



14/07/2023

**Subject: Appeal FAC048/2022 in relation to afforestation licence CN86604**

Dear Ms. Acheson,

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.

**Hearing & Decision**

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. Appeal FAC048/2022 was considered during a sitting of the FAC held remotely on the 02/02/2023 which was attended by the following participants:

**FAC Members** – Mr. John Evans (Deputy Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.

**FAC Administration** – Mr. Michael Ryan.

The file record of the decision was made available to the FAC by way of the DAFM Forest Licence Viewer (FLV). The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, the DAFM's Statement of Facts (SoF), and all other submissions, before deciding to set aside and remit the Minister's decision to grant afforestation licence CN86604 for the reasons outlined hereunder.

**Background**

The licence under appeal was issued by the DAFM on 08/04/2022 and is for the afforestation of 7.61ha of Native Woodland in Annaghgowan, Ballynary, Co. Sligo. The proposed development consists of four plots with planting composed of native broadleaf species. The licence was issued with conditions requiring; adherence to mitigation measures set out in an attached Appropriate Assessment (AA) Determination, a deer-fencing setback from the lakeshore, adherence to Native woodland "scenarios", and compliance with an attached archaeological report. A number of other relatively standard conditions were also attached to the licence.

**Location**

The proposal is located on the eastern shore of Lough Arrow, adjoining Loughbrick Bay and is split by a public road; the L1905. Plots 3 & 4 are south of this road with Plot 3 adjoining Lough Arrow. Plot 1 (comprising a utilised building setback) and Plot 2 are north of the L1905.

The site is described in the application documents as enclosed agricultural land with mineral and peat soil and a current vegetation cover of grass/rush and sedge & rush. The elevation is given as ca. 70m and the site is described as “not exposed” with a “westerly/neutral aspect” and as having adequate site access.

The approved operational details in Appendix A of the Approval Letter state that there is no drainage or firebreaks required, zero fertiliser will be applied, and the ground preparation will be limited to ripping. There will be slit planting with manual weed control and herbicide control in Year 2. There will be 2000m of Deer fencing erected around the perimeter of the application site.

The proposal is in the Sligo Bay Catchment, the Unshin\_SC\_010 Sub-Catchment, and the Unshin\_010 River Sub-Basin. According to publicly-available Environmental Protection Agency (EPA) maps there are no EPA-mapped watercourses within the application site but the Unshin\_010 River Waterbody runs from north-west to the south-east at a separation of c. 10-50m from the north-east boundaries of Plots 1 & 2. Information submitted by the applicant states that “the Barroe-South EPA watercourse is separated from the proposed works area by 10m, there is no potential for pollution related effects impacting the watercourse”.

The publicly-available information on [www.catchments.ie](http://www.catchments.ie) shows that both the Unshin\_010 River Waterbody and the Arrow Lake Waterbody have ‘Good’ status (assessed by monitoring for the 2016-2021 period). The Unshin\_010 is listed as ‘Not at Risk’ with the risk status of Lough Arrow under review. Lough Arrow was previously found to be ‘At Risk’ (for the period 2013-2018) with the significant pressure listed as ‘Other’ - invasive species (zebra mussels). The Water Framework Directive (WFD) Cycle 2 Report for the Unshin\_SC\_010 Subcatchment, lists the Arrow Lake Waterbody and the Unshin\_010 River Waterbody as within protected areas for drinking water. The proposal is underlain by the Ballymote Ground Waterbody which has ‘Good’ status and is ‘Not at Risk’.

#### **DAFM Processing of the application**

##### **Assessment to Determine Environmental Impact Assessment (EIA) Requirement**

The application was field (29/04/2021) and desk-assessed. The DAFM completed an “Assessment for EIA Requirement”, which was uploaded to the FLV on the 11/04/2022 with a “Last Spatial Run Date” of 05/11/2021. The EIA assessment considered the proposal’s potential impact on the environment across a range of criteria before concluding that the application should not be “subject to the EIA process”. The Forest Service District Inspector (DI) indicated that the application should be referred to the Forest Service ecologist. The assessment included the following information:

- The application area contains or adjoins a listed archaeological site or monument, etc. - additional measures beyond standard archaeology guidelines apply.
- In response to the question “Is the amount and type of forest cover in this locality known to be a significant issue?” the DI answered “No”.
- The approximate percentage of forest cover currently in the “underlining waterbody (or waterbodies)” is given as 20.59%.
- The site is within an area designated as sensitive to fisheries.

- The site is *not* in a High Amenity Landscape *but is within* a prime scenic area in the Sligo County Development Plan (CDP) or within an area listed in the Inventory of Outstanding Natural Landscapes or in a Landscape Conservation Area.
- Comments from the Local Authority were requested, received, and examined.
- The proposed area is *within* a European or national designation, including SACs, SPAs etc.
- Comments and issues from the public and non-governmental bodies were received and examined.

#### **Further Information Request**

The DAFM issued a Further Information Request (FIR) to the applicant on the 06/05/2021 by way of a letter (and again on the 05/08/2021) which stated:

*“Please exclude Plot 1 from application. This plot shows signs of persistent waterlogging and is outside the scope of the scheme. Please submit updated fence map. The project area requires a deer fence to protect against fallow deer population in the area. Re-submit bio showing all designated areas and all other relevant environmental considerations. See circular 18/2020 Biodiversity Map requirements for Afforestation and Forest Road applications. Please note herbicide is not permitted under the NWE scheme. Update species selection. Soil types differ between Plot 3 and 4”.*

#### **AA Process**

The applicant submitted an AA Pre-Screening Report (AAPSR) which was compiled by an Ecologist and a Forester and completed on the 25/11/2021. Referencing a Habitat Survey in June 2021, the AAPSR describes the project site as mainly Wet grassland (GS4) with a small area of Dry calcareous and neutral grassland (GS1). The south-west fields border Lough Arrow (Mesotrophic lake - FL4). The soil consists of mineral Gleys and peaty mineral soil across the site. The south-west boundary of the site overlaps with the Lough Arrow SAC and Lough Arrow SPA. The AAPSR concludes that “there is a likelihood of the proposed afforestation project having a significant effect, individually, on Lough Arrow SAC & Lough Arrow SPA”.

#### **Natura Impact Statement**

Based on the results of the AAPSR, a Natura Impact Statement (NIS) was produced by the same authors as the AAPSR. The NIS also has a completion date of 25/11/2021. The NIS includes site and proposal description details found in the AAPSR and contains “Section 2: SCREENED-IN EUROPEAN SITES – POTENTIAL IMPACTS & PROPOSED MITIGATION (IF POSSIBLE)”. The Qualifying Interest(s) (QIs) and Special Conservation Interest(s) (SCIs) are listed for Lough Arrow SAC and Lough Arrow SPA and for each an assessment is made as to whether it is likely the project will have an adverse effect. On the basis of this assessment the following mitigations were included:

- 10m water setback will be established along the lakeshore of Lough Arrow.
- There will be no refuelling, fuel storage or maintenance of machinery within 50m of a water setback or the Barroe South stream.
- There will be no use of herbicide, storing of chemicals or re-filling within 50m of Lough Arrow or the Barroe South stream.

- All water protection measures will be adhered to relating to setbacks, cultivation, monitoring, refuelling and the location of onsite storage depots and the disposal of waste, as set out in the Environmental Requirements for Afforestation (ERA), Native Woodland Establishment GPC9 & GPC10 Silvicultural Standards (NEW Standards) and Forestry Standards Manual (FSM).

The NIS also considered the proposal in combination with other plans and projects in the Unshin\_SC\_010 Sub-Catchment that could result in cumulative effects on European Sites (including data from the FLV, Leitrim Co. Council, An Bord Pleanála, Sligo County Development Plan 2017 – 2023, and the EPA) before concluding “No potentially adverse cumulative and/or in-combination effects on any of the SCIs has been identified with regard to the proposed project”.

#### DAFM AA Screening

There are two documents labelled *AA Screening Determination* on file, both were uploaded on the 30/03/2022. The first is titled *AA Screening Report (AASR)* and was completed by the DI and dated 24/03/2022. The second is titled *AA Screening Determination (AASD)* and was completed by a Consultant Ecologist on behalf of the DAFM, dated 30/03/2022. The AASR screened the following five European sites within 15km of the proposal:

- Bricklieve Mountains and Keishcorran SAC 001656
- Lough Arrow SAC 001673
- Lough Arrow SPA 004050
- Lough Gara SPA 004048
- Unshin River SAC 001898

Lough Gara SPA and Bricklieve Mountains and Keishcorran SAC were screened out with reasons provided while the remaining European sites were screened in with the overall conclusion that Stage 2 AA was “required in relation to one or more European sites”. In each case the reasons included referred to and relied on an assessment of in-combination effects (as described later in this letter).

The AASD provides “expert verification” of the DI’s screening conclusions as provided in the AASR. The AASD agrees with the DI’s original decision that 3 European sites require AA with the following rationale provided:

- **Unshin River SAC**  
*The proposed project site is located entirely outside the boundary of the European Site and therefore, there is no potential for direct effects. The proposed project site is located immediately adjacent to Lough Arrow. The river Unshin flows from the north of Lough Arrow and therefore surface water connectivity between the proposed project site and the SAC exists. The Unshin River SAC is located over 9km surface water distance from the proposed project site. Although the NIS 25/11/2021 screens this site out, a source-pathway-receptor exists and there is potential for impact- Screen-in.*
- **Lough Arrow SAC**  
*Part of the proposed native woodland site overlaps with the boundary of the SAC along the shoreline of Lough Arrow and therefore there is potential for direct effects to occur. Due to*

*proximity, there is also the potential for indirect effects to occur as a result of a chemical spill or hydrocarbon pollution should there be a spillage or leakage from machinery.*

- **Lough Arrow SPA**

*Part of the proposed native woodland site overlaps with the boundary of the SPA along the shoreline of Lough Arrow and therefore there is potential for direct effects to occur. The proposed project site lies within the potential foraging range of tufted duck and little grebe. Therefore disturbance/displacement effects cannot be ruled out. Due to proximity, there is also the potential for indirect effects to occur as a result of a chemical spill or hydrocarbon pollution should there be a spillage or leakage from machinery.*

The AASD states “the project must advance to Appropriate Assessment stage in relation to these European Sites.”

#### AA In-Combination Assessment

An In-Combination Statement (ICS) was completed by the DAFM on the 28/03/2022 and published on the FLV on the 30/03/2022. The ICS gives the Unshin\_010 River Sub-Basin as having approximately 16% forest cover. The ICS considers the potential for the proposed afforestation project to contribute to an in-combination impact on European sites and consulted various online planning systems and datasets (including Sligo Co. Council, the FLV, An Bord Pleanála, and the EPA) on the 28/03/2022 to identify other plans and projects, focusing on the general vicinity of the project area in the Unshin\_010 River Sub-Basin.

The ICS concluded that there is “no possibility that the proposed afforestation project CN86604, with mitigation measures set out in Section 4, will itself, i.e., individually, giving rise to an adverse effect on the integrity” of the screened-in European sites and “Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects.”

#### AA Determination

An AA Determination (AAD) was completed on the DAFM’s behalf by the same Consultant Ecologist as the AASD on the 30/03/2022. Section 1 states “The purpose of this Appropriate Assessment (AA) Determination is to record that an appropriate assessment of the project below has been carried out by the Minister in accordance with the relevant legislation, for the information of the public and interested bodies.”

Section 2 details the AA screening results and lists the Unshin River SAC, Lough Arrow SAC, and Lough Arrow SPA as the screened-in European sites.

Section 3 of the AAD states that “the Minister determined that an Appropriate Assessment of the activity proposed under CN86604 was required in relation to the above ‘screened in’ European sites” and that “For this reason, without being requested to do so, the applicant submitted a Natura Impact Statement (completed 25/11/2021) to facilitate the Minister carrying out an appropriate assessment. North-West Ecology Ltd., acting on behalf of the DAFM, subsequently evaluated the submitted NIS”. The AAD does not appear to contain an explicit evaluation of the NIS and does not clearly state whether the Minister accepts or rejects the findings of the NIS. Also at Section 3 there is a description of issues that the NIS does not address. These include the potential for flooding, the addition of a 1.9m high Deer fence, chemical treatment of fence posts, and providing access for Badger/Otter via two-way gates in the fence. The AAD

does not address the fact that the NIS only covers two screened-in sites and does not assess the proposal's potential impact on the Unshin River.

Section 4 of the AAD prescribes mitigation measures relating to timing of works (breeding season, weather), fencing, setbacks, crossing drains, biosecurity, use of certified stock, badger, otter, adherence to specified standards & guidelines, and prohibits the use of herbicide. Section 4 also states that "mitigation measures will ensure no impact to the integrity of the conservation measures for European sites within the zone of influence" and concludes that "no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site".

### **Referrals**

The DAFM referred the application to An Taisce, the NW Regional Fisheries Board (IFI), the National Parks & Wildlife Service (NPWS), and Sligo Co. Council. The application was also referred to the Forest Service's Archaeology Unit. An Taisce did not respond.

IFI's response (FLV upload 26/01/2022) highlights the importance of Lough Arrow for brown trout. It also highlights the proximity of the proposal to Lough Arrow SAC. The IFI states that "*The ecological status of this catchment has declined from good to moderate in the past five years and this status must be restored to good to comply with the Water Framework Directive.*"

IFI requested that if the application is granted the Forestry and Water Quality Guidelines are adhered to in addition to suggested conditions relating to:

1. 20m buffer zone along lake, retention of all riparian vegetation, trees, and shrubs. Two rows of native trees should be planted outside this aquatic buffer zone,
2. 10m buffer zone in Plots 1, 2 and 3 along valuable trout spawning stream. Two rows of native trees should be planted outside this aquatic buffer zone.
3. Plots 1 and 3 are composed of wet soils and are liable to flooding on the old OSI maps. These plots may not be suitable for planting,
4. Ground works /machinery,
5. Disposing of planting bags etc.,
6. NW Scheme be considered.
7. Two weeks notification prior to works commencing on this site.

The NPWS response (FLV upload date 24/11/2020) highlights the proximity of the Lough Arrow SAC/SPA and the need to screen for AA. The NPWS also attached an appendix containing more general points of relevance.

Sligo Co. Council's response (FLV upload date 09/10/2020) states:

*The Local Authority have serious concerns relating to the proposal due to its location:*

- (a) between a designated scenic route and the shores of Lough Arrow, which are designated visually vulnerable as per the CDP,*
- (b) adjacent to Lough Arrow SAC, SPA, a pNHA*

**Sligo Co. Council's response states**

*It is considered planting of the lands would be contrary to policy P-FOR-2 of the County Development Plan, which discourages new forestry development, except for broadleaf, in proposed/candidate and adopted NHAs, SACs, and SPAs, in Visually Vulnerable Areas and along Scenic Routes.*

An **archaeology report** (FLV upload date 07/01/2021) was produced, and this proposed additional conditions to be attached to the afforestation licence, including an annotated map showing a Recorded Monument (a possible Bi-Vallate Enclosure) in the southwest corner of the proposal.

### **Submissions**

There are 26 submissions on the FLV with concerns expressed that are largely reflected in the grounds of appeal.

### **Grounds of Appeal and submissions by the parties to the appeal**

#### **Grounds of Appeal**

There is one appeal against CN86604 (FAC048/2022). The grounds of appeal were submitted along with a Notice of Appeal Form on the 20/04/2022. The grounds are extensive and include 74 enumerated grounds in which there is some overlap on the issues raised. These were circulated to all parties, considered in full by the FAC, and are available on the FAC file. For convenience the grounds are briefly summarised as follows:

- Proposed deer fencing will impact on a protected scenic area, with negative effects on an SAC/SPA, a visually vulnerable area and on tourism.
- Prescribed bodies were not notified of application changes and requirements for AA of consideration.
- The Fencing map shows a fence through a recorded monument.
- The lack of Landscape Architect involvement in proposal within a sensitive area is not in keeping with the guidance provided in the DAFM document *Environmental Requirements for Afforestation*.
- The application is invalid by reason of incorrect and inaccurate information, and that information provided on the FLV was incomplete.
- The application contains incorrect and inaccurate information and is invalid.
- Negative impacts on sensitive waters of Lough Arrow and species therein. Potential negative impacts on a local group water scheme.
- The Lands proposed for afforestation are prone to flooding.
- Operations within wetland areas of the proposal require planning permission.
- Reasons for previous afforestation refusals on this site remain valid.
- Setback distances not detailed accurately.
- Insufficient detail on setbacks from neighbouring land.
- AA Screening Report completed incorrectly and inadequate consideration of in-combination effects.

- Note on AA In-Combination Effects not considered properly.
- Fishing board's submission not on FLV.
- Insufficient Assessment of Environmental Impacts
- Insufficient road opening for required equipment and road on a bend.
- Impact to broadband and TV signal for houses and businesses.
- Afforestation would surround appellant's house on two sides.
- No setback from neighbouring land.
- Instances of bias.
- Not all prescribed bodies received referral.

#### **DAFM response to Grounds of Appeal**

The DAFM provided three statements in response to the grounds of appeal from the DAFM Archaeology Unit, the DAFM the Ecology Unit, and the Forest Service Administration including comments from the District Inspector.

**The Archaeology response** states, inter alia that they are "*firmly of the view that as regards protection of the archaeological resource there is nothing therein that would have changed the substance of the decision made to approve afforestation license nor should any additional, specific, archaeological conditions have been recommended*". The response addressed several specific concerns and noted a 100m setback, described as a "*particularly large exclusion zone for monuments of this type*" applied to the monument with reference number SL 040-059. It was observed that this provided for maintenance of the relationship between that monument and others and with Lough Arrow. It also noted that the exclusion zone included restrictions on fencing works, and that conditions in the licence include archaeological monitoring by a suitably qualified archaeologist retained at the applicant's own expense (or that of his/her Registered Forester) for all ground preparation and drainage works undertaken in the other fields along the shores of Lough Arrow. The requirement for access to the archaeological site was stated to be included for the purposes of inspection by DAFM Forest Service or DHLGH National Monuments Service officials, but that this did not confirm a right of access for the public. The response also stated that the conditions proposed has been referred to the National Monuments Service who had responded with their agreement.

The DAFM Administration response states that the decision was issued in accordance with DAFM procedures, S.I. 191/2017 and the 2014 Forestry Act and also clarified the DAFM position on a number of matter relating to the operation of the FLV, specifically that older files do not appear on the FLV, and that the scheme of plot numbers used on the FLV does not relate to plot numbers in the application. In relation to the submission received from Inland Fisheries Ireland, the response states:

*The FLV is an online portal providing the public with information on forestry licence applications, to enable their participation in the decision-making process. Every effort is made to ensure that correct information is provided in all cases. Where we are notified or indeed discover that information is not as it should be, it is corrected as soon as possible. The IFI response of 23<sup>rd</sup> September 2020 appears on the FLV with a 'Date Received of 26-*



*JAN-2022'. This is the date IFI emailed DAFM with their response. It is not possible for our IT Unit to confirm dates and times documents were made public on the FLV.*

The DI's response states the AA screening procedure (November 2019 version) was applied. The response addresses some of the grounds of appeal in relation to water features and water quality, drainage, fertiliser, and herbicides. In so doing the response notes that adherence to the Environmental Requirements for Afforestation document is a condition of the licence, and that the application was referred to IFI. The response notes that a number of the grounds of appeal refer to areas of the application which were subsequently removed on the direction of the DAFM Forest Service. The response quotes from the Sligo County Development Plan 2017 – 2023 and refers to the policy objectives P-FOR-1, P-FOR-2, and P-FOR-3 of that plan. The response states that a number of the issues raised in the appeal are matters for other state bodies and that the NIS, though prepared on the applicant's behalf, was reviewed by a DAFM ecologist.

The Ecology response set out the relevant grounds of appeal and provided a response to each. The response explained the rationale behind the mitigation proposed in relation to the deer fence to reduce risk of collision to waterbirds by using reflective vinyl tags which is accompanied by a condition imposing a requirement to avoid works during the breeding season. The response states that the setback from the lake shore for the fence is 20m from the High-Water Mark, as is the aquatic zone setback. The dates of certain documents being placed on the FLV is outlined, and it is stated that these were in place for a second public consultation. The response stated that OPW Flood Mapping (May 2021) does not show a risk of flooding on the site, but the 6-inch maps and some third-party objections suggest otherwise and that the AAD consequently recommended an increased setback to 20m along the aquatic zone and along the northern boundary of plot 3. The response details proposed steps to protect water quality; noting that no fertiliser, herbicide, silt traps, or drainage will be employed; that the proposal is for native woodland and reiterating the use of a 20m setback as a mitigation; and noting that mitigations are mandated to protect water dependant habitat and species. In relation to invasive species, the response notes the biosecurity mitigation in the AAD. The response also outlines the steps taken in the Appropriate Assessment of the project; how the mitigations proposed are designed to ensure there will be no impact on the conservation objectives for the European sites within the zone of influence; and notes the issues relating to the NIS highlighting the sections of the AAD which acknowledge inaccuracies or omissions in the NIS, and which address these.

#### **Additional Submissions**

There are a number of additional submissions on file. These were also considered in full by the FAC and are summarised below. with reference to their timeline of their submission.:

The Appellant made a submission on the 28/11/2022 in the form of a letter with attachments. This restated and expanded on the ground of appeal that Planning permission for the project is required, stating that the project is not exempt development, with a letter from Sligo County Council in support. A diagram and photos were provided in support of the appellant's submission that the proposed forest entrance is not suitable as per the Government of Ireland Technical Standards for the Design of Forest Entrances from a Public Road (2019). Further information was provided on a previous letter of refusal for afforestation on the same lands, with letters from the DAFM evidencing this appended. An ecology report,

produced for forest application CN87072 (which the FAC notes was for lands ca. 2.3km south-southeast of the project site) was provided by the appellant as an attachment, who submits that this recognises the presence of the Devils bit Scabious plant on that site. The appellant submits that this when combined with a Report by Dr. Don Cotton outlining the presence of that species around Brick Bay indicates a deficiency in the process of the application. The submission also expands on a number of the grounds of appeal including raising issues in relation to consultation with, and consideration of, Group Water Schemes. Reference is also made to previous afforestation decisions in the vicinity recognising impact on otter populations from silt and sedimentation. It is submitted that the proposed deer fence mitigation is inappropriate, and that this change to the application warranted a re-referral to Sligo County Council. The efficacy of proposed conditions relating to archaeology are disputed and it is queried whether a setback distance based on planting rather than tree span will have the desired effect. It is further submitted that there is local discontent with the proposal and the number of submissions to the application process is reference in this regard.

The DAFM Archaeologist provided a response to the Appellant's submission of the 28/11/2022 on the 16/12/2022. This states that nothing in that submission would lead to additional specific archaeological conditions or would have impacted the nature of the decision with respect to archaeological considerations. The submission expands on the nature and operation of the proposed archaeological setbacks, including that the Biomap would be updated as part of the forestry grant administration process. The response also states that a report of archaeological monitoring expressly required by Point 9 of archaeology report attached to licence and adherence to this is required by conditions.

A DAFM Ecologist also provided a Response to Appellant's Submission of 28/11/2022 on the 20/12/2022. This disputes the relevance of points raised in relation to the application CN87072, specifically that this was refused on the on the basis of an Annex I habitat and Marsh Fritillary and not on the grounds of Otter populations, which it submits were considered in the AAD with a suitable mitigation in line with Forestry and Otter Guidelines (2009). It reasserts that the revised fencing was advertised on the FLV and as such available for review. It also restates details in relation to setbacks for deer fencing and restrictions during the bird breeding seasons, and that these mitigations took account of the nature and habitat of the relevant Special Conservation Interest. It provides details of the timing of the field survey which was conducted for the NIS and submits that this was at the optimal time for vegetation surveys, and that *Succisa pratensis* (Devi's bit scabious), food plant on Marsh Fritillary butterfly) on site nor was any Annex I habitat recorded. It submits that the details provided in the report authored by Dr. Don Cotton were not specific to the proposed site.

The Appellant the made a further submission on the 24/01/2023 in response to the DAFM Archaeology and Ecology responses to his additional submission. In this submission, the appellant makes reference to the document Project Woodland: Regulatory Review Report by solicitors Philip Lee LLP. It is submitted that Sligo Co. Council should have been informed of all changes arising from the AA and that FLV publication alone is not satisfactory as highlighted in the Report. It is also submitted that the review highlighted various aspects of European and national law in relation to possible impacts on European sites

and the consenting of forest roads and submits that the DAFM has not considered these. It also is submitted that the DAFM have not responded to the grounds of appeal apart from the DAFM ecologist.

### **FAC Considerations**

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision the subject of the appeal, or if the decision was made in compliance with fair procedures. The appellant referred at various points to previous decisions of the DAFM, reports, and referral responses regarding previously proposed afforestation projects in close proximity to the project site for CN86604. The considerations and findings of the FAC are limited solely to the DAFM's decision to grant afforestation licence CN86604.

The FAC considered the grounds of appeal submitted by the appellant, the DAFM's SoF and all additional submissions/responses to submissions, as summarised previously in this letter. The findings of the FAC are set out under the headings below.

### **DAFM AA & EIA Process**

In the first instance, the FAC considered the DAFM's decision to grant CN86604 in light of the requirements of the Habitats and EIA Directives.

Article 6(3) of the Habitats Directive states that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the European site in view of the site's conservation objectives.

As detailed previously in this letter, the FAC noted that an AAPSR was produced on the applicant's behalf which led to the completion of an NIS for two European sites; Lough Arrow SAC and Lough Arrow SPA. An AASR was completed by the DAFM DI which was then reviewed by a Consultant Ecologist on the DAFM's behalf in an AASD. The FAC noted that the AASR states no European sites overlap with the project area, which is incorrect. However, in the context of this decision, where this statement has been corrected elsewhere on the record, and the application has undergone the Stage 2 AA process, the FAC considered this to be a clerical error and not one of a serious or significant nature. The expert review of the AASR concluded that the DI had correctly screened in three European sites for Stage 2 AA; Lough Arrow SAC, Lough Arrow SPA, and the Unshin River SAC.

An AAD was completed on the DAFM's behalf by the same Consultant Ecologist that produced the AASD. The FAC observed that the AAD does not appear to contain an explicit evaluation of the applicant's NIS and does not clearly state whether the Minister has adopted the findings of the NIS. There is a portion of text in Section 3 that highlights some issues that the NIS does not address. These include the potential for flooding, the addition of a 1.9m high Deer fence, chemical treatment of fence posts, and providing access for Badger/Otter via two-way gates in the fence. In relation to the ground of appeal regarding Nutall's waterweed, the FAC noted that the AAD prescribes biosecurity measures to prevent the spread of invasive species. Regarding Marsh fritillary butterfly and Annex I habitats, the FAC considered that the NIS was informed by a field inspection completed during the summer (a preferable time for vegetation surveys)

by an ecologist and no *Succisa pratensis* (Devi's bit scabious), the food plant of Marsh Fritillary butterfly, was identified within the site and no Annex I habitat was recorded. However, the AAD does not address the fact that the NIS only covers two screened-in sites and does not assess the proposal's potential impact on the Unshin River SAC. The FAC considered this to be a serious error in the DAFM's processing of the licence application.

The FAC noted that the DAFM produced an ICS with a completion date of 28/03/2022. The ICS states that the Unshin\_010 River Sub-Basin has approximately 16% forest cover and considers the potential for CN86604 to contribute to an in-combination effect along with other plans and projects in the general vicinity of the project area in the Unshin\_010 River Sub-Basin.

The ICS concluded that there is no possibility that the proposed project itself, implementing the mitigation measures prescribed in the AAD, will give rise to "an adverse effect" on the integrity of the screened-in European sites and "Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects". The FAC considered the phrasing of this conclusion to constitute a significant error in the DAFM's AA screening process as it demonstrates that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which, in combination with other plans and projects, could result in a significant cumulative effect on a European site.

The FAC considered the DAFM's screening of the proposal for EIA. The 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 EIA is required. Neither afforestation nor deforestation are referred to in Annex I. 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 Forestry Regulations 2017 (S.I. No. 191 of 2017) require that an *environmental impact assessment* is carried out in respect of an application for a licence for afforestation of an area  $\geq 50$ ha, the construction of a forest road of a length  $\geq 2000$ m, and any afforestation or forest road application 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 7.61ha, so is sub-threshold for mandatory EIA and the DAFM completed an assessment to determine the requirement for EIA. The DAFM considered the proposal's potential to impact on the environment across a number of criteria before concluding that EIA was not required in this instance.

The FAC considered the DAFM's *Assessment for EIA Requirement* document which has a last spatial run date of 05/11/2021. The FAC noted that this document only refers to other forestry projects in the section titled *Cumulative effect and extent of project*. The FAC understands that the "*Assessment for EIA Requirement*" document should be read as a summary document, and in combination with the record of the DAFM's decision as a whole, and that the ICS considered non-forestry plans and projects in the vicinity of the proposal. However, the EIA assessment does not expressly cross-reference the detailed record of other plans and projects contained in the ICS and, in this case, the ICS was completed on the 28/03/2022, which is after the last spatial run date for the *Assessment for EIA Requirement* document. The FAC considered this to be an error on the DAFM's behalf.

The FAC also noted that in screening for EIA, the Minister relied on Forest Service guidelines in relation to water quality, landscape, and archaeology but these guidelines have not been attached as conditions to the licence. Furthermore, licence Condition 2 requires adherence to the *Environmental Requirements for Afforestation* (ERA). The ERA document states that it replaces a suite of Forest Service guidelines, including those relating to water quality, landscape, and archaeology.

In response to the question "Is the amount and type of forest cover in this locality known to be a significant issue?" the DI answered "No". While noting that elsewhere in the EIA assessment the DI states that "Comments and issues from the public" were received and considered, the FAC considers that in the particular circumstances of this case which include the number of submissions from locals in opposition to the proposal and the absence of any explanatory note (as provided for in the form used for screening by the DAFM) this statement to be not reflective of the facts recorded on the file and that this represents an error.

The approximate percentage of forest cover currently in the "underlining waterbody (or waterbodies)" is 20.59%. This is an almost 30% difference on the figure provided for percentage forest cover in the ICS with no explanation provided or reconciling of the variance between the two figures. In the context of the proximity of the Lough Arrow Natura sites, along with the Geevagh-Highwood Group Water Scheme (GHWGS) the FAC considered this error to be significant.

#### **Water Quality**

The FAC considered the grounds relating to water quality, including the aquatic habitats/species associated with the Lough Arrow European sites, impacts on fishing activities, and potential impacts on drinking water quality. Licence Condition 2 requires adherence to the ERA and the FSM (which include water setbacks) as well as the mitigation measures in the AAD, many of which relate to water quality. The FAC noted the WFD Cycle 2 Report for the Unshin\_SC\_010 Subcatchment lists the Arrow Lake Waterbody and the Unshin\_010 River Waterbody as within protected areas for drinking water. The FAC also noted the proximity of the site to a pumping station that supplies water to a local reservoir for the GHWGS. The FAC considered the nature, scale, and location of the project, comprising native broadleaves with ground preparation limited to ripping and no drainage operations, and no fertiliser to be applied, as set out in Appendix A of the approval letter. The FAC accept that the DAFM issued a Further Information Request (FIR) to the applicant on the 06/05/2021 (and again on the 05/08/2021) which stated, *inter alia*, that "herbicide is not permitted under the NWE scheme". However, the FAC observed that the application of herbicide in "Yr 2" of the proposed project is approved in Appendix A of the approval letter, and Licence condition 3 requires adherence to these operational details. The FAC are aware that Native Woodland Establishment projects would typically be established without the use of fertiliser or herbicide, however their use is provided for in certain circumstances by the terms of the *Native Woodland Establishment GPC 9 & GPC 10 Silvicultural Standards* document. The FAC considered that the licence conditions should have clearly prohibited the use of fertiliser or herbicide on the proposal site, and this should have been reflected in the approved operations in Appendix A of the approval letter and that this represents an error on the DAFM's behalf.

The FAC is of the view that the proposed development has the potential to benefit the water quality of the adjoining lake and river waterbodies, particularly in comparison to potential impacts associated with

standard agricultural grazing practices. Based on the information before it, the FAC considered the proposed project to be of low risk to the water quality of the GHGWS, however, in the particular circumstances of this case, and given the proximity of the GHGWS pumphouse, the FAC considered that the application should have been referred to the National Federation of Group Water Schemes (NFGWS) and that this represents an error in the processing of the application.

The FAC considered the grounds related to flooding, and the requirement for planning permission prior to the drainage of an area of wetland >0.1ha. The FAC noted the ecologist's response to the grounds of appeal which states that "the OPW Flood Mapping (May 2021) does not show a risk of flooding on the site but the 6-inch maps and some third-party objections suggest otherwise. Consequently, the AAD recommended an increased setback to 20m along the aquatic zone and along the northern boundary of plot 3". The FAC also noted that there is no drainage works proposed for any part of the site. The FAC considered that the DAFM did not err in their decision in relation to these grounds of appeal.

### **Landscape Impacts**

The FAC noted that the DAFM referred the application to Sligo Co. Council and the Assessment to Determine EIA Requirement states that comments from the Local Authority were requested, received, and examined. The Co. Council's referral response states that they have serious concerns relating to the proposal due to its location between a designated scenic route and the shores of Lough Arrow (which are designated visually vulnerable as per the CDP) and adjacent to Lough Arrow SAC, SPA, and pNHA. The Council reference policy P-FOR-2 of the CDP in their response, which the DI highlighted in the DAFM SoF, discourages forestry development, *except for broadleaf*, in proposed/candidate and adopted NHAs, SACs, and SPAs, in Visually Vulnerable Areas and along Scenic Routes. The FAC considered that the Council's response appears to contradict itself in that they express "serious concerns" regarding the proposed development, comprising native broadleaf species, but also refer to allowable exceptions for forestry developments of this nature. However, the FAC formed the view that the Co. Council's concerns relate to the location of the project along a scenic route, in a visually vulnerable area. The FAC accepts that in normal course changes may be made to the nature and scope of an application as a result of the deliberative process. However these typically result in the narrowing in scope of a project, whether in terms of the reduction of the proposed footprint of development or the selection of alternative species more suitable to the environment in which the project is to take place. In the particular circumstances of this case, the change to the nature of the proposed fencing, while intended to protect the environment, may have an unintended consequence relevant to the concerns of the Co. Council as expressed in their referral response. Under these circumstances, the FAC considered that the DAFM should have re-referred the application to the Co. Council following the addition of 2000m of Deer fencing with reflective tags to the proposed project.

### **Exempted Development**

The appellant raises a ground of appeal, supported by a letter from Sligo Co. Council, that the proposed development does not represent an exempt development within the meaning of the Planning and Development Regulations 2001 with specific reference to Article 9 (1)(a)(vi).

The FAC makes decisions as an administrative appellate body on certain decisions of the Minister for Agriculture, Food and the Marine as specified in the Agriculture Appeals Act 2001. The FAC notes that at

Section 5 of the Planning and Development Act of 2010 (as amended) no powers are conferred on the FAC with regard to making a declaration on exempted development.

However, the FAC also notes that Regulation 9 of the Planning and Development Regulations (as amended) refers to the de-exemption of development exempted under Article 6 of those regulations. Article 6 itself refers to various classes of development as set out in schedule 2 of those regulations and that these do not include afforestation following amendments made under S.I. No. 454/2011 of the Planning and Development (amendment) (No.2) Regulations 2011. These latter regulations deleted Class 15, as referred to in the letter from Sligo County Council, from Schedule 2; and inserted Article 8A which states that initial afforestation is exempted development.

### **Archaeology**

The FAC considered the grounds and submissions relating to archaeology. The FAC also considered the response provided by the DAFM's archaeology unit to the grounds of appeal and additional submissions. The FAC noted that the licence conditions require adherence to an appended archaeology report which contained an annotated map and prescribed nine site-specific archaeological conditions, including the requirement for a structured programme of archaeological monitoring of specified works by a suitably qualified archaeologist. The FAC considered that the DAFM did not err in their decision in relation to these grounds of appeal.

### **Setbacks**

In relation to the various setbacks referred to in the appellant's grounds, the FAC considered that both the ERA and the FSM stipulate setbacks distances/corridor widths for, *inter alia*, water features, public roads, hedgerows, ESB lines, and water mains. The FAC noted Licence Condition 2 requires adherence to both the ERA and the FSM. In addition to this, site-specific setbacks are included in the mitigation measures in the AAD with which the licence conditions require compliance. The FAC did not consider that the DAFM made an error in their decision regarding setback distances.

However, the FAC noted that in various submissions made by the DAFM, there was reference to the "High Water Mark" as the baseline for setbacks in relation to waterbodies, in particular Lough Arrow. While the FAC is aware that the term High Water Mark has a legal status in relation to coastal and transitional waters, it is not aware of it having any standing in an inland waters context. As this decision is being remitted for reasons as set out elsewhere in this letter, any new licence that may be issued should ensure that setbacks are made with reference to a mapped feature on an OSI or other map as may be acceptable to the Minister.

In relation to the setbacks applied to dwelling houses, the appellant specifically raises the issue as to whether there was any engagement by the applicant, their forester, or the DAFM on the issue of proposed planting on two sides of his house, and references section 6.5.2 of the Forestry Standards Manual in this regard. The FAC note that this section of the Manual states that

*In particular situations where the Forest Service considers that the proposed development would have a significant effect on a neighbouring dwelling, e.g. by creating a sense of enclosure or isolation or by blocking significant light or an important view, it may specify local consultation and proof of same, as a specific requirement at pre-approval stage. While the prescribed 60 metre 'without permission' setback will suffice in most cases, the Forest*

*Service may require greater setbacks or indeed, the exclusion of sections of a proposed site, if deemed necessary on landscape grounds.*

The FAC also noted that the ERA include guidance on this topic at page 27, stating that:

*Setback distance is most critical when a building is surrounded by forest on two or more sides.*

and;

*Consider retaining locally important views from the dwelling, by introducing open spaces through the forest. Also introduce open spaces that highlight natural features visible from the dwelling.*

Neither the applicant nor the DAFM have made any submission to the FAC in relation to the specifics of this ground of appeal. The FAC notes that beyond the specification of a 60m setback, the guidance provided by both documents is subjective and non-definitive. However in both cases, the setback is stated as a 'minimum' and is separate to the consideration of views. Having regard to the location, elevation, and orientation of the appellant's house, and the number and nature of the submissions from locals, the FAC is of the view that the DAFM should have directed local consultation as provided for in Section 6.5.2 of the FSM. The FAC regards this as an error in the decision-making process.

The FAC considered that the provision of broadband/television/mobile phone services is a matter between the residents and the relevant service providers.

#### **Access**

The FAC considered the grounds relating to access. The FAC noted the detail provided by the appellant, particularly in their additional submission of 28/11/2022, which relates to the specifications for forest road design. The licence decision before the FAC is for an afforestation project. The FAC noted that the Co. Council's response does not raise the issue of site access or the suitability of the local road network outside of their status as a scenic route. The FAC also considered that the site has been field-inspected by the DAFM and no issues were found regarding site access. The FAC reviewed publicly available map data and has formed the view that the location of the proposed site entrances is suitable for the proposed development. The FAC found that the DAFM did not err in their decision in relation to access.

#### **FLV**

The FAC considered the grounds of appeal regarding the delayed/failed publication of relevant documents on the FLV. The FAC also had regard to the DAFM's response to these grounds in their SoF, noting the DAFM's statement that "The FLV is an online portal providing the public with information on forestry licence applications, to enable their participation in the decision-making process".

The FAC noted that in the Admin Response component of the SoF provided by the DAFM it is stated that:

*The Inland Fisheries (IFI) response of 23rd September 2020 appears on the FLV with a 'Date Received of 26-JAN-2022'. This is the date IFI emailed DAFM with their response. It is not possible for our IT Unit to confirm dates and times documents were made public on the FLV.*

It is unclear to the FAC what this implies. One reading would suggest that the IFI provided a letter dated the 23/09/2020 but that this was not received until 26/1/2022, some 15 months later. Another reading



would suggest that the letter was inaccurately dated on the FLV. In either case the FAC consider that the discrepancy, in light of the grounds of appeal, and the FLV representing a record of the decision in an appeal to the FAC, would have warranted a more detailed explanation.

The FAC considered that all relevant information/documents should have been available to the public on the FLV at the time the decision was made, (notwithstanding statutory consultation periods for specific documents) in order to allow a fully informed consideration of the proposed development and the record of the decision to grant a licence. The FAC is of the view that, prior to the making of a new decision following the remittal of licence CN86604, the DAFM should ensure that all relevant documents and information are available on the FLV.

### **Conclusion**

Based on the evidence before it, as outlined above, the FAC found that the DAFM made a series of errors in their processing of the application prior to deciding to issue afforestation licence CN86604. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to complete a new AA screening of the proposed development (having particular regard to the Unshin River SAC) both individually and in combination with other plans and projects, and a new assessment to determine the requirement for EIA prior to the making of a new decision. The FAC considers that a new assessment to determine EIA requirement should i) include consideration of the existing level of forest cover in the Unshin\_010 River Waterbody, ii) include non-forestry plans and projects when considering the potential cumulative effect of the proposal and iii) should not rely upon adherence to Guidelines which have been superseded by the ERA.

The FAC also considers that, prior to making a new decision, the DAFM should ensure that the applicant provides evidence of consultation with relevant parties affected by planting on two or more sides of their property and allow the applicant the opportunity to make any adjustments to the proposed planting as may or may not arise. The DAFM should also refer the revised application details to Sligo Co. Council and the NFGWS and that any response received should be published on the FLV along with all other relevant documentation. Lastly, the FAC considers that, if a new licence is issued, only the approved operational details should be included in Appendix A of the approval letter and references to baselines for setbacks should be in the form of mapped features.

Yours sincerely,

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Luke Sweetman on behalf of the Forestry Appeals Committee