



21st December 2023

Subject: Appeal FAC020/2023 against licence decision LS09-FL0188

Dear :

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted 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 ("The Act"), as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

A hearing of appeal FAC020/2023 was held remotely by the FAC on 12th December 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Vincent Upton
Secretary to the FAC: Ms. Vanessa Healy

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 to grant licence LS09-FL0188. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to the granting of a felling licence on 11.09 hectares at Glendine, Co. Laois. The application was submitted on 24/03/2023. The application included operational and environmental information and a number of maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling of an existing 33 year old plantation comprised of Sitka spruce in 2025. The site would be replanted with Sitka spruce with setback areas bordering the aquatic zone and watercourses being left unplanted.

The application also included a document entitled Appropriate Assessment (AA) Pre-Screening Report, dated 16th May 2023, prepared on behalf of the Applicant. This describes the site, including hydrology,

and operations in further detail and screens the proposal for potential significant effects on European sites. This document identifies eight European sites within 15km. Each qualifying interest or special conservation interest associated with a Special Conservation Area (SAC) or Special Protection Area (SPA) is considered in turn. The report also identified other plans and projects considered in-combination with the proposal. The pre-screening determined that there are likely significant effects and that Appropriate Assessment should be undertaken in relation to specified interests of four European Sites, Slieve Bloom Mountains SAC, Slieve Bloom Mountains SPA, River Barrow and River Nore SAC, and River Nore SPA.

The application also included a Natura Impact Statement, this relates to two licences LS09-FL0188 and LS09-FL0191. Potential significant effects are outlined in relation to the interests identified in the pre-screening document and measures are outlined.

An AA screening and an AA Determination were prepared on behalf of the Minister. The screening records considerations of the same eight European sites as identified in the Applicant pre-screening report. The AA screening considers each site in turn and records a screening conclusion and reason. Other plans and projects considered in combination with the proposal are recorded. The screening document concludes that an AA was required in relation to three European sites Slieve Bloom Mountains SPA, Slieve Bloom Mountains SAC, and River Barrow and River Nore SAC.

A separate AA Determination was recorded that is stated to have taken into account the application information and NIS and the DAFM screening amongst documentation. The AA Determination records measures in relation to four European sites and provides reasons for the measures.

The application was referred to Laois County Council and the National Parks and Wildlife Service (NPWS). The local authority responded submitting that the proposal was not within an Architectural/Archaeological Site or Prime Scenic Area but it is within an SPA or NHA and that AA was required. The NPWS responding submitting that as the current policy of the Forest Service was to not licence afforestation in the SPA that there should be a moratorium on replanting. The submission also states that the soil type is "peatland" and that current Forest Service guidance prohibits the planting of peat soils. The submission goes on to state that it is recommended that the proposed works should take place from August 15th to the 28th of February of the following year to avoid disturbance to breeding and nesting birds and that if works are to take place outside these dates then an Appropriate Assessment Screening should be undertaken.

The licence was granted with conditions on 09/08/2023.

Appeal

One third party appeal was made against the decision to grant the licence and received by the FAC on 18th August 2023. The Notice of Appeal and full grounds of appeal were provided to the parties. In summary, the grounds submitted that no Appropriate Assessment was undertaken in relation to the replanting and that the decision of the Minister does not fulfil the basic requirements of the European Union legislation and case law. The grounds submit that there is no evidence that the person who

carried out the Appropriate Assessment had any qualifications and that there is no evidence that the original planting complied with the Birds Directive and the Environmental Impact Assessment Directive. The Appellant made a further comment by email on 17/10/23 again questioning the AA undertaken.

Minister's statement

The Minister provided a statement responding to the appeal which was provided to the parties. This statement outlined the processing of the application and the issuing of the licence. The statement submits that the replanting of the site was assessed and refers to the maps and content of the documentation in relation to reforestation. The statement also refers to a number of measures contained in the AA Determination that are conditions on the licence and relate to the replanting. The statement further submits that the operations that are not included in the specified categories of the EIA Directive and the implementing legislation.

Considerations of the FAC

The FAC considered that the appeal raises general concerns in relation to the Appropriate Assessment recorded by the Minister but does not submit any specific concerns in relation to significant effects or impacts on European sites and their interests.

As the parties were notified the FAC had regard to the documentation provided through the DAFM's Forestry Licence Viewer (FLV), the Notice of appeal and the statement provided by the DAFM. In relation to Appropriate Assessment the documents in a pre-screening report and Natura Impact Statement submitted by the Applicant in addition to other application information and a screening and Appropriate Assessment Determination (AAD) prepared on behalf of the Minister.

The procedure adopted is somewhat unusual as the NIS was prepared before the screening was undertaken by the Minister. Having regard to the Forestry Regulations 2017, the FAC formed the view that this may be acceptable in practice where there is a clear consistency in reasoning in the assessment undertaken by the Minister or that any significant inconsistencies are explained and where the assessment and conclusions are clear, definitive and complete.

In this instance, the FAC is of the view that there is contradictory information within the NIS and contradictory findings between the pre-screening and NIS prepared by the Applicant and the screening and assessment undertaken by the Minister. The FAC further considers that these contradictions have not been addressed in the assessment and reasoning recorded in the documentation of the Minister.

The FAC considers that of particular significance is the contradictions in relation to the Nore Pearl Mussel (*Margaritifera durrovensis*) and the Hen Harrier (*Circus cyaneus*).

In the NIS a contradiction is stated between the proximity of the proposal to a recorded population of Nore Pearl Mussel which is recorded as being both less than (pages 5 & 10) and greater than (page 31) 25km in the NIS. This species is particularly sensitive to changes in water quality and the proposal has the potential to impact on water quality through sedimentation and runoff according to the information

submitted by the Applicant. While a threshold of 25km might itself constitute a precautionary approach neither the Applicant nor the Minister record why this threshold was employed with reference to the available scientific evidence while separately the dilution capacity of the intervening water system is referenced. The contradiction in distance itself does not appear to be resolved in the documentation prepared by the Minister and this constitutes a serious error.

In relation to Hen Harrier, the NIS of the Applicant and the screening and AAD recorded by the Minister are in direct contradiction with the NIS finding that specific temporal restrictions are required while the Minister's screening and AAD found that such restrictions were not required to be specified unless information from the NPWS changed. While it may be that the Minister had access to different and more update information than the Applicant the FAC would anticipate that such a contradictory finding would be explained in the documentation. The FAC considered that this error is exacerbated by the submission of the NPWS which raises specific concerns regarding Hen Harrier.

Ultimately the Minister has not recorded an assessment of the likely significant effects, mitigation measures, and how they avoid impacts on the integrity of a European site and appears to have relied on the NIS of the Applicant which contains errors not addressed by the Minister and measures which are contradicted by the Minister without sufficient explanation.

The FAC considered that these two matters were sufficient themselves to set aside and remit the decision to ensure an appropriate assessment in keeping with the requirements of the Forestry Regulations 2017 and EU Habitats Directive was completed.

In relation to the submissions that were made, the FAC noted that the application and NIS were subject to a period of public consultation. Furthermore, the Minister is required to have regard to the submissions made by prescribed bodies and the public in making a decision. While the FAC considered that the submission from the NPWS contains a number of factual inaccuracies and attributes powers to the Minister for Agriculture which do not appear to be reflected in the forestry legislation, the FAC would anticipate that the Minister might address the submissions as part of the assessment process.

In addition, the FAC noted that the screening documentation submitted by the Applicant referred to the incorrect townland. This might constitute an obvious error given the project description and mapping but it further highlights the concern regarding the lack of clarity regarding proximity to a Nore Pearl Mussel population and effects on Hen Harrier. The NIS appears to be incomplete in places, for example, the following is stated on a number of occasions,

Release of significant levels of nutrients into the water, which could lead to oxygen depletion in the water. This makes it unlikely that significant nutrient release to receiving waters will arise. However fertiliser application is proposed as part of this project with a steep slope, so runoff of fertiliser is a threat.

This paragraph appears incomplete and represents part of the Applicant's description of likely significant effects.

The FAC considered that a number of measures proposed in the NIS and measures conditioned in the AAD contained errors or lacked clarity. For example, The NIS proposes the following measure,

A setback area of 10m will be applied along the aquatic zones present in LS08-FL0151 and LS08-FL0154 only, as specified in Section 14 of the Standards for Felling & Reforestation (DAFM,2019).

This obviously contains an incorrect reference to other licences but also specifies a setback of 10m. The Minister in the AAD specifies a wider set back. While the Minister is of course free to contradict the measures proposed by the Applicant or identified in an NIS, the FAC would consider that this would be explained. Another measures states,

Prior to the commencement of operations onsite, install silt and sediment controls at the locations marked on the Harvest Plan.

The FAC considers that the Minister has set a minimum standard for the content of Harvest Plans in the Standards for Felling & Reforestation (DAFM,2019), and the application included Harvest Plan maps. The application also refers to the applicant providing an operational plan to its staff and contractors before commencing work and based on the content of the application and the language employed it is unclear which is being referred to in this condition.

The FAC concluded that the decision should be set aside and remitted and, given the nature of the errors, the FAC considered that the Minister should request a new NIS or prepare an Appropriate Assessment Report that clearly identifies and assesses likely significant effects on European sites and, where they occur, mitigation measures as deemed necessary and a determination in relation to the integrity of the relevant European sites. Whichever approach is adopted, the FAC considers that a new period of public consultation should be undertaken.

The grounds make a general reference to the replanting of the lands not being assessed which is contested by the Minister. The FAC has already noted that the Appropriate Assessment process should be undertaken again but it does note that the application provided details of the replanting following felling and that the NIS and AAD referred to effects from the replanting operations and specified measures. The conservation objectives of the Slieve Bloom Mountains SPA also refer to achieving an even and consistent distribution of age-class across the forest estate.

The FAC considered that some of the grounds of appeal were not fully addressed in the statement provided on behalf of the Minister in particular those relating to the qualifications of the individuals undertaking the assessment and the original consent process for the afforestation of the lands. In relation to qualifications, the AAD notes the authors as Ecologists and the Appellant has not submitted

any substantial concerns or expressed how they consider the qualifications to be lacking. The Minister may provide further clarification of this in undertaking a new assessment and decision.

In relation to the afforestation of the lands, the Appellant has submitted no reasons as to why they consider that the original consent was deficient in some way. The current crop was planted in 1992 before the designation of many SACs and SPAs and the documentation does not establish that the land was afforested at that time. The Appellant has not expressed any specific concern in relation to the lands which are the subject of the decision that has been appealed or if or how they consider that a significant effect on the environment or an impact on the integrity of a European site has come about. In any case the FAC is setting aside the decision and remitting it to the Minister.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal, and submissions received. The FAC is satisfied that a series of serious error was made in making the decision in this case. Therefore, the FAC is setting aside and remitting the decision to the Minister regarding licence LS09-FL0188 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to carry out a new Appropriate Assessment of the proposal in keeping with the requirements of the Forestry Regulations 2016 and Article 6(3) of the EU Habitats Directive, before a new decision is made.

Yours sincerely,

Vincent Upton,
On Behalf of the Forestry Appeals Committee