



21/08/2024

Subject: Appeal FAC 095/2023 against licence decision TY19-FL0201

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 and Decision

A hearing of appeal FAC 095/2023 was held remotely by the FAC on 15th May 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, Mr Donal Maguire, & Mr. Luke Sweetman.
Secretary to the FAC: Ms. Vanessa Healy and Ms. Aedin Doran (Observer).

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. 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 licence TY19-FL0201. The reasons for this decision are set out hereunder in this letter.

Background

The application for the licence decision under appeal relates to the granting of a felling licence in the townlands of Ballynatona and Killeatin, Co. Tipperary. The application as submitted is dated 02/10/2023 and included operational and environmental information, and maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling of one sub-compartment of 12.21 ha, which comprises mainly Sitka spruce and to a lesser extent Lodgepole pine (south coastal) and Japanese larch planted in 1976 and 1979, forming a closed canopy over the entire project area. The site would be replanted with approximately 95% Sitka Spruce and 5% being open space. The licence was granted with conditions on 28/11/2023.

Appropriate Assessment Pre-Screening Report (AAPSR) dated 08/11/2023

The FAC finds on file a document entitled *Appropriate Assessment Pre-Screening Report*, dated 08/11/2023. This report which is marked as being for *Clearfell and Reforestation project TY19-FL0201, in the vicinity of Ballynatona and Killeatin, Co. Tipperary*, describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. This document describes the proposal site as consisting of conifer high forest, made up of one sub-compartment. The project area is part of a larger conifer plantation of varying age and class to the north and east. There is an area of heathland to the west and south. The surrounding area and wider landscape support an abundance of additional conifer plantations, heathland and improved agricultural grasslands. The project area is located on peaty gley soils (AminPDPT and AminSRPT) on a steep slope, sloping in a northerly direction.

In relation to hydrology, the AAPSR states that there are no aquatic features within or in close proximity of the project area. The closest aquatic feature within the sub-basin is an aquatic zone, the Flemmingstown River (order 2), which is present approx. 0.7 km east of the project area. There is no clear flow path between the project area and this aquatic zone. A buffer of additional conifer plantation occurs between the project area and the Flemmingstown River. The project is in the DUAG_030 River Sub-Basin. The water quality status for the DUAG_030 waterbody is 'Moderate' based on the latest EPA RWB data (ref. <http://gis.epa.ie/GetData/Download> > WFD Status Tables (Excel) (All waterbodies) 2013-2018 - November 2019 and WFD Status Tables (Excel) (All Waterbodies) 2016-2021 - December 2022] and has deteriorated from a status of 'Good' since 2013-2018. The *Cycle 3 HA 16 Suir Catchment Report, May 2024*, which is publicly-available on Catchments.ie, records the DUAG_30 waterbody as being 'At Risk' for the period 2016-2021 and identifies forestry and agriculture as significant pressures. The AAPSR states that "the impact of the proposed operations on this waterbody is considered to be negligible".

The report states that there are 4 Natura 2000 sites within 15km of the project namely 3 SACs and 1 SPA. These are:

- Blackwater Callows SPA (004094)
- Blackwater River (Cork/Waterford) SAC (002170)
- Galtee Mountains SAC (000646)
- Lower River Suir SAC (002137)

The AAPSR report states that all European Sites within a distance of 15 km surrounding the project area were identified and considered in relation to hydrological pathways for likely significant effect. In this case, there are no hydrologically connected European sites within 15km of the project area. The pre-screening report determines that, following an evaluation of the information set out in the report, it is concluded beyond reasonable scientific doubt, in view of best scientific knowledge, on the basis of objective information and in light of the conservation objectives of the relevant European sites, that the proposed project, individually or in combination with other plans and projects, will not have a significant effect on any European Site and that there was no requirement for this project to proceed to Appropriate Assessment (Stage 2).

DAFM Appropriate Assessment Screening Report & Determination dated 21/11/2023 (AASRD)

An AA screening Report & Determination is to be found on file as prepared by the Forestry Inspector, Department of Agriculture, Food and the Marine dated 21/11/2023. The screening refers to *Appropriate Assessment Screening Report & Determination for Felling and Reforestation project TY19-FL0201, at Ballynaton, Killeatin, Co. Tipperary*. This AASRD states that in undertaking the 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).
- responses from consultation bodies and submissions from 3rd parties.
- any subsequent supporting documentation received from the applicant.
- any other plan or project that may, in combination with the plan or project under consideration, significantly affect a European Site.
- any information or advice obtained by the Minister.
- Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site, available from National Parks & Wildlife Service (www.npws.ie).
- available ecological and environmental information including aerial imagery, historical OS maps, DAFMs iFORIS system, QGIS and ArcGIS applications and data available at National Parks & Wildlife Service (npws.ie), EPA Maps, GeoHive, Data and maps (gsi.ie), Biodiversity Maps (biodiversityireland.ie).
- any other relevant information.

