



20<sup>th</sup> September 2022

**Subject:** Appeal FAC 030/2022 relating to Licence CN88946

Dear

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 (as amended) has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Decision**

Having regard to the evidence before it, including the full Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN88946.

#### **Licence**

Licence CN88946 is for the afforestation of 15.26 Ha. of GPC 3 in the townland of Newgrove, Co. Galway and was submitted to the DAFM on the 6<sup>th</sup> of June 2021. On the 21<sup>st</sup> of March 2022 the DAFM issued a notice granting the licence with conditions.

#### **Forestry Appeals Committee.**

The appeal was considered at a sitting of the FAC held on the 17<sup>th</sup> of August 2022. The FAC members present were: Mr. John Evans (Deputy Chairperson), Mr Luke Sweetman and Mr. Iain Douglas and Secretary to the FAC: Mr. Michael Ryan.

#### **Background**

The proposal consists of the planting of 15.26 Ha. of GPC 3 forestry. The licence application was referred to the Galway County Council and Inland Fisheries Ireland on the 9<sup>th</sup> of October 2021 neither of which replied. The licence application was also referred to the Forest Service Ecology section on the 5<sup>th</sup> of November 2021 which reported on the 10<sup>th</sup> of March 2022.

The Inspector's Certification Report dated the 16<sup>th</sup> of March 2022 recommends that the licence be approved subject to six conditions one of which requires compliance with the mitigations set out in the Ecology Report of the 10<sup>th</sup> of March 2022.

The Inspector's Assessment to Determine EIA Requirement dated the 16<sup>th</sup> of March 2022 concludes that the application should not be subject to the EIA process.

The Inspector's Appropriate Assessment Screening Report (AASR) dated the 21<sup>st</sup> of March 2022, supported by an in-combination assessment date the 14<sup>th</sup> of March 2022 is on file. The AASR describes the soil type underlying the project area as being predominantly highly modified peat & peaty podzols, with a predominantly flat to moderate (<15%) slope and that the project area is crossed by or adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass rush and bog vegetation. The AASR concludes that there is no likelihood of a significant effect on any European site, and that Appropriate Assessment is not required.

The file contains the applicant's Pre-Approval Submission Report (undated) which sets out details regarding ownership, site condition, silvicultural conditions, plot & species, operation of the proposal, fencing, environmental considerations and whether acid sensitive tests are required.

The file contains a report and habitat mapping submitted by the applicant in response to the request for further information issued by the DAFM on the 20<sup>th</sup> of September 2021 and revisions uploaded to the DAFM file on the 11<sup>th</sup> & 25<sup>th</sup> of January 2022 and the 14<sup>th</sup> of March 2022.

The file contains the Ecology Report and an Appropriate Assessment Screening Report & Determination (ASSR & D) prepared by the DAFM ecologist both dated the 10<sup>th</sup> of March 2022 in response to the applicant's habitat documentation. This concludes with a determination under Section 42(16) of S.I. No. 477 of 2011 that for the purpose of compliance with Section 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), as the project will not have any significant effect, alone or in combination with other plans and projects, on the European Sites listed, DAFM determined that the project will not adversely affect the integrity of those European Sites.

There was one third-party submission on the licence application.

### **Hearing**

At the sitting of the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM and all materials on file. Following examination and assessment of documentation on the file before it, the FAC decided an oral hearing was not warranted in this instance.

### **Appeal**

There is one third-party appeal against the decision to approve the licence.

The grounds of appeal are summarised as follows:

1. *Environmental concerns.* (a)Setbacks not shown on mapping, (b) cumulative impact of forestry in a limited area, social isolation & road damage, EIA is required if forestry in the area more than 50m from the site is, (c) general environmental concerns regarding the suitability of Sitka spruce as a species with regard to biodiversity, carbon sequestration and suggests a greater increase in broadleaved planting on the site.
2. *Requests dwelling setback of > 60m due to landform*
3. *Access Road.* The access road is not a public road although described as such in mapping. There is no evidence of a right of way on file and the road is already in poor condition.
4. *Biodiversity*

