



23rd December 2024

Subject: Appeal FAC051/2024 against licence decision TFL00984423

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, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

A hearing of appeal FAC051/2024 was held remotely by the FAC on 15th November 2024. In attendance:

FAC Members:	Mr. Myles MacDonagh (Deputy Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC:	Ms. Aedín Doran

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 FAC has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine (Minister) to grant licence TFL00984423. The reasons for this decision are set out hereunder.

Background

The appeal relates to the decision of the Minister for Agriculture, Food and the Marine to grant a felling licence on 7.93 hectares at Tulligoline north and Meenylone north, Co. Limerick. The application included a Harvest Plan, operational and environmental information and a number of maps. The felling as applied for would comprise a thinning in 2023 and clearfell in 2025 on two plots of Sitka spruce. The lands would be replanted with a mixture of Sitka spruce (80%) and birch (20%). Plot 1 comprises 6.62 hectares and is situated to the west of the smaller plot 2 (1.3 hectares). Plot 2 is triangular in shape and adjoins another section of forest and, to the east, a minor public road and is situated in a wider rural landscape of agriculture and forestry land. The application records an aquatic zone at the western boundary and a number of relevant watercourses on site. Plot 2 is an irregular smaller block with a minor public road to the south and bounded by existing forest land.

The application was referred to Limerick County Council, NPWS and Inland Fisheries Ireland (IFI). The response from IFI submitted that they had no objection in principle but, in addition to requiring notification and adherence with best practice guidelines, emphasised the need for measures to avoid silt reaching the Oolagh river system and the consideration of invasive species. The County Council responded and also highlighted the proximity to the Oolagh river waterbody and the need for best practice measures. The NPWS also highlighted proximity to the river Oolagh and the Lower River Shannon SAC. They also submitted that the felling sites were within Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (SPA) and that the protocol between the NPWS and the DAFM should be adhered to and the NPWS should be contacted at least six weeks prior to operations commencing.

The DAFM recorded a screening for Appropriate Assessment dated 24/01/2024. This considered European sites within 15km of the felling site. The lands are located within the boundary of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, 359 metres from Lower River Shannon SAC and 12.2km from Moanveanlagh Bog SAC. Each site and its interests and conservation objectives are considered. The screening also identifies other plans and projects considered in combination with the proposed felling. The screening concluded that the proposal should proceed to Appropriate Assessment in relation to Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and Lower River Shannon SAC due to proximity and hydrological connection respectively.

The DAFM prepared an Appropriate Assessment Report (AAR) (a document prepared by or on behalf of the DAFM that fulfils the requirements of an NIS), dated 08/02/2024, that identifies the interests of the SPA and SAC, likely effects, other plans and projects and mitigation measures. The reports determined,

It is concluded that the proposed Felling and Reforestation project under TFL00984423, with mitigation measures identified, will itself (i.e. individually) not result in any adverse effect or residual adverse effects on the integrity of the European site(s) listed above. The project was also considered in combination with other plans in the area that could result in potential significant cumulative effects on these European site(s). No potential significant cumulative effects are predicted with the plans and projects listed in Appendix A.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site. This relates to the proposed activities under this project only. Any subsequent forestry-related activity requiring consent/grant aid shall be subjected to the DAFM Appropriate Assessment Procedure, including an in-combination assessment with the current proposal, prior to any future consent being granted.

The documentation includes a submission from a member of the public that contends that the AAR is deficient in assessing potential impacts on Hen Harrier, with specific reference to the use of pesticides.

The licence was granted subject to conditions on 02/05/2024 including adherence with the measures identified in the AA Determination.

Appeal

There is one third party appeal against the granting of the felling licence and the notice of appeal and full grounds of appeal were provided to the parties. The grounds in brief summary contend that,

- There has been no investigation as to whether the application site has complied with the requirements of EU law, specifically the Birds Directive or the Habitats Directive. There is no AA or EIA screening on the record for CN10859 which demonstrates compliance with EU law and the DAFM cannot award a felling licence where they cannot evidence that the original afforestation of the lands was carried out in full compliance with the law.
- The assessment carried out under Article 6(3) of the Habitats Directive is deficient in relation to the matters considered and in particular a submission made by a member of the public that is not recorded in the Determination.
- The restocking of the lands has not been assessed.
- The Appropriate Assessment (AA) “has failed to address the potential impact of allowing disturbance operations during the period and rearing to conclusively trigger the Red Zone protocol”. The AA has failed to address the fact that at least part of the project area is within an area that has been recorded as a Red Zone and does not indicate what data is relied upon.
- The AA has failed to address the potential impacts of the importation of toxic chemicals into the SPA by means of dipped plants and spraying, that the submission raised this and that a source, pathway, receptor has not been identified and addressed as part of the AA.
- The in-combination report for the project is deficient as it applied overly restrictive spatial and temporal criteria and failed to identify projects which could act in-combination with the project within the SPA. That it cannot be assumed that the regulatory systems in place for other plans and projects will avoid significant effects. There is no in-combination assessment.
- The grounds go on to make some commentary on the appeals process.

The DAFM provided a statement in response to the appeal that outlines the processing of the application and submits that the decision was made in keeping with DAFM procedures, the Forestry Act 2014 and Forestry Regulations 2017. The statement goes on to submit that the planting of the land took place over 25 years ago and is not covered by the appeals process. The DAFM submit that their position is that the clearfelling and replanting of an already established plantation forest is a standard operational activity and does not involve an activity or project covered by the EIA Directive. The AA process is outlined in detail and it is submitted that the DAFM demonstrated that it has considered other plans and projects in-combination with the proposal. It is submitted that the replanting was assessed and that the inclusion of broadleaf species will support the interest of the SPA. It is submitted that the felling area is not within a “Red area” and that the DAFM addressed the submission by the NPWS and the sharing of data between the NPWS and the DAFM is described. In relation to the use of chemicals it is submitted that this was assessed as part of the AA process.

The Appellant made a further submission in response to the Minister's statement which again restated that there is no evidence that the lands were afforested in compliance with the EIA Directive, that the Minister's statement does not address the absence of a reference to the submission in the report and questions as to what scientific knowledge the decision is based. The submission also included a report prepared by Bird Watch Ireland that related to the Hen Harrier measures.

Consideration of FAC

The grounds allege that,

There has been no investigation as too (sic) whether the application site has complied with the requirements of EU law....DAFM cannot award a felling licence for a project where they cannot evidence that the original afforestation of the lands was carried out in full compliance with the law.

The grounds contend that the lands were afforested some 27 years ago, which is prior to a number of significant changes in National and EU law. The FAC does not consider that the grounds provide any convincing evidence that the afforestation of the lands was regulatorily deficient. The function of the FAC is to hear and determine appeals against certain decisions of the Minister made under section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. The FAC considered the provisions of the Forestry Act 2014 and the Forestry Regulations 2017 and did not consider that they provide for the Minister to undertake such an investigation or to bring about the outcome desired by the Appellant. The decision before the FAC, which is the subject of the appeal, is the licence decision TFL00984423 made following an application for a tree felling licence.

The grounds raise a number of concerns regarding the Appropriate Assessment process undertaken by the DAFM. The FAC reviewed the process as provided and described in the appeal and by the DAFM. The DAFM undertook a screening for appropriate assessment that described the site and operations and its proximity to waterbodies and European sites. As previously noted, three European sites are identified within 15km of the felling lands, Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161, Lower River Shannon SAC IE0002165, and Moanveanlagh Bog SAC IE0002351. The grounds refer specifically to the SPA and the screening concluded that the proposal should proceed to Appropriate Assessment in relation to this European site for the following reason,

Possible effect due to the location of the project within the European site.

The FAC considered that this does not identify or describe the likely significant effects of the proposal on the SPA. Within the Appropriate Assessment Report in the section to describe the potential adverse impacts it is recorded,

The project area is located within this SPA, but is not located within a Hen Harrier Red Zone (also known as 'High Likelihood Nesting Area' (HLNA)).

And further states that mitigation measures are required and are outlined as follows,

The site of this project lies within a Green Area in relating to Hen Harrier, as per current information provided by NPWS. Therefore, potential disturbance operations associated with this project (see below) can take place during the Hen Harrier breeding season (1st March to 15th August, inclusive). However, if the Department of Agriculture, Food & the Marine (DAFM) is notified by the National Parks & Wildlife Service of a new Hen Harrier nesting site, and if the site of the project lies within or partially within 1.2 km of this location, the DAFM will inform the Applicant of this situation and will amend the terms of the licence, with immediate effect, to exclude potential disturbance operations from taking place during the Hen Harrier breeding season (1st March to 15th August, inclusive). (A potential disturbance operation is a forestry operation associated with a licenced project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the breeding activity of Hen Harriers. Potential disturbance operations include: timber felling (thinning, clearfell); timber extraction to roadside; timber loading at roadside; aerial fertilisation; mechanical cultivation for both afforestation and reforestation; forest road construction (and associated developments); the driving of fencing posts; and any other operation(s) the Forest Service may deem as potentially creating disturbance.)

