



19th July 2023

NOTES: Appeal FAC 081/2022 against licence decision CN90045

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine ("the Minister"). 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 appeal FAC 081/2022 was held remotely by the FAC on 14th June 2023.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson), Mr. Derek Daly, & Mr. Vincent Upton

Secretary to the FAC: Ms Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, the Statement of Fact (SoF) and associated documentation provided by the Department of Agriculture, Food and the Marine (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 CN90045.

Background

The licence decision relates to an afforestation application for 4.39ha in two plots at Ballytory Lower, Co. Wexford resulting in a decision to grant a licence for 1.99ha for one plot. The appeal is a first party appeal against the decision of the Minister to refuse permission for the afforestation of a plot for reasons related to the protection of archaeological features. A record of the decision was made available to the FAC by way of the Forest License Viewer (FLV).

The application

The application is for the planting of two plots. Plot 1, with an area of 1.99ha, was to be planted with Pedunculate Oak, Birch, Hazel and additional broadleaf species. Plot 2, with an area of 2.4ha, was to be planted with Monterey pine and additional broadleaf species. Documents related to the application are on file including an undated Inet Pre Approval Submission, a fencing map and a biomap both dated the

13/12/2021, a site notice dated 15/12/2021, and photo of same in situ. These are recorded as having been uploaded to the FLV on dates in December 2021 and January 2022. The maps provided show the two plots separated by a distance of ca. 380m apart, with features including hedgerows, a watercourse, the public road, the location of a site notice and other relevant details recorded.

Submissions and referrals

No submissions on the application are on file from members of the public. The application was referred to Wexford County Council, the NPWS, and An Taisce on the 19/01/2022. The NPWS replied on the 04/02/2022 and made no specific comments on the application while providing general observations on the nature conservation obligations of licencing bodies and forestry. Wexford County Council replied on the 25/02/2022 making no specific observations other than noting the proximity of the proposed project to nature conservation and archaeological sites, and its presence in a coastal zone and landscape of greater sensitivity. There is no response from An Taisce on file.

Archaeology Report

The file was also the subject of a report by a DAFM Forest Service Archaeologist which is dated the 22/02/2022. The report makes a series of observations regarding archaeological features in the immediate vicinity of Plot 2. These include the proximity of a farmyard complex surrounding a castle-tower house (WX048-042), the archaeological constraint zone around a levelled field system (WX048-041), three enclosures and a Ring Ditch (WX0480941001/2/3/4), and cropmarks of old field boundaries represented by single ditch features and other possible features including enclosures and a ring ditch visible on aerial photographs. The report also notes other features in the general vicinity of the application including a chapel and graveyard (WX053-041/001). A number of historical records are referenced in relation to these features, and the report concludes that:

In light of the foregoing, namely the proximity of Plot 2 to the Castle – Tower House (WX048-042), its siting between late medieval religious and secular centres, its proximity to an archaeological Field System, Enclosure and prehistoric funerary complex and the identification of previously unrecorded archaeological features as cropmarks in aerial imagery indicating sub-surface survival, the northern area proposed for afforestation— i.e., Plot 2—is REFUSED.

No objection is raised in the report to the proposal to plant Plot 1, while conditions are attached.

Appropriate Assessment

The application was subject to Appropriate Assessment for the purposes of the Habitats and Birds Directives. An Appropriate Assessment Screening Determination (AASD) is on file dated the 12/05/22 and prepared by a DAFM ecologist. This notes, on the cover page, that Plot 2 has been refused by Archaeology, and this is expanded upon in Section 2 which states:

To note, that while the initial application comprised two plots totalling an area of 4.39 ha, the Archaeology Assessment dated 22/02/2022 stated that Plot 2 is REFUSED. Therefore Plot 2 will not be assessed as part of the Appropriate Assessment Screening Determination. This assessment only considers Plot 1.

The AASD goes on to describe the site (which on the basis of the above the FAC takes to only refer to plot 1) as consisting of Acid Brown Earths/Brown Podzolics (81%) and Mineral Alluvium (19%), to lie between 0m and 20m above sea level, with an average slope across the site that is moderate at 1% ranging from 3% to 1%, and to currently consist of agricultural grassland and hedgerows. The project is stated to consist of afforestation of one plot under GPC9 Native Woodland Establishment, with no drainage, invert mounding, no fertilizer and herbicide control in year 1.

The AASD also notes that the Trane Stream flows along the northeastern boundary of Plot 1, and that relevant watercourses flow along the northern and southern boundaries of that plot. The river sub-basin is given as the Kisha_010, which is in the Kisha_Sc_010 sub catchment a part of the Ballyteigue-Bannow catchment. The source for these river basin characterisations is given as the Water Framework Directive (WFD) catchments data package, July 2018¹.

The AASD identifies 15 European sites located within 15km of the project site. Two sites, the Lady's Island Lake Special Area of Conservation (SAC) [0704] as designated under the Habitats Directive, and the Lady's Lake Specially Protected Area (SPA) [4009] as designated under the Birds Directive, are stated to be adjacent to the project area. All 15 sites are considered with reference to the proposed project and the two adjacent sites are screened in for Appropriate assessment. The remaining 13 sites are screened out, with reasons provided which include consideration of the possibility of in-combination effects of the project with others. In this regard, the review of each site includes the statement:

Furthermore, as set out in the in-combination assessment attached to this AA Screening Report (see Appendix A, located on file), the proposed project will not result in any cumulative significant effects on this European site, when considered in combination with other plans and projects.

As stated, an in-combination report is included in the AASD as an appendix. This identifies several plans and projects within the River Sub-basin Kisha_010 with reference to searches on the 12/05/2022 of the planning systems of the Wexford County Council, An Bord Pleanála, the EPA, and the DAFM forest service. A summary of the Wexford County Development Plan is also provided. The report concludes with an In-Combination Statement that states:

Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that there is no likelihood of the Afforestation project proposed under CN90045 having any significant effect, either individually or in combination with other plans or projects, on any of the following European site(s), for the reasons set out in Part A: Screening Report.

The report then lists the 13 screened out sites.

¹ <https://gis.epa.ie/GetData/Download>

An Appropriate Assessment Report (AAR) is also on file dated the 12/05/2022 and prepared by the same DAFM ecologist. This also notes that the AA process is confined to Plot 1 as a result of the findings of the Archaeology report, and summarises the AA screening process resulting in two sites, the Lady's Lake SPA and SAC being screened in. The AAR notes that the author field inspected the project area on 11/05/2022 noting that the aquatic zone was overgrown and that a thick hedgerow/treeline separated the project area from the SAC/SPA. It also notes that no evidence of Annex 1 habitats or protected species was identified, and that no invasive species were observed.

The AAR then considers each of the Qualifying Interests or Special Conservation Interests as appropriate for the two sites with regard to possible impact from the proposed project, and where appropriate mitigating actions are identified. These are consolidated into a list within the report and can be seen to focus on the protection of water quality, the retention of certain habitats and good site management including adherence to certain guidelines, requirements and standards. The AAR includes a section on in-combination effects which presents the same information contained in the appendix which was attached to the AASR. This section concludes with an in-combination statement which includes the following text:

It is concluded that there is no possibility that the proposed afforestation project CN90045, 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 AAR concludes with an assessment of potential residual impacts which concludes that the proposed project, alone or in-combination with other plans and projects, will have no adverse effect on the integrity of any European Sites.

The Appropriate Assessment process (Stage 2) is concluded in an Appropriate Assessment Determination (AAD) which is also on file dated the 12/05/2022 and prepared by the same DAFM ecologist. In sections 1 through 3 the document restates much of the information provided in the AASR and AAD as described above including the list of mitigations. Section 4 of the document provides an Appropriate Assessment Determination which states that the basis for the Minister making a determination was based on objective information, and that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

Inspector's Certification and screening for Environmental Impact Assessment

On file are a number of reports associated with the Inspector's certification of the project. These include a Site Details report and a Site Plots report both with a date of 24/06/22 recording various details of the project and site.

Also on file is an Assessment to Determine EIA Requirement also with a date of 24/06/22, referring to an Inspection Certification date of 23/06/2022 and a spatial run date of 08/04/2022. This considers the

project across a range of criteria including cumulative effect with reference to forestry projects and concludes that an EIA report is not required.

The Inspector's Certification Report is on file with a certification date of 23/06/2022. This notes a number of site-specific conditions that are to be attached to the licence, including a requirement that the mitigations set out in the AAD are adhered to. There are also two conditions relating to hedgerows. A further condition requires that Plot2 be refused due to archaeology.

The licence issued on the 24/06/2022 by way of an approval letter. This states that:

This licence is issued under the Forestry Act 2014 and Forestry Regulations 2017, as amended. The afforestation project must be carried out and completed in accordance with plans and particulars lodged with the application, as amended by any further plans and particulars submitted at the request of the Department, (see Appendix A), except as may otherwise be required to comply with the conditions set out in this section.

The licence includes a number of standard conditions such as adherence to industry manuals and standards, adherence to the operational proposals which are included as an appendix, notification to the Department on the commencement of works. It also includes those conditions listed in the Inspector's Certification including adherence to the mitigations set out in the AAD and the exclusion of Plot 2 from planting.

Appendix A is entitled "Operational Proposals that have been approved and must be implemented in full as conditions of both the Afforestation Licence and the Technical Approval for the Afforestation Scheme". This includes much of the information provided in the application, including the approved species for Plots 1 and 2.

Appeal and Statement of Fact.

There is one appeal against the decision, by the Applicant, received by the FAC on the 08/07/2022. There are a number of grounds of appeal, and these have been considered in full by the FAC, are available on the FAC file, and are addressed in the section below detailing the Consideration by the FAC of the appeal. For convenience, the grounds of appeal and subsequent correspondence is summarised below. These grounds and subsequent correspondence are extensive, and this summary is not intended as a substitute for a complete reading of the file.

The grounds can be summarised as consisting of two main areas of focus:

- A. Fair procedures relating to the time for appeal, in light that several days were consumed in posting etc, leaving the Appellant with only 9 days to submit an appeal.
- B. That the contention by a DAFM Archaeologist that the site contains, or is likely to contain, archaeological features is false by reason of direct evidence of the suggested features.

Attached to the Notice of Appeal Form are the grounds and copies of correspondence between the Appellant and DAFM which, amongst other matters, queries the availability of certain documents and sources of data for the purposes of submitting an appeal.

The DAFM provided a response to the grounds in the form of a Statement of Fact (SoF) dated the 13/03/2023 and a separate letter from the Archaeological section of the DAFM Forest Service dated the

15/07/2022. The SoF confirms the administrative details of the processing of the licence. In relation to the time available to the Appellant to make an appeal, the statement submits that the Approval issued on 24/06/2022 which was a Friday, and the decision was then advertised on the next advertising day, which was Monday 27/06/2022. The SoF submits that this is standard practice and that DAFM regret any delay in the documents leaving the Department. In relation to the 14-day period allowed for making an appeal to the FAC, the SoF states that this is a statutory requirement.

The letter from the Archaeological section expands on the details provided in the original archaeology report, providing further detail on the sources and provenance of information used. The letter acknowledges a typographical error in the original report wherein Plot 2 was referred to "Plot 1", but highlights that the correct nomenclature was used elsewhere in the report. Specific points raised in the grounds of appeal are addressed. Considerable detail is provided in relation to the use of aerial surveys and cropmarks, and remote sensing techniques, and the author sets out their qualifications in the use of these techniques. The letter concludes with a statement by the author that:

Consequently, and in conclusion, it remains my professional view that the recommendation to refuse Plot 2 in light of its proximity to the Castle – Tower House (WX048-042), its siting between late medieval religious and secular centres, its proximity to an archaeological Field System, Enclosure and prehistoric funerary complex and the identification of previously unrecorded archaeological features as cropmarks in aerial imagery indicating sub-surface survival remains well informed and absolutely proportionate to the circumstances.

The Statement of Fact and letter from the DAFM Forest Service Archaeologist were circulated to the Appellant who then wrote to the FAC on the 04/04/2023. In that letter, the Appellant requests an oral hearing. The Appellant disputes that the use of crop marks as an argument against the proposed afforestation is a persuasive one. Various arguments are presented in relation to local knowledge and terminology used for fields and places in the locality. It is submitted that if the use of crop marks and anecdotal descriptions of lands are to be relied on, this would have warranted further investigation by DAFM. It is submitted that the detailed nature of the archaeology reports is such that the making of a proper appeal within the time allowed is not possible, and that the issue of archaeology should be a matter of policy and it should not fall to an archaeologist to make the decision to refuse permission to plant. It is submitted that the implication of the acceptance of the archaeology assessment is that no planting can take place in a wider area of the Appellant's lands.

The Appellant made a further submission on the 11/04/2023 in which it is submitted that he recollects various drainage works having taken place on the site (plot2) that may be responsible for the crop marks being interpreted as archaeological features by the DAFM Archaeologist.

The DAFM Forest Service Archaeologist in turn responded to these submissions in a letter dated 26/04/2023. In the letter the FAC is cautioned against relying on evidence that can be described as hearsay and characterises significant portions of the submissions by the Appellant as being sweeping in nature without supporting evidence. Further information on the use of aerial photography and imaging is provided, and elements of previous submissions by the DAFM Archaeology section are restated and expanded upon. It is noted that the Appellant has been permitted to plant in Plot 1, and that this

evidences that archaeological reasons are not being used to prevent afforestation in the locality, and that each and every application is assessed on its own merits using the best information available. It is further noted that the opinion of the DAFM Archaeologist was verified by consultation with the National Monuments Service in compliance with legislation. It is submitted that the Appellant has had since July 2022 to commission their own Consultant Archaeologist to carry out any geophysical surveys in support of their assertions. It is also acknowledged that while the drainage works referenced in the submission by the Appellant in their submission of the 11/04/2022 may be visible in aerial photography, they are limited in scope and linear in nature and do not account for the circular, subcircular and sub rectangular features.

Consideration by the FAC

The Grounds of appeal

The first ground of appeal relates to the timing of correspondence from DAFM notifying the Appellant of the DAFM decision to grant a licence. This issue is considered under the heading of Fair Procedures below.

The Appellant submits that the reference to Plot 1 in the Archaeological report that informed the decision to grant the licence in relation to the archaeological constraint zone around a levelled Field System (WX048-041), three Enclosures and Ring-Ditch (WX048-041001/2/3/4) is in error. The FAC note that this error is acknowledged in the letter responding to the Grounds of Appeal provided by the DAFM Archaeologist that accompanies the SoF, which submits that the plot is correctly referenced elsewhere in that letter. The FAC consider that it is evident from the context of the paragraph in which the error was made that Plot 2 is being referred to, and that this represents a typographical error and does not represent a serious error in the decision-making process.

The Appellant also submits that several named features, with references by which the features may be found on the Historic Environment Viewer, are in lands separate from the proposed project lands for Plot 2. It is also submitted that there are no known associated crop mark features in the field in which the proposed project lands are located. It is further submitted by the Appellant that the existence of features in those separate lands (which the Appellant variously refers to as in Ballytory Upper and in the Kerlogue Field) is not relevant to the application. The FAC noted that the original Archaeology report of the 22/02/2022 stated that constraint zone for those archaeological features were contiguous to the proposed project lands, and at no point stated that they were in the project lands. The Archaeology Response to the grounds of appeal dated 15/07/2022, which the FAC had regard to, characterises those features as forming part of an archaeologically sensitive landscape that includes those features and others. The FAC also note that in the Appellant's further submission of the 04/04/2023 (at page 4 in relation to observation 7) the existence and relevance of these features appears to be acknowledged. The FAC is satisfied that the DAFM correctly identified the location of those features (WX048-041/001/002/003/004) in Ballytory North and not on the proposed project lands, and that those features are relevant to the archaeological consideration of the application.

In relation to the feature WX053-041/001, given as a Chapel and Graveyard, the Appellant submits that there is doubt as to whether this feature was a chapel, it being located at least 400m and two fields away from Ballytory castle. Again, the FAC had regard for the Archaeology Response to the grounds of

appeal dated 15/07/2022, which provides an extensive rationale for the designation of the feature (in points 3 through 5 of that letter), and supports that rationale by reference to the use of aerial archaeological survey techniques (in point 6 and subsequent points). The FAC further note that the designation of WX052-041/001 is made by the National Monuments Service and not DAFM. The FAC is satisfied that the feature WX053-041/001 is relevant to the Archaeological consideration of the site.

The Appellant disputes whether the lands located in Plot 2 lies in an archaeologically rich environment. Again, the FAC had regard for the Archaeology Response to the grounds of appeal dated 15/07/2022, which presents details of evidence of archaeological features within and around the plot based on modern aerial imagery (in point 12), together with details of the interplay between marked archaeological features (in points 13, 17 and others).

In subsequent correspondence dated the 11/04/2023, the Appellant makes an anecdotally based submission that the features identified in by the Archaeologist in Plot 2 may be the result of drainage works which took place on the lands. The FAC had regard to the response from the Forest Service Archaeologist in a letter dated 26/04/2023 which, while acknowledging that this may be the source of some features, this is not likely to explain all of the reasons outlined in the Archaeologist's report.

The FAC had regard to the submissions from the Appellant, in particular in his letter of the 04/04/2023, that the use of archaeological evidence to disallow afforestation is inappropriate and should be a matter of policy. In the first instance, the FAC note that matters of policy are not within its remit, however the committee also had regard to the letter from the DAFM Archaeologist of the 26/04/2023 which stated that the DAFM have an obligation to consider matters of archaeology under the Forestry Regulations of 2017, and that each application is considered on its own merits using the best information available at the time..

The FAC noted that the reason provided for the condition that excluded plot 2 was,

Reason: Protect archaeological remains that exists within the site, as well as to safeguard any buildings, structures, or features of special architectural or historic interest on the site.

However, the Archaeology report refers to the proximity to archaeological features external to the plot and the potential for sub-surface previously unrecorded archaeological features identified through cropmarks. In responding to the Appeal, the DAFM referred to the requirements of the Forestry Regulations of 2017. The FAC understand this to relate to the requirement on the Minister to refuse an application where the proposed development is likely to have a significant adverse impact on an archaeological, historical or cultural site of feature. However, the FAC is of the view that the report of 22nd February 2022 does not clearly provide the reasons as to how such a conclusion might be reached. This report also describes the potential for archaeological features on the site but describes this with a much greater degree of uncertainty than was contained in later submissions in responding to the appeal.

The FAC considers that the information gathered, and generated as mapped cropmarks, by the DAFM in relation to potential features on the plot itself represents new information not in the public domain that would not have been reasonably available to the Appellant while it was relied on by the Minister in the making of the decision. The Minister has the powers to request the submission of further information.

Given the nature of the information, the FAC considers that the Minister should have provided the Appellant with an opportunity to respond to the new information and findings of the Archaeologist in relation to the cropmarks on the site. This could include having the opportunity to engage a suitably qualified professional to investigate and report on the field patterns to facilitate the processing of the application. While the FAC notes the concern expressed by the DAFM regarding the potential costs involved if the Appellant was to be required to submit an Archaeological Impact Assessment, this would be a matter for the Appellant to decide in light of the information available. The FAC also noted the detailed submissions from the Archaeologist that post-dated the making of the decision which contain a more robust reasoning for the decision. This information has been made available to the Appellant as part of the appeals process.

In the specific circumstances of this case, the FAC considers the reliance by the Minister on new information generated with a stated significant degree of uncertainty by the DAFM that could not have reasonably been available to the Appellant and to which the Appellant was not provided an opportunity to respond to be a serious error in the making of the decision.

Fair procedures and proper processing of the licence

As noted above, the first ground of appeal relates to the timing of correspondence from DAFM notifying the Appellant of the DAFM decision to grant a licence. The FAC had regard to the SoF provided to the Committee dated the 13/03/2023. The SoF states that approval for the licence was issued on 24/06/2022 which was a Friday, and then advertised on the next advertising day, which was Monday 27/06/2022. The Appellant notes that the information relating to the decision which he received on Wednesday the 29/06/2022 was posted on Tuesday 28/06/2020, resulting in five days of a 14-day period being made unavailable for the purposes of an appeal². This delay appears to be acknowledged by DAFM in its SoF in which it states that it regrets any delay in the documents leaving the Department.

The SoF also observes 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, and that the documents were made available on it on the 24/06/2022 which is the date the licence was approved. The SoF also notes that the 14-day period allowed for making an appeal to the Forestry Appeals Committee (FAC) is a statutory requirement, pursuant to Regulations 5(1) of the Forestry Appeals Committee Regulations 2020 (S.I. No. 418 of 2020), as amended by Regulation 3 of the Agriculture Appeals Act 2001 (Section 14A) Regulations 2021 (S.I. No. 353 of 2021).

The FAC notes that, notwithstanding the availability of the decision on the FLV on the 24/06/2022, the Forestry Regulations 2017 (S.I. No. 191 of 2017) at Regulation 21(1) require the Minister to notify an Applicant in writing of the decision. The FAC further notes that section 14A(4)(a) of the Act, as prescribed by Regulation 2 of the Agriculture Appeals Act 2001 (Section 14A) Regulations 2021 (S.I. No. 353 of 2021) makes no distinction between working or calendar days. In this context and in the context of this particular appeal, the FAC considers that the reference by DAFM to the "next advertising day" in its SoF is not of relevance to this ground of appeal.

² The FAC note that the Appellant refers to both the Tuesday and Wednesday in question as June 28th 2022, and in the case of the latter assumes this to be an erroneous reference to Wednesday the 29th of June 2022.

The Appellant makes several references in the grounds of appeal, and in correspondence with the DAFM that occurred prior to the appeal and attached to the Notice of Appeal Form, to his inability to access certain references and data sources referenced in the Archaeological report provided by the Minister. The issues raised in the Archaeological report are not trivial, and the FAC notes the detailed nature of the material on those matters relating to Archaeology provided to the FAC by DAFM in response to the grounds of appeal, and in subsequent correspondence. The FAC also notes that in the letter provided by the DAFM Archaeologist of the DAFM dated the 26th April 2023, it is suggested at page 6 that the 14 day period of appeal would have been an appropriate time to engage a consultant archaeologist to assess the decisions for refusal.

Based on the foregoing, i.e. the complexity of the issues arising in relation to archaeology, the generation of new information by the DAFM and a four day delay in providing notice of the decision (from the date of the decision to the posting of same) out of a 14-day appeal period, the FAC considers that the Appellant would have been adversely impacted by the delay. However, the decision is being remitted to the Minister for a new decision to be made which includes providing the Appellant with an opportunity to consider the matters now arising.

The FAC notes that in the grounds of appeal and in subsequent correspondence the Appellant, while disagreeing with the conclusions of the DAFM Archaeologist, variously submits anecdotal evidence that might support those conclusions (for instance the local names given to fields such as the "Graveyard Field" and a report of workers finding burial locations in that field) and suggests that further investigation should be undertaken by the State (with particular reference made to the OPW). The FAC does not agree that in the case of an application for afforestation on an applicant's own lands it falls to the state to carry out such investigative works.

However, the FAC also accepts that at the time of making the application, the Appellant was unaware of a number of possible archaeological features subsequently identified by DAFM in and around Plot 2. The FAC notes that the archaeological report was finalised by DAFM on the 22/02/2022, while the decision to grant the licence (albeit confined to Plot 1) was issued some four months later on the 24/06/2022. While the FAC on this occasion is considering only issues relating to CN90045, the FAC is aware that in other applications that are made for afforestation, the DAFM will issue Requests of further Information where matters arise that might impact on the nature or scope of an application, such as matters of ecology. Such a course of action provides the applicant with the opportunity to amend their application to address DAFM concerns or to provide supplementary supporting information. The FAC again notes the contention in the letter provided by the DAFM Archaeologist dated the 26th April 2023 that the Appellant had opportunity, as part of the appeal process to engage a consultant archaeologist and to make additional submissions to the FAC. However, the appeal process is separate to the licence decision making process, and furthermore apart from the 14-day period set out for the making of an appeal there are no timeframes in legislation for an Appellant to use when estimating whether or not to commence investigative works in support of an appeal in relation to issues of which they are unaware until the date of a decision. On this basis, the FAC is of the opinion, as noted, that it would be appropriate in the circumstances that arise in this appeal for the DAFM to provide an applicant the opportunity to consider a report such as the Archaeology report in order to provide additional

information if the applicant wished. The Minister would still have been empowered to exclude the plot having considered any additional information or in the absence of a submission being made, while required to provide reasons for any exclusion.

On foot of the Archaeology report dated the 22/02/2022, the DAFM proceeded to carry out an Appropriate Assessment of the application confined to Plot 1. The FAC note that the Forestry Regulations 2017, at regulation 19, require the Minister to assess if a development, which is the subject of an application for a licence, is likely to have a significant effect on a European site. The AAR states that it had been recommended by the Archaeologist that Plot 2 was to be refused, however this does not provide certainty as to the extent of the project as only a recommendation for refusal had been made, as recorded. The FAC are of the view that this regulation does not provide the Minister the scope to assess part of a project, and in the absence of confirmation that the plot was excluded, the decision not to assess plot 2 represents an error in the processing of the application.

The FAC notes that the licence includes a condition that excludes Plot 2 from planting, while also include at Appendix A approved species for Plots 1 and 2. The FAC considers that this is a technical error in the licence, and noting that the decision is being set aside for reasons detailed elsewhere in this letter, considers that should a new licence be issued this inconsistency should be corrected.

Adherence to European Law

Having considered the grounds of appeal, the FAC also reviewed the processing of the application to ensure adherence to the application of European law.

The application was subject to an Appropriate Assessment process for the purposes of the Habitats and Birds Directives which the FAC noted was only carried out in relation to Plot 1 as discussed above. An AASD considered a number of European sites as designated under the requirements of those Directives, and identified two such sites as requiring full assessment, the Lady's Island Lake SAC [0704] and the Lady's Lake SPA [4009]. In screening out the other sites, a range of reasons were provided which included reference to absence of a possibility of in-combination effects. The assessment for each screened out site included the statement:

Furthermore, as set out in the in-combination assessment attached to this AA Screening Report (see Appendix A, located on file), the proposed project will not result in any cumulative significant effects on this European site, when considered in combination with other plans and projects.

As noted earlier in this letter, the in-combination report referred to in this statement is included in the AASD as an appendix which includes the statement:

Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that there is no likelihood of the Afforestation project proposed under CN90045 having any significant effect, either individually or in combination with other

plans or projects, on any of the following European site(s), for the reasons set out in Part A: Screening Report.

In the opinion of the FAC, these two statements are circular, and as result there is no evidence in the AASD or its Appendix of the reasons for determining that in-combination effects would not occur, or that a test was applied in order for such a determination to be made. The FAC considers that this represents a significant error in the decision-making process.

In respect of the two screened in sites, the AAD which marks the conclusion of the AA process, states that "In-combination effects were assessed prior to meeting this determination". The AAD relies on an AAR and states that this was compiled in order to:

... assess the significant effects and implications of the project, individually and in combination with other plans or projects, on the aforementioned screened-in European sites and to determine if the significant effects and implications identified would have an adverse effect on the integrity of any of these European sites, in view of their conservation objectives, and to identify and / or assess mitigation measures needed to avoid the risk of such effects or implications.

In the section of the AAR dealing with in-combination effects, it is stated that:

It is concluded that there is no possibility that the proposed afforestation project CN90045, 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 on the basis that these were precluded by reason of individual projects not having a significant effect. 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 considers 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.

The FAC also noted an Assessment to Determine EIA requirement was conducted, by the DAFM and that the questions in that assessment that relate to Cumulative effect only related to forestry projects and do not consider other types of projects. As discussed above, 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). While the FAC consider that 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 considers that this represents an error in the decision making process.

The Assessment to Determine EIA requirement considers issues relating to water quality, as does the AA process in respect of European sites, and in so doing would be considered as being required to have regard to the requirements of the WFD. The AA documentation notes that the project site is in the river sub-basin Kisha_010. The FAC notes that according to publicly available information provided by the EPA, at the time of writing this letter the Kisha_010 has a status of Moderate under the monitoring cycle 2016-2021, with that status having been assessed through modelling with low confidence. The FAC notes that the documentation on file does not give the status of the Kisha_010 at the time of the decision. However, the FAC notes that data available from <https://gis.epa.ie/GetData/Download> (which was cited in the AA documentation on file) indicates that at the time the licence was issued the river water body had an unassigned status. On this basis, and having regard to the High Court judgement by Ms. Justice Hyland on the 15th of January 2021 (2018/740 JR), the FAC consider it would not have been possible for a determination to be made of the possible impact of the project on a waterbody that immediately bounds the project site, and that this represents an error in the decision making process.

Conclusion

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 CN90045. The FAC is therefore setting aside and remitting the decision regarding licence CN90045 to the Minister to carry out a new Assessment for EIA requirement and an Appropriate Assessment screening of the proposal itself and in combination with other plans or projects, with proper consideration of the impact of the proposal with regard to the Water Framework Directive, before a new decision is made. Before conducting such assessments, the FAC consider that the DAFM should afford the Appellant the opportunity to provide additional information in light of the new information and findings of the Archaeology report of the 22/02/2022 and that a full Appropriate Assessment of the whole afforestation proposal should be carried out. If a new decision recommends the grant of a licence, the operational details of the licence should make reference to only those plots licenced.

John Evans, On behalf of the Forestry Appeals Committee.