



26th April 2023.

Subject: Appeals FAC 167 and 168/2022 regarding CN90174

Dear

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended ("the Act"), has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeals FAC 167/2022 and 168/2022 was held remotely by the FAC on 2nd February 2023.

In attendance

FAC Members: Mr John Evans (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman

Secretary to the FAC: Mr Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, the Statements of Fact (SoF) provided by the DAFM, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN90174.

Background

An afforestation licence for 18.9ha in one parcel at Knockilly, Co. Cork was issued by the DAFM on 17th October 2022. The licence decision pertains to the planting an integrated mix of Alder (ALD), Pendunculate Oak (PO), Goat Willow (GWI), and Downy Birch (DBI). The licence also includes provision for 503m of stock fencing. The materials on file indicate that the site is located ca. 200m south of the R578 road between Newmarket and Freemount. It is bounded to the north by a river and to the south by a local road which provides access. Planting is to follow a non-standard stocking density of 7 by 3.5m in a silvo-pastoral configuration.

Documentation on file (in particular the Appropriate Screening Report and Determination dated 12/08/2022) describes the site as having an average slope at 4% with a range of 0-12% with soil types Acid Brown Earths/Brown Podzolics (28%), Lithosols/Regosols (4%) and Surface water Gleys/Ground water Gleys (68%). Habitat is given as improved grassland (65%), Wet Grassland (20%), Scrub 5% Hedgerows (5%) and drainage ditches (5%). The site is described as at risk from fluvial and groundwater

flooding. The site is described as being 100% within the river sub-basin Allow_050 a part of the Sub-catchment Dalua_Sc_020 and the Blackwater (Munster) catchment. Streams forming part of the Allow_050 within 2km are given as Good or High.

Application documentation submitted includes: an iNet pre-approval submission report (undated, loaded to FLV 18/01/2022); an applicant Freshwater Pearl Mussel (FPM) Site Assessment (dated 08/01/2022); a map showing location of site boundary, water course and power lines (dated 08/01/2022); a fencing map, showing stock fencing of 350m (dated 08/01/2022); a photograph of a site notice in situ; and a printout of the site notice with the date of erection given as 19/01/2021.

The biodiversity map shows scrub (adjacent to water course), the location of the public road, powerlines, drains, the location of site notice, the location of site access, existing site tracks, hedgerows, public road and water setbacks. The FPM Site assessment confirms the project is within a FPM cSAC, states scrub boundary acts as buffer, gives soil as low Gley/not peaty, that the site adjoins an aquatic zone; and that pit-planting is to be employed.

DAFM Assessment

There is one submission on file from an adjacent landowner, raising issues relating to light, detrimental visual impact, impact on property value, and the potential impact of certain wildlife using proposed woodland as habitat.

No referrals to other state bodies are on file. The application was referred to a DAFM Archaeologist, and the resultant report is on file dated 16/03/2022. This recommends several conditions in relation to a historic Lime Kiln and historic tracks, including buffer zones and adherence to normal standards of the Forestry and Archaeology guidelines.

The application was subject to desk and field assessment (field assessment on the 17/02/2022 and 07/07/2022), per the SoF.

DAFM wrote to the applicant on the 27th of April 2022 requesting updated fencing and biodiversity maps as a result of certain identified deficiencies in the original application material, and requesting the exclusion of two small areas of existing woodland. The applicant then provided a revised fencing map and a revised biodiversity map. Both documents are dated 08/01/2022 and were uploaded to the FLV on the 29/04/2022. The revised fencing map stated that the required fencing was now 503m, with stocking density given as 408/ha. The revised Biodiversity maps indicated additional drains with associated setbacks on the site. Two drains indicated a direct connection to the watercourse at the north of the site.

An Appropriate Assessment Screening Report and Determination is on file dated 12/08/2022 prepared by a contract Ecologist on behalf of the DAFM. This notes that the proposal will allow herbicide control in Year 0 to Year 3. The site is described as outlined in the background section of this letter. Three European sites are identified within 15km of the project site, namely : the Blackwater River (Cork-Waterford) SAC 2170 which is screened in due to a hydrological connection; the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 4161 which is screened out due to its not being in

Red Area for Hen Harrier and the absence of habitat suitable for Hen Harrier nesting or foraging; and the Lower River Shannon SAC 2165 which is screened out on the basis of no hydrological connection.

An Appropriate Assessment Report (AAR) is on file dated 12/08/2022 prepared by the same contract ecologist on behalf of the DAFM. This considers the Qualifying interests for the Blackwater River (Cork-Waterford) SAC 2170, including FPM and other aquatic species. Mitigation measures are specified including setbacks and no fertilisers to be used. Restrictions on herbicides are also imposed.

An In-combination assessment is included as an Appendix of the AAR which considered other plans and programmes on the 29th of July 2022. This gives forest cover in River Allow_050 as 11%. As part of its conclusion, the report includes the statement:

It is concluded that there is no possibility that the proposed Afforestation project CN90174, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: 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.

An Appropriate Assessment Determination (AAD) is on file dated 28/09/2022 prepared by the same contract ecologist on behalf of the DAFM. This is consistent with the AAR in terms of screening conclusions and mitigations specified.

An Inspector's certification is on file. This includes specification of conditions to adhere to the archaeology report, mitigations in the AAD, adherence to the Environmental Requirements for Afforestation, and setbacks from Dwelling houses.

A number of further documents are on file associated with the Inspector's certification. These include a Site Details (Pre-approval) report, Site Plots (Pre-approval) report and an Assessment for EIA requirement. This last document considers the proposed project across a wide range of environmental categories based on a spatial analysis on 30/09/22. It refers to Form 1 for EIA which is not on file. In answer to the question "Are there populations of the Fresh Water Pearl Mussel likely to be affected by the proposed development?" the answer given is "No". Several questions are asked in relation to cumulative effect, all of which refer to forestry projects.

The licence was issued by DAFM by way of an approval letter on the 17th of October 2022. This is reflective of the conditions outlined in the Archaeology report, the AAD and the Inspector's certification report. An additional condition is included in relation to mound drains to be across the slope and species to be planted in a mixed manner. Other standard conditions typical of an afforestation licence are also applied.

Appeals and Statements of Fact

There are two third-party appeals against the decision to refuse the licence. The full grounds of appeal were considered by the FAC and are to be found on file. A number of the grounds in each appeal are similar and a brief summary of the grounds are:

- It is submitted that there are potential impacts from the proposed afforestation on an established Dairy Farm (FAC 167/2022) arising from the proposed project's proximity to the appellant's dwelling house, farmyard and surrounding lands.
- It is submitted that the afforestation will provide habitat for rodents, badgers and deer, and in the case of badgers and deer that this would exacerbate an existing TB problem in the area. In addition to this the planted area would attract deer which are also known carriers of TB. It is also submitted that such wildlife may predate on farmed stock such as duckling.
- It is submitted that larger wild animals, attracted by the habitat the proposed planting will provide, will negatively impact on the safety of horses and people working with them.
- It is submitted that the proposed afforestation represents a Fire risk, that this will be heightened through climate, and that there is potential impact on a dwelling house and farmyard and the contents therein.
- It is submitted that inadequate consideration has been given to the effect of adverse weather conditions including winds blowing debris and branches from the proposed planted area onto adjoining lands.
- It is submitted that the proposed planting will negatively impact on dwelling houses, lands and will deprive some of light and views.
- It is submitted that the proposed planting and the visual impact of same will negatively impact on the market value of property.

The DAFM provided an SoF for each appeal which addressed a number of the grounds raised, both of which are dated the 23/11/2022. Several the responses in each SoF are similar. The full SoFs were considered by the FAC and are to be found on file. A summary of the responses submitted by the DAFM are:

- In relation to the impact of wildlife and vermin utilising the habitat that the proposed afforestation would provide, it is submitted that concerns relating to disease potentially associated with badgers and deer and vermin (rodents, mink) was considered, as was the potential impact of deer upon horses, it was not deemed to require a specific condition on the approval.
- In relation to light and property values, it is submitted that this is addressed by the installation of dwelling house setbacks of 60m. It is observed that the tree species proposed shed leaves in the winter, which will minimise any shading of field in the winter/early spring months. A professional opinion is offered that broadleaf forests do not negatively impact upon grass growth in adjoining fields. It is noted that the northern half of the proposed afforestation is at a lower elevation than the land to the west, further reducing any negative impacts upon light or views. It is noted that in the case of FAC 167/2022 the referenced dwelling and farm buildings are currently largely surrounded by mature trees, in hedgerows/shelterbelts, which are unrelated to the proposed afforestation.
- In relation to views and light, it is submitted that the amount of forestry in the area was assessed by the Forest Service as part of the approval process, that the townland contains 4.76%

forestry, which is a low level of forestry, and that there is no forestry proposed immediately north, south or west of the farmyard and house, located to the west of the proposed afforestation site.

- In relation to the risk of fire it submitted that most fires spread from adjoining lands into forests, that the potential fire risk to the proposed plantation has been assessed and based on the vegetation present (improved grass and grass/rush), that DAFM is satisfied that the risk of fire is low/very low, and that the plantation proposed itself (A native woodland of oak, birch, alder and willow) is not a fire risk and no additional measures are required.
- In relation to risks arising from adverse climate it is submitted most leaves and branches will fall within the confines of the plantation.

The FAC noted that both SoFs included the statement:

For your information, this licence if reinstated following the hearing of the appeals by the Forestry Appeals Committee, will need to be a non-grant aided licence, as planting under CN90174 is required to meet the replanting obligation under the Felling Regulations for a Felling licence application. The Felling licence application is TFL00767622.

The FAC as established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001 has no role in the administration of forest grand-aid schemes.

Correspondence following submission of Appeals and SoFs

The full grounds of appeal and SoFs were circulated to all parties to the appeal. A number of further comments and observations were received by the FAC on foot of these materials being circulated. These are on the FAC file, were considered in full by the division hearing the appeal, and are summarised below.

The FAC received a submission from the applicant in a letter dated the 21/11/2022. The submission clarified that the proposed project is silvopastoral in nature, with a planting density of ca. 400 trees/ha. It is stated that the trees will be fenced off from stock and that the land underneath the trees will be grazed or taken for hay/silage. It is also stated that spacing between rows will be so as to allow the operation of machinery, that trees will not meet the bounds ditches so as to facilitate the operation of machinery. It also stated that there will be no scrub development and that this will guard against the provision of habitat cover for vermin. The applicant also states that despite this lack of habitat, it is the applicant's hope that biodiversity will increase as a result of the project in particular by providing habitat for raptors which would in turn also manage vermin. The letter outlines what the applicant perceives as the benefit of silvopasture with respect to biodiversity and the visual landscape. The applicant illustrates the points made with a series of orthophotos, makes reference to the relationship between the project proposal lands and neighbouring properties, and states that it is their belief that shading will not occur. In the course of the letter, the applicant queries whether one of the Notice of Appeals form has been signed.

A submission was received from the appellant in appeal in 167/2022 on the 20/12/2022 in which an extension of three months is requested before the hearing of the appeal by the FAC on the basis that the site notice was erected on a rarely travelled road, and also that an oral hearing be held.

A further submission was received from the appellant in appeal 167/2022 on the 22/12/2022. The appellant submits that a contention by the inspector in the SoF that vegetation would not be a problem if the licence was allowed could not be sustained as the plantation is for a 100-year crop rotation, and that what might occur in 20 to 30 could not be predicted. The appellant further states that there have been sightings of Hen Harrier and Curlew in the vicinity of the proposed project. It is submitted that the deer population will increase as a result of the project if allowed, and reiterates points made in the grounds of appeal in relation to TB and deer. It is also submitted that family members plan to build dwellings on land in proximity to the project which would interfere with potential views. The appellant makes several statements in relation to environmental law and requirements for guarantees and provision of evidence.

The appellant in appeal 168/2022 made a submission on the 20/12/2022 in which they reiterate and further expand on the grounds of appeal previously submitted, and request an Oral Hearing and extension of three months before the hearing of the appeal by the FAC on the basis that the site notice was on a rarely travelled road.

Consideration of FAC

In the first instance the FAC considered whether an Oral Hearing was required noting the request for such a hearing in the submissions, together with a three-month extension received from the appellants on the 20/12/2022 on the basis that the site notice was in a rarely travelled road. The FAC note that one of the appellants made a submission to the DAFM as part of the original licencing process (posted to the FLV on the 24/03/2022) and was notified by the DAFM of the decision. Neither of the Notice of Appeal Forms submitted by the appellants on the 26/10/2022 indicated that an Oral Hearing was requested. Maps provided as part of the application show that the site notice was located at the point of access to the proposed project from the public road in accordance with the regulation 11 of the Forestry Regulations 2017 (SI 191/2017).

While not raised in the grounds of appeal, the FAC note that the site notice is dated 19/01/2021, which is taken to be as a result of a clerical error as it was received by the DAFM in 2022. The inspector is recorded as having carried out a site inspection on the 17/02/2022 and makes no reference to the absence of a site notice. A photograph of the site notice in situ was received by the DAFM and placed on the FLV on the 11/02/2022. The FAC note that both appellants refer to having seen the site notice in their submissions dated the 20/12/2022. The FAC is satisfied that the site notice was displayed in accordance with legislative requirements and consider the use of the incorrect year to be a minor and insignificant clerical error.

In relation to those grounds of appeal relating to potential impacts from the proposed afforestation on an established Dairy Farm (FAC 167/2022) arising from the proposed projects' proximity to the appellant's dwelling house, farmyard and surrounding lands, as well as grounds relating to potential impacts on light and views, the FAC had regard to the SoFs and those maps provided as part of the application process. The licence includes conditions for a 60m setback from relevant dwelling houses. The species included in the licence are broadleaves, which as stated by the Inspector in the SoF shed their leaves in winter. The FAC also noted the statement in the SoF by the inspector that the northern half of the proposed afforestation is at a lower elevation than the land to the west, further reducing

negative impacts on light or views. The FAC also noted the submission from the applicant to the effect that the project proposal excludes lands immediately adjacent to farm buildings in order to minimise impact of the proposed planting, as well as the applicant's submissions in relation to the proposed nature and density of planting. The FAC is not satisfied that the DAFM have made an error in relation to these grounds of appeal.

In relation to the grounds of appeal that the afforestation will provide habitat for rodents, badgers and deer, and associated concerns in relation to TB and possible predation on farm animals, the FAC note the nature of the proposed project. This is a silvicultural project, which the applicant submits will provide for the grazing of land within the afforested area. Restrictions in afforestation do not form part of national plans for the eradication and control of TB, including the Bovine TB Eradication Strategy published by DAFM in 2021. The applicant in post appeal correspondence states that there will be no scrub development and that planting will not be to the boundary of the site. The FAC is not satisfied that an error was made by DAFM in considering the possible impacts of the proposed afforestation on farm animals.

It is also submitted that larger wild animals, attracted by the habitat the proposed planting will provide, will negatively impact on the safety of horses and people working with them. The FAC had regard for the approval issued by DAFM on the 17/10/2022 which includes 503m of stock fencing, which the Inspector considered appropriate to the development, and did not recommend upgrading to deer fencing. The SoF states that the townland contains 4.76% forestry, which is a low level of forest cover and that there is no forestry in the immediate vicinity. The FAC is not satisfied that the DAFM made an error in relation to these grounds of appeal.

On whether the proposed project represents a fire risk or if there is risk of debris and branches from the proposed afforestation, the FAC notes that the application and licence include adherence to the Environmental Requirements for Afforestation including setback distances from dwelling houses and other buildings. The FAC is not satisfied that the DAFM made an error in relation to these grounds of appeal.

In relation to the possible visual impacts of the proposed planting and potential negative impact on the market value of property in the vicinity, the FAC had regard for the SoFs provided by DAFM which noted the presence of mature trees on neighbouring properties, the setbacks included in the approval letter through requirements for adherence to the Environmental Requirements for Afforestation published by DAFM, and the nature of the proposed woodland. The FAC also noted that the application is from a landowner proposing to plant on their own land. The FAC is not satisfied that the DAFM made an error in relation to these grounds of appeal.

The FAC considered the post-appeal correspondence from the appellants and applicant where they related to already stated grounds of appeal. The committee also noted several additional grounds put forward by an appellant, including reference to bird species, possible plans for future development, and requests for legal assurances. Section 14b(7) of the Act permits a party to make a further submission where it necessary or expedient for the fair and proper determination of the appeal. However section 14b(6) states that a party shall not be entitled to make submissions other than submissions related to

the grounds stated. Nevertheless, the FAC considered that the conditions placed in the licence by DAFM are appropriate for the proposed development and within the powers conferred on that Department by legislation. The FAC also noted that future developments are the responsibility of whatever planning authority may be involved in the permitting of such projects. In relation to the possibility of Hen Harrier and curlew, the FAC noted that the proposal was subject to an Appropriate Assessment and was reviewed by a qualified Ecologist, and that the appellant has not advanced any evidence as to the presence of these particular bird species.

In addressing the grounds of appeal, the FAC considered also the requirements of the EIA and Habitats Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The decision before the FAC relates to the afforestation of 18.9ha hectares which is substantially below the 50ha threshold for mandatory EIA as set out for afforestation applications in the Irish Forestry Regulations 2017 (S.I. 191 of 2017). The regulations also provide that the EIA should be carried out for projects below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. In order to determine this, the DAFM carried out an Assessment to Determine EIA requirement. This considered the project across a wide range of categories, including Archaeological, Land Use, Water, Protection of FPM, Landscape, Designated Habitats and Cumulative effect, and concluded that an EIA is not required. The questions that relate to Cumulative effect only related to forestry projects and do not consider other types of projects. The FAC note that a separate process was carried out for Appropriate Assessment on European sites which include an in-combination assessment of other plans and projects (including, but not limited to, forestry projects). The FAC consider that while the DAFM are entitled to rely on a reading of the entire file, it would be clearer if it was made explicit that the assessment to determine EIA requirement included consideration of the Appropriate Assessment in-combination report.

The FAC noted that in carrying out the assessment to determine EIA requirement, 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.

The FAC also considered the Appropriate Assessment of the project as required by the EU Habitats and Birds Directives. The Directives require 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 on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications. The FAC examined the record and statement from the DAFM and the information as uploaded to the FLV to inform the general public as to

the content of the application including that relating to Appropriate Assessment. As noted above, an ecologist carried out an Appropriate Assessment Screening Report and Determination (dated 12/08/2022). In this it was concluded that the proposed project will not have any significant effect, alone or in combination with other plans and projects, on the considered European Sites and also determined that the project will not adversely affect the integrity of these European Sites. This included an In-Combination Assessment based on a search of planning systems on the 29/07/2022.

In considering the Appropriate Assessment process, the FAC noted that other plans and projects are recorded in the In-combination statement which was prepared in relation to the project and that this was relied on in the screening element of the process. The statement includes the passage,

It is concluded that there is no possibility that the proposed Afforestation project CN90174, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives: 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 would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered and that the In-Combination statement makes reference to 'adverse' effects. The FAC would consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considered this to be a significant error as it demonstrates that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in-combination with other plans and projects might result in a significant effect. Furthermore, it would appear that the use of mitigations may have been relied upon when determining whether to screen a site in or out for further assessment.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence CN90174. The FAC is therefore setting aside and remitting the decision regarding licence CN90174 to the Minister to carry out an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects before a new decision is made.

Yours sincerely,

John Evans On Behalf of the Forestry Appeals Committee

