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28<sup>th</sup> July 2023

**Subject:** Appeals: FAC117/2022 relating to Licence CN86190

Dear [REDACTED]

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food, and the Marine. The FAC, established in accordance with Section 14A(1) of the Agriculture Appeals Act 2001 (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 Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statements of Fact (SoF) provided by the DAFM, all materials on file, the notice and grounds of appeal and in particular the following considerations, the FAC has decided to allow the appeal and set aside the decision of the Minister regarding licence CN86190.

**THE LICENCE.**

Licence CN86190 is for 6.41Ha of afforestation the townland of Coolykeerane, Co. Cork.

The application for the licence was submitted to the DAFM on the 26<sup>th</sup> of March 2020. A decision approving the licence was issued on the 12<sup>th</sup> of August 2022 with conditions including compliance with DAFM Technical Standards, compliance with the mitigation measures set out in the Appropriate Assessment Determination and compliance with the conditions contained in the archaeology report on the licence application.

**FORESTRY APPEALS COMMITTEE.**

A hearing was held remotely at a sitting of the FAC on the 21<sup>st</sup> of July 2023 which considered the appeals and the processing of the licence as it relates to the decision to issue the licence on the 12<sup>th</sup> of August 2022.

The FAC members present were: Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton and Mr. Iain Douglas.

FAC Secretariat: Ms. Vanessa Healy & Ms. Ciara Murphy.

**BACKGROUND.**

The proposal consists of the afforestation of 6.41Ha in 4 plots. Plot 1 is GPC 9 Native woodland Scheme (NWS Scenarios 1-3), Plots 2 & 3 are GPC 3 (Sitka spruce and Additional Broadleaves), Plot 4 is GPC 1 Unenclosed (Sitka spruce and birch). The Plot numbering is that used on the DAFM Site Plots-Pre-Approval report dated 12/08/2022 and the licence as issued.

The site is in two separate blocks, a southern block located approximately 4.2km north-west of the town of Millstreet and a second block located some 600m northwards which is bounded by the Blackwater River (Cork/Waterford) SAC River SAC. The land use in the area is agricultural in nature. The nearest residence to the southern block is circa 316m from the nearest site boundary and the nearest residence to the northern block is circa 300m from the nearest site boundary.

The site description given is that the site soils are predominantly podzolic in nature. The slope across the site is predominantly flat to moderate (<15%). The vegetation on site is described as wet grassland, improved grassland, degraded peat with gley soils in wetter areas.

The application documents before the FAC included a Bio Diversity/Operational Map and a fencing map uploaded to the Forestry Licence Viewer (FLV) on the 26<sup>th</sup> of March 2020 and a site notice and photograph of the site notice in situ uploaded to the FLV on the 1<sup>st</sup> of April 2020.

The DAFM referred the licence to the following consultation bodies on the 9<sup>th</sup> of April 2020 (i) An Taisce, (ii) Cork County Council, (iii) National Parks & Wildlife Service (NPWS), and (iv) Inland Fisheries Ireland (IFI).

An Taisce replied 30<sup>th</sup> of April 2020 expressing concerns that an Appropriate Assessment (AA) was required for the Blackwater River (Cork/Waterford) SAC (including the Freshwater Pearl Mussel), that measures are required to protect water quality and that the water setbacks are less than the standard set out in the DAFM documentation. Cork County Council replied on the 7<sup>th</sup> of May 2020 requesting conditions to avoid discharge of silt to the Blackwater River. The NPWS replied on the 21<sup>st</sup> of May 2020 requiring AA Screening of the Blackwater River (Cork/Waterford) SAC. IFI replied on the 30<sup>th</sup> of April 2020 stating that it had no objection to the proposal, but that water quality should be protected and requested a particular pattern of planting where there was no existing bankside cover.

On the DAFM file there is an Inspector's Certification Report; an Inspector's Appropriate Assessment Screening Report (AASR) and an Inspector's Assessment to Determine Environmental Impact Assessment (EIA) Requirement all dated the 11<sup>th</sup> of August 2022. Also on file are a DAFM ecologist's Appropriate Assessment Determination (AAD) dated the 25<sup>th</sup> of July 2020, a DAFM ecologist's Appropriate Assessment Report (AAR) dated 2<sup>nd</sup> of June 2020; a DAFM ecologist's Appropriate Assessment Screening & Determination Report (AASR) dated 2<sup>nd</sup> of June 2020 which includes an In-combination Statement of the 19<sup>th</sup> of May 2020, and an archaeology report dated the 3<sup>rd</sup> of September 2020.

The Inspector's Certification Report recommends that the licence be approved subject to three conditions; 1. the carrying out and completion of the afforestation in accordance with the measures set out in the Environmental Requirements for Afforestation 2016 (ERA) and the Forestry Standards Manual (FSM), 2. compliance with the mitigation measures in the AAD and 3. compliance with the requirements the conditions contained in the archaeological report.

The Inspector's Assessment to Determine EIA Requirement concludes that the proposed afforestation is not required to undergo EIA.

The licence was subject of both a Desk Assessment and a Field Inspection. The Field Inspection took place on the 29<sup>th</sup> of April 2020.

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

## **THE APPEAL.**

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

The grounds of appeal are summarised as follows:

1. That the appeal of the Minister's decision to the FAC is contrary to judgements of the CJEU because the FAC is appointed by the same Minister.
2. That there is no evidence that the decision maker had regard to the plantation as a whole for compliance with EIA & AA Directives.
3. Cumulative effect in the AA Report which is presumed to be the Natura Impact Statement (NIS).
4. The same ecologist carried out AA & AAD.
5. The proposal is within the Blackwater SAC and that all recent reports on the Blackwater SAC have found that it is threatened by forestry but that the decision maker decided that planting conifers will have no effect.
6. The proposal is within the feeding range of the Hen Harrier.
7. The AAR shows planting in excess of 50 Ha therefore, EIA is required.
8. That "*cumulation with other plans existing and/or approved projects*" and "*areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC*" are criteria referred to in Annex III Directive 2011/92/EU to determine whether projects in Annex II of the directive should be subject to EIA.
9. Case 285/11 regarding assessments under the habitats Directive cannot have lacunae.
10. That the time frame for public consultation on EIA is 30 days.

## **DAFM STATEMENT OF FACT.**

The SoF provided by the DAFM for the appeal, dated the 2<sup>nd</sup> of June 2023 confirms the administrative details of the licence application, indicates that the licence application was desk assessed and that a field assessed was carried out on the 29<sup>th</sup> of April 2020. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

There is also a statement dated the 31<sup>st</sup> of August 2022 from the District Forestry Inspector (DI) confirming that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, outlining the DI's involvement with the file, and confirming that, having considered the amount of forestry in the area, the limited area of the licence and other characteristics of the application, a sub-threshold EIA was warranted.

There is a response from the DAFM ecologist to the grounds of appeal on file dated the 30<sup>th</sup> of November 2022.

## **CONSIDERATION BY THE FAC.**

At its sitting on the 21<sup>st</sup> of July 2023, the FAC had before it the full DAFM record of the decision as made available on the FLV, the notice and grounds of appeal, the SoF provided by the DAFM and all materials on the FLV. Having reviewed all the documentation the FAC considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

## **GROUND OF APPEAL**

That the appeal of the Minister's decision to the FAC is contrary to judgements of the CJEU because the FAC is appointed by the same Minister.

In addressing this ground of appeal, the FAC considered, in the first instance, that the FAC operates under the Agriculture Appeals Act 2001 as amended and carries out its functions in an independent and impartial manner in respect of the appeals process, as mandated and required under Irish law.

**That there is no evidence that the decision maker had regard to the plantation as a whole for compliance with EIA & AA Directives.**

In addressing this ground of appeal, the FAC considered that, while licence CN86190 as applied for and licenced has two distinct and separate blocks of afforestation, in all the documentation concerning AA it is clear and unequivocal that both blocks were considered together as one in licence application CN86190.

*“This screening for Appropriate Assessment has been undertaken to determine whether the proposed Afforestation project under CN86190 (henceforth referred to in this document as ‘the project’), individually or in combination with other plans and projects, is likely to have a significant effect on any European site (i.e. Natura 2000 sites), in view of the site’s conservation objectives.”<sup>1</sup>*

However, the FAC does not consider that the Minister assessed the application that was made as the licence was issued for a proposal comprised of four plots while the application described the proposal as comprising five plots. This constitutes a serious error and is addressed further below.

**Cumulative effect in the AA Report which is presumed to be the Natura Impact Statement (NIS)**

In addressing this matter, the FAC considered that the statement *“The cumulative effect according to Colette Murray, Ecologist, Southern Scientific Services in the AA Report, which we presume to be the Natura Impact Statement”* fails to elucidate any of the appellant’s concerns regarding cumulative effects in the Appropriate Assessment Report. However, the FAC considered that the test employed by the Minister in considering In-combination effects was incorrect as noted below.

**The same ecologist carried out AA & AAD.**

In addressing this ground of appeal querying the carrying out of the AA and AAD by the same ecologist the FAC considers the appellant’s analogy is not directly comparable, the ecologist is neither the applicant nor the licence decision maker. The FAC further noted that the DAFM followed its established procedure in carrying out the AAR and AAD. The Forestry Regulations 2017 provide that the Minister may require the submission of a Nature impact Statement or may rely on other appropriate information. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. Based on the information before it the FAC did not find, in relation to the issues raised in this ground of appeal, that the decision was made without complying with fair procedures.

**The proposal is within the Blackwater SAC and that all recent reports on the Blackwater SAC have found that it is threatened by forestry but that the decision maker decided that planting conifers will have no effect.**

In addressing this ground of appeal, the FAC noted that information publicly available on the EPA website indicates that forestry is identified as a significant pressure on the main channel of the Blackwater (Munster)\_060 which adjoins the northern block of the proposed planting but not the Ahane Beg tributary adjoining the southern block. The FAC also noted that risk to the Blackwater SAC

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<sup>1</sup> Appropriate Assessment Screening Report & Determination for Afforestation project CN86190, at Coolykeerane, Co. Cork Section 1.1 Legislative context

was identified, and an AAR was undertaken by the DAFM and that the AAR, in Section 4 “Mitigation Measures”, site-specific measures are identified to mitigate any effect on the SAC and to protect adjoining/downstream aquatic based species and habitat. The implementation of these mitigation measures is a requirement of the licence issued.

**The proposal is within the feeding range of the Hen Harrier.**

In addressing this ground of appeal, the FAC noted the response from the DAFM Ecologist that Hen harriers forage over open heath, scrub, and farmland habitats during the breeding season, that the species has a core foraging area of 2km and that the site was field inspected by an ecologist and the habitats on site were found to be predominately Agricultural Grassland that was moderately – intensively farmed. The FAC also noted that the proposed afforestation is located some 9.2 km from Mullaghanish to Musheramore Mountains SPA (the nearest SPA of which the Hen harrier is a Special Conservation Interest) and that the site does not contain suitable foraging habitat for the Hen Harrier. The FAC further noted that the appellant has adduced no evidence that Hen harrier is present on the site or forages on the site. The FAC is not satisfied that an error was made on this matter.

**The AAR shows planting in excess of 50 Ha therefore, EIA is required.**

In addressing this ground of appeal, the FAC noted that the AAR as referred to by the appellant contains a list of afforestation projects located within the vicinity of the proposed planting within the last 5 years. Of the projects identified only 19.17Ha. have been approved, 18.90Ha. have a decision pending and therefore, cannot be taken into consideration as, under the Annex III of the EIA Directive 2011/92/EU, only existing and/or approved projects can be taken into account for cumulative impacts. The FAC further noted that even if all the projects listed taken together with the proposed afforestation would total 44.48Ha. and therefore, would still be below the 50Ha. threshold. In any case, the Forestry Regulations 2017 provide for mandatory EIA in respect of an application for a licence for afforestation that would involve an area of 50Ha or more. The application in this case was for afforestation of for 6.41Ha. and there is no indication that the proposal was an expansion of an existing area of afforestation and the application was subject to a sub-threshold screening for EIA.

***That “cumulation with other plans existing and/or approved projects” and “areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC” are criteria referred to in Annex III Directive 2011/92/EU to determine whether projects in Annex II of the directive should be subject to EIA.***

In addressing this ground of appeal, the FAC noted 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. Neither afforestation nor deforestation is 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 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 50Ha. And any afforestation below the 50Ha. Threshold 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 6.41Ha. so is sub threshold for mandatory EIA as set in Irish Regulations.

The FAC noted that the DAFM carried out an Assessment to Determine EIA Requirement dated 11/08/2022 and that “Cumulative effect and extent of project” and “Designated Habitats” were addressed as part of the assessment. In reviewing the Assessment to Determine EIA Requirement the FAC noted that questions that relate to cumulative effect only refer to forestry projects and do

not consider other types of projects. The FAC also noted that a separate process was carried out for AA which includes an In-combination assessment of other plans and projects that includes a range of other plans and projects in addition to forestry projects. This In-combination assessment was carried out on the 19<sup>th</sup> of May 2022 and was available to the DI prior to the carrying out of the Assessment to Determine EIA Requirement. The FAC consider that while the DAFM are entitled to rely on a reading of the entire file, the record states that in undertaking a screening for EIA the Minister only had regard to forestry projects. Furthermore, the screening relies on a series of guideline documents that were not attached as conditions of the licence and appear to have been superseded by the Environmental Requirements for Afforestation.

The FAC also noted that the following response was recorded in the affirmative,

*Does the application and its associated operations threaten the achievement of "good ecological status" recovery objective set for the underlining waterbody or waterbodies under the WFD River Basin Management Plan?*

Were the Minister to grant a licence having reached this conclusion, the FAC would understand that this would not be in compliance with the Water Framework Directive. The status of the relevant waterbodies was recorded by the Ecologist in the Appropriate Assessment, but the Ecologist does not appear to have made a conclusion comparable to that of the Inspector and, in addition, the EIA screening contains no narrative explanation such that this might be concluded to be an obvious error. The FAC consider it likely that this was a clerical error considering the Appropriate Assessment undertaken and the other reasons recorded in the screening document but, in any case, it represents one of a series of errors made in the screening that would have required it to be undertaken again.

**Case 285/11 regarding assessments under the Habitats Directive cannot have lacunae.**

In addressing this matter, the FAC considered the statement,

*"So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned"*

In making this statement, the FAC consider that the appellant fails to identify lacunae in the AA, or elucidate any of his concerns regarding lacunae in the AA of this licence application.

**That the time frame for public consultation on EIA is 30 days.**

The FAC noted the provisions of the Forestry Regulations 2017, Part 7 Regulation 13 which sets out the provisions for public consultation on environmental impact assessment of forestry development. The FAC further noted that no EIA was required for the proposal. The Applicant had erected a site notice and the application was subject to two periods of public consultation of 30 days each.

**FORESTRY REGULATIONS 2017 (as amended).**

**Plot Table.**

The FAC noted that under Regulation 5(2)(b) of Part 3 of the Forestry Regulations 2017 (as amended) it is a requirement that a plot table detailing the number of each plot, the area of each plot, and the species of trees to be planted accompany the map required under Regulation 5(2)(a) but that no such plot table accompanies the ordnance survey map (biodiversity/operational map) as shown on

the documents available to the public on the FLV. The FAC noted the absence of an Inet Pre-Approval Submission Report which contains inter alia the required Plot and Species Details. The application was processed considering four plots rather than five and it is clear from the areas provided for these plots that the plot numbers in the licence do not correspond to the application that was made. The FAC considers the omission of the plot table to be a breach of the Forestry Regulations 2017 (as amended).

***Biomap.***

The FAC noted that the Biomap dated the 20<sup>th</sup> of February 2020 submitted by the applicant shows Plots numbered 1 to 5 but that the Site Plots Report dated 12/08/2022 and the licence as issued refer to only four plots. The FAC noted that Plot 2 on the biomap does not appear to be mapped on the FLV. There is no record on the FLV documentation how, when or why Plot 2 on the biomap was excluded from the licence. The FAC understands that the biomap displaying five plots was the description of the proposal that was subject to public consultation, while a project of four plots was subject to an AA. The FAC considers the lack of explanation for the discrepancy on the public file to be a serious error in the processing of the licence.

The FAC noted that the proposed afforestation is in two separate and distinct sections and that while the biomap indicates the location of the access point to onto the public road for Plots 4 & 5, Plots 1-3 are located some 300 north-west of the public road, it is not apparent how or where Plots 1-3 are accessed from the public road as required by Section 18.7 "Biodiversity Map" of the Forestry Standards Manual 2015. The FAC considers that the failure to ensure that the mapping conformed to the requirements of the Forestry Standards Manual 2015 regarding the identification of vehicular and pedestrian access to the site represents a serious error in the processing of the application.

***Site Notice.***

The FAC noted that Regulation 11(1) of the Forestry Regulations 2017 requires the applicant to erect a site notice at the entrance from the public road to the land to which the application relates or where no entrance exists, at the point where it is proposed to create an entrance, so as to be easily visible and legible by persons using the public road, and that the biomap submitted on the 20<sup>th</sup> of February 2020 shows only the site notice at the entrance from the public road to Plots 4 & 5, the biomap does not show how Plots 1-3 are accessed from the public road or where the entrance from the public road is located. The FAC considers that the lack of a public notice to the separate block of planting on Plots 1-3 consequent to the failure to indicate the entrance from the public represents a serious error in the processing of the licence application.

The FAC noted that Regulation 11(1) of the Forestry Regulations 2017 requires the applicant to erect a site notice before the making of the application. The FAC further noted that the file was uploaded to the FLV on 26/03/2020 but that the site notice is dated 01/04/2020, a number of days after the application was made. The FAC noted that the file fails to provide an explanation as to the discrepancy in these dates represents an error in the processing of the application. The FAC considers that, on the face of the record, there has been a breach of the Forestry Regulations 2017 (as amended).

**APPROPRIATE ASSESSMENT.**

The FAC noted that in the AAR prepared on behalf of the DAFM dated 02/06/2022 that Section 7 is headed "AA Determination" and that there is a separate document titled "Appropriate Assessment Determination" dated 27/05/2022 also prepared on behalf of the DAFM. The FAC understands, from national and EU Guidance, that the AAR should reach a conclusion to enable the competent authority, the Minister in this instance, to make a decision on the proposal and therefore, the AA determination is made separately. The FAC considers that the use of the term "AA Determination" in

the AAR creates confusion as to which document is relied upon when reaching a decision on the licence.

The FAC also noted that the conclusion of the In-combination Statement of 19/05/2022 contains the following statement,

*It is concluded that there is no likelihood of the proposed afforestation project CN86190 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests/Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project.*

The FAC considers this to be an error as the conclusion does not appear to consider effects that might arise from the proposal itself which are not significant themselves but which in-combination with other plans and projects might result in a significant effect. The FAC therefore, considers that any new AA screening should consider whether the project in-combination with other plans and projects has the potential to result in a significant effect on a European site.

#### **Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the SoFs submitted by the DAFM. In accordance with Section 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that there was non-compliance with the Forestry Regulations 2017 (as amended) in regards the application that was made and that there was a serious or significant error or series of errors made in the making of the decision regarding licence CN86190. The FAC is thus, allowing the appeal and setting aside the decision of the Minister for the reasons stated.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee