



21<sup>st</sup> March 2022.

**Subject:** Appeal FAC 103/2021 regarding licence CN82466

Dear

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

#### **Background**

Licence CN82466 is for the afforestation of 4.97 hectares at Park, County Limerick which was refused by the Department of Agriculture, Food and the Marine (DAFM) on the 25<sup>th</sup> May 2021.

One reason was stated;

*Environmental Considerations; The proposed area is considered to be predominately comprised of suitable habitat for Hen Harrier conservation - Rough Grassland as described by Ruddock et al. (2012; 2016), is surrounded by the SPA, is located in an area with high likelihood of nesting Hen Harriers (i.e. Red Areas, DAFM 2015) and is within the core foraging range of a further three similar Red Areas for nesting Hen Harriers. Therefore, there is a high likelihood that the proposed afforestation could impact Hen Harrier in the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 through removal of foraging, nesting and/or roosting habitat, particularly considering the existing extent of afforestation in the SPA. This refusal is to ensure good forestry practice, the protection of the environment, health and public safety.*

#### **Hearing**

A hearing of appeal FAC 103/2021 was held by a division of the FAC on the 7<sup>th</sup> March 2022. The FAC members in attendance at the hearing were Mr. Myles Mac Donncadha (Chairperson), Mr. Iain Douglas and Mr Derek Daly.

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and, in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN82466.

**Licence**

The licence pertains to the afforestation of 4.97 hectares at Park, County Limerick. The site is a single plot roughly rectangular in configuration with some roadside frontage on the north-western boundary with proposed planting of a mix of Sitka spruce (3.94 hectares), Alder (0.40 hectares) and Birch (0.29 hectares) and 1,700 metres of fencing. The total area to be planted is 4.63 hectares. There is a watercourse also along part of the western boundary. It is proposed to plant Alder alongside the watercourse and Birch along the roadside boundary. There are a number of dwellings in the area.

The application was accompanied by mapping including location maps, biodiversity/operational mapping, a fencing map and public notices. A Natura Impact Statement (NIS) was also submitted in the course of the application. The NIS indicates that the site is located adjacent to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA which borders the site to the east and south. The NIS identified and assessed Natura sites and associated Qualifying Interests (QIs) and includes an Assessment of Potentially Significant Impacts. It is indicated that direct impacts to the Hen Harrier and Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161) are unlikely given the nature of the works required on the site and works will not occur within the footprint of the SPA. The habitat adjacent to the site is suboptimal for foraging Hen Harriers as it contains conifer plantations which have closed canopies. The proposed afforestation site is suboptimal for Hen Harriers as it is made up of improved grassland which has become abandoned. Other QIs are assessed and overall, it is concluded that with careful application and maintenance of adequate and appropriate mitigation measures as outlined in the NIS it is unlikely that this project will have significant impacts on the integrity of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161), Lower River Shannon SAC (002165) and River Shannon and River Fergus Estuaries SPA (004077). A further submission by the applicant dated the 29<sup>th</sup> January 2021 identifies the site as improved grassland.

The site is within the within the River Sub-Basin Owvane (Limerick)\_020 River Waterbody WFD, for which the EPA records the status as good and in terms of risk is indicated as not at risk.

The inspector certification refers to the project comprising 4.97 hectares where the soil type is predominantly podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area is crossed by / adjoins an aquatic zone(s).

The application was referred to the National Parks and Wildlife Service who in a response dated 5<sup>th</sup> June 2019 state that an Appropriate Assessment is advised as the site is within a red zone nesting area for hen harriers.

Submissions were also received from a number of local residents referring to impacts arising from the proposal on their properties and dwellings and impact on the Hen Harrier species.

**DAFM Assessment**

The DAFM assessment includes an initial assessment from the District Inspector that records a screening for AA and subsequent certifications. In the initial screening four European sites are recorded within 15 kilometres of the project area two of which were screened out. The sites screened out were Askeaton Fen Complex SAC 002279 which was screened out concluding that it can be excluded, based on objective

scientific information, that the project itself (i.e. individually) will not have a significant effect on this European Site, due to the following findings: the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. The DAFM has determined that there is no likelihood of the project having any significant effect, either individually or in combination with other plans and projects, on this European site. Barrigone SAC 000432 was also screened out concluding that it can be excluded, based on objective scientific information, that the project itself (i.e. individually) will not have a significant effect on this European Site, due to the following findings: the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site. Two sites were screened in as potential impacts were identified to Lower River Shannon SAC (002165) and the River Shannon and River Fergus Estuaries SPA (004077) due to the project design (including associated operations and ancillary works) and location; the European Site, its qualifying interests and conservation objectives; and the possibility of potential sources and pathways.

There are subsequent Inspector certifications which reflect a chronological sequence of the assessment of the licence and which includes an additional European site Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 which was not present in earlier assessments. This site was subsequently screened in for AA based on the finding that the site cannot be excluded, based on objective scientific information, that the project itself (i.e. individually) will have a significant effect on this European site, due to the presence of an Annex 1 habitat listed as a qualifying interest within the project area.

An Incombination report concluded, following the initial screening determination that there is the possibility of the project having a significant effect, either individually or in combination with other plans and projects, on the European Site(s) listed below. Lower River Shannon SAC (002165) River Shannon and River Fergus Estuaries SPA (004077) Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161).

DAFM carried out an Appropriate Assessment Screening Determination (AAS) which in conclusion screened in three European sites the Lower River Shannon SAC (002165), River Shannon and River Fergus Estuaries SPA (004077) and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161).

The Appropriate Assessment Determination (AAD) by DAFM concluded based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and 5 the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed under CN84526, individually or in combination with other plans or projects, will adversely affect the integrity of the European Site: Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161, having regard to the conservation objectives. An additional two European sites, the Lower River Shannon SAC (002165) and the River Shannon and River Fergus Estuaries SPA (004077), were screened in but are not addressed "given the adverse effects on the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161". The FAC notes the reference to CN84526 in the AAD and also that the AAS refers to CN82466.

As part of the assessment of the licence it is also noted by the FAC that there are a number of ecologists reports and references to field assessment.

## **Appeal**

There is one appeal against the decision to refuse the licence.

The grounds of appeal refer to;

- The afforestation proposal to which this appeal represents is located adjacent but not within the Stacks, Mullaghareirks, Mount Eagle and West Limerick Hills SPA.
- This SPA supports Irelands largest breeding population of hen harrier. Hen harrier surveys have indicated a decline of approximately 30% in their population since 2005 within the Stacks, Mullaghareirks, Mount Eagle and West Limerick Hills SPA. However, data for the last 5 years has shown that the population has stabilised and in 2020 there were 30 confirmed pairs and one possible pair.
- In relation to suitable hen harrier habitat, they have traditionally used heather moors for nesting during the breeding season and the surrounding countryside for foraging which has included farmland. Due to the reduction in suitable habitat, hen harriers have adapted to nesting in young conifer plantations and are now frequently associated with these forests.
- It was noted that the proposed afforestation site was largely made up of improved grassland (GA1) (Fossitt, 2000). This type of habitat has been identified as being suboptimal for hen harrier as "Improved grassland was strongly avoided as a nesting habitat and landscapes with a high percentage cover of grassland were also avoided".
- Scrub, peatland and linear hedgerow habitats have been identified as optimal habitat for nesting and foraging hen harrier. As discussed previously scrub and peatland were not identified within the proposed afforestation site.
- However adjacent to the site there are areas classified as Forest and semi-natural areas with areas of Scrub and/or herbaceous vegetation associations (324) and also areas of Peatland (412). It would appear that there are large areas of habitat suitable for nesting and foraging hen harrier in the wider area which would lessen the impact of afforestation on the proposed site.
- It is therefore concluded that the lack of suitable habitat within the proposed site and the extensive area of suitable habitat in the surrounding area and that hen harriers appear to have adapted to a nesting and foraging with commercial forestry indicate that the proposed afforestation project should be allowed to proceed.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. The licence application was desk and field assessed. The Statement from Inspectorate indicates restates the reason for refusal and following a review of the Appropriate Assessment Determination on file agrees with its recommendation to refuse a licence for afforestation for the lands in question.

There is also a response from the DAFM ecologist to the matters raised in the grounds of appeal by the appellant's ecologist and specifically refers to three issues which requires response.

The first issue is in relation to lack of suitable habitat within the proposed site. The response considers the ground of appeal submitting that the Fossit (2000) definition of improved grassland (GA1) applies to the site and that improved grassland was strongly avoided as a nesting habitat and that landscapes with a high percentage cover of grassland were also avoided by the Hen Harrier. The response contends that the Fossit definitions are insufficient in this instance citing that Irwin et al., 2012 used the same definition of "rough" vs "improved" grassland and were subsequently used in the AA Determination. This category of "rough grassland" has been identified as suitable Hen Harrier habitat.

The second issue is submitted as the extensive area of suitable habitat in the surrounding area based on CORINE data. The DAFM response is that these data are unsuitable for such analysis, as the spatial resolution of this dataset is low compared to that of other datasets used in DAFM analysis, and the relevance of some habitat classifications (particularly agricultural habitats) to Ireland is also low. Added to this, the fact that CORINE is only updated once every 5-10 years means that changes relating to forest felling and replanting, which are among the land use changes of greatest relevance to Hen Harriers, may be incorrectly represented. In addition, edge effects of afforestation can increase predation risk to Hen Harrier and predation has been identified as the likely cause of high rates of nest failures in this SPA in 2021.

The third issue refers to the submission that Hen Harriers appear to have adapted to nesting and foraging within commercial forestry. The response considers that the basis for this statement is unclear; afforestation of open habitats that are used by Hen Harriers will ultimately lead to a net loss of suitable habitat and loss of suitable habitat to forestry has been identified as a pressure on Hen Harrier conservation in Ireland and the SPA adjoining the proposed area is already over 50% afforested (NPWS Site Synopsis for 004161).

#### **Assessment of Appeal.**

In addressing the grounds of appeal, the FAC considered the requirements of the Habitats and EIA Directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The FAC considered if the procedures leading to the making of the decision to grant the licence for the proposed development were consistent with the EIA Directives. Regarding Environmental Impact Assessment (EIA) and related matters, the EU EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine through thresholds or on a case by case basis (or both) whether or not EIA is required. The Irish Regulations, in relation to forestry licence applications, require mandatory EIA for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers

such development would be likely to have significant effects on the environment. The proposal as described is for the afforestation of 4.97 hectares and is sub-threshold for the mandatory submission of an EIA report. In this case the FAC found that the DAFM assessed the proposal and considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process.

In considering the appeal the FAC examined the Appropriate Assessment Screening process as undertaken by the DAFM as it related to the afforestation of 4.97 hectares. Having examined the documentation submitted, the FAC noted that the initial assessment identified four sites within a 15 kilometre radius of the site but subsequently this was increased to five sites. The FAC has identified the same five Natura sites as the DAFM within 15 kilometres from the proposal and the FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined. The FAC noted the AAS of the DAFM screened in three sites the Lower River Shannon SAC (002165) and the River Shannon and River Fergus Estuaries SPA (004077) and the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161.

The AAD concluded based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the project proposed, individually or in combination with other plans or projects, will adversely affect the integrity of the European Site: Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161, having regard to the conservation objectives. In relation to the European sites, the Lower River Shannon SAC (002165) and the River Shannon and River Fergus Estuaries SPA (004077) which were screened in are not addressed in the determination.

In considering the AAD the FAC considered the provisions of the Forestry Regulations 2017 in particular Part 8 which refers to Appropriate Assessment Protection of European sites. The said Regulations in paragraph 19(4) refer to 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 the site as a European Site, the Minister shall assess if the development, individually or in combination with other plans or projects is likely to have a significant effect on the European site and to carry out an appropriate assessment of the implications of the proposal for the European site either alone or in combination with other plans or projects in view of that site's conservation objectives and in paragraph 19(5) to having regard to the conclusions of the assessment under paragraph (4), the Minister may grant a licence or attach conditions to a licence to protect the integrity of the European site, only after having ascertained that the proposed development will not adversely affect the integrity of the site.

In considering in particular the AAD and its overall conclusion the FAC note that the appeal relates to a refusal of a licence but the provisions of the Forestry Regulations 2017 apply to all licences being considered. The FAC also note the reference to CN84526 in the AAD and also that the AAS refers to

CN82466 and that this may represent a typographical error. The FAC considers that in not addressing and carrying out a determination and finding in relation to all three sites which were screened in the AAS the DAFM has not ascertained that the proposed development will not adversely affect the integrity of all of the European Sites as required. Appropriate Assessment, the FAC considers, requires a complete evaluation and determination of all European sites identified in the screening. The FAC is therefore satisfied, having regard to the record of the decision, that a serious and significant error was made in the decision regarding Appropriate Assessment screening and determination.

In relation to and on water quality generally the FAC notes that in relation to WFD the project is within the the River Sub-Basin Owvane (Limerick)\_020 River Waterbody WFD, for which the EPA records the status as good and in terms of risk is indicated as not at risk. The FAC has examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes; mapping and aerial imagery of the area; the location and nature of watercourse adjoining the site and the area generally and the proposal to plant the Alder species adjoining the watercourse. The FAC, having examined the matter, concluded that the proposed afforestation will not impact on the quality on any receiving waters.

In relation to potential hydrological impacts on Natura 2000 sites the FAC noted that the NIS and identified potentially significant impacts to qualifying features of the Lower Shannon SAC (002165) and the AAS in relation to the Lower River Shannon SAC (002165) this site was screened as it is approximately 6.5 km (linear distance) from the project and approximately 12 km downstream of the project and is hydrologically connected via the Owvane river that adjoins the proposed area. Of particular concern are potential impacts to otters and aquatic habitats and species QIs of this Natura site. The River Shannon and River Fergus Estuaries SPA (004077) was also screened in as this European site is approximately 8.2 km (linear distance) from the project and approximately 12 km downstream of the project and is hydrologically connected via the Owvane river that adjoins the proposed area and given the hydrological connection and the nature and status of the intervening waterbodies, of particular concern are potential impacts to Wetlands and supporting aquatic habitats and species for the QIs of this Natura site.

Both European sites have therefore an identified hydrological connection and in the absence of a determination as stated above the FAC cannot conclude the absence of potential hydrological impacts on these two Natura 2000 sites.

In relation to other matters the FAC noted submissions by third parties in relation to proximity of the development to their dwellings the FAC notes that good forestry practice and guidelines requires minimum setbacks from dwellings, public roads and watercourses where a licence is approved. The FAC noted the location of dwellings in the immediate area of the proposal and is satisfied that subject to compliance with these Guidelines though noting that changes to current landscape will arise the separation distance will ameliorate adverse impacts.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal and other submissions received. The FAC is satisfied that significant errors were made in making the decision at the Appropriate Assessment Determination assessment stage. The FAC decided to set aside

and remit the decision of the Minister and to require the carrying out of an Appropriate Assessment Determination in relation to all European sites identified in the Appropriate Assessment Screening with the potential for the proposed development to impact on the QI's identified in the screening, before making a new decision in respect of the proposed development.

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee