



17th October 2024

Subject: Appeal FAC004/2024 in relation to the refusal of an afforestation licence under CN91224

Dear

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

Hearing & Decision

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine your appeal. Appeal reference FAC004/2024 was considered during a sitting of the FAC held remotely on the 19th June 2024, which was attended by the following participants:

FAC Members – Mr. Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.

FAC Administration – Ms. Aedin Doran

The record of the Minister's decision was made available to the FAC by way of the Forestry Licence Viewer¹ (FLV). The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, the DAFM's Statement of Fact (SOF), and all other submissions, before deciding to affirm the Minister's decision to refuse afforestation licence CN91224, for the reasons outlined hereunder.

Background

The decision under appeal was issued by the DAFM on 18th January 2024 and relates to a proposal for 11.13ha of afforestation in Tullyleague, Ballygiltenan upper, Co. Limerick. The refusal letter stated that the application could not be approved due to "environmental considerations" and states "As per Environmental Requirements for Afforestation Working Document v.31 Aug 23, any part of a site overlapping with a Hen Harrier High Likelihood Nesting Area (HLNA) that extends outside of a SPA is ineligible and must be excluded from the application." The decision letter also 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 not exposed, with an easterly aspect. The existing vegetation type within the project area is recorded as grass/rush and the access is "adequate." The Appropriate Assessment Determination on file states that "The project area lies between

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

98 m and 125 m above sea level. The average slope across the site is moderate, at 3% and ranges from 10% to 0% and the habitats present are comprised of Wet grassland (GS4) – 75%, Drainage ditches (FW4) – 10%, Hedgerows/Treelines (WL1/WL2) – 10%, and Scrub (WS1) – 5%.

The proposal is in the Glencorbry_010 River Sub-Basin. Publicly available information on Catchments.ie shows the Glencorbry_010 river waterbody currently has “Moderate” status (assessed by monitoring – “High confidence”) for the 2016-2021 period and is “At Risk” from “sediment, nutrients” with agriculture and forestry listed as the significant pressures. The proposal is underlain by the Ballylongford Ground Waterbody which has “Good” status but is also “At Risk” with Drinking Water Treatment Sludge, forestry, and agriculture the significant pressures. A watercourse (Glencorbry, Order 1) runs along the eastern boundary of Plot 2, and along the northern boundary of Plot 3, flowing generally from southwest to northeast.

DAFM Processing of the application

Assessment to Determine Environmental Impact Assessment (EIA) Requirement

The DAFM’s SOF states that the application was field inspected on the 21st November 2023 as well as being desk-assessed. The DAFM’s “Assessment for EIA Requirement”, which has a certification date of 17th January 2024, considered the proposal’s potential impact on the environment across a range of criteria which included the following questions and answers:

- *The physical characteristics and design of the afforestation project, as detailed in the Environmental Considerations section, the Form 1 application form and accompanying maps, and any other supplemental reports submitted by or on behalf of the Applicant, have been examined? – “No”*
- *Is the project area partially within a SPA? – “No”*
- *If proximate to a SPA designated for breeding Hen Harrier, is the project area wholly or partially within any section of a High Likelihood Nesting Area (HLNA) that extends outside of the SPA? – “Yes”*
- *Has that area(s) within the HLNA been excluded from the application? – “No”*
- *Is the project area wholly or partially within the Current Breeding Distribution for Hen Harrier, as recorded in the current NPWS Article 12 Report? – “Yes”*
- *Has this sensitivity been addressed by the Ecology Section and any resulting recommendation(s) enacted, either through project redesign, conditions to be attached to the afforestation licence (if issued), or refusal? – “No”*

AA Screening Report & Determination (AASRD)

The AASRD was prepared by an Ecological Consultant and is dated 17th April 2023. The AASRD summarises the project details and site characteristics and, in Section 3 – “Information”, states:

In undertaking this screening for Appropriate Assessment, the following were taken into account:

- *the initial application, including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer) and input from the District Inspector (including information following field inspection...*
- *...Any information gathered during site visits by DAFM representatives;*
 - *The site is split into 2 distinct areas, Plots 1 and 2 in the north and plots 3 and 4 to the south.*
 - *Both areas were comprised of wet grassland. There was a large amount of soft rush, creeping and meadow buttercup and broadleaf dock.*

No Annex I habitats or Annex II or IV species were encountered.

Section 5 screens the four European sites within a 15km radius. The following three sites were screened in for Stage 2 AA for the following reasons:

- Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161
 - “Due to the location of the project adjacent to this European site and possible effect on the protected species.”
- Lower River Shannon SAC IE0002165
 - “As there is a hydrological connection between the project and this European Site.”
- River Shannon and River Fergus Estuaries SPA IE0004077
 - “as there is a hydrological connection between the project and this European site”.

Moanveanlagh Bog SAC IE0002351 was screened out due to “no hydrological connection or other sufficient pathways for impact”.

