



30<sup>th</sup> July 2024

**Subject:** Appeals FAC 021/2024 against licence decision CN92134

Dear

I refer to the appeal (FAC 021/2024) to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and Marine (MAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

#### **Hearing and Decision**

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 the appeal was held remotely by the FAC on 19<sup>th</sup> June 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly, & Mr. Luke Sweetman.  
Secretary to the FAC: Ms. Aedin Doran.

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the MAFM to grant the licence CN92134. The reasons for this decision are set out hereunder.

#### **Background**

The licence decision under appeal pertains to the afforestation of 7.72 hectares at Bunagarha, Co Kerry. The approval also provides for 800m of fencing. The application was submitted on 15/11/2022 and advertised on 25/11/2022 and on 12/05/2023. The proposal provides for the planting of mainly Sitka spruce (5.609 ha 85 % of plot 1), Additional Broadleaves (0.989 ha) and Sessile Oak, Scots Pine, Downy Birch and Rowan on a 3:3:2:2:2 ratio on plot 2 which comprises 0.31 ha. Plot 3 is 0.81 ha is described as GPC 9. The application is accompanied by Biodiversity Maps on file marked 15/11/2022, and 05/05/2023. There is also a document marked 'other' dated 05/05/2023 which was received following a request for further information as issued by the DAFM and this map shows the 'new house' which had been raised in a submission as being absent from the mapping.

A request for further information is on file dated 01/03/2023 which sought a revised biodiversity map showing the location and flow direction of all relevant watercourses / aquatic zones on site. A further request for information is on file dated 28/04/2023 indicating that the revised bio map (received) does not include setback distances from dwellings adjacent to the site and that these must be included. It sets out that the proposed fencing is excessive. It sets out that the recent Greenway is located near the proposed site and that the application must consider the greenway from a landscape point of view. It also draws to attention that the department has been informed the position of the site notice is only seen by traffic heading due east and is partly illegible. It asks that a photograph of clear site notice in both directions should be submitted. It also points out that there are new dwellings in the area that are not visible on the map of the proposed forestry and that one is a new dwelling that is bordering the lands to the North.

A further request for information dated 18/10/2023 issued indicating that there is a stream located in the middle of this site which flows along the hedgerow to the east and subsequently along the southeastern boundary and asks that a revised biodiversity map with the inclusion of the aquatic zone and associated setbacks is submitted.

The application materials on file sets out among other matters that the site is suitable for 15% Broadleaf Afforestation, that the site is not prone to flooding, that the site is free of shell marl or highly calcareous soils, that the status of the land is enclosed, that site access is adequate, that the soil type is mineral, that the site is exposed, that the aspect is neutral and that the vegetation type is grass / grass rush, that the ground preparation is to be by mounding, inverted mounding, that standard stocking and spacing to apply, that slit planting method would apply, that there would be no fertiliser, no drainage required, nor firebreaks.

#### **AAP Assessment form marked as uploaded 12/03/2024**

There is a report marked as uploaded on the forestry licence viewer (FLV) on 12/03/2024 entitled 'AAP Assessment form'. The report is itself undated and does not indicate who its author is. The report sets out observations that it states are based on '*desk-top study, information on iFORIS, application details, communications with Forest Service District Inspector (DI) (DI completed Site Inspection) expert opinion, and experience*' and includes that the project site is within the Article 12 Hen Harrier Breeding Distribution and that the habitats present are improved agricultural grassland, and wet grassland. It also states that OS Maps indicate the field areas have been improved and are subjected to management, that scrub/woodland, and wet grassland are adjacent to the east and that improved agricultural grassland extends away in all remaining directions. It also states that the project site is at the outskirts of Listowel Town, that a number of occupied dwellings occur within 100m of the project site, that the R523 road runs immediately adjacent to the south of the project, with ribbon development adjacent/extending away from the proposal site and that a small housing development is located in the field area to the east/southeast. Farmhouses/yards are stated to be located to the north and northeast of the project site.

