



11th November 2024

Subject: Appeal FAC032/2024 against licence decision CN91344

Dear

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

Hearing

A hearing of appeal FAC032/24 was held remotely by the FAC on 17th October 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Myles Mc Donagh & Mr. Vincent Upton
Secretary to the FAC: Ms. Aedín Doran

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.

Decision

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 Minister for Agriculture, Food and the Marine (Minister) to refuse licence CN91344. The reasons for this decision are set out hereunder.

Background

The appeal relates to the decision of the Minister for Agriculture, Food and the Marine to refuse a licence application for afforestation on 12.86 hectares of land at Kilcrea, Co. Dublin. The application was made on 24th August 2022 and included operational and environmental information including maps.

The land is described as enclosed, agricultural land with a *Grass, Grass Rush, Bracken/Briar, Scrub/Laurel/Rhodo* vegetation type on a mineral soil. The lands are described as not being exposed, having a neutral aspect and is located at sea level. The forest would be comprised of native woodland containing alder, birch and other broadleaf species. Site preparation would be through invert mounding without additional drainage and without fertiliser or chemical weed control. Adequate access is said to be in place with marked access to the west leading to the public road where the location of the site notice is

described. The maps show the lands to be comprised of agricultural fields bounded by hedgerows. Aquatic zones and relevant watercourses cross and adjoin the lands to the south and east. Two recorded monuments are marked at the southern boundary and a number of recorded monuments are marked in the wider landscape. The application describes the area as being located in an NPWS referral zone, containing or adjoining a listed archaeological site or monument, and within a prime scenic area and notes,

Within High Sensitivity Fingal, NPWS 3km Referral Broadmeadows and Swords Estuary SPA, NPWS 0.5km Referral Malahide Estuary, EPA Rivers Turvey and Lanestown and NMS Sites And Monuments

Two dwellings are marked outside and to the west of the lands along the public road. Malahide estuary is located to the south and east. Stock fencing would be erected along the north, east and part of the southern boundary. The documents include a copy of a site notice dated 24th August 2022 and a photo of the site notice erected.

The application was referred to An Taisce and the local authority. A Biodiversity Officer from Fingal County Council wrote to the DAFM on 24th March 2023 indicating that the referral had not reached them previously and noted that their comments may not be considered. They submitted that while the application suggested the lands were not prone to flooding, the flooding maps on floodmaps.ie indicate that this site is subject to both river and coastal flooding and that the lands would have formed part of the Malahide estuary and comprised of saltmarsh before a flap valve was fitted to the Turvey river. They submitted that the lands have been identified for potential saltmarsh restoration and have good potential for this as relatively little intervention would be required and such restoration would provide biodiversity and carbon sequestration benefits.

The DAFM wrote to the applicant on 14th August 2023 seeking to arrange an inspection of the lands in winter in relation to potential flooding and noted that consideration should be given to the submission from Fingal County Council. The file includes a document described as Further Information Response said to have been uploaded on 22nd March 2024 and includes tide times and dates.

The file includes a report prepared by a DAFM Archaeologist which described the lands and monuments and specified conditions that should be attached to any licence which included exclusion areas around a tide mill and the mill race and causeway and archaeological monitoring.

The file includes a document entitled Breeding Wader Assessment Report which described the ecology of the lands following a site inspection. This notes a number of water features which are described as being absent from the application maps. The survey focused on a number of identified wader species and found the lands, in the main, to be suitable habitat. The report identifies threats and pressures on the species which includes land use change and predation and notes the potential for increased predation following afforestation. The report further notes that the lands lie within 200 metres of an SPA and that an Appropriate Assessment would be required but was not completed as a result of the survey results and

suggests that adverse impacts on the SPA were likely based on the survey and report results. The report concludes,

It is recommended that a REFUSAL be issued for License CN91344 on the basis it will have a significant adverse impact on wader species. Reason for refusal is in the interests of the protection of Wader species onsite, and in the immediate surrounds.

The file includes a document entitled Inspector's Certification Report in which it is noted that the AA and EIA Screenings were "not conducted and in this case functionally answered due to straight to refusal recommendation policy per office note 21 Feb 2024".

