



3rd August 2023

Subject: Appeal FAC197/2022 against licence decision CN90471

Dear Sir,

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 Marine (Minister). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

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 appeal FAC197/2022 was held remotely by the FAC on 21st July 2023. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton

Secretary to the FAC: Mr. Ciara Murphy, Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence CN90471. The reasons for this decision are set out hereunder.

Background

The appeal relates to a decision by the Minister to issue an afforestation licence for 2.31 hectares at Farrannabrack, Co. Kerry. As the parties were informed, the Minister referred the FAC to the Forestry Licence Viewer as the source of the documents required to be made available to it. The FAC referred to these documents and the submissions made by the parties in considering the appeal.

The forest would comprise a native woodland of pedunculate oak, downy birch, hazel and other broadleaves. Site preparation would be through inverted mounding with slit planting and without additional drainage or the use of fertiliser or chemical weed control. The application included 340 metres of stock fencing. The application as submitted included operational and environmental information and a number of maps. The biomap marks access to the site at the northern edge where the

lands meet the public road and an existing track leads into and adjoins the plot. The biomap also records the location of a site notice and the documents include photos of a site notice at a roadside. The biomap shows an electrical line crossing the site and an associated setback and a dwelling setback to the northwest. The biomap marks a hedgerow and relevant watercourse bordering the plot and marks a setback. The plot is described as enclosed agricultural land with a mineral soil and a grass, grass rush vegetation type.

The application was referred to the NPWS, Kerry County Council and Shannon Regional Fisheries Board (RFI). Only a response from the County Council is recorded which notes that there are no recorded monuments on the lands but that an archaeological impact assessment is recommended.

The site notice is dated 8th March 2022 and the application was advertised on 11th May 2022. A second date for advertising for public consultation is recorded as 9th September 2022 which was after the production of the Appropriate Assessment screening and Report.

There were a number of submissions from members of the public, including the Appellant, who objected to the proposal on the basis that it would have a negative impact on views, traffic, water, biodiversity and amenity.

The site was inspected by a DAFM Ecologist and it is recorded that the Ecologist confirmed the site composition and the Appropriate Assessment notes that no Annex I habitats or Annex II or IV species were encountered. The DAFM Forestry Inspector undertook a desk assessment.

The record includes a screening for Appropriate Assessment dated 3rd August 2022. This records the details of the proposal and the source of documents and information relied on in the process. Six European sites were identified within 15km of the proposal and each site is considered in turn with their qualifying interests/special conservation interests identified and likely significant effects recorded. Other plans and projects considered in combination with the proposal are also recorded. A series of maps are included in the screening document including a map showing the proximity of the proposal relative to European sites in the area. The screening includes reasons for the screening determination in relation to each European site. It was concluded that the proposal should proceed to Appropriate Assessment due to a hydrological connection with Castlemaine Harbour SAC IE0000343.

An Appropriate Assessment Report was recorded and dated 4th August 2022 which outlines each qualifying interest of the SAC, the components of the conservation objectives relevant to the proposal and effects, the potential for adverse effects to arise and the mitigation measures required. A number of mobile aquatic species are identified, and measures related to the protection of water quality are identified. A final determination is recorded dated 12th October 2022 in which the Appropriate assessment process is outlined and the required measures listed. This concludes that,

Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats)

Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The DAFM also recorded a consideration of the proposal across a series of criteria and concluded that the proposal was not required to be subject to an Environmental Impact Assessment. The licence was granted on 5th December 2022 subject to conditions.

Appeal

There was one third party appeal against the granting of the licence and the full grounds and Notice of Appeal have been provided to the parties. The Appellant had made a submission on the application that raised similar concerns as in the appeal. In summary, the grounds contend that the planting of the site will severely affect the quality of life of the Appellant and their neighbours. The grounds contend that the proposal is too close to the houses, would cause pollution, attract vermin and have a negative impact on biodiversity. It is submitted that access to the lands is off the National Primary Road and that it is not suitable for additional traffic or heavy machinery. The appeal was accompanied by a number of documents including letters, photos and report from a Forest Consultant and a GP letter. The Forestry Consultant submitted that the site is flat and bordered by a dyke and that a forestry development would add to the pollution and that the access is unsuitable for heavy machinery and forestry lorries. The GP letter expressed the concerns of the Appellant in relation to mental health impacts on occupants of the dwelling close to the proposal lands.

Minister's Statement

A response to the appeal was provided by the DAFM and circulated to the parties. This submitted an outline of the processing of the application and addressed the grounds of appeal. It was submitted that the proposal includes a setback of 60 metres as required under the Environmental Requirements for Afforestation and that as the proposal is for Native Woodland establishment that it should enhance views, would not impact excessively on light levels and have a positive impact on wildlife. It is further submitted that as a native woodland the forest would not be harvested in the same way as conventional spruce and that most of the traffic would be at the establishment phase. The statement also refers to the Appropriate Assessment Determination report. It is also submitted that the application was referred to the County Council but not referred to the archaeologist as it was 200 metres away.

Considerations of the FAC

The FAC considered the proximity of the proposal to dwellings. Under the Forestry Standards Manual 2015 and the Environmental Requirements for Afforestation 2017 planting can not take place within 60 metres of a dwelling unless the consent of the dwelling owner is provided in which case the set back is 30 metres. In this instance, the biomap submitted marks a 60 metres setback from dwellings to the west of the northwestern corner of the site. There would be no planting directly south from the dwellings and the nearest dwelling is separated from the lands by a private laneway and hedgerows. The proposal is for the planting of mixed, native, deciduous tree species. Given the nature of the proposal, the setback of 60 metres and the orientation of the site the FAC does not consider that there is any evidence that

the proposal would have a significant direct impact on a dwelling. The types of trees to be planted will not reach a height of any significance for a number of decades. The proposal will be visible from the Appellant's dwelling, but the FAC does not consider that this fact would constitute a serious interference with the Appellant's dwelling that the proposal should have been refused.

The proposal is for the small-scale planting of a native woodland on agricultural land. No concerns regarding landscape impacts were raised by the County Council. The proposal would occur in a managed agricultural landscape close to a national road and on the outskirts of a town. The FAC does not consider that the proposal could be considered likely to have a significant adverse impact on the landscape.

In relation to water quality, the Appellant expresses some general concerns regarding water quality but provides no detail of how they believe the proposal would have a negative impact on water quality. Similarly, while the appeal includes a letter from a Forestry Consultant this also provides no basis for the claims that the proposal would have an adverse impact on water quality. Indeed, the Forestry Consultant submitted that the water course is currently discoloured and subject to pollution with the land in its current use. The proposal is for the planting of a field currently in agricultural use with a mixed species native woodland on mineral soil employing low-intensity methods. The proposal would be subject to conditions related to good practice which the FAC consider would address any risk of short-term impacts of planting at the establishment phase. The FAC considers that the long-term impacts on water quality are likely to be positive given the nature of the proposal and the current use of the lands.

In relation to biodiversity, the land is currently comprised of improved agricultural grassland and the Appellant provides no detail of how they believe that the proposal would have a negative impact on biodiversity aside from a general comment that a number of species including Hen Harrier are in the area. The lands were inspected by a DAFM Ecologist, and the AA screening records that no Annex I habitats or Annex II or IV species were encountered. As noted by the Ecologist the lands do not represent suitable foraging habitat for Hen Harrier. The FAC consider that existing hedgerows may constitute locally valuable habitats, but these will be retained and the proposal involves the planting of a number of native tree species. The proposal would be located on improved agricultural land in a managed agricultural landscape. The FAC considers that the most likely impacts on biodiversity from the proposal generally are likely to be positive. The Appellant also expresses concerns regarding "vermin" and it is likely that the proposal creates habitat for small mammals which would also be associated with hedgerows, and other agricultural features, and can constitute a component of the diet of Hen Harrier. The Appellant's dwelling is separated from the lands by hedgerows, garden and a laneway. However, the FAC has noted a number of errors in the screening for Appropriate Assessment and Environmental Impact Assessment as outlined below.

In relation to impacts on traffic, the proposal would involve a machine operating on the lands for a limited period to prepare the inverted mounds and a number of workers planting the trees over the establishment period, including at the initial planting of the lands and potentially some additional planting in the first four years. Such activities would not be out of keeping with the kind of management practices undertaken in agriculture and the related traffic. After this has occurred there is unlikely to be

any traffic in relation to the management of the forest aside from an occasional visit by car until harvesting might occur. Given the composition of the proposal the commercial harvesting of the site is unlikely and would not occur for a number of decades. Mixed species native woodland is not managed in the same manner as commercial conifer plantations, grows at a slower rate, and is not managed using a clearfell method. Should any felling take place on the lands or if the owner wishes to create a new entrance to the public road or to widen an existing entrance that would require a separate licence application. The FAC considers the likely long-term outcome of the proposal is for a reduction in traffic from the lands.

In the context of the grounds that refer to impacts on biodiversity and the environment, the FAC considered the screenings undertaken and recorded in relation to the requirements of the EU Habitats and EIA Directives. The file includes a number of documents that relate to a screening for Appropriate Assessment undertaken to assess possible significant effects on European sites. The screening documents include the following text,

It is concluded that there is no likelihood of the proposed Afforestation project CN90471 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 would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned. As stated on the record, it appears that the incorrect test was employed at the screening stage in that only significant effects that might arise from the project itself were considered. For this reason, the FAC considers that the screening should be undertaken again. The FAC also reviewed the reasons for the screening conclusion and was satisfied that, given the nature, scale and location of the proposal, sufficient reasons were generally provided. However, in relation to Castlemaine Harbour SAC, this was screened in on the basis of a hydrological connection while the nature of the effects of concern are not identified. The FAC consider that the nature of the significant effects that are considered likely, or uncertain, should be described in the process. The FAC considers that this is important in assessing the effectiveness of the proposed measures.

The FAC also noted that the River Waterbody Maine 020 is recoded as being of Moderate status in relation to the Water Framework Directive while the EPA record the status for the current cycle as good. While this may have stemmed from the timing of the screening and assessment, the FAC would consider that this change in status should be considered as part of the new screening. In reviewing the Appropriate Assessment, the FAC also noted that it was concluded that measures were required in relation to sea lamprey but not for river lamprey. While these are separate species that differ in terms of conservation status and habitats, they share some similarities in terms of threats and habitat

requirements. In the context of the overall assessment undertaken, the FAC considers that this should be reviewed to ensure that this conclusion was the intended outcome.

The record also includes a document entitled Assessment for EIA Requirement. Annex II of the EU EIA Directive (2011/92/EU as amended by 2014/52/EU) identifies classes of development for which Member States may set thresholds or criteria for requiring environmental impact assessment. This includes "initial afforestation and deforestation for the purpose of conversion to another type of land use" and road construction. The Forestry Regulations 2017, SI 191 of 2017, require that afforestation of 50 hectares or more be subject to an Environmental Impact Assessment (EIA). Afforestation of less than the threshold of 50 hectares but which the Minister considers likely to have significant effects on the environment, taking into account the criteria set out in Schedule 3, must also be subject to EIA. The proposal in this case is 2.31 ha and significantly below the threshold for mandatory EIA.

When making an application for a forest licence, an applicant must provide the information in Schedule 1 of the Forestry Regulations 2017. This includes a physical description of the whole project and location; a description of the aspects of the environment likely to be significantly affected and a description of any likely significant effects on the environment from the expected residues, emissions, and waste where relevant and the use of natural resources, to the extent of the information available on such effects. This information must take account of the criteria identified in Schedule 3 of the Forestry Regulations 2017.

The application includes details of the proposed operations and a series of maps including detailed maps showing environmental features on and surrounding the lands. In addition to the environmental features on the maps provided, the application includes a range of other environmental considerations. The application also recorded a number of responses to questions that relate to possible effects on the environment some of which automatically require the submission of an additional report and further information on the nature of effects and measures to mitigate such effects.

The Assessment for EIA Requirement document relies on guidelines that have been replaced by the Environmental Requirements for Afforestation (DAFM) according to that document. This includes a reference to Landscape Guidelines and concerns regarding landscape impacts were included in the grounds. Neither were these guidelines attached as conditions of the licence. The reliance on these documents constitutes a serious error.

The FAC noted that the following was left blank,

- What is the approximate % of forest cover at present in the applications townland?
- What was the approximate % of forest cover in the applications townland(s) 5 years ago?

The consideration of cumulative effects is a requirement of the screening and EIA processes. In addition, while the Minister recorded a separate characterisation of plans and projects in the area, this is not explicitly cross-referenced in the EIA Determination, which itself only refers to forestry projects. While

the FAC would consider it reasonable that the record as a whole should be considered and that the reasons for not considering that the proposal is likely to have a significant effect on the environment might be found in separate documents, it would be clearer if an explicit reference to the characterisation of existing and approved projects was included in the EIA Determination and the consideration of likely significant effects on the environment.

The section dealing with *Designated and non-designated Habitat Recommendation* states that there was no recommendation for *B - Supplementary operational conditions* while these were required as part of the AA process and should have formed part of this process. In responding to the Appeal, the DAFM submitted that the proposal was not referred to a DAFM Archaeologist as it was 200 metres away and the FAC understands this to relate to the procedure of referring application where a proposal lies within 200 metres from a recorded monument. While the FAC considers this to be reasonable the FAC would consider it to be good practice to record such reasons in the EIA screening, where such matters are raised by prescribed bodies.

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a series of serious and significant errors was made in the making of the decision in this case. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence CN90471 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake new screening for Appropriate Assessment, and Appropriate Assessment as required, and screening for Environmental Impact Assessment before a new decision is made.

Yours sincerely,

Vincent Upton On Behalf of the Forestry Appeals Committee