The AASRD states that combined with the project details and site characteristics summarised above, there is sufficient information within the application and available from elsewhere to form a sound judgement regarding the likelihood of the project having a significant effect on a European site. It records considerations of four European sites within 15km of the project area. The AA screening considers each site in turn and records a screening conclusion and reasons. The screening document concludes that all four European sites were screened out and that there was no requirement to proceed to Stage 2 AA.

DAFM In Combination Report 21/11/2023

There is an In-combination report '*for Felling and Reforestation project TY19-FL0201*' dated 21/11/2023 on file which deals with the screened-out sites. It includes the following statement:

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project TY19-FL0201, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed elsewhere in the Screening Report, have been taken into consideration in reaching

these conclusions. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that they do not have any significant effect on those same European Site(s). There is no likelihood that the proposed project will have, or contribute to, any significant effect on those same European Site(s), when considered in combination with other plans and projects’.

County Council Referral

The application was referred to Tipperary County Council on 13/10/2023. There is no record of a response on file from the Local Authority.

IFI Referral and Response

The application was referred to the IFI on 13/10/2023. There is no record of a response on file from the Local Authority.

Appeal

One third-party appeal was made against the decision to grant the licence. The Notice of Appeal and grounds of appeal were provided to the parties. In summary, the grounds submitted that no assessment has been carried out into the replanting of this site, quoting from case CJEU Case 258/11 and submitting that an Appropriate Assessment must comply with same, and contending that there is no evidence that the original planting complied with the Birds Directive and the Environmental Impact Assessment Directive.

Minister’s Statement (SOF)

The Minister provided a statement responding to the appeal which was provided to the parties. This statement disputes the appellant’s assertion that there are lacunae in the Appropriate Assessment process. The Appropriate Assessment Screening, it states, is created following a detailed and thorough process that delivers precise, complete, and definitive findings and sets out the steps taken by the Department underpinning its compliance with article 6(3) of the Habitats Directive. The SOF sets out steps taken in the processing of the application and provides content in relation to the replanting assessment of the proposal.

Considerations of the FAC

The FAC had regard to the documentation provided through the DAFM’s Forestry Licence Viewer (FLV) as notified to the parties, the notice of appeal and the statement provided by the DAFM. In relation to Appropriate Assessment the documents included a Pre-Screening Report submitted by the Applicant in addition to other application information, an AASRD and an In-combination assessment as prepared on

behalf of the Minister. The In-Combination Assessment dated 21/11/2023 appears to be an appendix to the DAFM AASRD.

In relation to In-Combination assessment 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 an 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 it is not clear that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as these were ruled out at screening stage for screened out sites on the basis that 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.

In the FAC's view, the reference to 'residual effects' in the In-Combination report / assessment dated 21/11/2023 on file that appears to deal with the screened-out sites, creates confusion as it is not clear what effects are being referred to in this instance and there is no explanation as to what gives rise to these effects such that they can be described as being 'residual'. The FAC would understand that the term residual is generally used in the context of what remains after an action is undertaken. In the context of Appropriate Assessment (AA) the term residual effects is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment entitled Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states on page 40,

If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions.

In the context of undertaking the screening again the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion.

The appellant raises the issue of the original planting consent relating to the proposal area and whether it complied with the Birds Directive and the Environmental Impact Assessment Directive. 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 original consent process for the afforestation of the lands. Notwithstanding, the FAC considers that the grounds do not identify any significant effects on the environment that have occurred since the establishment of the forest nor a basis for assuming that the original planting was regulatorily deficient. Apart from this, the FAC considers that its remit is to make a determination on the decision under appeal in line with the requirements of the Agriculture Appeals Act 2001, as amended.

The FAC notes that the licence includes a number of conditions that relate to the protection of the environment, including adherence with a number of published standards and guidelines developed by the DAFM. The FAC noted that the wording of some of these documents appeared with errors. There is a reference in condition 3 of the licence to "forestry biodiversity" whereas the FAC would understand this should be Forest Biodiversity Guidelines. The FAC would consider that such documents should be clearly identified, ideally with the associated date to avoid any confusion, and readily available. However, the FAC considers this to be a minor error as these documents are, in general, well recognised in practice. Of more significance is the absence of the requirement for full compliance with the Standards for Felling and Reforestation (DAFM, 2019). These standards state, 'This document sets out the universal standards that apply to all felling (thinning, clearfelling) and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the Department of Agriculture, Food & the Marine under the Forestry Regulations 2017 (S.I.191 of 2017). (Pg 1)'.

The FAC understand this to be a policy statement and that it is the adopted policy of the Minister for Agriculture, Food and the Marine to condition adherence with these standards on felling licences unless there was a stated reason otherwise. In addition, the Forestry Regulations 2017 require the Minister to have regard to such standards in making licencing decisions. The FAC considers that the failure to include full compliance with these standards as a condition on the licence represents a serious error.

The FAC is satisfied that a serious error was made in the making of decision TY19-FL0201 and is setting aside the decision and remitting it to the Minister to undertake a new screening of the likely significant effects on European sites of the project itself and in-combination with other plans and projects. The FAC also considers that the DAFM should address the other errors identified previously in this letter prior to the making of a new decision.

Yours sincerely,

Donal Maguire
On Behalf of the Forestry Appeals Committee