The report sets out that the project site is not within an SPA designated for Hen Harrier and that the project site is not within the core foraging range of this European Site, nor is the project site within core

foraging range of HNLA associated with this European Site. It also states that the project site is not directly connected to this European Site by traditional hen harrier habitat (i.e. Bogland/peatland) while stating that vast open areas of improved agricultural grassland separate the project site and this European Site. It also states that the project site is not within a Non-Designated Important Area for Breeding Hen Harrier as defined in Ruddock (2016b) and that the separation distance between the project site and the closest Non-Designated Important Area for Breeding Hen Harrier, is outside the foraging range (core and maximum) of Hen Harrier during the breeding season. It states that a review of NBDC (understood by the FAC to refer to National Biodiversity Data Centre) datasets does not hold records of Hen Harrier at the project area within NBDC 1km (R0233, R0234) while stating that a review of NBDC datasets indicate records of Hen Harrier during the breeding season between ca, 2km – 4km distant from the project site. It states that as per Ruddock et al (2016a) one possible/confirmed breeding pair within R03 10km OS grid square (in which the project site is located) during 2015 National Hen Harrier Breeding Survey.

The report inter-alia states that given the existing land-uses/management, the project site is considered sub-optimal for foraging Hen Harrier and that there are similar habitats abundant in the greater landscape and that the habitats present do not correspond with the most frequently used broad habitat category for non-breeding (winter roosting) Hen Harrier as described in O'Donoghue (2021). It also records that the results of desk study and communications with the District Inspector indicates the lands immediately adjacent to the project site are not used by/are unsuitable for breeding Hen Harrier (i.e. nest sites) and that existing land-uses/existing disturbances indicates the project area/habitats in the proximity of the project site are unsuitable for breeding Hen Harrier. The report states that based on the earlier content of the report that *'the planting of trees because of CN92134 will not result in significant loss of suitable hen harrier habitat'*. The report also states that given *'the project area/adjacent lands are considered unsuitable for breeding hen harrier, and the separation distance of >5km to known hen harrier breeding sites, the planting of trees as per CN92134 will not result in significant, disturbance, or displacement related effects on hen harrier'*. The report concludes with a heading *'Determination'* wherein it states that *'it is determined the proposed CN92134 project will not result in Significant Negative Effects on Hen Harrier'*.

#### **DAFM (Inspectors) AA Screening Report & Determination dated of 24/11/2023**

An Appropriate Assessment Screening Report & Determination (AASRD) is to be found on file as prepared by a Forest Service Ecologist, dated 24/11/2023 on behalf of the Minister. The screening refers to *'Afforestation project CN92134, at Bunagarha, Co. Kerry'* and records considerations of four European sites as below.

- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161.
- Moanveanlough Bog SAC IE0002351.
- River Shannon and River Fergus Estuaries SPA IE0004077.
- Lower River Shannon SAC IE0002165.

This AA screening considers each site in turn and records a screening conclusion and reasons. The screening document concludes that an Appropriate Assessment was required in relation to one European

Site, ie the Lower River Shannon SAC IE0002165. This report references an 'Appendix A: In-Combination Report for Afforestation proposed under CN92134 'See File'.

### **DAFM Appropriate Assessment Report dated 24/11/2023**

An Appropriate Assessment Report (AAR) dated 24/11/2023 is to be found on file as prepared by a Forest Service Ecologist on behalf of the Minister. The AAR records that the Lower River Shannon SAC (IE0002165) was screened in and indicates that the purpose of this AAR is to evaluate whether the project (CN92134) individually or in combination with other plans and projects, would have an adverse effect on the integrity of 'any European Site, in view of that European Site's conservation objective(s) and best scientific knowledge'. It sets out that in undertaking the AAR, inter-alia, the following was taken into account.

- *'responses from consultation bodies and submissions from 3rd parties;*
  - *31/08/2022: Referral Letter issued to National Parks and Wildlife Service (NPWS). No response received.*
  - *31/08/2022: Referral Letter issued to Kerry County Council (KCC). No response received.*
  - *31/08/2022: Referral Letter issued to Inland Fisheries Ireland (IFI). On 02/10/2023 IFI response included;*

*Inland Fisheries Ireland has no objection in principle to this application but wishes to highlight the proximity of the Galey River which runs alongside the eastern site boundary and which comprises an important salmonid habitat. IFI noted:*

    - *It is important that no deleterious matter is permitted to discharge into any watercourse.*
    - *There should be no disturbance of the existing riparian zone during forestry operations,*
    - *On site management should be in place to prevent self-seeding to occur within aquatic buffer zones.*
    - *IFI recommends that the applicant be advised to ensure that ground stability is kept under constant review, and planting and associated operations are carried out in such manner as not to result in creation of unstable ground conditions, or subsequently lead to post planting ground instability.*
    - *To prevent nutrient losses to waters, fertilisation should not in the future be carried out on areas of the site that are as a consequence of the proposed ground preparation and planting, liable to drain/discharge directly to receiving waters.*
    - *IFI Limerick requires notification of commencement of operations.*
    - *IFI also note works must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines and with the Environmental Requirements for Afforestation as published by the Forest Service'.*

Section 3 of the AAR deals with the identification and assessment of potential adverse effects arising from the project itself (i.e. individually). Section 4 of the AAR sets out proposed mitigation measures and Section 5 deals with In-combination effects and makes reference to an Appendix 1 to the AAR.

**DAFM Appropriate Assessment Determination dated 08/01/2024.**

A separate Appropriate Assessment Determination for Afforestation project CN92134, at Bunagarha, Co. Kerry dated 08/01/2024 is to be found on the FLV where it is referenced as 'AAP Assessment Form'. This report records what was taken into account in undertaking the Appropriate Assessment wherein it also references having considered, inter-alia, the following.

- *'responses from consultation bodies and submissions from 3rd parties;*
  - *31/08/2022: Referral Letter issued to National Parks and Wildlife Service (NPWS). No response received.*
  - *31/08/2022: Referral Letter issued to Kerry County Council (KCC). No response received.*
  - *31/08/2022: Referral Letter issued to Inland Fisheries Ireland (IFI). On 02/10/2023 IFI response included;*

*Inland Fisheries Ireland has no objection in principle to this application but wishes to highlight the proximity of the Galey River which runs alongside the eastern site boundary and which comprises an important salmonid habitat. IFI noted:*

    - *It is important that no deleterious matter is permitted to discharge into any watercourse.*
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    - *IFI Limerick requires notification of commencement of operations.*
    - *IFI also note works must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines and with the Environmental Requirements for Afforestation as published by the Forest Service'.*

The AAD report states that *'Further to the receipt or preparation of additional information in relation to this application (in the form of an Appropriate Assessment Report (AAR)), and a decision pursuant to S.I. No. 293 of 2021 (as amended) and Regulation 10(4) of the Forestry Regulations 2017 (S.I. No. 191 of 2017) (as amended) to publish a formal notice of the same, there was a 30-day public consultation period to allow for submissions or observations in writing concerning the application. This 30-day period is now closed, and no submissions were received' and that 'It was determined that adequate information was available to enable an Appropriate Assessment Determination to be reached for this project. The Minister has carried out the Appropriate Assessment of the potential impacts of the likely significant effects of Afforestation project CN92134 on those European sites 'screened in' (as listed above) and has made*

*certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the proposed project, individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the following mitigation is implemented'*

The AAD report goes on to set out the mitigation proposed and concludes that *'the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site'*.

#### **DAFM Appropriate Assessment Screening Report and Determination Appendix 1**

There is on file an In-combination report for afforestation project CN92134 titled as 'Appropriate Assessment Screening Report and Determination Appendix 1, which is dated 24/11/2023 and which the FAC understands is an appendix to the AASRD dated 24/11/2023 and therefore appears to be the In Combination report for the screened-out sites. However, the reference in the AASRD is to an Appendix A whereas this document is referenced as Appendix 1. It includes the following statement:

*'The proposed afforestation project CN92134 lies in a rural landscape in the townland(s) of Bunagarha, Kerry. It is within the River Sub-Basin FEALE\_080, approximately 4% of which is under forest cover, which is less than the national average of 11%. At 7.72(ha), the proposed project is considered small in scale. The review of the DAFM Forestry Licence Viewer identified a number of forestry projects within the vicinity. These projects are subjected to Environmental Assessments including assessment required under the Habitats Directive.*

*In the River Sub-Basin FEALE\_080 over the last 5 years a number of developments have been or were in the process of being granted planning permission. These too are subjected to Environmental Assessments including assessment required under the Habitats Directive.*

*Given the nature and location of the proposed works in relation to European Sites listed below, and lack of source - pathway of connectivity to result in potential significant effects on these European Sites, the proposed project CN92134 Project will not give rise to any potential significant cumulative effects, in combination with other plans and projects identified, and therefore likely significant effects can be excluded in this regard;*

- *Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161.*
- *Moanveanlagh Bog SAC IE0002351.*
- *River Shannon and River Fergus Estuaries SPA IE0004077.*

*Therefore, it is reasonable to conclude, that the proposed project, either individually or in combination with other plans or projects would not be likely to result in significant effects on the European Sites listed above.*

*As per the Appropriate Assessment Screening Report and Determination (AASD) (dated 24/11/2023) for the CN92134 proposed project, 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. 31 of 2020), DAFM has determined that there is the possibility of the proposed project having a significant effect, either individually or in combination with other plans and projects, on the European Site(s) listed below;*

- *Lower River Shannon SAC IE0002165.*

*As such, the CN92134 project must advance to Appropriate Assessment stage in relation to these European Site(s)'.*

#### **DAFM Appropriate Assessment Report Appendix 1**

There is on file an 'Appropriate Assessment Report Appendix 1: In-combination report for afforestation project CN92134' which is dated 24/11/2023 and is described as an Appendix to an Appropriate Assessment Report. This In Combination assessment is in respect of the screened in site and includes the following statement.

*'It is concluded that there is no possibility that the afforestation project CN92134, with the mitigation measures set out in Section 4, will itself, i.e. individually, adversely affect the integrity of those European Site(s) screened in (as listed elsewhere in this AA Report. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives have been considered in reaching this conclusion. There is no likelihood of any residual effects that might arise, which do not in themselves have an adverse effect, creating an adverse effect on the integrity of the site(s) in-combination with other plans and projects. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that those plans and projects do not give rise to any adverse effect on the integrity of those same European Sites. It is concluded that this project, when considered in combination with other plans and projects, will not adversely affect the integrity of those same European Site(s). Note that this relates to the proposed activities under CN92134 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted'.*

#### **Assessment to Determine EIA Requirement**

The DAFM recorded a consideration as to whether the proposal should be subject to an EIA. In addition to the previously identified records, this records a consideration of the proposal across a range of criteria and included that the application should not be subject to the EIA process. The record shows that the application was desk and field assessed. The statement provided by the DAFM to the FAC indicates that the application was referred to Kerry Co. Council who responded suggesting conditions and drawing attention to access requirements. In examining the content of the Assessment to Determine EIA Requirement on file and regarding the N/A answer on page 1 of 6, the FAC notes that Questions 2.11 & 2.12 are referred to but the document itself does not label the questions as such. In the particular

circumstances of this case the FAC considers that the author has provided the rationale for the answers to Questions 2.11 & 2.12 and the answers indicate that these are the two questions immediately preceding the last question in this section. The FAC considers this to be a clerical error but not a significant one. The licence was issued on 01/02/2024 subject to conditions.

### **Appeal**

There is one third party appeal made against the decision to approve licence CN92134. The full grounds of this appeal and submissions received by the FAC are to be found on file and have been provided to the parties concerned. The DAFM informed the FAC that the documents required under the Forestry Appeals Committee Regulations 2020 are provided through the Forestry Licence Viewer (FLV) and the parties were notified of this. A brief summary of the grounds of the appeal is set out below.

- Contention that the R523 is extremely busy and that the entrance to same from the project site is dangerous.
- Submission that the area is densely populated with 36 houses within 1 km west, 28 houses for 1 km east and 90 houses within 1 km radius.
- Submission that there is a nursing home nearby and a large fabrication industry.
- Raises accident history of the road.
- Contends that the river Feale is overlooked and references that good fishing is available in the river.
- References the extent of wildlife in the lands and makes submissions relating to Hen Harrier.
- Contends sightlines at the entrance are very poor.
- Raises the topography of the road.
- Raises an issue with drainage and contends that drainage from the appellant's site has been vandalised by the landowner in the past.

### **DAFM Statement (SOF) to the FAC**

The DAFM provided a statement (SOF) to the FAC in relation to the appeal which outlines the procedure adopted by the DAFM in processing the application, the related dates and the final decision. It is submitted (among other matters) that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the 2014 Forestry Act. The statement submits that the application was referred to Kerry Co. Council and that two replies were received. The SOF in response to the appeal sets out that a desktop study and subsequent field inspection of the afforestation application was carried out on the 21/10/2023.

*It also states that 'After the field inspection, and the provision of an AASD and additional environmental constraints document, I was satisfied that the site was appropriate for approval.*

*The appellant objections relate to the potential impacts of the proposed afforestation the environment including the nearby Moanveanlagh Bog SAC, the River Feale and the hen harrier, as well as other issues such as traffic within the locality and the nearby greenway. They further expressed concerns regarding the potential impacts of the afforestation on their adjacent property including fire risk, views, and satellite signal.*



*The attached AASD and assessment of additional environmental constraints have addressed the environmental issues relating to nearby Natura 2000 sites, river bodies and the hen harrier, and no significant impact was identified for these environmental considerations.*

*The greenway will not be impacted by the afforestation project as it is more than 400 m from the afforestation project, and the southern boundary will be planted with broadleaves.*

*All concerns relating to the potential impacts of the afforestation on their adjacent property that are within the scope of the afforestation project have been addressed, in my opinion, through the design of the afforestation project such as the implementation of a 60 m setback from adjacent dwellings and the planting of additional rows of broadleaves to reinforce the setback.*

*In relation to the appellants concerns regarding traffic safety, full technical details for a forest road entrance are not within the scope of afforestation licences, which are addressed in the future when the site is ready for harvesting. As stated in the Forestry Standards Manual, the only requirement necessary for afforestation licences is that the land must have road frontage, assuming all other criteria have been met such as legal rights-of-way. The licence was approved based on the following statement in the Forestry Standards Manual:*

*"Adequate access is deemed relevant for afforestation purposes once the proposed lands are adjoining a public road".'*

#### **Post Appeal Correspondence**

Following a consideration of the appeal at a hearing on 19/06/2024 the FAC sought clarification from the DAFM on a number of matters. The content of the clarification request made by the FAC is as follows;

*"The FAC is seeking further information in relation to the appeal FAC 021/2024 against licence decisions CN92134. In considering this appeal the FAC has noted that the Appropriate Assessment Report of 24th November 2023 contains inter-alia, the following passage at Section 2 where it is set out what was considered when completing the report.*

*'responses from consultation bodies and submissions from 3rd parties;*

- 31/08/2022: Referral Letter issued to National Parks and Wildlife Service (NPWS). No response received.*
- 31/08/2022: Referral Letter issued to Kerry County (sic) Council (KCC). No response received.*
- 31/08/2022: Referral Letter issued to Inland Fisheries Ireland (IFI). On 02/10/2023 IFI response included; Inland Fisheries Ireland has no objection in principle to this application but wishes to highlight the proximity of the Galey River which runs alongside the eastern site boundary and which comprises an important salmonid habitat. IFI noted:*
  - It is important that no deleterious matter is permitted to discharge into any watercourse.*
  - There should be no disturbance of the existing riparian zone during forestry operations,*

- On site management should be in place to prevent self-seeding to occur within aquatic buffer zones.
- IFI recommends that the applicant be advised to ensure that ground stability is kept under constant review, and planting and associated operations are carried out in such manner as not to result in creation of unstable ground conditions, or subsequently lead to post planting ground instability.
- To prevent nutrient losses to waters, fertilisation should not in the future be carried out on areas of the site that are as a consequence of the proposed ground preparation and planting, liable to drain/discharge directly to receiving waters.
- IFI Limerick requires notification of commencement of operations.
- IFI also note works must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines and with the Environmental Requirements for Afforestation as published by the Forest Service'.

*In considering this appeal the FAC further noted that the Appropriate Assessment Determination Report of 8th January 2024 contains inter-alia, the following passage at Section 2 where it is set out what was considered when completing the report.*

*'responses from consultation bodies and submissions from 3rd parties;*

- *31/08/2022: Referral Letter issued to National Parks and Wildlife Service (NPWS). No response received.*
- *31/08/2022: Referral Letter issued to Kerry County Council (KCC). No response received.*
- *31/08/2022: Referral Letter issued to Inland Fisheries Ireland (IFI). On 02/10/2023 IFI response included; Inland Fisheries Ireland has no objection in principle to this application but wishes to highlight the proximity of the Galey River which runs alongside the eastern site boundary and which comprises an important salmonid habitat. IFI noted:*
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  - *To prevent nutrient losses to waters, fertilisation should not in the future be carried out on areas of the site that are as a consequence of the proposed ground preparation and planting, liable to drain/discharge directly to receiving waters.*
  - *IFI Limerick requires notification of commencement of operations.*
  - *IFI also note work IFI also note works must be carried out in accordance with Good Forestry Guidelines and Water Quality Guidelines and with the Environmental Requirements for Afforestation as published by the Forest Service'.*

*The FAC wish to establish whether the application CN92134 was referred to the NPWS and the IFI as stated in the extract passages above as evidence of these referrals nor the IFI response quoted appears on the Forestry Licence Viewer for the project. The FAC also notes that the SOF provided to the FAC for this appeal does not mention a referral to the NPWS nor the IFI and includes that the Local Authority did respond to the referral.*

*The FAC also notes that the schedule in Appendix A as contained in the approval letter / licence notification relating to licence CN92134 records a 'Not Entered' commentary for all of the operational proposal details and wishes to establish whether there is a rationale for these entries or whether these entries were, in at least some of the cases, made in error.*

*The FAC also notes that the Appropriate Assessment Screening Report and Determination dated 24th November 2023 references an Appendix A whereas the In-combination that relates to the screened out sites on file is headed as Appendix 1. The FAC wishes to establish whether there is an Appendix A as referenced in the AASRD or whether the naming of the In-combination assessment report on file for the screened out sites as Appendix 1 is an error.*

*The FAC notes that the Appropriate Assessment Determination document is titled on the forestry licence viewer as 'AAP Assessment Form'.*

*The FAC requests a response to this request at the soonest opportunity”.*

The FAC received a response dated 27<sup>th</sup> June 2024 to the request made by it for clarification. The text of the said response is set out below.

*“Forestry Appeals Committee,*

*Re: CN92134 FAC021/2024*

*DAFM Approvals Response:*

*This file was never referred to IFI or the NPWS. The AAR states these referrals took place on 31.08.22 but the file wasn't set up until November 2022. The only prescribed body letter on the file is to Kerry County Council dated 01.03.23 and they responded on the 18.04.2023.*

*In relation to the name of the AAD on the FLV, DAFM can't see how this happened as the actual AAD was made public so the name should have carried across. The 2nd AAP assessment form on the FLV is a HNVf assessment.*

*DAFM Ecologist Response:*

*Referrals described in Appropriate Assessment Report and Appropriate Assessment Determination have been entered in error.*

*Appropriate Assessment Screening Report and Determination describes an Appendix A....The Appendix A is an Error, this should be Appendix 1.*

*Regards''*,

#### **Considerations of the Forestry Appeals Committee**

The FAC in the first instance considered whether an oral hearing was required in the case of this appeal and having regard to the particular circumstances of the appeal the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The FAC considered the grounds in the appeal relating to Appropriate Assessment (AA) and related matters (including the contention relating to Hen Harrier). The FAC finds that an AA Screening (AASRD) on file as carried out by a Forest Service Ecologist which screens in the Lower River Shannon SAC IE0002165. The FAC finds that the AAR on file for the project CN92134 records incorrect information in relation to what referrals of the application took place (i.e. that the application was referred to the NPWS and the IFI when in fact it wasn't) while also recording a detailed response from the IFI that does not appear to relate to application CN92134. It is also recorded that Kerry County Council made no response when in fact two responses were made and are to be found on file. The FAC also finds that the AAD on file similarly records incorrect information in relation to what referrals of the application took place while also recording a detailed response from the IFI that does not appear to relate to application CN92134. It is also recorded that the County Council made no response when in fact two responses were made and are to be found on file. The FAC considers that the recording of incorrect information in both the AAR and AAD in relation to the application referral and in relation to responses received represents a serious error in the processing of the application as it relates to the Appropriate Assessment Process. The FAC also find that an incorrect reference was made to the Appendix related to the AASRD (i.e. where Appendix 1 was used instead of Appendix A). The FAC concluded that this is a minor error and would not in itself be a serious error in the processing of the application. However there are other serious errors in the processing of the application which require that the decision CN92134 is set aside and remitted to the Minister. Similarly, the clarification from the DAFM in relation to the name of the AAD on the FLV is noted by the FAC. The FAC considers that the DAFM should review the names given to the documents displayed on the FLV relating to the application to ensure that all documents and reports are accurately named.

The FAC considered the contentions made in the appeal grounds relating to density of development in the area and the existence nearby of a nursing home and a fabrication industry. The FAC noted that the location of any dwelling houses in the vicinity of the project area are beyond the minimum setback distances that are normally applied in the case of afforestation licence approvals relating to dwelling houses, that conditions to ensure this are contained within the licence, and that the appropriate setbacks are proposed along the public roads. The FAC also noted that the licence conditions require adherence to the Environmental Requirements for Afforestation which includes standard setbacks for various features.

The FAC considered the submission from the Planning Authority in relation to the application and noted that same focused on archaeological matters and raised no concern with the potential impact of the proposed project on residential amenities. The FAC concluded that there was no convincing evidence that the DAFM made a serious or significant error, or series of errors in making the decision to grant CN92134 in relation to these grounds in the appeal.

The FAC considered the contentions made in the appeal grounds relating to the access from the project site to the public road, road safety and the capacity of the road network to accommodate the proposal. The FAC examined the documentation submitted in relation to this issue including the submission made by the operations department of Kerry County Council which confirms that the access point to the project area is at a point on the public road where a 60kph speed limit applies. The FAC also noted from the copy photographs submitted by the appellant that the access point to the project occurs at a point on the public road where a broken centre line exists which is in itself an indication of the existence of a sight distance that does not require a prohibition on overtaking in either direction subject to the speed limits that apply at the location. The submission from the Council suggests that further information should be obtained however it is noted that this suggestion relates to information relating to harvesting operations whether as thinning or clearfell. The FAC notes that any future thinning or felling at the location will be the subject of a separate consenting process. The Council submission also sets out that planning permission will be required for any new construction or extension of a haulage road within the proposed forestry and notes that no such proposal is provided for in this application. The submission included suggested conditions for inclusion in any licence issued. Having considered these issues the FAC would note in terms of traffic that the project will not generate constant use but will be intermittent in nature confined largely to periods of thinning and felling (which will be the subject of a separate consenting application(s)) and therefore will not significantly impact traffic flows. In these circumstances, the FAC concluded that there was no convincing evidence before it that a significant or serious error was made in the making of the decision by the Minister to grant the licence for the proposal as it related to the grounds of appeal regarding traffic generated, road safety or the capacity of the road to accommodate this afforestation proposal.

The FAC considered the contentions made in the appeal grounds relating to an issue with drainage wherein it is contended that drainage from the appellant's site has been vandalised by the landowner in the past. The FAC considers that this is a civil matter between the parties and does not fall to be determined by the FAC. The FAC noted that condition number 3 of the licence as issued required that all works adhere to the specific operational proposals set out in Appendix A (to the licence). The FAC further noted that the schedule in Appendix A as contained in the approval letter / licence notification relating to licence CN92134 records a 'Not Entered' commentary for all of the operational proposal details and asked in its clarification request to the DAFM that it wished to establish whether there is a rationale for these entries or whether these entries were, in at least some of the cases, made in error. This element of the clarification request was not addressed in the response received from the DAFM.

The FAC considered the submission made in the appeal grounds contending that the river Feale was overlooked and references that good fishing is available in the river. The FAC notes that in the appendix to the AASRD it sets out that *'The proposed afforestation project CN92134 lies in a rural landscape in the*

*townland(s) of Bunagarha, Kerry. It is within the River Sub-Basin FEALE\_080, approximately 4% of which is under forest cover, which is less than the national average of 11%. At 7.72(ha), the proposed project is considered small in scale. The review of the DAFM Forestry Licence Viewer identified a number of forestry projects within the vicinity. These projects are subjected to Environmental Assessments including assessment required under the Habitats Directive'. The FAC also notes that water quality related questions were posed by the DAFM in its further information requests to the applicant. The FAC considers that this is evidence that the water related impacts of the proposal were considered and also notes evidence of this in the extent of conditions included in the AAD as mitigations that relate directly to the protection of water quality. Notwithstanding, the FAC notes that entries were made in the AASRD and AAR which quoted requirements of the IFI in a circumstance where there is no submission on file from the IFI to correspond with this position. The FAC concluded that it is a serious error to record materials in a consideration of a proposal that are not related to the proposal and that as a result there is confusion as to whether the assessment made can be conclusive. The decision in this case is being set aside and remitted for reasons set out elsewhere in this letter and the FAC requests that the matter of consideration of potential impacts and effects of the proposal on the River Feale should be clearly set out and documented on file prior to a new decision being made on the application.*

The FAC is satisfied that serious errors were made in the making of decision CN92134. The FAC is thus setting aside and remitting the decision of the Minister regarding licence CN92134 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new screening for Appropriate Assessment and, if required, prepare an Appropriate Assessment Report that identifies and assesses likely significant effects on European sites, of the proposal itself and in-combination with other plans and projects, and, where they occur, mitigation measures and an assessment as to whether the proposal would impact on the integrity of a European site. The Minister should also address the other matters raised in this letter before a new decision is made on the application.

Yours sincerely,

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Seamús Neely, On Behalf of the Forestry Appeals Committee