habitat Map is included in Appendix I of the NIS and is referred to throughout that document. The term “relevant watercourse” is a commonly employed term that distinguishes watercourses that may not be marked on published Ordnance Survey maps but has the potential to transport sediment and is defined in the *Environmental Requirements for Afforestation* (DAFM, 2016; page 5) as,

Relevant watercourses are often artificial, and include existing drains and channels and other potential pathways that may contain flowing water during and immediately after rainfall.

The Habitat Map in Appendix I of the Natura Impact Statement displays and marks watercourses that make up the drainage system on the lands as described in the Natura Impact Statement and distinguishes them from the river that adjoins the site. The FAC is satisfied that the condition is precise or definitive and is not satisfied that the Minister erred in relation to this issue.

The grounds further submit that the measure *“Silt traps will be installed within relevant watercourses (see revised Biomap, dated 23/11/2020).”* is neither complete, precise nor definitive. The FAC noted that the record includes two files, an initial Bio Map and a Revised Bio Map, with the latter being included in the Appendix of the NIS. The FAC noted that neither map is dated 23/11/2021 and confirmed with the DAFM that this was the case and that that the reference is to the Revised Bio Map provided. Regarding the measure itself, the FAC is satisfied that the installation of silt traps in relevant watercourses is a standard forestry practice that would be in keeping with the *Environmental Requirements for Afforestation* (DAFM, 2016) and readily implementable by the Applicant and appears to have been properly assessed in the NIS and AAD. The Natura Impact Statement notes that the existing drains lack silt traps and the installation is included in that document and the AAD. However, the FAC considers that the date provided in the measure and the reference to the Revised Bio Map could introduce a lack of clarity and that this represents an error although one of an obvious and primarily clerical nature. The FAC is satisfied that this can be addressed by varying the licence decision to include the following condition,

Silt traps will be installed in all relevant watercourses as described in the Natura Impact Statement and the Bio Map contained in Appendix I of the Natura Impact Statement. Reason: For clarity and to ensure

proper implementation of measures identified in the Natura Impact Statement and Appropriate Assessment.

The FAC considers that the inclusion of these additional conditions is for clarity and to ensure proper implementation of the measures identified and assessed in the Appropriate Assessment undertaken by the DAFM.

The grounds contend that the measure to read the Ecology report in conjunction with the AAD demonstrates that the AAD fails to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works. The licence as issued contains separate conditions to adhere with the AA and Ecology reports measures. The Ecology report describes the site and species and habitats present or potentially present. It includes specific measures in relation to Badger, a species protected under National legislation but not covered by the EU Habitats Directive for which European sites are classified. The Freshwater White-clawed Crayfish are listed under Annex II and V of the Habitats Directive but are not a qualifying interests of a European site that could potentially be affected by the proposal. The FAC considers that the undertaking of a separate Ecological Report and the imposition of conditions for the protection of species protected under National Legislation is entirely appropriate and represents a proper consideration of the potential for the proposal to result in more general effects on the environment outside of the requirements of Appropriate Assessment under Article 6(3) of Habitats Directive. The FAC does not consider that it was necessary to include the identified measure in the AAD but that it would not impact on the effectiveness of the findings of the Appropriate Assessment of the proposal in relation to European sites. The FAC is not satisfied that this represents a serious or significant error or an error which might effect the decision.

In considering the record, the FAC also noted that the distance to Lough Fingall Complex SAC (000606) was recorded as 1.5km in the AAD whereas the SAC is in fact c.15km from the proposal. The FAC is satisfied that this is an obvious error and would not effect the decision. The FAC also noted that the final line of the screening recorded in the AAD in relation to Castletaylor Complex SAC (000242), Ballinduff Turlough SAC (002295), Lough Fingall Complex SAC (000606) states that "it is determined that there will be significant effects on the QI's of this Natura site". However, based on the reasons outlined and the heading and sub-text of the section under which this is recorded the FAC is satisfied that these represent obvious errors of no real significance. The FAC also noted that the AAD measures in relation to Merlin exclude disturbance operations from the period 1st March to 31st August which supersedes the Hen Harrier season.

In relation to the grounds that quote from Regulation 42 18(a). This appears to the FAC to relate to S.I. No. 477/2011 (European Communities (Birds and Natural Habitats) Regulations 2011). In relation to afforestation decisions, the function of the FAC is to hear and determine appeals of decisions of the Minister for Agriculture, Food and the Marine under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. Part 8 of the Forestry Regulations 2017 addresses *Appropriate Assessment* and Part 9 addresses *Decisions* and includes obligations regarding notifications. The record includes an observation

and request for documentation made by the Appellant and the notification provided to them by the Minister subsequent to the decision being made. The website of the DAFM includes a document entitled *Afforestation Decisions Report 16-DEC-20* (<https://www.gov.ie/en/collection/0ecf6-afforestation-decision-reports-december-2020/>) that includes notice of the decision to approve CN84424 and related details. Notice and details of the licence could also be viewed on the DAFM's online *Forestry Licence Viewer* the first phase of which was launched in December 2020. The FAC is not satisfied that the Minister erred in the making of the decision in relation to this ground of appeal.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC considers that the proposal is in keeping with Good Forest Practice and Government Policy. The FAC is satisfied that a series of errors was made in making the decision and is varying the decision of the Minister for Agriculture, Food and the Marine to include the following additional conditions,

The High-Water Table area in Plot 1 that will be left unplanted must be marked and agreed with a DAFM Ecologist following a site inspection before any works commence. Reason: For clarity and to ensure proper implementation of measures identified in the Natura Impact Statement and Appropriate Assessment.

Silt traps will be installed in all relevant watercourses as described in the Natura Impact Statement and the Bio Map contained in Appendix I of the Natura Impact Statement. Reason: For clarity and to ensure proper implementation of measures identified in the Natura Impact Statement and Appropriate Assessment.

Yours sincerely,



Vincent Upton, On Behalf of the Forestry Appeals Committee