The file includes an Appropriate Assessment screening document which identifies twenty European sites within 15km of the site. The conclusion notes that the screening is on hold. The file also includes a document entitled Assessment to Determine EIA Requirement which considers the proposal across a number of criteria and also appears to be incomplete.

The decision to refuse was issued on 11th March 2024 and the following reasons were included,

- *Environmental Considerations,*
- *Per the recommendation of the DAFM forest service Breeding Wader Assessment Report. The project will have a significant adverse impact on wader species. In the interests of the protection of Wader species onsite, and in the immediate surrounds. 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). You are now required to remove your site notice immediately.*

Appeal

There is a one first party appeal against the decision and the full grounds of appeal have been provided to the parties. In summary, the grounds submit that the refusal was made on environmental considerations. The grounds make reference to a letter from the County Council that the site is subject to river and coastal flooding as per floodmaps.ie. The grounds submit that floodmaps.ie have stated that there is an error in the data which is under review since 2018. The appellant submits that they have known the site for over 50 years and that it has never been subject to flooding. The grounds go on to state that the County Council have identified the site for saltmarsh restoration but that no action has been taken and they are being restricted in planting forest. The Notice of Appeal Form was accompanied by the decision letter from the DAFM and an email from the County Council to the DAFM both of which have text highlighted.

The DAFM prepared a statement in response to the appeal. This outlined the processing of the application and submitted that the decision was made in keeping with DAFM policy, the Forestry Regulations 2017 and the Forestry Act 2014. The statement includes submissions from the district Forestry Inspector and Ecologist. The Inspector submits that the reason for the decision was the report prepared by an Ecologist

in relation to the impact of the development on wader bird species and that other matters were not considered as part of the decision. It is submitted that this is keeping with DAFM policy as outlined in an Office Note of 21st February 2024 which was included with the statement. In relation to the potential flooding of the lands and the submission from the County Council it is submitted that these did not form part of the decision.

The DAFM Ecologist submitted that under the implementation of the Forestry Programme 2023-27 and the Environmental Requirements for Afforestation, August 2023 an application is required to be accompanied by a report addressing the habitat suitability or the rationale for why planting should proceed, where the lands fall within a Bird Watch Ireland Breeding Wader Hotspot. As the application fell during a transition period, the DAFM considered that it should undertake a report itself. It is further submitted that the lands fall within such a boundary in relation to Dunlin, Lapwing and Redshank and the lands had been assessed as suitable habitat, and some on the cusp of suitability. The report further suggests impacts as a result of increased predation following land use change. It is submitted that the report found that the planting is likely to have a significant adverse effect on waders and it is not possible to mitigate this effect. The statement goes on to submit that if an AA was undertaken that the application would be screened in and that adverse impacts on the Malahide Estuary SPA would be likely. The statement was accompanied by a document entitled Forest service, DAFM, Breeding Wader Policy.

Considerations of FAC

The FAC considered the grounds to relate to the refusal of the afforestation licence and the reasons provided for the refusal. The Appellant refers specifically to the reference in the decision to "Environmental considerations" and the submission made by the County Council and the related further information request made by the Minister. The FAC considers that the provision of the term "Environmental considerations" as a reason for the refusal for the licence would not be considered to be an acceptable reason in and of itself as it is unspecified. However, the decision letter also referred to the findings of the Ecologist's report and the FAC would understand that it is this report and its findings that formed the basis of the decision.

The FAC understands the Appellants submission regarding the flooding of the lands and reviewed the resources referred to in the appeal and found that the flood risk data for this area is under review. Furthermore, the FAC noted that the County Council have suggested a preferred use of the land but do not appear to have initiated any communication or process with the Appellant concerning this matter. The FAC would not consider it appropriate if the reason for the refusal had been a generally stated preference of the local authority. However, in this case the reason for the refusal was the report prepared by the DAFM.

The submissions from the DAFM in response to the appeal refer to the provisions of the Forestry Programme and the procedures adopted in implementing the programme. The FAC would understand the Forestry Programme to be primarily a set of funding interventions to promote certain forestry activities. Decisions regarding grant aid do not fall within the remit of the FAC and the refusal before the FAC is that

of the licence application not a grant scheme. It appears to the FAC that the Minister has relied on the procedures for a grant aid scheme to make a decision on a licence application.

It is not clear from the licence decision letter, as to what basis the Minister would rely on rules for grant aid to make decisions on forestry licence applications. At the same time the Minister has obligations to undertake screenings for Appropriate Assessment and Environmental Impact Assessment the purpose of which is to allow for the consideration of likely impacts on the environment and the need to attain further information and reports and undertake an assessment of the likely effects on European sites and the environment.

The FAC noted that, in relation to Appropriate Assessment, the Forestry Regulations 2017 provide the following,

Protection of European sites

19. (1) Where the Minister receives an application for a licence under sections 17 or 22 of the Principal Act, which is not directly connected with or necessary to the management of a European site, the Minister shall carry out a screening for appropriate assessment of the development, in view of the conservation objectives of the European site, to assess if the development, either individually or in combination with other plans or projects, is likely to have a significant effect on the European site.

The FAC would understand that the provisions of the Regulations do not explicitly provide discretion to the Minister not to undertake a screening for Appropriate Assessment where an application for afforestation is received. The FAC considers this to be particularly relevant where the reasons provided for refusal in this case are reliant (or at least partially reliant) on the proximity of the proposal site to a Special Protection Area. The submission from the DAFM suggest a particular outcome might be found should such an assessment be undertaken but no Appropriate Assessment was undertaken.

The Forestry Regulations 2017 also provide for the Minister to under a screening for Environmental Impact Assessment and an Environmental Impact Assessment based on certain criteria and thresholds. This includes considering likely significant effects on biodiversity and species and habitats protected under Directive 2009/147/EC.

In relation to the report prepared by the DAFM, this makes reference to the provisions of the Forestry Programme and does not refer to the reason or significance of the report in the context of the licence decision. The report concludes that the afforestation of the lands would have a significant adverse impact on wader species but the report appears to be limited to an assessment of the suitability of the lands as habitat and does not include any analysis of the implication of its loss. The report itself does not appear to be consistent in its findings, at one point stating that no waders were encountered during the survey and later stating, in relation to breeding waders, that "*many of which were found to be utilising the site for foraging during the time of survey*". The DAFM submitted an undated document entitled *Forest Service, DAFM, Breeding Wader Policy* which is also described as relating to the Forestry Programme 2023-

2027 and does not refer to the licencing process. The document appears to be a procedural document related to the implementation of the Forestry Programme as opposed to a published policy of the Minister. Furthermore, the document described as a policy document indicates that the applicant might have the opportunity to submit their own reports and to make a submission as to why the proposal might proceed. From the record of the decision as is available to the FAC, it appears that no such opportunity was afforded the Applicant.

On the other hand, should the proposal have been subject to an Appropriate Assessment (AA), as the statement from the DAFM suggests might have occurred, the Applicant might be afforded the opportunity to submit their own reports and analysis and would be afforded the opportunity to make a submission on the AA process. The Forestry Regulations 2017 place certain obligations on the Minister and also provide for the Minister to refuse forestry licence applications under certain circumstances but the decision in this case appears to rely on procedures related to grant aid instead of the provisions of the Forestry Act 2014 and the Forestry Regulations 2017.

The FAC determined that serious errors had been made in the making of the decision to refuse the licence application by the Minister and that the decision should be set aside and remitted for a new decision. The FAC considered that the application should be subject to a screening for an Appropriate Assessment and Appropriate Assessment, if required, and that the Minister should make a new decision on the application in keeping with the requirements of the Forestry Act 2014 and the Forestry Regulations 2017. The Minister should also have regard to any published policy the Minister has on afforestation, the conservation of protected bird species and the avoidance of pollution or deterioration of habitats relevant to those species outside of European sites. The Forestry Regulations 2017 also require the Minister to provide the main reasons and considerations on which the decision is made.

Yours sincerely,

-
Vincent Upton,
On Behalf of the Forestry Appeals Committee