The AASRD contains an Appendix A “In-combination report for afforestation project CN91224”, which assesses the potential for cumulative significant effects on the screened-out European site; Moanveanlagh Bog SAC. This in-combination report was completed on the 13th March 2023 and which states:

It is concluded that there is no likelihood of the proposed afforestation project CN91224 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.

Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in-combination with other plans and projects. Therefore, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and projects.

Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.

➤ Moanveanlagh Bog SAC IE0002351.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s). Note 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.

AA Report

Also to be found on file is an AA Report, compiled by an Ecological Consultant and dated 17th April 2023. Section 3 of the AA Report is titled “Identification and assessment of potential adverse effects arising from the project itself (i.e. individually)” and indicates that the DAFM reviewed and considered the site-specific threats, pressures and activities with the potential to affect the screened-in European Sites and prescribed mitigation measures where considered necessary.

In relation to Hen Harrier, the sole Special Conservation Interest (SCI) of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, the AA Report states that “No mitigation is possible

for this site as a result of its location and the presence of suitable foraging and breeding habitat for Hen Harrier within the project area.” In terms of potential for adverse impact the AA Report states:

Plot 3 adjoins the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161. The entire project is located in an area with a number of high likelihood of nesting Hen Harriers (i.e. "Red Areas", DAFM 2015) and within the core foraging area of breeding Hen Harrier, the Special Conservation interest of the SPA. There is also both foraging and nesting habitat present. Therefore the planting of trees would result in the loss of supporting habitat for the SCI of this European Site and would result in adverse effects on this European site.

Section 4, "Mitigation Measures", states in relation to Hen Harrier that:

- *There are no measures that can be applied to mitigate the effects that this project could have on the Hen Harrier.*
- *The proposed area is considered to be predominately comprised of suitable habitat for Hen Harrier conservation. It is located adjacent to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161.*
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- *This is in combination with the existing extent of forestry in the SPA and further fragmentation of this area could have a serious effect on this SPA'S SCI species.*

Section 7 of the AA Report, "AA Determination", states:

It is concluded that the proposed Afforestation project under CN91224, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site(s) listed above. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects on these European site(s). No potential significant cumulative effects are predicted with the plans and projects listed in Appendix A. Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. This relates to the proposed activities under this project only. Any subsequent forestry-related activity requiring consent/grant aid shall be subjected to the DAFM Appropriate Assessment Procedure, including an in-combination assessment with the current proposal, prior to any future consent being granted.

Appendix A of the AA Report contains an "In-combination report for afforestation project CN91224" completed on 13th March 2023. On the opening page of this report, it is stated that the potential for the proposed afforestation project CN91224 to contribute to an in-combination impact on European sites was considered by the DAFM and that various online planning systems and datasets were consulted in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basin Glencorbry_010. The FAC noted that section "5. County Development Plan", states that "Objectives relating to Natura 2000 sites set out within Limerick County Development Plan 2010-2016 (as varied) were consulted." The in-combination report concludes that (emphasis added):

There is no possibility that the proposed afforestation project CN91224, with mitigation measures set out in Section 4, will itself, i.e. individually, giving rise to an adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation

Interests and Conservation Objectives: Similarly, there is no likelihood of any residual effect(s) that might arise, which do not in themselves have an adverse effect, creating an adverse effect in-combination with other plans and projects.

It is concluded that there is a possibility that the proposed afforestation project at site CN88723 will itself, i.e. individually, give rise to potential adverse effect on the integrity of the following European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives:

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

Therefore, there is the potential for the proposed project to contribute to a cumulative adverse effect on the integrity of the above European Site(s), when considered in-combination with other plans and projects. Therefore, it is deemed that this project, when considered in combination with other plans and projects, could give rise to adverse effect on the integrity of the above European Site(s)."

AA Determination (AAD)

The AAD was prepared by an Ecological Consultant on 20th November 2023. Section 3, "Appropriate Assessment" lists the information that was taken into account and includes:

- *Any information gathered during site visits by DAFM representatives;*
 - *The site is split into 2 distinct areas, Plots 1 and 2 in the north and plots 3 and 4 to the south.*
 - *Both areas were comprised of wet grassland. There was a large amount of soft rush, creeping and meadow buttercup and broadleaf dock.*

No Annex I habitats or Annex II or IV species were encountered.

Section 4, "Appropriate Assessment Determination" consistently refers to afforestation project CN88723 throughout and does not make any reference to afforestation project CN91224. There are also portions of text which are redacted. This section states, *inter alia*, that "There are no measures that can be applied to mitigate the effects that this project could have on the Hen Harrier" and concludes that The Minister has determined, based on objective information, that reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of the stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA.

Submissions & Referrals

There were no third-party submissions on this application. The DAFM referred the application to the National Parks & Wildlife Service (NPWS), Shannon Region Fisheries Board (IFI), and Limerick County Council (LCC). LCC did not reply.

The NPWS response stated that "The proposed planting area lies within the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (SPA) (Site Code 004161) and is

located approximately 5 kilometres upstream of the Lower River Shannon Special Area of Conservation (SAC) (Site Code 002165). The Forest Service should be satisfied that the proposed planting works will not have an adverse impact on the Natura 2000 sites.” The NPWS also provided an Appendix with other points of relevance.

IFI’s response stated that they had “no objection in principle to this application but wishes to highlight the proximity of the Glencorbry River which shares its boundary with those of parcels no. 2 and no.3, and which comprises an important salmonid habitat.” IFI also made a number of recommendations regarding protection of water quality and notification of commencement of operations.

Grounds of Appeal and DAFM Response

There is one first-party appeal against the decision to refuse CN91224 (FAC004-24). The grounds of appeal have been considered in full by the FAC and are summarised below:

- The Appellant is appealing the licence refusal as the proposal is outside of an SPA for Hen Harrier,
- The Appellant highlights the financial implications of the DAFM’s refusal decision,
- The Appellant emphasized the stress/mental health impacts the refusal of this proposal has had on both him and his wife.

The DAFM’ SOF contains administrative comments, and a statement from the Forestry Inspectorate. The administrative comments state that the decision was issued “in accordance with our procedures”, S.I. 191/2017, and the Forestry Act. In summary, the statement from the Inspectorate submits that:

- A desktop study and subsequent field inspection of the afforestation application found the proposal lies entirely within a HLNA.
- The Environmental Requirements for Afforestation Working Document v.31Aug23 states,
 - Sites wholly within a section of a HLNA that extends outside of a SPA designated for breeding Hen Harrier, are ineligible and must not be submitted. (This will be indicated on iNET, drawing from a confidential dataset.)
 - Any part of a site overlapping with a HLNA that extends outside of a SPA is ineligible and must be excluded from the application.
- “The afforestation application was refused based on the above statements.”

Additional Information

Following the FAC’s consideration of appeal FAC004/2024 on_19th June 2024 and having regard to the redactions in certain AA documents, outlined above, the FAC wrote to the DAFM on the 20th June 2024 with the following request:

In considering appeal ref. FAC004/2024 the FAC have had regard to the Appropriate Assessment (AA) documents relating to this file as published by the DAFM including: i) an AA Screening Report & Determination, ii) an AA Report, and iii) an AA Determination. It appears that each of these documents contains environmental information which has been “blacked-out” or redacted. On the face of the record, it appears that the decision under appeal relies, in part at least, on environmental information which has not been provided to the FAC, as required by Regulation 7(2) (b) of the Forestry Appeals Regulations of 2020.

While the FAC understands that the DAFM may have a basis to withhold sensitive information in light of the provisions of 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), the FAC notes that 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 Agriculture Appeals Act 2001 (as amended), and is subject to the same constraints in relation to environmental information as the DAFM itself. The FAC is therefore requesting that the DAFM provide unredacted versions of the relevant AA Screening Report & Determination, AA Report, and AA Determination for the FAC's consideration.

The DAFM provided the information requested above on 21st June 2024. Among the information contained in the unredacted AA documents is confirmation that "the afforestation proposal is overlapped by a number of HLNA."

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.

As detailed previously in this letter, the FAC identified a number of significant errors in the DAFM's AA and EIA screenings of the proposal applied for under CN91224. However, in the FAC's view, such errors can potentially be discounted in certain circumstances, e.g., where the DAFM has decided to refuse a licence for environmental reasons (as any potential effects, significant or otherwise, on the environment or European sites which may have resulted from errors in the relevant screening processes will not, in fact, occur).

The FAC noted, during its consideration of the record of the DAFM's decision under appeal, that both the AA Report (in Section "7. In-Combination Statement") and the AAD (throughout "Section 4 Appropriate Assessment Determination") refer to the project under consideration as CN88723. This is evidently a significant error on the face of the record. However, the FAC also noted the proximity of the proposal to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (the sole SCI of which is Hen Harrier), and the DAFM's statement in their SOF that "The proposed afforestation application lies entirely within a Hen Harrier High Likelihood Nesting Area."

The FAC also considered the DAFM's reason for refusing the licence on this occasion which was stated in the decision letter to be "As per Environmental Requirements for Afforestation Working Document v.31 Aug 23, any part of a site overlapping with a Hen Harrier High Likelihood Nesting Area (HLNA) that extends outside of a SPA is ineligible and must be excluded from the application."

The FAC had regard to the personal nature of the Appellant's grounds of appeal and wishes to express sincere empathy for the financial and emotional stress the Appellant and his wife have experienced arising from the refusal of their afforestation application.

However, based on the information before it, and for the reasons outlined above, in the particular circumstances of this case the FAC concluded that there was insufficient evidence on which to base a determination that the DAFM's decision to refuse an afforestation licence under CN91224 should be

overturned. Therefore, the FAC decided to disallow appeal FAC004/2024 and to affirm the Minister's decision to refuse an afforestation licence under CN91224.

Yours sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee