



29/01/2023 2024

**Subject: Appeal FAC196/2022 in relation to the refusal of an afforestation licence under CN88584**

Dear

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

**Hearing & Decision**

Appeal reference FAC196/2022 was considered during a sitting of the FAC held remotely on the 05/10/2023 which was attended by the following participants:

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

**FAC Administration** – Ms. Ciara Murphy

The record of the Minister's decision was made available to the FAC by way of the publicly available Forestry Licence Viewer<sup>1</sup> (FLV). On receipt of the appeal, members of the FAC reviewed the file in order to determine whether the appeal was proper to the work of the Committee. In so doing, it was noted that substantial portions of the documents on file and available on the FLV are redacted. On this basis, on the direction of a Deputy Chair of the Committee, FAC administration at the Agriculture Appeals Office wrote by email to the Department of Agriculture, Food, and the Marine (DAFM) on the 26/05/2023 requesting unredacted copies of various documents. These were an Ecology Report, Natura Impact Statement (NIS), Appropriate Assessment Screening Report & Determination (AASRD), and Appropriate Assessment Determination (AAD). It was stated in the request that any information received would be confidential to the members of the FAC and staff of the Agriculture Appeals Office.

On the 29/05/2023 the Forestry Support Unit of DAFM responded providing two unredacted versions of NISs prepared on behalf of the applicant who is the first-party appellant. This response further stated that a DAFM ecologist had determined that these were the only two documents that could be provided to the Committee. A separate email on 29/05/2023 from the DAFM, also referring to the request for unredacted information, was received and this stated that apart from the two NISs provided by the first-party appellant, none of the other requested documents could be released in unredacted form to the FAC as they contained sensitive information from a non-statutory environmental organisation who had

<sup>1</sup> <https://flv.apps.services.agriculture.gov.ie/>

specifically stated the information was not to be shared with the FAC. It was also stated that release of the information would result in the FAC having access to more information than is available to the public.

On the 30/05/2023 the FAC administration at the Agriculture Appeals Office wrote by email to the DAFM questioning the basis of the decision not to provide unredacted documents to the Committee, and in particular how information provided to the DAFM by a third party could be relied on when making a decision, but not be relied upon by an Appeals body. The attention of DAFM was also drawn to Section 7(2)(b) of the Forestry Appeals Regulations 2020. No response to this query was received by the FAC administration at the Agricultural Appeals Office and a hearing date was scheduled for the 05/10/2023.

On the 05/10/2023 a division of the FAC convened and, having considered the above, determined it was appropriate to consider the appeal, noting that it was open to the Committee to adjourn if it was found during its deliberations that further information was required or an oral hearing was required to properly and fairly determine the appeal.

The FAC considered all of the evidence before it, including the record of the decision by the DAFM as provided on the FLV and the two unredacted NIS documents provided by the 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 refuse afforestation licence CN88584, for the reasons outlined hereunder.

### **Background**

The decision under appeal was issued by the DAFM on 30/11/2022 and relates to a proposal for 2.72ha of afforestation in Flean More, Co. Limerick. In summary, the refusal letter stated that the application could not be approved due to "environmental considerations" and because of the potential for forestry operations to cause disturbance to Hen harrier. The DAFM considered that the loss of the proposed project site (as a known breeding and foraging site) would cause significant adverse impact to Hen harrier in Ireland and as a result the licence application was refused. The DAFM stated that "This refusal is to ensure good forestry practice, the protection of the environment, health and public safety. This refusal is issued under the Forestry Regulations 2017 (S.I No. 191 of 2017)".

### **Site Details**

The *Site Details Report – Pre-Approval* document on the FLV states the soil type is mineral and the site is comprised of enclosed land, currently in agricultural use, which is moderately exposed, with a neutral aspect. The vegetation type(s) within the project area are recorded as grass/rush and "Scrub/Laurel/Rhodo". Aerial imagery on the FLV shows the proposal is bordered to the north and east by existing coniferous forestry.

The proposal is in the 24 Shannon Estuary South Catchment, The 24\_7 Owvane[Limerick]\_SC\_010 Sub-Catchment, and the Glencorbry\_010 River Sub-Basin. The Glencorbry\_010 river waterbody runs along the southern boundary of the proposal. Publicly available information on Catchments.ie shows the Glencorbry\_010 river waterbody has 'Moderate' status (assessed by monitoring – "high confidence") for the 2016-2021 period and its risk status is 'At Risk'. The 3rd Cycle Draft Shannon Estuary South Catchment Report (HA 24) identifies the Glencorbry\_010 as one of three waterbodies where forestry is a significant pressure and states (page 24) that "The significant issues are arising primarily as a result of clearfelling and associated operations, which results in increased sediment and nutrient loads". Appendix 3 of the

Catchment report shows that both agriculture and forestry are recorded as significant pressures on the Glencorbry\_010.

The proposal is underlain by the Ballylongford ground waterbody which Catchments.ie records as having Good status but is 'At Risk' however, no specific pressure is listed in the associated 3<sup>rd</sup> cycle catchment reports.

### **DAFM Processing of the application**

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

The application was field inspected on the 28/05/2021 as well as being desk-assessed. The DAFM's District Inspector (DI) completed an "Assessment for EIA Requirement", which has a certification date of 27/09/2022. The EIA assessment considered the proposal's potential impact on the environment across a range of criteria including the *Cumulative effect and extent of project* where it is noted that the approximate percentage of forest cover currently in the "underlining waterbody (or waterbodies)" is 14.11%. This section also states that the application, "together with existing afforestation of 3 years or less within a 500 metre radius", constitutes an area of 14.03ha. In the section titled "Designated and non-designated Habitat Recommendation" it is stated that, following referral to the Forest Service Ecologist and/or National Parks & Wildlife Service (NPWS), in evaluating the scale and significance of any potential impact, refusal of the application was recommended.

#### **Ecology Report**

An Ecology Report, dated 26/09/2022, was produced by a DAFM Ecologist, and was posted on the FLV on 30/11/2022. There are a number of sections in the Ecology Report which are redacted. The report does not contain a habitat map but does include the following information:

- *A site visit was conducted 08/09/2022 by DAFM Ecologist to determine the suitability of the proposed project site for Hen Harrier based on the reporting of a Hen Harrier on site during the NIS survey. Additionally, the DI had reported that wet grassland was present on the project site but the NIS described the grassland as improved agricultural grassland which would not be suitable for Hen Harrier.*
- *During the site visit DAFM ecologist noted the presence of semi natural grassland on the project site. The wet grassland on the site includes orchids, sedges and rushes as well as a high percentage cover of forbs. This grassland had been identified as GA1 Improved Grassland in the accompanying NIS however, the presence of a number of indicator species for the Annex I habitat Molinia Meadows was noted by DAFM Ecologist. Devils bit scabious (*Succisa pratensis*), a foodplant for the Marsh Fritillary Butterfly (*Euphydryas aurinia*) Irelands only Annex II invertebrate species protected under the EU Habitats Directive was noted in abundance on the site.*
- *The entire site (outside of the area in the north of the site that has been defined as poor heath in the NIS) is characterised as GS4 (Fossitt, 2000), and has links with the Annex I habitat '6410 Molinia meadows on calcareous, peaty or clayey-silt-laden soils (*Molinia caeruleae*)'.*

The Ecology Report includes a section titled "Assessment and Recommendations" which begins by addressing "the Annex I habitat" in its first paragraph but is heavily redacted. The second paragraph in

this section begins with “As described in the AAD” and then is completely redacted. The third paragraph states:

*Taking into consideration the area of Annex I habitat, the required setback for this habitat, the ESB corridor and the house setback there is only a relatively small area of the application eligible for planting and this would not meet the minimum area requirement for conifer plantations (see Section 5.4.1 Forestry Standards Manual).*

There follows a sentence which is redacted but includes the statement “see AA Determination”.

The final paragraph in the “Assessment and Recommendations” section states:

*Following a review of the initial application CN88584, including all information submitted by the applicant including an NIS, information available via iFORIS (including its GIS MapViewer), information from DAFM ecologist field visit, consultation with the Irish Winter Hen Harrier Survey and responses from 3rd Parties and referral bodies, it is recommended that CN88584 at Flean More, County Limerick is REFUSED.*

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

The following documents are published on the FLV and comprise the record of the DAFM’s AA process before the FAC. All of these documents contained redacted sections:

- 1<sup>st</sup> NIS, compiled a Senior Environmental Consultant with Envirico Ltd, on behalf of the applicant, dated 08/11/2021.
- 2<sup>nd</sup> NIS, compiled by the same Senior Ecologist, on behalf of the applicant, dated 04/05/2022.
- AA Pre-Screening Report (AAPSR) also compiled by the same Senior Ecologist, on behalf of the applicant, dated 04/05/2022.
- AASRD, prepared by a DAFM Ecologist, dated 26/09/2022.
- AAD, made by the same DAFM Ecologist, dated 26/09/2022.

#### **NIS**

As noted previously, unredacted versions of both NISs were provided to the FAC by the DAFM via email. There is no information before the FAC to suggest that the 2<sup>nd</sup> NIS was informed by new information from a more recent field visit than that which informed the 1<sup>st</sup> NIS. Both NISs list the River Shannon and River Fergus Estuaries SPA and the Barrigone SAC as screened-out, and the Lower River Shannon SAC and the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA as screened in for Stage 2 AA. The 2<sup>nd</sup> NIS largely re-states the information compiled in the 1<sup>st</sup> NIS and both include a description of the project area and the proposed operations. Both NISs include a statement from the consultant Senior Ecologist in Section 1.3 that “It is notable that a Hen Harrier was observed during the site survey flying over the proposed development site, flying from and to coniferous forestry surrounding the site”.

The FAC observed that there are differences in the NISs at Section 2.2 which describes the potential for the project to create an adverse effect on the Hen Harrier, the Special Conservation Interest (SCI) of the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. In describing the habitat found on site, the 1<sup>st</sup> NIS states:

*The habitats located within the proposed development site were dominated by Improved Grassland and Wet Heath with pockets of Scrub, Wet Grassland and Mixed Broadleaved Woodland.*

The 2<sup>nd</sup> NIS states:

*In its current state, the submitted area does not provide suitable foraging, nesting or roosting habitat for breeding Hen Harrier. The site is dominated by improved grassland which accounts for ~80% of the habitat cover. Furthermore the site is bordered by a domestic dwelling, a public road and is bisected by overhead powerlines.*

The FAC noted that both NISs include the statement that the proposal is “within the 500-750m distance quoted as that within which noise pollution is considered obtrusive to Hen Harrier, there is a potential for effects on foraging and breeding habitat of the Conservation Interest of the SPA.”

#### **AAPSR**

The AAPSR contains much of the same information as the NISs, including a description of the project area and the proposed operations. The AAPSR also screens out the River Shannon and River Fergus Estuaries SPA and the Barrigone SAC for Stage 2 AA. Regarding the River Shannon and River Fergus Estuaries SPA, the AAPSR provides reasons for screening out each SCI of this SPA in *Section 3: Individual Effect on European Sites*. For the SCI Wetland and Waterbirds [A999] it is stated that this SCI was screened out “based on distance from the SPA as per guidelines set out in the Bird Foraging Table (Version 6 Jan 2020)”.

Section 3 states there is a possibility of the project having a significant effect on the Lower River Shannon SAC and the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. Regarding the SPA, the rationale for this conclusion is described as follows:

- Hen Harrier activity was observed on location during the site walkover (the FAC understands that this took place in October 2021).
- The proposal is close enough to the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA that noise pollution is considered obtrusive to Hen Harrier.
- There is potential for effects on foraging and breeding habitat of the Conservation Interest of the SPA.

#### **AASRD**

The AASRD includes a description of the habitats and vegetation on the application site which states, “Wet grassland GS4 that is improved in a small section and of Annex I quality in the majority of the site”. The *Information Sources* listed include “the NIS submitted 12/11/2021, revised NIS completed 04/05/2022...” and under *Other Relevant Information* it is stated that the “Irish Winter Hen Harrier Survey was contacted to determine if the project site contained roosting Hen Harrier” but the rest of the paragraph is redacted in the version available to the FAC on the FLV.

Four European Sites are identified within 15km of the proposal:

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

- Barrigone SAC.

Barrigone SAC was screened out due to separation distance. The other three European sites were screened in with reasons recorded but there are redactions in the reasoning for Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and Lower River Shannon SAC. The AASRD differs from the AAPSR in screening *in* the River Shannon and River Fergus Estuaries SPA for the following reason:

“The project site is located 4.3km upstream of this SPA and there are potential for adverse impacts to the SCI Wetland and Waterbirds due to the hydrological connection. The site is located outside of the core foraging range for the majority of the SCIs of this site however it is within the core foraging range of Whooper Swan (*Cygnus cygnus*) [A038] and Light-bellied Brent Goose (*Branta bernicla hrota*) [A046]. The habitats on-site are considered sub-optimal for these species as the site is bisected by electricity power lines, it is surrounded by forestry, hedgerows and it is adjacent to a road. Therefore the site is screened in for the SCI Wetlands and Waterbirds only”.

An In-Combination Assessment is included in Appendix 2 of the AASRD which considers other forestry and non-forestry plans and projects and states that “It is concluded that there is no likelihood of the proposed afforestation project CN88584 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 In-Combination Statement notes that “the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment”.

#### **AAD**

The AAD lists the same three screened-in European sites as the AASRD with reasons included. The reason for the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA is redacted. The AAD states that “the NIS dated (04/05/2022) contains a fair and reasonable examination, evaluation and analysis of the likely significant effects of the activity on the environment and adequately and accurately identifies, describes and assesses those effects except in relation to the following points...”. The first of these points is that reference is made to the presence of scrub on the site which the DAFM consider to be excluded from the application but that this is not recorded consistently in the mapping submitted. The AAD states that “this assessment was conducted with the assumption that the area of scrub is excluded from the project site”.

The second point made by the DAFM regarding the NIS appears to relate to the determination contained within the NIS that “the submitted area does not provide suitable foraging, nesting or roosting habitat for Hen Harrier”. However, the following paragraphs are heavily redacted in the version available to the FAC, so it is not possible for the FAC to evaluate the DAFM's reasoning in this regard.

The last point raised by the DAFM regarding the applicant's NIS notes that the River Shannon and River Fergus Estuaries SPA was screened out in the AAPSR submitted “with the NIS” but that the DAFM screened in this European site in their AASRD using the precautionary principle. The AAD gives the reason for screening the River Shannon and River Fergus Estuaries SPA in for Stage 2 AA as being “due to its location

downstream, the proximity of the project site to the adjacent aquatic zone and specifically in consideration of the SCI Wetlands and Waterbirds [A999]". The AAD states that the mitigation measures proposed in the NIS to protect water quality in the Lower River Shannon SAC would also protect the River Shannon and River Fergus Estuaries SPA.

The AAD concludes that the Minister for Agriculture, Food, and the Marine has determined that based on objective information, "reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161". However, the points listed as the basis for this determination are heavily redacted.

### **Submissions & Referrals**

There were no submissions on the application. The DAFM referred the application to the National Parks & Wildlife Service (NPWS), Limerick Co. Council, and the Shannon Region Fisheries Board (IFI). Limerick Co. Council did not reply. The NPWS stated they had "no comment to make on this application" but attached an appendix containing more general points of relevance.

The IFI responded with comments regarding the drainage on site and stressed that "no deleterious matter is permitted to fall into the Glencobry River or its tributaries." They also referred to ground stability and the prevention of nutrient losses.

### **Grounds of Appeal and DAFM Response**

There is one first-party appeal against the decision to refuse CN88584 (FAC196/2022). The grounds of appeal have been considered in full by the FAC and are summarised below:

- 1) The proposal is outside Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The nature of the potential impact of the proposal has not been clearly outlined nor relevant supporting information provided. There is no clarity of what separation distance is required for there to be no adverse impacts on Hen Harrier. The Forestry Standards Manual states "applicants will be informed whether or not the project area lies within a Green Area or a Red Area within the conditions attached to any consent / approval / licence issued."
- 2) The Ecology Report references a map of Annex I Habitat to be attached to the refusal letter. This was not included nor provided to the applicant on request.
- 3) AAD contains redacted information. An unredacted version should have been provided to the affected party to allow an assessment of the validity of the assessments in the AAD.
- 4) AAD Section 3 refers to a phone call between a DAFM ecologist and a member of the Irish Hen Harrier Wintering Survey (IHHWS). In the absence of written proof of this conversation it should be disregarded as part of the decision-making process.
- 5) It is noted that the NPWS response had no comments in relation to Hen Harrier.

In addition to the above, the applicant stated they contacted the Forest Service by email on the 05/12/2022 and 07/12/2022 requesting this information but no further information was provided, and the applicant had been left with no choice but to appeal the decision. The appellant submits that it is "Not clear how the decision was made to refuse the application" and that there is a "lack of clarity and withholding of information".

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

The DAFM's response to the grounds of appeal is provided in an Statement of Fact with and Administrative response and an Inspectorate response. The SoF is accompanied by and an Ecology response.

The Administrative comments are summarised below:

- The unredacted Ecology Report and AAD were erroneously sent with the refusal letter to the applicant/forester. Only the redacted versions were put on the FLV.
- The DAFM justified their redaction of sensitive ecological data to avoid persecution of protected species etc.
- The DAFM contend that they did reply to applicant/forester's email on 07/12/2022 informing them that the Department had made is decision and were not in a position to review it. Also informed them of their right to appeal to the FAC.

The Inspectorate comments state that the refusal was justified following recommendations from the DAFM Ecology Unit and includes the reason given for refusal as per the decision letter.

The Ecology response addressed the issues raised by the appellant in numerical order as summarised below and included a map labelled as *Figure 1. Area eligible for license – area with no shading and within the ref lines (located within the white lines below eligible area for license less than the white area).*

In relation to the first ground, the response states that:

- CN88584 is approximately 720m from the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and was screened in for AA on this basis. The applicant's NIS notes that a Hen Harrier was observed flying over the application site during the site survey. The field visit by the applicant's ecologist was on 29/10/2021. The applicant's NIS states there is a potential for effects on foraging and breeding habitat of the Conservation Interests of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA.
- The applicant's ecologist recommended a "breeding habitat survey of the project site if the timing of operations requires it". This would not address the potential impact on foraging. A field inspection by DAFM ecologist on 08/09/2022, confirmed that apart from a small area of semi-natural grassland near the house that is maintained short, the majority of the entire proposal site is suitable for foraging Hen Harrier.
- Suitable foraging habitat for Hen Harrier is defined as rough grassland, neglected, containing long grass, waterlogged areas and/or stands of rushes as per Ruddock et al., 2012;2016. Hen Harrier are more likely to nest in areas of high edge/area ratio such as already occurs on this site (Sheridan et al., 2020).
- Having considered the NIS, the DAFM contacted a "non-statutory environmental organisation with relevant expertise", and this organisation confirmed that the project area supports an endangered species protected under the EU Habitats Directive, EU Birds Directive and the Wildlife Act 1976, as amended. On the basis of this information, the DAFM recommended refusal to licence afforestation.
- Article 4 of European Communities (Access to Information on the Environment) Regulations 2007 and Regulation 42, No. 18 (c) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) applies in respect of this information.



- The proposed project would result in population declines and threaten the conservation status of the species under consideration.

In relation to the second ground, it is submitted that a map of Annex I habitat should have been attached.

In relation to the third ground, the following is submitted:

- The applicant's NIS identified Hen Harrier in the vicinity and the NIS did not confirm if the application contained suitable breeding habitat or whether afforestation would have an adverse effect on the Conservation Objectives of the SPA.
- Having considered the NIS, and following contact with a relevant non-statutory environmental organisation, the DAFM were satisfied that the project area supports an endangered species protected under various legislation and the licence application was refused on this basis.
- Following AA, the DAFM determined that the proposal has the potential to affect the integrity of the European site Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, having regard to its conservation objectives in relation to Hen Harrier.
- Additionally, a field inspection by a DAFM ecologist on 08/09/ 2022 confirmed the presence of the Annex I habitat, 6410 Molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae), on most of the project site, apart from an area of semi-natural wet grassland (GS4) towards the entrance to the site and an area of dry heath to the north of the site. Annex I habitat is not eligible for planting.
- Considering the setback required for protection of the Annex I habitat, the ESB corridor, and the dwelling setback, there is only a small area eligible for planting (approximately <0.2ha). Broadleaf planting adjoining the house setback and also a setback for the Annex I habitat further reduces the area available for planting under GPC3, which was applied for. Based on these factors the application was refused.
- There are two bases for refusal of this application and each basis in their own right warrants a refusal.

In relation to the fourth ground it is submitted that:

- The application was refused on the basis of both the Hen Harrier and the presence of Annex I habitat Individually, each of these issues warrants a refusal.
  - Contact with the non-statutory environmental organisation was by telephone and this was documented in the Ecologist's file notes and in internal emails between the file Ecologist and senior management in DAFM. These notes and emails were not provided to the FAC.
  - DAFM are currently developing a Memorandum of Understanding with the non-statutory environmental organisation in order to have access to their locational data on a protected species, that is relevant in the assessment of forestry applications.
1. In relation to the fifth ground of appeal, the DAFM agree that a reply was received from NPWS with "No comment".. The DAFM relies on the most up-to-date information available. Currently it is not possible to obtain the locational data for the protected species from the NPWS. In addition, the NPWS response was received prior to submission of the NIS so they were unaware that the applicant's ecologist observed a Hen Harrier flying over the project area and "flying from and to coniferous

forestry surrounding the site". The decision was based on the best information available, which included that submitted by the applicant.

### **Additional Submissions**

The FAC circulated the appeal file, including the DAFM's SoF, to the first-party appellant on 21/02/2023. a representative of the first-party appellant responded 22/02/2023 querying if email correspondence he had previously provided to the FAC was on file as it had not been circulated. The FAC responded that it had been received and would be reviewed by the FAC. The FAC has reviewed this email correspondence between the first-party appellant and the DAFM and note that it documents Coillte requesting that the DAFM provide the supporting information referenced in their licence refusal decision.

The representative of the first-party appellant responded to the FAC's circulation of the appeal file on 08/03/2023 and made an additional submission in response to the DAFM's SoF. This additional submission was circulated to the DAFM and the DAFM Ecology Unit responded on 20/03/2023. The FAC circulated the DAFM Ecology Unit's response to the appellant on 23/03/2023 but there is no record before the FAC of any further response being received. The FAC have considered the additional submissions from both the first-party appellant and the DAFM in full and the following is a summary. The first-party appellant raised the following issues:

- 1) "Continued failure to provide information in relation to approval decision". A map (Figure 1) is included in the DAFM's SoF but it's unclear if this is intended to demonstrate the habitats on site or not. Also queries the clarity, quality, and format of the map.
- 2) "Continued failure to provide information in relation to Hen Harrier Red/Green zones". It is contended that "this is not sensitive information" and again refers to Appendix 21 of the Forestry Standards Manual.
- 3) "Error in decision making process". The first-party appellant contends that information from the IHHWS was a significant factor in the decision-making process and it is "poor practice and unprofessional" to rely on this information as there is no public record of it.

### **The DAFM's Ecology Unit response to the appellant's additional submission**

1. It is submitted that Figure 1 is a map showing the extent of Annex I habitat on the proposal site and the remaining area eligible for planting outside of this. Annex I habitat is shown with bright green hatching. The Habitat Map on the file is that submitted by the applicant which shows Annex I habitat as Improved Agricultural Grassland.
2. The response refers to Appendix 21 of the Forestry Standards Manual and states that the entirety of the area outside of Red Areas but within an SPA, is referred to as Green Areas. therefore all Green Areas are within an SPA. CN88584 is outside of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA so it cannot be within a Green Area. States CN88584 is not within a Red Area. It is also submitted that all breeding and resting birds are protected under the Wildlife Act 1979 and amendments, whether outside or within an SPA. It is stated that the project site includes habitat suitable for foraging and roosting Hen Harrier as noted in both the NIS and by the DAFM's ecologist following site inspection.

3. It is submitted that all appropriate DAFM procedures and policies in place at the time of the processing of this file were followed in the documentation and dissemination of the information gathered on this file. That the information provided by the non-statutory environmental organization is valid and must be considered. That all refusals are reviewed by a senior ecologist before being issued. There were two bases for refusal of CN88584, and either one independently was sufficient to refuse the application.

### **Findings of the FAC**

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 under appeal, and if the decision was made in compliance with fair procedures.

#### **DAFM AA Process**

In the first instance, the FAC considered the DAFM's decision to refuse CN88584 in light of the requirements of the EU 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 AA of its implications for the European site in view of the site's conservation objectives.

As detailed previously in this letter, the FAC noted that the DAFM considered the AAPSR submitted by the applicant but also completed their own Stage 1 AA screening in an AASRD. The DAFM's AASRD came to a different screening conclusion than the AAPSR regarding the River Shannon and River Fergus Estuaries SPA, indicating that Stage 2 AA was required in relation to this European site. However, there is no evidence before the FAC of Stage 2 AA having taken place. Both of the applicant's NISs refer to the River Shannon and River Fergus Estuaries SPA as being screened *out* for Stage 2 AA and there is no record before the FAC of the DAFM having completed an AA Report in relation to this project. The FAC considered this to be a significant error in the DAFM's consideration of this proposal in relation to Article 6(3) of the Habitats Directive.

The FAC considered the DAFM's AA In-Combination Statement for this proposal. The FAC noted that the DAFM concluded that "there is no likelihood of the proposed afforestation project CN88584 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 that the phrasing of this conclusion constitutes a significant error in the DAFM's AA process as it demonstrates 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.

In relation to the AAD, the FAC noted that the DAFM accepted the NIS as a fair assessment of the project except in relation to three points. One of these relates to reference in the NIS made to the presence of

scrub on the site which the DAFM considered to be excluded from the application but that this is not recorded consistently in the mapping submitted. The AAD states that “this assessment was conducted with the assumption that the area of scrub is excluded from the project site”. The FAC consider that an AAD should be unambiguous and not based on an assumption, and that in the absence of definitive mapping this is a significant error in relation to Article 6(3) of the Habitats Directive.

### **EIA Screening**

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. 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 2.72ha which is sub-threshold for mandatory EIA and the DAFM completed an assessment to determine the requirement for EIA before concluding that EIA was not required in this instance.

The FAC considered the DAFM’s *Assessment for EIA Requirement* and noted that this document only refers to other forestry projects in the section titled *Cumulative effect and extent of project*. The FAC understands that the *Assessment for EIA Requirement* document should be read as a summary document, and in combination with the record of the DAFM’s decision as a whole, and that the AA In-Combination Statement considered non-forestry plans and projects in the vicinity of the proposal. However, the EIA assessment does not expressly cross-reference the detailed record of other plans and projects contained in the AA In-Combination Statement and the FAC considered this to be a significant error on the DAFM’s behalf. The FAC considered this to be an error on the DAFM’s behalf in their processing of the licence application.

### **Grounds of Appeal**

The FAC considered the grounds of appeal submitted under FAC196/2022 and will address these in numerical order below.

1. The FAC noted the location of the proposal as being outside of the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The FAC understands that, as the proposal is not within an SPA, it cannot be within a Green Area, as defined in Appendix 21 of the Forestry Standards Manual, 2015. The FAC noted that the DAFM’s response to the appellant’s additional submission confirms that the proposal is also not within a Red Area. Appendix 21 of the Forestry Standards Manual, 2015 is titled *APP and Hen Harrier* and states “Specific procedures apply in relation to applications for consent / grant approval / licences involving certain forestry operations which have the potential to disturb Hen Harrier breeding activity within and surrounding SPAs designated for breeding Hen Harrier. These procedures, agreed with National Parks & Wildlife Service (NPWS), focus on disturbance operations within so-called ‘Red Areas’ during the Hen Harrier breeding season, 1st April to 15th August”. Appendix 21 goes on to states that “A potential disturbance operation is a forestry operation which

has the potential, through excessive noise, vibration, mechanical movement, etc., to disturb the breeding activity of Hen Harriers" and lists a number of examples including mechanical cultivation for afforestation and the driving of fence posts. This ground of appeal includes a quote from Appendix 21 (p200) where it is stated "applicants will be informed whether or not the project area lies within a Green Area or a Red Area within the conditions attached to any consent / approval / licence issued." However, the FAC noted that this statement is made in relation to potential "scenarios" set out in Table 1 that apply to felling licence applications whereas the decision under appeal is an afforestation application.

The appellant contends that "There is no clarity of what separation distance is required to for there to be no adverse impacts on Hen Harrier". The FAC consulted the DAFM's publicly-available Bird Foraging Table (version 6th Jan. 2020)<sup>2</sup> which lists the *Screen-out scenarios* for Hen Harrier in relation to afforestation as i) where the project is over 11 km from the SPA, and ii) where the project is less than 11 km from the SPA, not overlapped by a Red Area and does not contain the described foraging habitat. The FAC found that the Bird Foraging Table indicates that the DAFM considers a separation distance of >11km as being sufficient for there to be no adverse impacts on Hen Harrier from an afforestation project.

2. The FAC considered that the DAFM's ecology report references a map of Annex I Habitat to be attached to the refusal letter and noted that the DAFM's response to the grounds of appeal accepts that this map was not attached to the refusal letter which issued. The FAC considered this to be an error in respect of fair procedures on the DAFM's behalf. The FAC considers that any new decision issued by the DAFM in relation to CN88584 should be accompanied by a map of Annex I Habitat on the proposal site.
3. The Administrative response in the DAFM's SoF states that "The unredacted Ecology Report and AAD were erroneously sent with the refusal letter to the applicant/forester". The first-party appellant has not responded to this point in their submissions to the FAC. The FAC is of the view that there are circumstances where it is appropriate, and in compliance with the relevant legislation, for the DAFM to redact sensitive environmental information in the decisions they issue (including associated documents) and publish on their website and the FLV. An example of this may be the location of nesting sites/exact location of specific populations of protected species. The FAC noted that there are sections of the DAFM's AA documents and Ecology Report relating to CN88584 which are heavily redacted. In the ecology note accompanying the SoF, DAFM set out that Article 4 of the European Communities (Access to Information on the Environment) Regulations 2007, and Article 18 of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) applies in respect of the information in question.

At regulation 4 in the European Communities (Access to Information on the Environment) Regulations 2007, the scope of those regulations is defined as applying to any information not required to be made available under any other statutory provision. It is unclear to the FAC whether in citing these

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<sup>2</sup> [gov.ie](http://gov.ie) - Forestry Circulars ([www.gov.ie](http://www.gov.ie))

regulations the DAFM is asserting that the emails from the first-party appellant to the DAFM of the 05/12/2022 and 07/12/2022 constituted requests for Access to Environmental Information, in which case regulations 5(1) and 7(4) would also apply. In any event, Article 8 of those regulations set out that a public authority shall not make available environmental information for a number of reasons including where disclosure of the information would adversely affect:

*(iii) the protection of the environment to which that information relates.*

Regulation 18 of the European Communities (Birds and Natural Habitats) Regulations (as amended) relates to the designation, amendment and de-designation of classified special protections areas and does not appear to have any relevance to this ground of appeal. The FAC take this to be an erroneous reference to Regulation 42 subsection (18) which at paragraph (c) states that information that if made publicly available could pose a risk to the conservation of protected species may be exempted from the requirements on a public authority to make available for inspection any determination made in relation to a plan or project and the reasons for that determination.

In the situation where the FAC have not been provided with unredacted versions of the same documents, the FAC are unable to assess whether or not the DAFM have redacted these documents appropriately, or if the redacted sections provide a basis for the refusal as discussed later in this letter.

4. The FAC is of the view that the DAFM must make decisions, and particularly AADs, based on the best objective scientific data available. In this regard, the FAC considered that having received an afforestation application for a site adjacent to a Hen Harrier SPA, it was open to the Minister under the provisions of Regulation 9 of the Forestry Regulations 2017 (S.I. No. 191 of 2017) to consult with any consultation body, person, or body (not being a consultation body) that the Minister considered appropriate, including the IHHWS. In the particular circumstances of this case, the DAFM stated in an ecology response accompanying the SoF that they had contacted the IHHWS by telephone and that this was documented "in the Ecologist's file notes and in internal emails between the file Ecologist and senior management in DAFM". The FAC considered that it was open to the DAFM to provide a copy, albeit redacted if and where appropriate, of this correspondence to the applicant, and/or to publish it on the FLV but the DAFM failed to do so. The FAC considered this to be a significant error in the DAFM's processing of this application in relation to fair procedures and the maintenance of an adequate record of the decision.
5. The FAC noted that the NPWS had no comment to make on this application when it was referred to them by the DAFM. However, the evidence before the FAC is that the NPWS response was received prior to i) the submission of the NIS, so they were unaware that the applicant's ecologist observed a Hen Harrier flying over the project area and "flying from and to coniferous forestry surrounding the site", and ii) the DAFM receiving relevant information from the IHHWS regarding the potential impact of the proposal on Hen Harrier. In these circumstances, the FAC considered that the DAFM should have re-referred the application, along with the pertinent information contained in the NIS and provided by the IHHWS, to allow for a response prior to the making of the decision to refuse CN88584.

The FAC considered the DAFM's contention in their response to the grounds of appeal, and the appellant's additional submission, that there were two bases for refusing the application and either one independently was sufficient to refuse the application. However, the second basis, outlined by the DAFM in their SoF, was not included as a reason for refusal of the licence application in the decision letter under appeal.

#### **The record of the decision and redactions therein**

As noted previously in this letter, the record of the decision in this appeal was provided to the FAC by way of the FLV, and several documents provided in this way were heavily redacted. The redaction of these documents formed, in part, a basis for the appeal. As also noted, a significant element of the decision appears to relate to a phone call which it is asserted took place between an ecologist and an environmental non-governmental organisation but for which there are no contemporaneous notes (redacted or otherwise) provided on the record. It is apparent that, based on the response of the DAFM to the request by the FAC administration for unredacted copies of various documents, those redactions related to the information that it is asserted was provided in that phone call.

The custom and practice of the Committee has been to consider appeals on the basis of the record of the decision as made available to members of the public and other relevant information in the public domain. Where other information is provided to the FAC, as provided for under sections 14B(6), (7), and (9) of the Act, the practice of the FAC is to circulate such information to all parties to the appeal. These practices by the FAC are based on principles of fair procedures and natural justice. In the circumstances of this appeal however, where the redacted material is itself the subject of an appeal, it appears self-evident to the FAC that a departure from the practice of relying solely on information in the public domain is required.

While the DAFM may have had a basis to rely on Regulation 8 of the European Communities (Access to Information on the Environment) Regulations 2007, and Regulation 42(18) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended), to withhold sensitive information from the first-party appellant, both regulations relate to a "natural or legal person" and "members of the public" respectively.

The FAC consider that there is a distinction to be drawn between the provision of sensitive information to such persons (whether they are an applicant for a licence, a party to an appeal, or any other third party), and the FAC which is an independent appeals body, established in accordance with Section 14A (1) of the Act, and is subject to the same constraints in relation to environmental information as the DAFM itself. The FAC further consider that the DAFM has not provided any basis on which provision of the unredacted information to the FAC would or could adversely affect *the protection of the environment to which that information relates or could pose a risk to the conservation of protected species or habitats.*

Regulation 7(2) of the Forestry Appeals Regulations of 2020 require that:

*The Minister shall, in relation to each notice of appeal, furnish the Forestry Appeals Committee with the following –*

- (a) a statement showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and*
- (b) information, documents or items in the power or control of the Minister that is relevant to the appeal.*

Section 14(B) of the Act states that:

*(5) A party to an appeal other than the appellant shall, when responding to an appeal, state all of the grounds upon which he or she responds to the appeal and provide to the Forestry Appeals Committee all of the documents and evidence upon which he or she intends to rely to support those grounds.*

and also, that:

*(7) The Forestry Appeals Committee may, where it considers it necessary or expedient for the fair and proper determination of an appeal, require or permit a party to an appeal to—  
(a) make submissions to the Committee other than submissions related to the grounds stated or documents and evidence provided under subsection (4) or (5), or  
(b) provide documents or evidence to the Committee other than documents or evidence provided under subsection (4) or (5).*

While the DAFM may consider that weight must be given to the wishes of the non-statutory environmental organisation, the FAC consider that in light of the foregoing the Department has failed in its statutory obligations to provide the FAC with required information and a complete record of the decision in the case of this appeal.

In the circumstances of this appeal, the FAC has noted a number of significant or series of errors as summarised in the conclusions section below, and that these are such that the decision should be set aside and remitted to the Minister. The FAC observe that in circumstances where those identified errors did not exist, the FAC would be unable to affirm the decision in the absence of the unredacted documents it requested.

### **Conclusion**

Based on the information before it, the FAC found that the DAFM made significant errors in their processing of the application prior to refusing a licence for afforestation under CN88584. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to:

- Carry out a screening for appropriate assessment of the project itself and in combination with other projects.
- Ensure that any such consideration of in-combination effects includes consideration of 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.
- Ensure that any site screened-in for Stage 2 AA, including the River Shannon and Fergus Estuaries SPA if so screened in, is considered either through an updated NIS or the preparation of an AA Report by the DAFM.
- Ensure, that in the event of a refusal, such a decision is accompanied by any necessary maps.
- Ensure that any decision is accompanied by a complete record including any contemporaneous notes or emails which form the basis of the decision.
- Ensure that any AAD is not based on assumptions or ambiguous, in particular in relation to the location of scrub.
- Ensure that, in the event of a refusal, any decision letter contains all reasons for refusal.



- Carry out an assessment for EIA requirement that considers, or references the consideration, of other plans and projects other than Forestry related projects.
- Ensure that, in the event of a refusal based on sensitive information, that an unredacted copy of documents is available to be provided to the FAC or other arrangement such that the FAC can determine the correctness of the decision where relevant in the event of an appeal.

These matters should be resolved in keeping with the detail of these issues provided in this letter.

Yours sincerely,

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John Evans on behalf of the Forestry Appeals Committee

