



22nd March 2023

Subject: Appeal FAC 115/2022 against licence decision WW06-FL0207

Dear

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

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. A hearing of appeal FAC 115/2022 was held remotely by the FAC on 7th of December 2022. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Derek Daly, & Mr. Vincent Upton
Secretary to the FAC: Mr. Michael Ryan

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine to grant the licence WW06-FL0207. The reasons for this decision are set out hereunder.

Background

The licence decision under appeal pertains to an application for Felling (thinning) at a site located in the townlands of Ballinguile, Ballinguilehill, Barnameelia, Blackrock, Carrigatheme, Slieveboy Lower, Slieveboy Upper, Slievenamough, and Slievenamough Plain, Co. Wicklow. The site consists of eight parcels of land totalling 130.47 ha (per licence approval letter). As the licence is for thinning, there is to be no replanting.

A Natura Impact Statement (NIS), provided by the applicant, describes the project site as being on mineral soils on a moderate slope, sloping in a western and southern direction. The existing habitat on

the site is given as 99% WD4 (Conifer plantation) and 1% GS4 (Wet Grassland). The conifer plantation is stated to comprise Sitka spruce and to a lesser extent Hybrid Larch, Japanese larch, and other conifers (planted in 1988, 1989, 1990, 1992, 1993, 1994, 1995, 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2021) forming a closed canopy over the majority of the project area. The northern boundary of the site is stated to lie adjacent to the Wicklow Mountains SAC, and the site is stated to lie in the Derreen_020 river sub basin (50.782ha) and the Derreen_030 river sub basin (79.688ha). Various aquatic zones are noted, and hydrological connectivity is noted with the Slaney River Valley SAC and subsequently after some distance with the Wexford Harbour and Slobbs SPA. Upland heath and bog habitat is noted to the north of the site, and agricultural grasslands are noted to the west and south. The project area is stated to lie with the Slaney-Derreen catchment that is designated as a Special Area of Conservation for the Freshwater Pearl Mussel (FPM).

The public record of the processing of the licencing decision, including the licence application documents, is available on the Department of Agriculture, Food and the Marine (DAFM) Forestry Licence Viewer (FLV). Application documents include a Pre-Approval Submission Report, an NIS, a Harvest Plan, stocking details, and location maps showing various features including relevant public and forest roads, and archaeological features.

Submissions and referrals

There are no submissions from members of the public visible on the public file. Referrals were made to the National Parks and Wildlife Service (NPWS) on the 15th of October 2021, and to Inland Fisheries Ireland (IFI) on the 4th of November 2021. No responses are on file.

DAFM consideration of the application

The DAFM undertook a screening for Appropriate Assessment. An AA Screening Report and Determination (AASR) dated the 28th of July 2022 is on file. This identifies six European (Natura) sites for screening for Appropriate Assessment, one of which is on the basis of a hydrological connection, and the remainder being on the basis of being located within 15km of the project site. Each of these sites is considered with reference to the sites' qualifying or special conservation interests, and makes the following conclusions:

- The Wicklow Mountains SAC [2122] and the Slaney River Valley SAC [0781] are screened in due to possible effect due to the location of the project within those Natura sites.
- The Wicklow Mountains SPA [4040] is screened in due to possible effect due to the proximity of potential habitat for the species listed as the Special Conservation Interest of this Natura site.
- The Slaney River Valle SAC [0781] is screened in due to possible effect due to the proximity of potential habitat for the species listed as the Special Conservation Interest of the Natura site.
- The Holdenstown Bog SAC [1757] is screened out due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

- The Vale of Clara (Rathdrum Wood) SAC [0733] is screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise.
- The Wexford Harbour and Slobs SPA [4076] is screened out due to the separation distance and the intervening waterbody between the Natura site and the project.

In each case reference is made to an in-combination statement attached to the AA Screening, which it is stated sets out that as there is no likelihood of the project itself (i.e. individually) having a significant effect on the European site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects.

The referenced in-combination assessment report is on file as an Appendix to the AASR, and refers to various planning systems being consulted on the 28th of July 2022, with a focus on the general vicinity of the project area in the River Sub-Basins DERREEN_020 and DERREEN_030. The planning systems consulted include those of Wicklow County Council, An Bord Pleanála, the Environmental Protection Agency, and the DAFM Forest Service. Consideration of the Wicklow County Development Plan 2016-2022 is also included. The document concludes with an In-Combination Statement that states:

It is concluded that there is no possibility that the proposed Thinning project WW06-FLO207, with mitigation measures set out in Section 4 of the AA Determination document, will itself, i.e. individually, give rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives. Therefore, there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of any European Site(s), when considered in-combination with other plans and projects.

An Appropriate Assessment Determination (AAD) dated the 29th of July 2022 is also on file. A number of inputs are noted as having been considered by the DAFM as part of the Appropriate Assessment process for those sites screened in by the AASR. These include the application, the Natura Impact Statement, and other projects that may in combination with the project under consideration adversely impact on the integrity of a European site. Each of the screened in sites are considered with reference to the relevant qualifying or special conservation interests, and where required mitigations are identified with reasons provided.

The AAD states that:

The Minister has carried out the Appropriate Assessment of potential impacts on the likely significant effects of the activity / project on those European sites 'screened in' (as listed above) and has made certain, 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 under WW06-FLO207, individually or in combination with other plans or

projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the following mitigation is implemented:

and continues to list the mitigations relating to invasive species; Merlin; the protection of heaths, grasslands and blanket bogs; FPM; Otter and other aquatic features; adjoining and downstream aquatic bases species and habitat. It also stipulates adherence to water protection measure guidance in the form of various standards and guidelines.

The DAFM issued the applicant with a licence in a letter dated the 4th of August 2022. This included a range of conditions including that the mitigations set out in the AAD be adhered to. On the 11th of August, the DAFM wrote to the applicant advising that the licence had been suspended arising from a three-day outage of the FLV which resulted in potential appellants not having the full 14 days' notice of the grant of the licence in which to lodge an objection with the FAC. The Licence was subsequently reissued to the appellant dated the 15th of August 2022.

The Appeal and Statement of Fact

There is one third party appeal to the FAC against the decision to grant a licence. The DAFM submitted a Statement of Fact (SoF) as provided under Section 14B(5) of the Act. The grounds, and the SoF are on the FAC file and have been made available to all parties to the appeal. The grounds of appeal are summarised below together with a summary of the DAFM response as provided in the SoF in *italics*.

1. The appellant objects to the independence of the both the Forest Service and the FAC on the grounds that the board of applicant are appointed by the Minister for Agriculture, Food and the Marine.

DAFM: No Comment made

2. That there is no evidence that the decision maker had any regard to the whole plantation for compliance with the EIA and Habitats Directives.

DAFM: Notes the licence is for thinning. The entire area is the subject of the licence. An AA was carried out on the plantation as represented by the application. Various documents associated with this process are on file.

3. It is submitted that there are lacunae with respect of assessment of Article 6(3) of the Habitats Directive and makes reference to Case 258/11 of the CJEU in this respect.

DAFM: notes that the DAFM screening for WW06-FL0207 agreed with the applicant's that the Wicklow Mountains SAC and Slaney River Valley SAC should be screened in. This resulted in multiple soil and water conditions (conditions A to S in the licence).

4. That a reference to application LS06-FL0052 in the AAD indicates that the decision maker did not read the file.

DAFM: An incorrect AAD was posted to the FLV, but the correct one was available to the decision maker.

5. That the AASR (in reference to LS06-FL0052) relies on distance to an SPA (Wicklow Mountains 004040) and that the absence of a complete source-pathway-receptor chain cannot be ruled out. The appellant refers to 258/11 and a judgement of Kelly (not referenced) in this regard.

DAFM: Wicklow Mountains SPA was screened in. Merlin mitigations are in line with expert opinion of Dr. Fielding as previously provided by the FAC to DAFM. Three sets of professionals agreed no likely impacts on Peregrine.

6. That the project is accessible via a number of Forest Roads (WW06R0124, WW06R0118, WW06R0110, WW06R0116) and queries whether these have been subject to AA or EIA.

DAFM: No Comment made.

7. That the proposed mitigation measures contain lacunae, as the words “will be” and “where necessary” are present throughout.

DAFM: No Comment made.

8. That the document Forestry and Freshwater Pearl Mussel Requirements (Forest Service 2008) is in draft form and has never been subjected to Appropriate Assessment.

DAFM: Potential risks for FPM identified in the NIS and AASR resulting in screening in of Slaney River Valley SAC resulting in measures A to D in licence.

Post Hearing Correspondence

At the hearing, the FAC noted the statement in the SoF that:

...the Forest Licence Viewer is principally a tool to allow access for the public to DAFM documents as opposed to a tool for storing files for final decision makers.

Having considered this statement, the Committee wrote to the Forest Service of DAFM on the 3rd of February 2023 to clarify the status of the FLV. In doing so, the FAC sought to ascertain whether for the purposes of its hearings the FLV represented a record of the decision and those documents relied upon in the granting of the licence WW06-FL0207.

A response was received to this request on the 10th of February 2023, in which the Forest Service confirmed that the FLV represents a complete record of the decision and those documents which were relied upon in the making of the decision for licence WW06-FL0207. The Forest Service further stated that in the case of the appeal in question the correct AAD was not posted to the FLV (LS06-FL0052 was posted instead); and the correct AAD was posted on the 22nd of July 2023 (this is taken by the FAC to be an error and that the 22nd of July 2022 is intended). The Forest Service stated that the error did not mean that the decision maker (Certifying Officer) didn't read the correct AAD when making the final decision; that they did, and that the Forest Service accept that the wrong AAD was posted to the FLV at the time, and this was regretted.

Considerations of FAC

In relation to the statement by the appellant in relation to the independence of the appeals process, the FAC operates under the Agriculture Appeals Act 2001 as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The FAC considered the ground of appeal that decision did not have regard for the whole plantation in compliance with the EIA Directive and Habitats Directives. 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. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations in relation to forestry licence applications, require the compliance with the EIA process 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 felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for felling for the purposes of thinning. The FAC does not consider that the proposal comprises deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered as requiring EIA in Irish Regulations. The FAC therefore concludes that no error was made by the DAFM with regard to the EIA Directive.

In relation to the Habitats Directive, the FAC observed that the DAFM carried out a screening for Appropriate Assessment, which considered the possibility of in-combination effects on a number of European sites, including three sites which were screened in the Appropriate Assessment. The In-combination statement, referencing searches of planning systems carried out on the 28th of July 2022 included a statement as noted above to the effect that mitigations proposed will ensure the project itself will not give rise to adverse effects and that consequently there could be no effect in-combination with other plans and projects.

The FAC note that consideration of mitigation measures is not an acceptable basis for determining that Appropriate Assessment is not required, as the test at screening is whether there may be an impact. The FAC would further understand that the consideration of other plans and projects (including forestry related projects) should take place as part of the process to ascertain whether there are likely significant effects arising from the project itself and in-combination with other plans and projects, having regard to the conservation objectives of the European site concerned, and in the assessment of the impact of such effects of the project itself and in-combination with other plans and projects on the integrity of the European site. As stated on the record it appears to the FAC that other plans and projects were only considered after the assessment of the likely significant effects of the project individually was completed, which would appear to the FAC to be the incorrect test and not to be in accordance with the requirements of Article 6(3) and the Forestry Regulations 2017.

The FAC considers this to be a serious error as it suggests that the screening undertaken did not consider effects of the proposal which might not be significant in themselves but could in-combination with other

plans and projects result in a significant effect on a European site. The Minister in making a new decision should undertake a new screening for Appropriate Assessment to ensure that the correct test is being employed.

The appellant submits that the AAD posted on the FLV included a reference to another project, and that this indicates that the decision maker did not read the file. In the SoF provided by DAFM it is accepted that an incorrect AAD was posted, but that the final decision maker would have had access to all relevant documents. This position was restated in post hearing correspondence received from DAFM. DAFM further submit in the SoF that the correct AAD is now displayed on the FLV. As noted above, the FAC queried this section of the SoF with DAFM. In particular, the FAC sought reassurance that the documents available on the FLV represent a complete record of the decision and those documents relied upon to grant the licence. In response, the DAFM stated that the FLV does represent a record of the decision. Based on this response, the FAC are satisfied that the decision maker reached a decision based on a complete reading of the file and that no error was made in relation to this specific ground of appeal.

However, the FAC holds the view that the appellant has submitted an appeal in good faith based on information provided on the FLV. In so doing, the FAC holds the view that the appellant would have had a reasonable expectation that this information would be correct and accurate. In addition to being an important part of the record of the decision-making process, the AAD forms part of the licence as it is referenced in condition 10. While these issues arose post-consent, and thus do not fall under the consideration of the FAC, the DAFM accepted that the incorrect document was published on the FLV after the decision was made as is evident from the content of the AAD. The FAC provided the statement from the DAFM to the parties and informed them of the source of the documentation that it would be examining as part of the appeal. In any case, the decision is being set aside and remitted for reasons described elsewhere in this letter for a new decision. DAFM should ensure that the correct documentation is published on the FLV after the new decision is made.

Two further grounds of appeal are submitted in the context of the appellant having had access to the incorrect AAD. For completeness, the FAC considered those grounds as they relate to the documentation available to it on the FLV. It is suggested in one of these grounds that there are lacunae with respect of assessment of Article 6(3) of the Habitats Directive, in particular with reference to consideration of the Peregrine and Merlin in the Wicklow Mountains SPA in the NIS provided by the applicant. The FAC notes that the Wicklow Mountains SPA was screened in for Appropriate Assessment by the DAFM and that the AAD posted to the FLV at the time of the FACs deliberations includes specific consideration of the need for mitigations in relation to the species in question. The FAC is not satisfied that the DAFM made an error in relation to this aspect of the Appropriate Assessment process.

The possibility of further lacunae is also raised by the appellant in relation to language in the proposed mitigation measures contained in the AAD. The FAC is satisfied that the language referenced relates to acceptable post consent decision making to be made by suitably qualified foresters on behalf of the

applicant and similarly assessed by qualified staff of the Forest Service of DAFM, and does not represent an error.

The appellant also notes a number of forest roads, and queries whether these have been subject to Appropriate Assessment or Environmental Impact Assessment process. The grounds provide no evidence of deficiency in this regard and the FAC considers that this matter is likely to be outside of the scope of the appeal at hand. As noted in the appeal the application identified existing forest roads related to the felling site which were before the DAFM in making the decision. The Appropriate Assessment and licence conditions include restrictions on forestry operations in relation to specified time periods and areas. The licence relates to tree felling and does not include further forest road works which would require licencing under the forestry legislation. The FAC are not satisfied that an error occurred in the making of the decision in relation to this ground.

The Appellant also submits that the document Forestry and Freshwater Pearl Mussel Requirements (Forest Service 2008) is in draft form and has never been subjected to Appropriate Assessment. The FAC had regard for the statement in the SoF provided by DAFM that potential risks for FPM were identified in the NIS and AASR resulting in screening in of Slaney River Valley SAC resulting to a number of measures carried through to the licence. The FAC is not satisfied that the status of the document referenced has resulted in an error in the processing of the licence having regard to the entirety of the process and the range of conditions specified.

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 serious error was made in the making of the decision in this case. The FAC is, thus, setting aside and remitting the decision of the Minister regarding licence WW06-FL0207 in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, to undertake a new screening for Appropriate Assessment before a new decision is made.

Yours sincerely,

John Evans On Behalf of the Forestry Appeals Committee