



23rd November 2023

**Subject:** Appeal FAC 188/2022 against licence decision CN82466

Dear

I refer to your 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 ("The Act"), 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 FAC 188/2022 was held remotely by the FAC on 14<sup>th</sup> September 2023. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Luke Sweetman  
Secretary to the FAC: Ms. Ciara Murphy.

#### **Decision**

Having regard to the evidence before it, including the record of the decision which was made available to the FAC by way of the Forestry Licence Viewer (FLV), the notice of appeal, and submissions received, the FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to refuse the licence CN82466. The reasons for this decision are set out hereunder.

#### **Background**

The licence decision relates to an afforestation application at Park, Co. Limerick resulting in a decision on the 16/11/2022 to refuse a licence for 4.97ha on the basis that the proposed area is considered to be predominately comprised of suitable habitat for Hen Harrier conservation, is surrounded by an SPA and is in an area of high likelihood for Hen Harrier nesting, and is in the core foraging range of thee similar red areas for nesting Hen Harrier.

Information on file shows (see correspondence dated and uploaded to FLV 21/03/2022) that a decision to refuse was previously appealed to the FAC (103/2021) resulting in a set aside and remit on the basis of there being a serious error in relation to Appropriate Assessment of possible impacts on a European site.

For the avoidance of doubt, this decision of the FAC relates only to the decision to refuse a licence on the 16/11/2022, and is based on a review of the documentation on file relevant to the making of that decision.

### The application

On file and uploaded to the FLV on the 31/10/18 are the following:

- An OSI based fencing map, dated 19/09/2018 showing the locations of 1700m of Stock Fencing.
- An undated OSI based location maps showing the site location relative to the road network.
- An OSI based biomap dated 19/09/2018 showing 10m set back from a stream, a 10m setback from a road, location of site notice, access point, flow direction of a watercourse, mound drain direction, location of hedgerows and a note indicating mounds at 2m x2m intervals and the retention of hedgerows.
- An OSI based species map dated 19/09/2019 showing planting of Sitka spruce (3.94ha), alder (.4ha) and birch (.29ha), with a note indicating intimate mix and small fields mainly,
- A site notice, dated 18/10/2018, stating the townland as Park (Carrigerry) and the application area as 4.63ha, accompanied by a photograph of the site notice in situ.

### Submissions

There are four submissions on file:

1. Two identical submissions, both uploaded to the FLV on the 26/11/2018. One of these is dated the 25/11/2018, while the second has its date of submission obscured by DAFM redactions. Due to redactions, it is unclear if this is the same submission. Both raise concerns in relation to impacts on a nearby dwelling house and local roads.
2. A submission uploaded to the FLV and received by DAFM on the 5/12/2018 which raised concerns relating to the project site's proximity to a home, impact on sunlight, and hen harrier designation of adjacent land.
3. A submission uploaded to the FLV on the 10/12/2018 and marked as received by DAFM on the 06/12/2018. This states concerns relating to Hen Harrier, impact on sunlight, midges, road size and impact on property values.

### Processing by DAFM

#### Referrals - 2019

A referral was made to the NPWS on the 11/02/2019 and a reply received on 05/06/2019 noting the presence of a Red Zone for Hen Harrier and the consequent requirement for Appropriate Assessment. Retention of hedgerows and good forestry practice is recommended and an appendix on forestry and nature conservation is attached.

The referral to NPWS stated that the application was also being referred to An Taisce and Limerick County Council, but referrals are not on file to those bodies in 2019 (other referrals were made later in 2022 as outlined below).

#### Referrals - 2022

The application was referred to NPWS, Limerick County Council and the Western Region Fisheries Board on the 30/03/2022. A reply from Limerick County Council only is on file dated 05/04/2022. This refers to the status of "Owvane\_020" (the FAC understood this as referring to the Owvane (Limerick)\_020) as Good, but at Risk due to elevated Phosphate with Agriculture cited as the likely source. It is stated that the

County Council does not perceive there being a high risk of silt from the site if good forestry practice is applied.

#### Correspondence and the Natura Impact Assessment

DAFM wrote to the applicant on the 17/04/2019 requesting a revised species map, fencing map, biomap and drainage map with a request that these exclude the public road and neighbouring forestry, focus broadleaves on the north of the site, and take into account the location of adjacent dwellings. These are not on file; however the applicant provided a Natura Impact Statement (NIS) dated the 03/02/2021 prepared by a consultant ecology firm. This was accompanied by a Land Types for Afforestation report dated the 29/01/2021. The FAC notes that the DAFM issued circular 02/2020 to all registered Foresters and Forestry Companies, advising of the development of NIS templates, and that applications that were supported by an NIS would receive priority treatment. The NIS provided by the applicant was based on and refers to a walk over field survey carried out on the 09/12/2020. It notes three Natura sites that could potentially be impacted by the proposed project:

- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (Site Code 004161)
- River Shannon and River Fergus Estuaries SPA (Site Code 004077)
- Lower River Shannon SAC (Site Code 002165)

In relation to Hen Harrier, the NIS notes that

*Direct impacts to the Hen Harrier and Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA are unlikely given the nature of the works required on the site. Works will not occur within the footprint of the SPA. The habitat adjacent to the site is suboptimal for foraging Hen Harriers as it contains conifer plantations which have closed canopies. Madders (2000) has indicated that post-thicket or mature forest is generally avoided by Hen Harriers for foraging. He notes that the harriers may be forced to fly at greater heights subsequently impairing the birds' ability to detect and catch their prey (Madders, 2003).*

*The proposed afforestation site is suboptimal for Hen Harriers as it is made up of improved grassland which has become abandoned. This habitat provides little suitable cover for nests and is used infrequently by hunting Hen Harriers (Wilson et al., 2010). Harriers prefer moorland, grassland mosaics and pre-thicket forest habitats (NPWS, 2015). Their preferred prey species include Meadow Pipit (*Anthus pratensis*), Wood Mouse (*Apodemus sylvaticus*) and other small passerines during the breeding season whilst Meadow Pipit, Brown Rat (*Rattus norvegicus*) and wintering thrushes predominate in winter.*

Also on file and uploaded to the FLV on the same date as the NIS is a *Land Types for Afforestation report*, dated the 29/01/2021. This is prepared by the same consultant ecologist as the NIS. This describes the vegetation on the site as having a uniform nature, and concludes it is consistent with Fossitt Code GA1 (improved grassland).

#### Appropriate Assessment

A number of documents associated with an Appropriate Assessment (AA) for possible impact on European Sites in March to May 2021 are on file. As these were the subject of a subsequent set aside and remittal

of the decision by the FAC, these are not considered here. These resulted in a refusal to grant issued on the 25/05/2021.

An AA Screening Report and Determination (AASRD), uploaded to the FLV on the 09/11/2022 is on file and dated the 16/10/2022. This describes the soils on the site as being Surface water Gleys/Ground water Gleys (93%), Peaty Gleys (4%) and Blanket Peats (3%). The elevation of the project area is stated to lie between 130 m and 150 m above sea level and the document includes a topography map. The slope and aspect is given as being moderate in average at 3% and to range from 0% to 9%

In relation to habitat and onsite vegetation, the AASRD points out inconsistencies between the NIS and the Land Types for Afforestation Report (on file and dated 29/01/2021). It states that the site was site inspected by a DAFM field ecologist on the 30/03/2021 which led to a determination that the dominant habitat is wet grassland (GS4).

The site is stated in the AASRD to lie in the Owvane (Limerick)\_020 river sub-basin and this is given as *Good, not at Risk*, but notes that 6km downstream this changes to *Poor* with Forestry listed as a significant pressure. Five sites within 15km of the project site are screened for the likelihood of significant effects. In addition to the three listed in the NIS, the Barrigone SAC (Site Code IE0000432) and the Askeaton Fen Complex (Site code IE0002279) are also considered.

The following are screened in for full AA:

- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161
- Lower River Shannon SAC IE0002165
- River Shannon and River Fergus Estuaries SPA IE0004077

Reasons given for this screening include proximity to the site (for Hen Harrier) and hydrological connection (for Otter and Wetland habitat).

All screening decisions outlined in the AASRD also rely on an in-combination assessment which is included as an Appendix in the AASRD. This considers a range of planning systems and the Limerick County Development Plan. In relation to the screened-out sites, this states:

*In light of the plans and projects identified in the area, and the nature and location of the proposed works in relation to European Sites listed below, and/or lack of sufficient relevant source - pathway connectivity to these European Sites, the proposed project CN82466 would not give rise to any potential significant cumulative effects, in combination with other plans and projects identified/listed above, and therefore potential for significant effects can be excluded in this regard;*

An Appropriate Assessment Determination (AAD), uploaded to the FLV on the 09/11/2022 and dated the 06/10/2022 is on file. This makes reference to the previous AAD and subsequent appeal.

It also makes reference to the NIS and states that:

*Based on the information provided in the NIS (dated 03/02/2021), the Land Types for Afforestation Report (dated 29/01/2021) and the site inspection by the DAFM Ecologist (30/03/2021), the proposed area is considered to align with the above description of Rough*

*Grassland (RG). In addition, the proposed area is surrounded by a Hen Harrier SPA, is located within an area with high likelihood of nesting Hen Harriers (i.e. "Red Areas", see Appendix 21 in the Forestry Standards Manual (DAFM, 2015)) and is within the core foraging range of a further three similar "Red Areas" for nesting Hen Harriers. Given the sensitivity of the data for Hen Harrier high likelihood of nesting areas (HLNAs), this information is not publicly available and consequently was not available to the authors of the NIS. CN82466 is not within Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 and, although the NIS identified the potential for indirect impacts on Hen Harrier, it concluded that it is unlikely to have significant effects on the integrity of this European site. However, as mentioned above, the conclusion in the NIS did not consider the Ruddock classification of suitable/unsuitable habitat for Hen Harrier and was reached without the knowledge of HLNA locations. DAFM, in assessing CN82466, deems there is a likelihood that the proposed afforestation could significantly impact Hen Harrier in the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 through removal of foraging, nesting and/or roosting habitat, particularly considering the existing extent of forestry in the SPA.*

It concludes that mitigations can be put in place to prevent significant effects on the Lower River Shannon SAC (002165) and the River Shannon and River Fergus Estuaries SPA (004077), but states that in relation to the Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161:

*there is a high likelihood that the proposed afforestation could impact Hen Harrier in the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 through removal of foraging, nesting and/or roosting habitat, particularly considering the existing extent of afforestation in the SPA.*

The AAD also relies on an In-Combination report which is attached as an appendix and refers to online systems being consulted on the 27/09/2022. This includes the following:

*In the River Sub-Basin Owvane (Limerick)\_020 over the last 5 years a number of developments have been or were in the process of being granted planning permission. These too undergo environmental assessment, including AA screening and appropriate assessment, if necessary.*

*It is concluded that there is no possibility that the proposed Afforestation project CN82466, 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:*

- *Lower River Shannon SAC IE0002165.*
- *River Shannon and River Fergus Estuaries SPA IE0004077*

At page 5 of 21 of the AAD the distinction between the use in the NIS of Fossitt Codes (e.g. GA1, GS4) and the descriptors of grassland used by NPWS of "rough" and "improved" is highlighted. The AAD states that based on the information provided in the NIS (dated 03/02/2021), the Land Types for Afforestation Report (dated 29/01/2021) and the site inspection by the DAFM Ecologist (30/03/2021), the proposed area is considered to align with the above description of Rough Grassland (RG).

### Other Documents associated with Inspector's Certification.

A number of other documents are on file. These are:

- An Appropriate Assessment Screening Report dated 16/11/2022 with a certification date 15/11/2022.
- A Site details report dated 16/11/2022. This states that there is adequate access, gives the area as 4.97ha, and states that site notice in format prescribed has been erected.
- A Site plots report dated 16/11/2022 giving the total species area as 4.63ha
- An Assessment to Determine EIA requirement dated 16/11/2022, with a Certification Date of 15/11/2022 and a spatial run date of 15/11/2022.
- An Inspector's Certification dated 16/11/2022 with a certification date 15/11/2022. This includes a recommendation to refuse the licence.

### **Grounds of Appeal and Statement of Fact**

There is a single ground of appeal from the applicant:

*"I am appealing the decision again on the grounds that the ground is not designated for the Hen Harrier. I have spoken to the National Parks and Wildlife the Ranger, the Forestry Inspector, the regional Inspector and all are in support of the ground been planted. I have been trying to talk to someone in the Ecology office with 3 weeks but I'm still waiting for a reply I will forward further proof and evidence that it should planted in the next few weeks. I hope we can communicate and resolve this in the near future."*

The DAFM provided the FAC with a Statement of Fact (SoF) dated the 21/07/2023. The SoF confirms the administrative processing of the application as outlined above. A statement from the Inspectorate acknowledges the previous decision of the FAC, and states reasons for the refusal to grant a licence related to the presence of Hen Harrier in the locality and the nature of the proposed project site which is stated to be suitable habitat for that species.

The SoF is accompanied by a response from the DAFM Forest Service Ecology Section, which is dated the 10/03/2023. This states that refusal is warranted on the basis that there is likely impact on Hen Harrier based on the presence of "Rough Grassland" on the site, and its location withing the core foraging range of a site in the SPA and a further three similar "Red Areas".

### **Considerations of the FAC**

The FAC first considered whether an oral hearing was necessary to consider the appeal properly and fairly, and decided that the grounds of appeal, the SoF, and record of decision provided adequate details in order to determine the appeal.

The FAC noted that this is a decision to refuse the grant of a licence and it is subject to a first party appeal. As a consequence, the FAC considered the record of the decision to determine if this was issued in accordance with fair procedures.

There is a single ground of appeal which the FAC understands is to contend that as the ground on which the proposed project is to take place is not designated for Hen Harrier, the decision to refuse a licence for reasons relating to Hen Harrier is not justified.

The FAC note that the possibility of Hen Harrier being present in the locality of the project site is not disputed. The FAC further note that correspondence from NPWS on the 05/06/2019 stated that the site is within a “Red Zone” nesting area for the species. The Forestry Standard Manual (DAFM, 2015) sets out that a Red Zone for Hen Harrier is an area encompassed by a 1.2km radius from a Hen Harrier nesting area known to the NPWS.

The FAC considered whether, as a licencing authority, the DAFM properly carried out its obligations under Council Directives 92/43/EEC (“The Habitats Directive”) and 79/409/EEC (“The Birds Directive”) to consider whether *“Any plan or project not directly connected with or necessary to the management of the 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 site in view of the site’s conservation objectives”*. The “Site” in question may be a site designated for the protection of species or habitats under the Habitats Directive, or a site designated for certain species of birds under the Birds Directive. In the case of species, the protection afforded under the Directives applies to projects that occur within the confines of the protected site, and to projects that occur outside the confines of the project site that are within the natural range of the species for which the site is designated.

The Appropriate Assessment process is set out in general terms in the Directives, and consent authorities carry out the process informed by guidance provided by the European Commission and national and European case law. The process consists of Stage 1 Assessment which is a screening stage and Stage 2 Assessment, which is full Appropriate Assessment, or “Natura Impact Assessment”. The process also includes Stages 3 and 4 which may be invoked in certain circumstances which do not arise in this case. In Ireland, the NPWS provides guidance that where a project is located within 15km of a European site, a screening assessment is required<sup>1</sup>. It also sets out that where despite the inclusion of mitigation measures adverse effects on the integrity of a European site cannot be excluded, the plan or project must be abandoned.

The FAC note that the NIS provided by the applicant sets out no mitigations in relation to Hen Harrier, and that this was on the basis that the project site is sub-optimal for use by that species which it is stated consists of improved grassland which has become abandoned, and that Hen Harrier have tolerance for elevated noise levels that might be associated with project works. The site is also described in the NIS as consisting of predominantly wet grassland consistent with Fossitt Code GS4. However, the *Land Types for Afforestation report*, also provided by the applicant the vegetation on the site as having a uniform nature, and concludes it is consistent with Fossitt Code GA1 (improved grassland).

The DAFM carried out a Stage 1 Screening for Appropriate Assessment as recorded in the AASRD. This pointed out inconsistencies between the NIS and the Land Types for Afforestation Report (on file and dated 29/01/2021). It also states that the site was inspected by a DAFM field ecologist on the 30/03/2021 which led to a determination that the dominant habitat is wet grassland (GS4). The Assessment screened in three European sites including the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161

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<sup>1</sup> See: <https://www.npws.ie/protected-sites/guidance-appropriate-assessment-planning-authorities>

This resulted in a full Appropriate Assessment, as recorded and concluded in the AAD. At page 5 of 21 of the AAD the distinction between the use in the NIS of Fossitt Codes (e.g. GA1, GS4) and the descriptors of grassland used by NPWS of “rough” and “improved” is highlighted. The AAD states that based on the information provided in the NIS (dated 03/02/2021), the Land Types for Afforestation Report (dated 29/01/2021) and the site inspection by the DAFM Ecologist (30/03/2021), the proposed area is considered to align with the above description of Rough Grassland (RG). The AAD provides details of the plant species found on site, and found it to be in the process of reverting from wet grass land to a semi-natural state. The AAD also notes that while the NIS described the site as being sub-optimal for Hen Harrier, the relevant NPWS guidance, the NPWS Irish Wildlife Manuals 59 and 93 (Ruddock et al. 2012; 2016) do not refer to Fossitt habitat descriptors but instead provide definition of “rough” and “improved” grassland (with the former described as suitable for Hen Harrier conservation and the latter described as unsuitable), and expresses the opinion that the lands in question align with the definition of “Rough Grassland”.

This characterisation of the land, taken together with the proximity the project site to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (which effectively surrounds the site) which means it is in the foraging range of the Hen Harrier, and the proximity of “Red Areas” for nesting Hen Harrier, led the DAFM to determine that the proposed project could significantly impact Hen Harrier in the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 through removal of foraging, nesting and/or roosting habitat, particularly considering the existing extent of forestry in the SPA. The FAC considers that in normal course, in light of the obligation on a public body to not consent to a development activity where adverse effects on the integrity of a European site cannot be excluded (even in the circumstances where the project site is not located in the European site), this would be sufficient basis for the DAFM to refuse the licence.

However, in this particular case the decision was based on consideration of an NIS prepared on behalf of the applicant. It is acknowledged by the DAFM in the AAD that the applicant did not, and could not, have had knowledge that the project site is located in a Hen Harrier high likelihood of nesting area (HLNA), and within the core foraging area of a further three similar “Red Areas” for Hen Harriers. The DAFM in the AAD state that this is because of the sensitive nature of Hen Harrier data. However, while DAFM has not made available the location of nesting sites, it has revealed in publicly available information on the FLV (the AAD, and the response from NPWS dated the 05/06/2019) that the project site is in proximity to those sites. Furthermore, the DAFM was in possession of this information prior to the submission of the NIS, and prior to the Circular issued by the Department advising applicants’ foresters that an NIS could be submitted.

Under these circumstances the FAC considers that the DAFM has made a technical error in relation to the provision of fair procedures to the applicant. On this basis, the FAC are setting aside the decision of the Minister and remitting it so that the applicant be provided with an opportunity to amend the NIS if so desired, before a new decision is made. In so doing, the FAC suggests that DAFM update its processes to provide an applicant or their representatives a mechanism to determine the likely presence of HLNAs (or other sensitive habitat) before an NIS is produced.

### **Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and all submissions received. The FAC is satisfied a significant error was made in the making of the



decision in relation to affording the applicant fair procedures in this case. The FAC is, thus, setting aside and remitting the decision of the Minister to refuse a licence for CN82466 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to afford the applicant the opportunity to amend the NIS if so desired before a new decision is made.

Yours sincerely,

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John Evans On Behalf of the Forestry Appeals Committee

