



2nd May 2023.

Subject: Appeal FAC 116/2022 regarding licence decision WD05-FL0155

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 (DAFM). 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

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 116/2022 was held remotely by the FAC on 7th December 2022.

In attendance

FAC Members: Mr John Evans (Deputy Chairperson), Mr. Derek Daly and Mr. Vincent Upton

Secretary to the FAC: Mr Michael Ryan

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 following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence WD05-FL0155.

Background

A felling licence (WD05-FL0155) covering an overall area of 33.18 hectares comprising thinning at Kilcanavee, Killerguile, Knockaturnory, Monminane County Waterford was issued by the DAFM on 5th August 2022. The licence decision pertains to nine identified plots with planting occurring over the period 1988 to 2004 primarily of Sitka Spruce with a range of other evergreen and deciduous species. The project area an upland site on the slopes of Croughaun Hill. The pre-screening report refers to the site indicating the majority of the project area is Sitka spruce planted between 2001 and 2004, with Japanese larch planted between 2003 and 2004 also common. The project area also includes smaller numbers of Lodgepole pine, European larch, Birch, Beech, and other broadleaves planted between 2001 and 2003, Noble fir planted in 1988, Western red cedar planted in 2002 and 1956, and other

broadleaves planted in 1955. The soil type is described in the documentation as largely peaty podzol soil with steep and some very steep gradients.

Application submitted included mapping and details of the the various plots in an information pack uploaded on the Forestry Forest Viewer on 14/12/2018 and an archaeology map uploaded 27/12/2018.

An Appropriate Assessment (AA) Pre-Screening Report with a completion date of 18th February 2022 was prepared by the applicant which identified four Natura 2000 sites within 15 km of the project, Lower River Suir SAC (Site Code: 002137; Comeragh Mountains SAC (Site Code: 001952); Nier Valley Woodlands SAC (000668) and Mid-Waterford Coast SPA (Site Code: 004193). In addition, one Natura site, the River Barrow and River Nore SAC (Site Code: 002162) at a distance of 44,082 metres from the project, which the document states was excluded from the AA process at Pre-Screening stage, is indicated as also hydrologically linked to the project the River Barrow and River Nore SAC (Site Code: 002162). One site Lower River Suir SAC (002137) was identified as having a possible effect arising from the project on a number of Qualifying Interests (QIs). An incombination statement was also part of the report concluding no cumulative impacts were identified arising from the project that could cause significant effects. Furthermore, no additional impacts were identified that might arise from the combination of projects and plans with the proposed project. Mitigation measures are also outlined.

The site as identified on EPA mapping is located within the within the River Sub-Basins CLODIAGH (PORTLAW)_030 (IE_SE_16C030300) which is stated as in terms of risk is "at risk" and status is "moderate" and CLODIAGH (PORTLAW)_040 (IE_SE_16C030400) which is stated as in terms of risk is "not at risk" and status is "good".

DAFM Assessment

The application was subject to desk assessment by the DAFM.

The application was referred to Inland Fisheries Ireland on the 04/11/2021 with no indication of any response.

The DAFM prepared an Appropriate Assessment Screening Report & Determination dated 26/07/2022 (and uploaded on the FLV on the same date) which identifies the same four Natura sites within 15 kms, screens out three and screens in Lower River Suir SAC IE0002137 due to possible effect arising from the direct hydrological connectivity between the project area and this SAC and concluding AA is required.

An Appropriate Assessment Determination was completed by an ecologist and dated 27/07/2022 uploaded on the FLV on the same date. Section 4 outlines mitigation measures in relation to QIs including the Freshwater Pearl Mussel (FPM), Otter and other aquatic features and more generally in relation to the protection of adjoining / downstream aquatic based species and habitat. Section 4 concludes the basis for this AA Determination and indicates that the conditions set out in combination along with strict adherence to the guidance cited, will eliminate pathways of impact of significance to the screened in features and based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

An In-Combination Statement completed on the 26/07/2022 uploaded on the FLV on the same date concluded *“that there is no possibility that the proposed felling project WD05-FL0155, 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. 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 adverse effect on the integrity of any European Site”.*

The decision to grant the licence issued on the 05/10/2022 subject to conditions which included conditions requiring adherence to specific archaeological requirements, that the applicant must adhere to the mitigation measures specified in the Attached Appropriate Assessment Determination Document.

Subsequent to the initial issue of the licence the DAFM in a letter dated 11/08/2022 stated that *“Due to an outage of the Forestry Licence Viewer for a period of 3 days adequate time was not given for any party to submit an appeal against this licence. The licence is hereby suspended and will reissue to give the full 14 days. The Licence was subsequently reissued with a date of 15/08/2022.*

Appeal

There is one appeal against the decision to refuse the licence and a brief summary of same is included below. The full grounds of appeal were considered by the FAC and are to be found on file.

The grounds of appeal submit that that in relation to this decision that it is contrary to CJEU judgements with no evidence of having regard to compliance with EIA and Habitats Directives and makes reference to Case 258/11 of the CJEU and it is submitted that there are lacunae with respect of assessment of Article 6(3) of the Habitats Directive.

The grounds refer to the National Survey of Upland Habitats referring to the reintroduced White Tailed Eagle and other bird species in the Comeragh Mountains SAC and screening out on the basis of hydrological connection is not relevant.

It is submitted that monitoring is not a mitigation measure citing reference to rainfall.

It is restated that the Comeragh Mountains SAC was not assessed.

Reference is made in the grounds of appeal to other thinnings and the absence of evidence of AA or EIA assessments.

DAFM Statement

The DAFM provided a response to the grounds of appeal in the form of a Statement of Fact (SoF) which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the grounds of appeal and states that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act.

Specifically in relation to matters raised in the grounds of appeal it is indicated that the licence is for a thinning operations only. It is stated in the SoF that it is the position of the Department that thinning a forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed).

The SoF sets out that an Appropriate Assessment consistent with Article 6(3) of the Habitats directive was carried on felling licence application WD05-FL0155 for the whole plantation represented by that application, and that the only SPA screened within 15km was the Mid-Waterford Coast SPA which is 13km from the project area and does not include as a qualifying interest any of the bird species referenced in the appellants grounds of appeal. It is further stated in the SoF that the Appropriate Assessment carried out by the Department was fully in line with Article 6(3) of the Habitats Directive establishing Appropriate Assessment of European Sites. With regard to areas outside of SPAs, the Department were not notified of any known recent nesting sites of protected bird species in the applicants NIS.

In the SoF the Department states that the monitoring of site conditions is an important activity for protecting water quality particularly when weather conditions deteriorate. The specific measure referred to by the appellant allows for the complete shutdown of operations when rainfall is particularly heavy and water quality is threatened. There are many other mitigations throughout the AA Determination that go far beyond monitoring and impose on operators' restrictions and work practices aimed at protecting water quality. To this end there are some 17 individual measures that together can be classified as soil and water conditions.

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats 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. In considering the appeal, the FAC consideration and determination of this appeal is made in accordance with the statutory provisions as set out in Section 14B(13) of the Agriculture Appeals Act 2001 as amended.

The FAC considered the submission in the grounds of appeal relating to the Environmental Impact Assessment (EIA) Directive. 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 are 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 Forestry Regulations 2017 (S.I. 191 of 2017), 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 decision before the FAC relates to the thinning of 33.18 hectares of commercial managed forest. The FAC concluded that the felling and replanting 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 not covered by national regulations (S.I. No. 191 of 2017) and that screening for significant effects under the EIA Directive was not required in this case. As such, the FAC was not satisfied that a serious or significant error was made in the making of the decision in relation to these grounds of appeal and the activity permitted in this case.

The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 require the Minister to screen and to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and the information as uploaded to the FLV to inform the general public as to the content of the application including that relating to Appropriate Assessment.

The DAFM recorded an Appropriate Assessment Screening Report & Determination completed by the District Inspector (DI) dated 26/07/2022 which identifies four Natura sites within 15 kms, screens out three and screens in Lower River Suir SAC IE0002137 due to possible effect arising from the direct hydrological connectivity exists between the project area and this SAC and concluding AA is required.

The DAFM also recorded an Appropriate Assessment Determination (AAD) which was completed by an ecologist dated 27/07/2022. The FAC noted that section 4 of the AAD mitigation measures in relation to QIs including the Freshwater Pearl Mussel (FPM), Otter and other aquatic features and more generally in relation to the protection of adjoining / downstream aquatic based species and habitat. The AAD screens out all Natura sites and in relation to the basis for this AA Determination indicates that the conditions set out in combination along with strict adherence to the guidance cited, will eliminate pathways of impact of significance to the screened in features and based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The FAC examined the record and statement from the DAFM and identified the same four Natura sites as DAFM. In relation to the screened in Natura site the Lower River Suir SAC IE0002137 the qualifying interests include the Freshwater Pearl Mussel and Otter species and the AAD outlines specific measures in relation to these to be included as conditions of a licence for the protection of these species and these were subsequently included in the conditions of the licence. Specific to the Fresh Water Mussel

these include requirements to prevent silt entering watercourses and to protect environmental sensitivities of the feature in the Lower River Suir SAC. In relation to the Otter species conditions are included to minimise disturbance and protect established habitat of the species. There are also other conditions in the licence to protect water quality.

Specific to the reference in the grounds of appeal to that the Comeragh Mountains SAC was not assessed the appellant has not offered any details in relation to this but the FAC notes that the Comeragh Mountains SAC IE0001952 was screened out by DAFM in the screening process due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise, having considered the project design and location, the European site and its conservation objectives, the possibility of potential sources and pathways and the application of DAFM procedures. The European site in question is a Special Area of Conservation whose qualifying interests include a number of terrestrial and aquatic habitats and a plant species. The site has not been designated for either of the bird species identified in the appeal and the appeal provides no reasons as to how the conservation objectives of the SAC or the species individually might be impacted.

The FAC also noted in the grounds of appeal reference to the National Survey of Upland Habitats referring specifically to the reintroduced White Tailed Eagle and other bird species in the Comeragh Mountains SAC and screening out on the basis of hydrological connection is not relevant. The FAC noted that Site Report No. 3: Comeragh Mountains cSAC (001952), Co. Waterford (Revision) January 2014 Commissioned by National Parks and Wildlife Service in paragraph 2.18 does refer to "a reintroduced White-tailed Eagle (*Haliaeetus albicilla*) was observed landing for a brief period near the highest point of the plateau during this survey".

The National Parks and Wildlife Service reintroduced this species to Ireland in 2007 the initially released eagles subsequently dispersed widely throughout Ireland and the breeding population of the species has successfully fledged chicks across counties Cork, Kerry, Clare, Galway and Tipperary. Forestry and the thinning of forestry is not identified as a threat to the species. There is no record of the species nesting in the project area or any evidence in support of this in the grounds of appeal.

The FAC, having considered the grounds of appeal and the record and the reasons stated for screening out of these sites and in relation to the Appropriate Assessment screening, concluded that it was not satisfied that an error had occurred in the making of the decision.

The FAC noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement was prepared in relation to the project. The statement includes the passage,

"It is concluded that there is no possibility that the proposed felling project WD05-FL0155, 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. 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 adverse effect on the integrity of any European Site”.

The FAC notes in relation to In Combination the DAFM deemed that the proposed project will not have any adverse effect, alone or in combination with other plans and projects, on the European Sites and also determined that the project will not adversely affect the integrity of these European Sites.

The screening document includes the following conclusions,
Furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this 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 FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and in the Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC that the potential for significant effects to arise from the proposal in-combination with other plans and projects were not considered and that the In-Combination statement makes reference to ‘adverse’ effects. The FAC would consider that this is not in keeping with the requirements of the Forestry Regulations 2017 and Article 6(3) of the EU Habitats Directive.

The FAC considered this to be a significant error as it suggests that the DAFM did not consider effects that might arise from the project which were not significant in themselves but which in-combination with other plans and projects might result in a significant effect.

The FAC notes that in relation to the issue of water quality that the conditions of the licence in addition required compliance with Departmental guidelines and requirements of the Forestry and Water Quality Guidelines. There are also previously referred to conditions specific to the protection of water quality identified in the AAD. The site as identified on EPA mapping is located within the within the River Sub-Basins CLODIAGH (PORTLAW)_030 (IE_SE_16C030300) which is stated as in terms of risk is at risk and status is moderate and CLODIAGH (PORTLAW)_040 (IE_SE_16C030400) which is stated as in terms of risk is not at risk and status is good. Both sub basins are within Subcatchment Clodiagh[Portlaw]_SC_010 and forestry is not identified as a threat in either sub basins,

The FAC consider that the issue of water quality was addressed in the assessment of the project and that the development will not have adverse effects on receiving waters. It is also considered that monitoring rainfall which would contribute to implementing mitigation measures to protect water quality is a

reasonable and standard approach and informs the protection of water quality and is in keeping with good practice. The FAC considers that the assessment should be read as a whole and would require the implementation of all measures.

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, and all submissions received. The FAC concluded that a serious or significant error or series of errors were made in the making of the decision in respect of licence WD05-FL0155. The FAC is therefore setting aside and remitting the decision regarding licence WD05-FL0155 to the Minister to carry out an Appropriate Assessment screening and Appropriate Assessment, as required, of the proposal itself and in combination with other plans or projects before a new decision is made.

Yours sincerely,



Derek Daly On Behalf of the Forestry Appeals Committee