



09/05/2023

**Subject: Appeal FAC079/2022 in relation to afforestation licence CN88472**

Dear \_\_\_\_\_

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

#### **Hearing & Decision**

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to determine the appeal properly and fairly. A hearing of appeal FAC079/2022 was held remotely by the FAC on the 18/01/2023 and was attended by the following:

**FAC Members** – Mr. Donal Maguire (Deputy Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman.

**FAC Administrative Staff** – Ms. Vanessa Healy & Mr. Michael Ryan.

The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, the DAFM's Statement of Facts (SoF), and all other submissions, before deciding to set aside and remit the Minister's decision to grant afforestation licence CN88472.

#### **Background**

The licence under appeal was issued by the DAFM on 23/06/2022 and is for the afforestation of 11.94ha in Tomard lower, Ballygowan, Co. Carlow. The proposed development consists of two plots with a mixture of Sessile oak, Scots pine and additional broadleaves, under GPC 9 – Native Woodland Establishment. The licence was issued with relatively standard conditions as well as additional archaeological requirements.

The site is described in the application documents as enclosed agricultural land with mineral soil and a current vegetation cover of grass. The site is described as moderately exposed with a neutral aspect and having adequate access.

The approved operational details in the Approval Letter state that there will be no drainage or firebreaks required, no fertiliser or herbicide will be applied, the ground preparation will be limited to ripping and pit planting. There will be 1440m of Deer-Rabbit fencing erected around the perimeter of the site.

The proposal is in the Barrow\_SC\_110 Sub-Catchment and the Barrow\_180 River Sub-Basin. The Barrow\_180 river waterbody is within the River Barrow and River Nore (RBRN) SAC and was given a 'Moderate' status and deemed to be 'At Risk' under the WFD Cycle 2 assessment which is published on [www.catchments.ie](http://www.catchments.ie). The significant pressures were identified as Urban Run-off and Agriculture. The proposal is bounded to the east by the RBRN SAC but is separated from the river by c.35m of broadleaf woodland. According to publicly-available Environmental Protection Agency (EPA) maps, there are no mapped watercourses within the proposal site.

The proposed area is split between two ground waterbodies. The north-west side is within the Bagenalstown Lower ground waterbody which, according to [www.catchments.ie](http://www.catchments.ie), has 'Good' status currently with its 'Risk' status under review. The south-west portion is underlain by the Athy-Bagenalstown Gravels ground waterbody. This currently is rated as 'Poor' status and 'At Risk' with the Status Failure Reason recorded as "Nitrate (as NO3)".

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

The DAFM completed an "Assessment for EIA Requirement", dated 22/06/2022, which considered the proposal's potential impact on the environment across a range of criteria before concluding that the application should not be subject to the EIA process. The Forest Service District Inspector (DI) indicated that the application should be referred to the Forest Service ecologist. The assessment included the following information:

- The application area contains or adjoins a listed archaeological site or monument - additional measures beyond standard archaeology guidelines apply.
- The site is in a High Amenity Landscape and within a prime scenic area in the County Development Plan or within an area listed in the Inventory of Outstanding Natural Landscapes or in a Landscape Conservation Area.
- The proposed area is within a European or national designation, including SACs, cSACs, SPAs, iSPAs, NHAs, pNHAs Nature Reserves and National Parks.
- The DI answered "No" to the question "Comments and issues from the public and non-governmental bodies were received and examined?".

#### **DAFM Appropriate Assessment (AA) Process**

The DAFM's Forestry Licence Viewer (FLV) contains an AA Screening Report (AASR) completed by the DI and dated 22/06/2022. Question 3 asks "As District Inspector, have you reviewed all referral responses and submissions received in relation to this?". The DI answered "Yes".

The AASR shows two European sites within 15km of the proposal, and both were screened for AA. No sites outside of this *likely zone of impact* were screened. The AA screening results were:

- **RBRN SAC** was screened out due to:
  - "Other factors, refer to AAS"
- **Slaney River Valley SAC** (c.15km) was screened out due to:
  - "The unsuitability of the project area for use by any species listed as a qualifying interest of the Natura site".

The overall conclusion in the AASR was to *Screen Out: No likelihood of a significant effect on any European site, and Appropriate Assessment not required.*

#### **AA Screening Report & Determination (AASD)**

An AASD was prepared by an ecologist on the DAFM's behalf and is dated 17/06/2022. It considers the Qualifying Interests (QIs) and Conservation Objectives of the RBRN SAC and the Slaney River Valley SAC,

and the potential for significant effects resulting from the proposed project. Both European sites are screened out for Stage 2 AA for the following reasons:

- **RBRN SAC:** "...due to the scale and nature of the project (native woodland planting, no drainage, ripping cultivation only, no fertiliser) and lack of hydrological pathway to the aquatic zone. No significant effects are envisaged."
- **Slaney River Valley SAC:** "...due to the location of the project in a different WFD catchment and a separation distance of 15 km between the project and the European site."

In relation to both sites, it is also stated "furthermore, as set out in the in-combination assessment attached to this AA Screening Report... the proposed project will not result in any cumulative significant effects on this European site, when considered in combination with other plans and projects."

#### **AA In-Combination Statement**

The DAFM produced an AA In-Combination Report, dated the 31/05/2022, which consulted various online planning systems (Carlow Co. Council, An Bord Pleanála, EPA) and datasets (including the DAFM's FLV) to identify other (forestry and non-forestry) plans and projects focusing on the general vicinity of the project area in the River Sub-Basin Barrow\_180. Objectives relating to Natura 2000 sites set out within the Carlow County Development Plan 2015-2021 were also consulted.

The In-Combination Report states that "...there is no likelihood of the proposed Afforestation project CN88472 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 projects."

In conclusion, the AASD states that "DAFM has determined that there is no likelihood of the afforestation project proposed under CN88472 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... As such, the project does not advance to the appropriate assessment stage in relation to these European Sites."

#### **Referrals**

On the 21/04/2021, the DAFM referred the application to An Taisce, the National Parks & Wildlife Service (NPWS), and Carlow Co. Council. On the 18/10/2021 the application was referred to Transport Infrastructure Ireland (TII) based on the response from Carlow Co. Council.

**An Taisce's** response states the planting of native broadleaves is welcome, but it is noted that the proposed application is immediately adjacent to RBRN SAC. The main concerns are i) an AA is required for the RBRN SAC ii) Water Quality iii) Areas for Biodiversity Enhancement (ABE) should be marked on an updated Bio Map.

**The NPWS** response states: they have no comment to make but attached an appendix containing more general points of relevance.

**Carlow Co. Council's** response states: It is noted the proposed site is within the Killeshin Hills Landscape Character Area which is rural/agricultural and has moderate sensitivity and moderate potential capacity to absorb different types of development.

The Landscape Character Assessment (LCA) shows existing forestry plantations within the area and potential for further such contiguous plantations. The LCA sets out how forestry plantations should be designed to be in harmony with the landscape. The Co. Council highlight the proximity of the RBRN SAC

and the DAFM's statutory obligations under the Habitats Directive and other environmental considerations. They state that "given the proximity of the M9 Motorway, TII should also be consulted."

**TII Responses** - There are two responses from TII on the FLV. One is an email dated 16/11/2021 which states:

*It is noted from the documentation referred to TII that that the M9 motorway runs east-west between 15-80m south of the project area. Based on the information provided, TII is unable to ascertain the potential impacts of the proposal on the M9 in the southwestern portion of the site such as:*

- 1. If access is proposed in proximity to the over bridge and associated structures, and*
- 2. The drainage regime proposed in this area. TII advises that drainage for the proposal should be independent from the drainage regime for the M9 and should ensure no impact on the motorway. TII requests that the above issues are taken into consideration prior to any decision being made on the subject application.*

The second TII response was uploaded to the FLV on the 15/11/2021 and states, *inter alia*, that:

- Sufficient set back of planting from the M9 corridor should be provided to ensure windfall or tree damage does not impact M9 road user safety, and to allow maintenance and harvesting works.*
- There should be no works or operations that impact the M9 drainage regime. The capacity and efficiency of the national road network drainage regimes shall be safeguarded for national road drainage purposes in the interests of road user safety.*
- No works should impact any environmental mitigation provided in association with the M9 Motorway Scheme and TII recommends consultation with Carlow County Council in this regard.*
- The M9 Motorway at this location is subject to a Motorway Maintenance and Renewal Contract (MMaRC) operated by Egis Lagan Services. TII recommends consultation with the MMaRC Contractor ([info@egislagan.ie](mailto:info@egislagan.ie)).*

**Archaeology** - The application was referred to the DAFM's Archaeology Unit. An archaeology report was produced, and archaeological conditions were attached to the afforestation licence.

### **Submissions**

There are numerous submissions on the FLV from residents of the area surrounding the proposed plantation. The main concerns expressed are related to; the impact on adjacent dwellings, planting setbacks, property values, light, enclosure (existing "native woodland" to rear of houses), health and safety (both mental health and road safety due to frost), views, impacts on the social and economic fabric of the community, dumping, attracting vermin, the date of site notice erection, site notice became illegible, applicants are not living locally, impact on landscape character and panoramic views, impact on the RBRN SAC, forest fires.

### **Licence**

The approval letter is dated 23/06/2022. Conditions 1-4 are relatively standard, and Condition 5 requires adherence to the archaeology report and specifies additional archaeological requirements.

### **Grounds of Appeal**

There is one appeal against CN88472 (FAC079/2022). The grounds of appeal were submitted along with a Notice of Appeal Form (NOAF) dated 05/07/2022 which was accompanied by a letter with "comprehensive grounds and statements as basis for my appeal". The grounds of appeal were considered in full by the FAC and the following is a summary:

### ***Notice of Approval***

- The notice of approval stated there are “no conditions to approval” despite the proximity to RBRN SAC, M9 and residential dwellings.
- No comment from NPWS is “strange” given location beside SAC.
- The “concerns raised” by referral bodies are seemingly unaddressed.

### ***Residential Houses***

- Area surrounding proposal is “densely populated” with 11 houses and 35 people within 400m of each other. All will be impacted.
- Existing forest to rear of dwelling houses means proposal will have a disastrous impact on light levels.
- Forestry & Landscape Guidelines – “setback distance most critical when a building is surrounded by forest on both sides”.
- Global warming means more forest/gorse fires.
- Not all impacted households were consulted.
- Not all questions were answered by the Forester who met with some householders.
- No household has seen proposed site plans.
- No opportunity to make submission on the AA.
- Prominent hill on site - increased feeling of enclosure.
- Applicant not a local family.

### ***Landscape Concerns***

- Carlow County LCA – proposed site within an area rated 4/5 starts for sensitivity.
  - Feasibility study into “Barrow Heritage Drive” which would likely use road along site. Forestry and Landscape Guidelines state that along scenic routes, it is necessary to retain a reasonable number of views throughout rotation for the benefit of road users.
  - Approval contradicts these landscape guidelines.
- Approval is in contradiction to Carlow Co. Council’s concerns in referral response RE layout, natural contours, and boundaries.

### ***AASD***

- There is hydrological connection between the proposal and the RBRN SAC via groundwater discharge and a drain to the east of the site which runs parallel to the River Barrow and eventually feeds to river.
- Site is within a Ground Waterbody which is “At Risk” according to EPA’s 3<sup>rd</sup> Cycle Draft Barrow Catchment Report.
- Believes the project should have been screened in for full AA.
- Concerns of TII were not considered and no record of consultation with Carlow Co. Council or Egis Lagan Services (contractor) despite recommendations of TII.

### ***Current Land Use***

- Rented and actively farmed by local farmer.
- Good agricultural land – changing to forestry “short-sighted” due to rising food insecurity.

### ***Conflict of Interest***

- A daughter of the applicant’s family is an approved ecologist for the Native Woodland Scheme. The same scheme under which grant aid is applied for. Concerned this project may not have been approved otherwise, inappropriate use of public funds.

## **DAFM Response to Grounds of Appeal**

The DAFM provided a written response to the grounds of appeal in the form of a SoF to the FAC. The SoF states the AA screening procedures in place at the time of processing were followed (Nov19 version). *The application was field, and desk-assessed on the 24/01/2021 and the 24/03/2022.*

The DI stated that they had reviewed each submission and considered the issues raised and that the 60m dwelling setback, public road setback, and the nature of the planting (Native woodland) are "sufficient to address the concerns raised as per the standards for afforestation." The DI stated, "standard conditions would be sufficient to provide for all environmental conditions at this location and no site-specific conditions were required other than archaeology."

The DI stated "the site was screened in and referred to Ecology for assessment. I have received the 'screen-out' recommendation from Ecology. All relevant authorities were notified, and their responses were reviewed and considered." The DI responded to each heading in the grounds of appeal:

***Notice of Approval***

"The statutory deadline for receipt of appeals for any decisions issued by the Minister for Agriculture, Food, and the Marine (DAFM) are subject to the statutory 14-day deadline."

***Residential Houses***

Appropriate dwelling setbacks of 60m will apply as per the Environmental Requirements for Afforestation (ERA) as a condition of approval.

***Landscape Concerns***

The road setback will be composed of 10m of open space and adjoining this will be 10m of broadleaves. Broadleaves will be planted adjoining the setbacks to the road, water, and dwellings.

***AASD***

"The afforestation project and all associated operations shall be carried out and completed in accordance with the measures set out in the ERA and the Forestry Standards Manual (as amended by periodic Circulars)."

***Current Land Use***

The DAFM Afforestation scheme is open to all landowners who wish to avail of it.

***Conflict of Interest***

"The afforestation project and all associated operations shall be carried out and completed in accordance with the measures set out in the ERA and the Forestry Standards Manual (as amended by periodic Circulars)."

**Additional Information**

There were several additional submissions in relation to this appeal:

- **15/07/2022** – The applicant's forester's response to the appeal was submitted to the FAC but not circulated to other parties for response due to an administrative error.
- **05/10/2022** – The appellant informed by the FAC that a hearing of the appeal would be scheduled. Given 21 days for any further submission.
- **24/10/2022** – The appellant responds to the DAFM SoF.
- **28/10/2022** – The FAC wrote to the appellant informing them that the submission by applicant/forester had been received on the 15/07/2022 but had not been circulated. Given 14 days for any response.

- **09/11/2022** (date of letter) and **11/11/2022** (by email) – appellant responds to the FAC’s circulation of the applicant’s forester’s submission in response to the appeal.

The additional submissions expand upon the issues submitted in the grounds of appeal and the responses to same. These submissions were considered in full by the FAC and the following is a summary.

#### **Applicant/Forester Response to Grounds of Appeal (15/07/2022)**

States the applicant’s intent for this Native Woodland project is to benefit the local environment including the RBRN SAC, enhance biodiversity, and help to mitigate the impacts of climate change.

##### ***Notice of Approval***

States current approval is based on the application of zero fertiliser, the runoff from this land due to added (agricultural) fertiliser will be eliminated because of the planned afforestation.

##### ***Residential Houses***

Minimum 60m dwelling setback and additional ESB setback will ensure trees will not infringe on current light levels.

There is no forest to the rear of the houses, there is grazing land with mature oak trees present i.e., Parkland. All houses were built in the area with the mature oaks present.

A site notice was erected in line with requirements. The forester met with any interested parties on the 10/04/2021. The forester answered all questions to the best of his ability. The applicants wrote to neighbours fronting the land (where names were available) to clarify several issues and to invite them to discuss any further concerns. The forester did not receive any such phone calls. the Native Woodland Scheme has in-built flexibility to select smaller tree species on higher elevations such as the hill to the front of several houses.

##### ***Landscape Concerns***

Proposal comprises native woodland, planted in concentric circles to mimic natural native woodland, which will sit naturally in the landscape.

There are no designated viewing points in the locality for passing cars to safely stop at. Currently views from the road are predominantly obscured by hedge growth.

Licence conditions require the presence of an Archaeologist to identify if any significant archaeological remains are present or impacted by the proposal.

##### ***AASD***

The project area is well-drained dry land with no drains or streams running from it to the River Barrow or to the drain (relevant watercourse) which runs parallel to the river.

The project is 25m distance from the relevant watercourse at its closest location. Intervening vegetation (woodland) within this 25m setback will ensure any potential runoff during proposed operations will be intercepted.

No fertiliser use proposed, no potential risk to groundwater from the project. Beneficial change in land-use from intensive agriculture (using chemical fertilisers and slurry), the project is likely to benefit groundwater. Native woodland will increase the retention capacity of the surrounding area, providing a buffer between the RBRN SAC and surrounding agricultural land.

##### ***Current Land Use***

Ireland has the lowest afforestation level in the EU, with high levels of agricultural CO2 and methane emissions which need to be offset by afforestation. This project provides an opportunity to expand the native oak woodland that occurs in the adjacent RBRN SAC with all the associated benefits for wildlife.

***Conflict of Interest***

No conflict of interest exists, no material gain exists, this is a unique opportunity to afforest good quality land beside an SAC, with no expected return (equivalent to the retail value of the land if sold as agricultural land) in the applicant's lifetime.

***An Taisce***

We corresponded with Dr Elaine McGoff of An Taisce, to clarify their position (e-mail attached). She wrote saying: 'To reassure you, this isn't an objection, and we very much welcome broadleaf in the right place. This submission by us is very standard and shouldn't prove any impediment to your application in light of you having already supplied an AA. At most it may require some clarification on the specific areas for biodiversity, if the Forest Service doesn't already have them (I imagine they do in your pre-screening).'

***Contact with Concerned Households***

Considerable effort made to discuss the application with residents, including on-site meeting to answer questions and providing contact details to communicate any further questions or concerns.

**Appellant response to DAFM SoF (24/10/2022)**

***Setbacks***

Contends 60m dwelling setback does not account for the hill within the proposal area. Existing woodland to rear of houses. Increased fire risk. Impact on TV/broadband/mobile signal. DAFM Minister on record saying the DAFM may require a greater dwelling setback or exclusion of sections of a proposed site, if deemed necessary on landscape grounds. Requests additional condition excluding planting on the hill.

***AASD***

Applicants failed to carry out "proper AA" and failed to screen properly for EIA.

***Maintenance***

No fertiliser planned. This will lead to "uncontrolled eye sore" as with "forest" to rear of dwellings. Negative effect on property values. The proposal fails to consider future environmental impact.

Hedging along road not maintained in line with Roads Act 1993 (Section 70). Concerned that lack of maintenance will have negative impact on RBRN SAC.

**Appellant response to Applicant/Forester Submission (09/11/2022)**

Expresses great concern the FAC did not provide fair process. Queries was delayed circulation of applicant/forester submission deliberate and related to the conflict-of-interest issue raised in their initial objection. The FAC provided the appellant with the applicant's forester's submission and allowed 14 days for the appellant to submit a response. The appellant responded to the points made by the



applicant/forester under the below headings. This response was considered in full by the FAC and the following is a summary:

***Notice of Approval***

Reiterates concerns regarding lack of management of scrub leading to “unsightly wasteland”. Concerns about rodents and fire hazards. Refers to Forestry & Landscape Guidelines and need to account for long-term implications of managing large open areas adjoining properties and fire hazards. Unsightly view will devalue properties.

***Residential Houses***

Queries detail of 60m setback – from house or boundary etc. Disputes applicant/forester statement that trees to the rear of houses do not comprise a forest. Impact on light. Enclosure. States setback >60m needed in this case. States site notice was illegible for a significant amount of time.

***Landscape Concerns***

View to Mount Leinster impacted. Views from road are blocked by hedges because landowner not managing them as per 1993 Roads Act. Forestry Landscape Guidelines referenced regarding scenic viewpoints.

***AASD***

Reiterates that full AA needed.

***Current Land Use***

Excellent agriculture land which is sought after - references food shortages. References Dr. Elaine McGoff’s comments on application details. Lack of transparent sharing of information. References legal advice on same.

***Contact with Concerned Households***

Disputes accuracy of the account of the forester’s discussion with neighbours on the 10/04/2021. Not all questions answered fully. Neighbours lost faith in forester’s ability to answer questions hence no further contact.

In conclusion the appellant states the site is “most inappropriate” for afforestation and states legal advice sought and DAFM decision does not comply with judgements of the CJEU.

***Appellant Email of 11/11/2022***

Refers to submission of letter of 09/11/2022 and submits that the applicant’s dwelling house is up for sale which confirms that they do not have the community’s best interest in mind.

**FAC Considerations**

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against specified decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision the subject of the appeal, or that the decision was made without complying with fair procedures. The FAC considered that some of the issues raised by the appellant are not related to the DAFM’s decision to issue CN88472 and therefore are outside of the remit of the FAC.

The FAC considered the grounds of appeal as submitted by the appellant. There were a number of contentions put forward by the appellant across various submissions/responses to submissions, as summarised previously in this letter. The FAC has considered all of these submissions in full and will address these under the headings below.

#### ***DAFM Screening for AA & EIA***

In the first instance, the FAC considered the DAFM's decision to grant CN88472 in light of the requirements of the Habitats and EIA Directives.

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

The FAC noted that a Stage 1 screening for AA was completed by an ecologist on the DAFM's behalf and recorded in an AASD. The AASD screened the RBRN SAC and the Slaney River Valley SAC for AA. Using the publicly-available EPA mapping tool, the FAC identified the same two European sites as being the only Natura sites within 15km of the proposal. Both European sites were screened out for Stage 2 AA, with reasons given. The potential impact of the proposal on the RBRN SAC is raised by the appellant in their grounds of appeal. Regarding this site, the ecologist states in the AASD that they have "examined, analysed, and evaluated, in the light of the best scientific knowledge in the field, the following aspects of the project: i) the nature of the proposed works (including associated operations and ancillary works) and location; ii) the above European site together with its QIs and conservation objectives, and iii) potential sources and pathways relevant to this European site". The AASD states that the RBRN SAC was screened out "due to the scale and nature of the project (native woodland planting, no drainage, ripping cultivation only, no fertiliser) and lack of hydrological pathway to the aquatic zone. No significant effects are envisaged." The FAC is satisfied that the DAFM have considered the potential for the proposal itself, i.e., individually, to have a significant effect on the Natura 2000 network in line with the requirements of the Habitats Directive.

The DAFM produced an In-Combination Report, as detailed above, which concludes that "there is no likelihood of the proposed Afforestation project CN88472 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 considered the phrasing of this conclusion to constitute a significant error in the DAFM's AA screening process as it shows that the decision maker has not considered effects that might arise from the proposal which themselves may not be significant but which, in combination with other plans and projects, could result in a significant cumulative effect on a European site.

The FAC considered the DAFM's screening of the proposal for EIA. The EIA Directive sets out, in Annex I, a list of projects for which EIA is mandatory. Annex II contains a list of projects for which Member States must determine through thresholds or on a case-by-case basis (or both) whether or not EIA is required. Neither afforestation nor deforestation are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Forestry Regulations 2017 (S.I. No. 191 of 2017) require that an *environmental impact assessment* is carried out in respect of an application for a licence for afforestation of an area  $\geq 50$ ha, the construction of a forest road of a length  $\geq 2000$ m, and any afforestation or forest road application below the specified parameters where the Minister considers

such development would be likely to have significant effects on the environment. The decision under appeal relates to a licence for afforestation of 11.94ha, so is sub-threshold for mandatory EIA and the DAFM completed an assessment to determine the requirement for EIA. The DAFM considered the proposal's potential to impact on the environment across a number of criteria before concluding that EIA was not required in this instance.

The FAC considered the DAFM's *Assessment for EIA Requirement* document (dated 22/06/2022) and noted that, in the section titled *Public Participation and NGO Participation* the DI answered "No" to the question "Comments and issues from the public and non-governmental bodies were received and examined?". This appears to be a clerical error given that in the AASR, also completed by the DI and dated 22/06/2022, Question 3 asks "As District Inspector, have you reviewed all referral responses and submissions received in relation to this?" to which the DI answers "Yes".

The FAC understands that while the "*Assessment for EIA Requirement*" document should be read as a summary document, and in combination with the record as a whole, the document only refers to other forestry projects in the section titled *Cumulative effect and extent of project* and does not expressly cross-reference the detailed record of other plans and projects contained in the AA In-Combination Report.

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

#### **Current Land Use and the Impacts on the RBRN SAC, Water Quality, and the Environment**

The FAC considered the appellant's submissions regarding the proposal's potential impact on the RBRN SAC, water quality, and the environment. The FAC consulted the publicly-available Site Synopsis for the RBRN SAC which is published on [www.npws.ie](http://www.npws.ie). This synopsis states, *inter alia*, that *Land use at the site consists mainly of agricultural activities – mostly intensive in nature and principally grazing and silage production. Slurry is spread over much of the area. Arable crops are also grown. The spreading of slurry and fertiliser poses a threat to the water quality of the salmonid river and to the populations of E.U. Habitats Directive Annex II animal species within the site...*

*The main threats to the site and current damaging activities include high inputs of nutrients into the river system from agricultural run-off and several sewage plants... The water quality of the site remains vulnerable. Good quality water is necessary to maintain the populations of the Annex II animal species listed above. Good quality is dependent on controlling fertilisation of the grasslands, particularly along the Nore.*

The FAC noted that the proposed project area is partially underlain by the Athy-Bagenalstown Gravels ground waterbody and is within the Barrow\_180 river waterbody. The Athy-Bagenalstown Gravels is currently rated as 'Poor' status and 'At Risk' with Agriculture listed as the significant pressure in the 3rd Cycle Draft Barrow Catchment Report and the Status Failure Reason recorded as "Nitrate (as NO3)". The Barrow\_180 is 'Moderate' status and deemed to be 'At Risk' with the significant pressures identified as Urban Run-off and Agriculture. The FAC observed that the approved operational proposals in the DAFM's approval letter include manual vegetation control, as opposed to herbicide application, and no fertiliser is to be applied. The ground cultivation will be limited to 'ripping' with no drains to be installed. The information before the FAC indicates that there is no surface-level hydrological connection between the proposed project area and the River Barrow. Based on the evidence before it, the FAC is of the view that the proposed project would represent a beneficial change in land use and land management practices in terms of potential to have a negative impact on the RBRN, the Barrow\_180 river waterbody, and the Athy-Bagenalstown Gravels ground waterbody. The FAC also considered that the proposal

would have a positive impact on local biodiversity given the native species which are proposed for planting, as opposed to intensively managed agricultural land.

### **Notice of Approval**

The FAC considered the grounds of appeal relating to the “notice of approval” which the appellant submits had “no conditions to approval”. The afforestation licence approval letter before the FAC, uploaded to the FLV on the 23/06/2022, contains conditions 1-5 which require, *inter alia*, adherence to the Environmental Requirements for Afforestation (ERA) and the Forestry Standards Manual (FSM).

The FAC considered that the DAFM are the relevant authority with responsibility for afforestation licencing. Regulation 9 of the Forestry Regulations 2017 sets out the circumstances where the Minister *shall consult with any consultation body that the Minister believes may have an opinion on the proposed development*. The FAC noted that the DAFM consulted with Carlow Co. Council, the NPWS, and An Taisce. The FAC observed that, following consideration of the response from the Co. Council, the DAFM then referred the application to TII for their response. The FAC is mindful that the DAFM are not bound by the Forestry Regulations 2017 to implement any recommendation made in a response from a consultation body, however, the TII’s response stated that *No works should impact any environmental mitigation provided in association with the M9 Motorway Scheme and TII recommends consultation with Carlow County Council in this regard*. There is no evidence before the FAC to suggest that the DAFM sought further information from the Co. Council. In the particular circumstances of this case, the FAC considered the DAFM should have confirmed with Carlow Co. Council exactly what environmental mitigation had been implemented in association with the M9 Motorway Scheme to allow the DAFM prescribe conditions to avoid interference with these measures.

The FAC noted that the NPWS did not make any specific observations on the application. Regulation 9(4) of the 2017 Forestry Regulations states that “Where a consultation body to whom a notice or further information is sent under this Regulation fails to make a submission or observation within 30 days from the date of the notice or such longer timeframe set out in the notice or further information, the Minister may make a decision without further communication to that body.”

### **Residential Houses & Setbacks**

The FAC considered the submissions regarding the potential impact of the proposal on the residential houses to the north-east of the proposed project area. The FAC observed that licence Condition 2 states that the afforestation project shall be carried out in accordance with the measures set out in the ERA and the FSM. Table 5 in the ERA prescribes the minimum utilised building setback. Table 5 states that building setbacks are measured from the outer wall of the roofed building, as opposed to the boundary wall of the property. The FAC found that a 60m dwelling house setback applies to the residences adjacent to the proposal. The ERA states that setback distance is “most critical when a building is surrounded by forest on two or more sides.” The FAC reviewed the submitted photographs and publicly-available aerial photography/satellite imagery and noted that the houses are bounded to the rear by a parcel of land containing what appears to be mature broadleaf trees with areas of scrub, throughout a wider area of open ground which appears to be grazed to some level of intensity. The Forestry Act 2014 (revised - updated to 29 June 2022) defines a forest as “land under trees with—

(a) a minimum area of 0.1 hectare, and

(b) tree crown cover of more than 20 per cent of the total area, or the potential to achieve this cover at maturity.

and includes all species of trees.”

The FAC's view is that it is unclear whether the land to the rear to the residential houses comprises a forest, or if it is more suitably categorised as parkland, as contended by the appellant's forester in his submission. The above definition of a forest uses a percentage of total area, and it is not clear which 'total area' is being referred to by the appellant. However, it is a matter of fact that the residential houses are currently surrounded on all other sides by agricultural land delineated by hedgerows. The FAC does not consider the vicinity of the project area to be "densely populated" but it is clear that a number of residents have expressed strong views opposing the proposal on the basis of the impact on the landscape, the loss of light, and similar issues. The FAC noted that the FSM states in Section 6.5.2 *Setback for dwelling houses / associated buildings* that "Forest developers should liaise with the owners of neighbouring properties, to resolve in advance any potential concerns." Based on the evidence before it, the FAC considers that the applicant made a substantive effort to engage with the adjoining residents via their registered forester to address the residents' concerns. The FAC noted the applicant's forester's submission that the Native Woodland Scheme has in-built flexibility to select smaller tree species on higher elevations such as the hill to the front of several houses. The FAC found that, in the particular circumstances of this case, given the level of concern expressed by local residents in their submissions on the application, the DAFM should have required a Species Map to be submitted by the applicant to show, *inter alia*, the areas to be planted with smaller tree species/native shrubs which should have included the brow of the hill opposite the residential houses.

The FAC considered the nature, scale, and location of the proposal in terms of risk of fire to the residential houses. The FAC has formed the view that, given the predominately broadleaf planting proposed, the separation distances between the residential houses and the proposal, and the surrounding agricultural landscape, the DAFM did not err in issuing this licence regarding the issue of fire risk.

The FAC considered that the provision of broadband/television/mobile phone services is a matter between the residents and the relevant service providers. The FAC noted that the DAFM's Native Woodland Scheme is open to applicants who meet the scheme criteria whether they are local residents or not. The view of the FAC is that the presence of rodents is an issue dealt with by homeowners in many rural/agricultural areas and is not particular to forestry plantations. The appellant has expressed a view that the proposal will lead to the development of an "unsightly wasteland" where unmanaged scrub is allowed to develop. They have also contended that the proposal will devalue their property. The FAC considered that the appellant did not adduce sufficient convincing evidence to support their contention regarding home values. The FAC was also mindful of the subjective nature of what constitutes an "unsightly" view. The FAC found that the DAFM did not err in the making of their decision in relation to these issues.

### **Landscape Concerns**

In relation to the appellant's submissions regarding the proposal's impact on the surrounding landscape, the FAC noted that the DAFM referred the application to Carlow Co. Council. The FAC considered the Council's response which states that the proposed site is within the Killeshin Hills Landscape Character Area which is rural/agricultural and has moderate sensitivity and moderate potential capacity to absorb different types of development. The Council highlighted that the LCA sets out how forestry plantations should be designed to be in harmony with the landscape. The FAC noted the applicant's forester's submission that the planting will be set out in concentric circles to mimic natural native woodland. Based on the information before it, the FAC found that the DAFM's approval of afforestation licence CN88472 is not in contradiction to Carlow Co. Council's response, as contended by the appellant.

Regarding hedgerow maintenance, the FAC considers that the DAFM's decision to issue afforestation licence CN88472 does not exempt the licence holder from meeting any legal requirements set out in the 1993 Roads Act or any other statute.

### **Conflict of Interest**

The FAC found that there was no convincing evidence before it to support the appellant's contention that the applicant's successful application for approval under the Native Woodland Scheme was as a result of the decision-maker's bias or a conflict of interest.

### **Conclusion**

Based on the evidence before it, as outlined above, the FAC found that the DAFM made a series of errors in their processing of the application prior to deciding to issue afforestation licence CN88472. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to carry out *and record a new AA screening and in-combination assessment, and a new assessment to determine the requirement for EIA*. The FAC considers that a new assessment to determine EIA requirement should include other, non-forestry, plans and projects when considering the potential cumulative effect of the proposal and should not rely upon adherence to Forest Guidelines which have been superseded by the ERA.

The FAC found that the DAFM should consult with Carlow Co. Council and confirm what environmental mitigation had been implemented in association with the M9 Motorway Scheme in order to consider the proposal's potential impact on same.

The FAC also found that the DAFM should require an updated Species Map to be submitted by the applicant, detailing the proposed planting design (concentric circles etc.) and clearly marking the area of high ground proposed to be planted with smaller species of native trees/shrubs and that this should be considered by the DAFM before the making of a new decision.

Yours sincerely,

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Luke Sweetman on behalf of the Forestry Appeals Committee



**An Coiste um Achomhairc**

**Foraíseachta**

Forestry Appeals Committee

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