- a) DAFM Ecology Report (which specifically addresses points made in the applicant's original submission)
  - i. While DAFM Report states that there is no evidence of badgers on the site. The appellant states that the badger sett is in adjoining lands and that the planting site is used for travel & forage.
  - ii. Questions DAFM Report on Pine Marten.
  - iii. Questions DAFM Report on the Irish Black Bee and requests conditions requiring notification of herbicide spraying.
  - iv. The appellant notes there is no mitigation for Hen Harrier but the site is within 11km of Slieve Aughty SPA where Hen Harrier is a Qualifying Interest.
  - v. Questions DAFM Report regarding the Hen Harrier foraging area within the planting site.
  - vi. The appellant states that there should be no planting during bird nesting season due ground nesting birds.
- b) AA Screening
  - i. Slieve Aughty should not have been screened out due to Hen Harrier considerations.
  - ii. Galway Bay SAC & Rahasane Turlough SAC should have been included due to there being a hydrological connection.
  - iii. Pre-Approval Form. The appellant states that there was furze present on the site and disputes the District Inspector's report that there is peat on the site.
  - iv. Requests further mitigation measures for wildlife & bee population and reconsideration of the need for an Appropriate Assessment for Slieve Aughty SPA and other Natura Sites.
5. *Soil*. The appellant seeks contemporary site inspection report(s).
6. *Work carried out prior to application being submitted*. The appellant is not satisfied that his concerns about work carried out in contravention of the Environmental Requirements for Afforestation 2016 have been considered and that he has not been informed as to why that work was considered not to breach those requirements.
7. *Details of Planting Plan*. The appellant states that there are no details on the number of trees and the distance between them and reiterates the objection to Sitka spruce.
8. *Spraying Herbicide/Pesticide*. The appellant reiterates the request to be informed when spraying will take place.
9. *Invasive Species*. The appellant states that there appears to be Japanese Knotweed at the entrance to the site and requests a Japanese Knotweed Management Plan if presence is confirmed.
10. *Issues with the Application*. (a) the site notice was not signed then replaced. Is the application invalid? (b) the applicant not the landowner and there is no evidence of a lease on file, (c) the revised Bio Map of 14/03/2022 has multiple errors.

## Hearing

### ***DAFM Statement of Fact provided to the FAC***

The Statement of Fact (SoF) provided by the DAFM dated 27<sup>th</sup> of May 2022 confirms the administrative details of licence application CN88946; indicates that a desk and field assessment were carried out on the proposed afforestation (the date of the field inspection was the 12<sup>th</sup> of August 2021) and states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on this licence application. The SoF included a statement dated the 18<sup>th</sup> of May 2022 from the Forestry Inspector confirming that the current Appropriate Assessment screening of November 2019 was carried out, that the standard operating procedures were applied, and contained a history of the Inspector's involvement with the licence application.

### ***Consideration by FAC.***

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the Forest Service, and other on-line services. Aerial photography and mapping, including that submitted with the application show that the vegetation on the lands appears to be primarily agricultural grassland with hedgerows, scrub and semi natural woodland and semi natural grassland. Soil mapping shows the soil underlying the site as Surface-water and Groundwater Gleys, Peaty Gleys and Cutover Basin Peats. The Carra Stream forms the southern site boundary.

### ***Appropriate Assessment (AA).***

The FAC noted that the DAFM, in advance of making the decision to grant the licence, carried out a Stage 1 Appropriate Assessment Screening Report and Determination by a qualified ecologist dated 10<sup>th</sup> of March 2022 which included an in-combination assessment report. The FAC identified the same four Natura 2000 as being within 15Km of the proposed afforestation; Lough Rea SPA (Site Code 0004134), Lough Rea SAC (Site Code 0000304), Slieve Aughty Mountains SPA (Site Code 0004168) and Glenloughaun Esker SAC (Site Code 0002213). The FAC further noted that the DAFM in-combination report concluded that the proposed afforestation, when considered in combination with other plans and projects, will not give rise to any significant effect on the Natura 2000 sites identified. The FAC is satisfied that the procedure adopted by the DAFM in its Appropriate Assessment Screening Report and Determination, by considering the qualifying and conservation interests for the four Natura 2000 sites within a 15km distance of the development and the assessment of the project design, location of the project and possible pathways to those sites, is sufficient for the DAFM to determine whether an Appropriate Assessment was required having regard to the nature, scale, and location of the proposal and that the Minister has not erred in the processing of the application as it relates to this ground of appeal.

### ***Environmental Impact Assessment (EIA).***

The FAC noted that the DAFM, in advance of making the decision to grant the licence, had an Ecology Report prepared by a qualified ecologist dated 10<sup>th</sup> of March 2022 and based on that report the Inspector's Assessment to Determine EIA Requirement recorded a consideration of the application across a range of criteria relevant to the development proposed, including water, soil, terrain, slope, designated areas, or landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC notes that the proposed afforestation is located in an area of Low Landscape Sensitivity in the Galway County Development Plan 2022-2028. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an EIAR was required having regard to the nature, scale, and location of the proposal and that the Minister has not erred in the processing of the application as it relates to this ground of appeal.

### ***Water Framework Directive (WFD).***

EPA mapping shows the site lying within Catchment 29 Galway Bay South-east. The relevant sub catchment is the Kilcolgan\_SC\_010 within which forestry is not identified as a pressure. EPA mapping shows the site adjoining the WFD river water body the Carra Stream\_10 on the southern site boundary which was of Poor status in the 2013-2018 and is now At Risk in the 3<sup>rd</sup> WFD Cycle. The underlying Ground Water body is the Rahasane Turlough SAC IE\_WG\_G\_0100 which was of Poor status in the 2013-2018 and is now At Risk in the 3<sup>rd</sup> WFD Cycle. The DAFM in its Ecology reported dated the 10<sup>th</sup> of March 2022 considered the potential impact on water quality by the project and proposed a series

of mitigation measures which the FAC is satisfied would, if implemented as described, prevent further deterioration of the status of the relevant waterbodies and promote the improvement of water quality.

***FAC Consideration of the Grounds of Appeal.***

In addressing the grounds of appeal, the FAC considered the following.

**Environmental Concerns.**

- (a) The FAC considered the appellant's specific ground of appeal that the 20m setback and additional broadleaved planting to the Carra Stream specified in the licence condition is not marked on the operational map of 14/03/2021. The FAC noted that one of the mitigations in the Ecology Report states, "A water setback, a minimum of 20m in width, to be installed adjoining the aquatic zone and managed in accordance with the Environmental Requirements for Afforestation (DAFM, 2016)." and that "Five lines of broadleaves are to be planted outside of the aquatic zone setback (both sides). Condition 5 of the licence requires "Strict adherence to all mitigation conditions, as per Ecology Report, 10/03/2022, T. Slattery, attached. Note that a 20m Aquatic setback is required on River on southern boundary". It appears to the FAC that a 20m setback and additional broadleaved planting is specified on both sides of the Carra Stream which is the only aquatic zone within the application boundary. The lands on the southern bank of the Carra Stream is not within the boundary of the licence application area and there is no evidence on the file that those lands are in the same ownership as the proposed afforestation. The FAC considers that the proposed condition requiring a 20m aquatic setback and additional planting outside the licence area to be a material alteration of the licence and that a new licence application is required in such circumstances and as such represents a serious error in the making of the decision.
- (b) The FAC noted that in relation to forestry Environmental Impact Assessment is required "where the application involves an area of 50 hectares or more, or where the Minister has determined that an environmental impact assessment is necessary" and that the criterion used by the DAFM to determine the need for EIA is where the licence application area, together with existing afforestation of 3 years or less within a 500m radius, exceeds 50 Ha. The DAFM have determined that the area in question is 42.56 Ha. and is therefore below the EIA threshold. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.
- (c) In relation to the lack of response from Galway County Council and Inland Fisheries Ireland, the DAFM is the competent authority for forestry licencing, therefore a referral response is not required from those bodies in order to complete an Assessment to Determine EIA Requirement.

The FAC noted that this ground of appeal states that the proposed afforestation will lead to social isolation but contains no detail as to what negative impact this afforestation will have on the local community. The FAC considers that issues related to national forest policy that, under law, is the responsibility of the Minister for Agriculture, Food and the Marine. The FAC can address only the grounds of appeal that relate directly to the licence for afforestation before it and cannot take account of wider non-forestry considerations of afforestation on a particular area as these relate to forestry policy. The DAFM did record a consideration of the proposal across a number of criteria that includes both environmental and social effects and the cumulative effect of the proposal. Tree planting under the proposal is required to be set back 60 metres from dwellings with an additional planting of 10 rows of broadleaved species. The land is private agricultural land with a network of existing hedgerows that will be retained and is not in a prominent position in the landscape.

The appellant states that the planting of Sitka spruce offers no benefits for local biodiversity and does not have the carbon sequestration effect it was originally thought to have. The FAC noted that the species of trees to be planted comply with the rules for plantation set out in the Forestry Standards Manual 2015 and is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

**Dwelling Setback.**

The FAC considered the appellant's ground of appeal that the 60m dwelling setback and additional broadleaved planting is insufficient because of the landform. While the appellant quotes the height of Sitka spruce as 90-100m. The results of the Irish National Forest Inventory 2017, publicly available on the DAFM website, recorded the mean annual height increment of privately-owned, grant-aided Sitka spruce as 0.65m. Given a typical harvesting age of c.35 years, this would result in trees with a mean height of <23m at felling. Taken together with the absence of significant changes in the landform in the area, the FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

**Access Road.**

The FAC noted the appellant's ground of appeal that the roadway leading from the public road to the site is not a public road and the applicant has not indicated a right of way along that roadway. The FAC is not in a position to adjudicate on legal entitlements on ownership or use of this road but noted that a granting of a licence does not confer any entitlements to such a right or the suitability of the road in question for use in bringing materials to and from the site.

**Biodiversity.**

(a) DAFM Ecology Report.

The FAC considered the appellant's ground of appeal regarding the content of DAFM Ecology Report with respect to the presence of badger in the vicinity and the suitability of Sitka spruce for pine marten. The FAC noted that badgers and their setts are protected under the provisions of the Wildlife Act 1976, and the Wildlife Amendment Act 2000. The FAC noted that the Vincent Wildlife Trust document referred to by the appellant also states that planting exotic species and monoculture can provide arboreal habitat and connectivity for pine marten. The FAC considered the nature, scale and location of the proposal being for afforestation in an area of managed agricultural land, and the Ecology Report and associated mitigation measures required by the DAFM to prevent the unnecessary loss of biodiversity to the area and minimise adverse impacts to invertebrates, small mammals and those species that forage upon them. The FAC finds that the granting of the licence for the operations in this case does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

The FAC considered the appellant's ground of appeal that they should be notified when the proposed herbicide is applied. The FAC noted that herbicide spraying is normally applied by hand and undertaken in a controlled and targeted way and has concluded that, there is no requirement to engage in the consultation methods suggested in the grounds and that any spraying is required to follow best practice as outlined by the DAFM in the Environmental Requirements for Afforestation 2016 and practice guides. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant are not required to be attached to the licence.

The FAC considered the appellant's ground of appeal that the DAFM Ecology Report does not contain any mitigation for the Hen Harrier. The FAC noted that the mitigation measures for ground nesting birds requires that planting is to occur outside of the breeding bird season (1st

March – 31st August) which is the recognised breeding season for the hen harrier. The FAC further noted that the Appropriate Assessment Screening of the Slieve Aughty Mountains SPA (Site Code 0004168) carried out by the DAFM ecologist screened out the need for a Stage 2 Natura Impact Statement for this site, therefore mitigation measures for the hen harrier are not required. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

The FAC noted the mitigation measure specified in the DAFM Ecology Report to prevent adverse impacts to ground nesting birds and that compliance with the mitigation measures is a condition of the licence. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

(b) AA Screening.

The FAC considered the ground of appeal that the Slieve Aughty SPA should not have been screened out based on the distance between the site of the licenced site and the SPA. The FAC noted the finding in the AASD was that the SPA was screened out *“due to the separation distance of 11.4 km between this European site and the project placing it outside of the core foraging range for the SCIs of this site. Additionally, the project site is not located within any currently recognised range or distribution for the SCIs of this site”* and that there are no pathways for impact. The FAC noted that the Irwin et al 2021 study referred to in the appeal found that the 11.4.km foraging distance applied to one bird only and that the same study found that over 50% of all GPS records, consistent with hunting behaviour, were <2 km from the nest and that the concentration of hunting behaviour was more than 10 times higher within 1 km of the nest than it was between 2 - 5 km. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

The FAC considered the ground of appeal that the Rahasane Turlough SAC and Galway Bay SAC should have been included in the AA Screening Report. The FAC noted that both sites are substantially greater than the 15km screening separation distance criterion the DAFM use the for AA screening and that the Rahasane Turlough SAC is circa 20km from the site of the proposed planting and that there is a hydrological connection between the two of some 24km in length. Having considered this and the Conservation Objectives for the two SACs in question, the FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

(c) Site Details-Pre-approval Form.

The FAC considers the first paragraph of this ground to be a statement.

The FAC considered the ground of appeal that further mitigation for wildlife & bee population should be included in the licence and that AA screening parameters and the decision not to include Slieve Aughty SPA and other areas should be reconsidered. The FAC had regard to the DAFM Ecology Report and the fact that the licence states that the granting of a licence does not exempt the holder from meeting any legal requirements set out in any other statute.

**Soil Reports.**

The FAC considered the appellant’s ground of appeal that the DAFM Ecology Report and the DAFM letter requesting Further Information dated 20<sup>th</sup> September 2021 refer to a site inspection of the 12<sup>th</sup> of August 2021 but that there is no report of that inspection on file. The FAC noted that the DAFM Ecology Report makes no reference to the Inspector’s site visit of the 12<sup>th</sup> of August 2021 but refers to *“Two site visits were conducted on this file by the Registered Foresters Ecologist, who is considered sufficiently competent to identify protected species and evidence of protected species”*. The DAFM

does not have access to the reports of those site visits, only the findings as set out in the Supplementary Information for the Habitat Map for CN88946.

In his appeal the appellant accepts that the issue of soil types has been addressed but is seeking the report of the site inspection on which the DAFM letter of 20<sup>th</sup> September 2021 is based. The FAC noted the comprehensive report of the District Inspector's site visit of 12/08/2021 contained in the DAFM Appropriate Assessment Screening Report & Determination of 10/03/2022 and which is on the public file. The FAC does not consider that that the decision was made without complying with fair procedure.

#### **Work carried out prior to application being submitted.**

The FAC considered the appellant's ground of appeal that work had been carried out on the site prior to the submission of the licence application in contravention of Section 2.5.3 of the Environmental Requirements for Afforestation December 2016. The FAC notes that section 2.5.3 of the Environmental Requirements for Afforestation December 2016 - ABE Criteria states that "best quality habitats" should be selected i.e.. those with the greatest biodiversity value identified at level 2 or 3 according to Fossitt's *A Guide to Habitats in Ireland* (2000). The FAC considers that it is those habitats which should not be removed habitats prior to submission of the afforestation application. The FAC notes that it is an offence, under the Wildlife Act 1976, as amended, to destroy vegetation on uncultivated land between the 1<sup>st</sup> of March and the 31<sup>st</sup> of August. The appellant has stated that gorse, hawthorn and other species were removed "in the weeks prior" to March 2021, without specifying what other species may have been removed. The FAC further notes that the DAFM "may" decide to refuse the licence on the ground of habitat removal but has elected not to do so. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

#### **Details of Planting Plan.**

The FAC considered the appellant's ground of appeal that there is insufficient information on the proposed planting plan in terms of number of trees being planted and the distance between them. The FAC noted that the Operational Proposals in the licence indicate that standard stocking is proposed. Standard stocking is set out in Section 10.5 of the Forestry Standards Manual 2015 and compliance with that manual is a requirement of the licence. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

#### **Invasive Species.**

The FAC considered the appellant's ground of appeal that there may be Japanese Knotweed at the site entrance. The FAC noted that in the Ecology Report of the 10<sup>th</sup> of March 2022 mitigation measures are set out to prevent the introduction of or spread of, non-native invasive species and refer to specific guidelines and best practice at [invasivespeciesireland.com](http://invasivespeciesireland.com) and that compliance with the mitigation measures in the Ecology Report are a condition of the licence. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

#### **Application Issues.**

The FAC considered the appellant's ground of appeal that the revised biodiversity map dated 10<sup>th</sup> of March 2022 has multiple errors. The FAC notes that, except for the labelling of the roadway, all of the other bullet points in this ground relate to the Ecology Report mitigation measures and conditions of the licence which were not available to the applicant prior to the issuing of the licence. The FAC noted that the licence is issued subject to compliance with the conditions attached and that compliance with the proposal and conditions is monitored at various stages. The FAC is not satisfied that the Minister has erred in the processing of the application as it relates to this ground of appeal.

#### **Other Matters**



The FAC noted that in the Inspector's Assessment to Determine EIA Requirement response is No to the question on Public Participation and NGO participation - *Comments and issues from the general public and non-governmental bodies were received and examined?* and that the questions in the Assessment to Determine EIA Requirement were answered on the basis of the Ecology Report. The original submission by the appellant raised a number matters not related to ecology and have not been addressed. The FAC further noted that the Minister is required to have regard to written submissions or observations received in making a decision on the licence. The FAC concluded that the *Assessment to Determine EIA Requirement* had not been recorded appropriately and that this constituted a serious error in the making of the decision.

The FAC noted that in the Assessment to Determine EIA Requirement the approximate % of forest cover within 5 km of the site is stated to be 13.18%. The in-combination report states that approximately 7% of the River Sub-Basin - Carra Stream\_010 is under forest cover. The rationale for using two different criteria is inconsistent and is not explained. Also, it is not clear if the "vicinity" referred to in the in-combination report is the same as the 5km buffer referred to in the Assessment to Determine EIA Requirement Report. The FAC considers that in the interest of transparency the use of these different criteria should be explained.

### **Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001(as amended) the FAC is satisfied that a series of errors was made in the making of the decision regarding licence CN88946 and that the licence should be set aside and remitted to the Minister to DAFM to (i) consider whether the requirement to plant outside the licence application area is a material alteration of the proposal and should be subject to a new licence application and consequent public consultation; (ii) to undertake a new Assessment to Determine EIA Requirement with particular regard to the question on public participation.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