Reason: In the interest of the protection of hen harrier

The DAFM also recorded an Appropriate Assessment Determination that outlined the process and stated the same condition and the licence was issued conditional on adherence with the AA measures.

The FAC considered that neither the screening nor the assessment outlines what significant effects the Minister considers likely to occur on the SPA having regard to the conservation objectives of the site. There is no recorded consideration as to suitability or otherwise of the felling site as habitat or whether the proposal might have direct or indirect effects on the interest of the SPA and its habitat. While it might be inferred from the measures what their purpose may be, inference should not be required. The screening and assessment should clearly outline what significant effects are considered likely to occur, the measures proposed to reduce or avoid the effects and assess whether adverse impacts on the integrity of the European site may occur.

The FAC also considered that the reference to excluding “any other operation(s) the Forest Service may deem as potentially creating disturbance.” lacks clarity as it is unclear as to how or when this process would be undertaken and how or when the applicant would be informed. The statement made in response to the appeal submits that the inclusion of broadleaf planting would have a positive effect on the conservation interest of the SPA but this is not noted in the AA process.

The FAC concluded that a number of serious and significant errors had occurred in the AA screening and AA processes.

The grounds contend that the AA measures are insufficient and that the AA has failed to address the potential impact of the importation of toxic chemicals into the SPA by means of dipped plants and spraying and that the submission provided a detailed assessment as to how toxic chemicals have the potential to impact on the conservation interests of the Stacks SPA.

In relation to the general approach adopted by the DAFM, the FAC has previously made a determination on this matter based on a report by an independent ornithologist and this report is available on the website of the Agriculture Appeals Office¹. The DAFM approach is based on a protocol agreed with the NPWS as noted in the submission made by that body on the application. While the report submitted by the Appellant suggests that Bird Watch Ireland has suggested improvements on the measures, this report postdates the assessment process undertaken by the Minister following a protocol agreed with the NPWS.

The grounds allege that a submission that was made during the public consultation process was not considered as part of the assessment and that there is a source-pathway-receptor not considered as part of the assessment. The grounds allege that there is no reference to the submission that was made and quote a number of sections of the document. They do not note that the Determination states that submissions from 3rd parties were taken into account. However, the FAC considers that it was a serious error not to specifically note submissions made and to provide some reason either explicitly or in the process more generally that addresses the matters raised. As previously noted, the FAC does not consider that the Minister has identified what they considered to be the likely significant effects of the proposal.

Neither the grounds nor the submission on the AA claim that the authors have any expertise or particular knowledge in relation to Hen Harrier or the environment more generally and make a number of unsubstantiated claims. The scientific paper that forms part of the basis of the submission relates to a study involving the administration of pesticides at sub-lethal doses to house sparrows (*Passer domesticus*). As the paper notes, their concern relates to agricultural practices including the potential for food crops to be sprayed which would in turn be consumed by birds, as well as potential for contaminated arthropods and other sources. There are clear and obvious difference between the use of pesticides in agriculture and forestry. Of particular relevance would be the fact that forestry does not involve the planting of a food crop, such as a grain crop, and that pesticide use is limited in forestry to the establishment phase over a rotation of 30 to 40 years whereas pesticides may be used in agriculture on a much more regular basis, and that, where employed, pesticide use in forestry involves dipped plants and/or spot spraying as opposed to broadcast or more widespread spraying commonly employed in tillage. In addition, neither the submission nor the grounds provide a clear basis for concluding that the use of pesticides in the required regulated manner might have a significant effect on the SPA having regard to the conservation interests of the site. As noted in the DAFM statement and the licence conditions, pesticide use is regulated in Ireland and the granting of the licence does not remove any obligations on the licence holder or their agents to adhere to such regulations.

¹ Ornithological Opinion on conditions attached to appealed felling licences, specifically relating to the protection of the Hen Harrier and/or Merlin. Report to the Forestry Appeals Committee. Dr. Alan Fielding. 2nd December 2021

The FAC considers that neither the grounds nor the submission could be considered to provide sufficient evidence in itself to conclude that the proposal might have a significant effect on the site or an adverse impact on the integrity of the site in relation to the matters raised. However, it will be for the Minister to undertake a new Appropriate Assessment screening and Appropriate Assessment, as needed, of the project prior to making a new licence decision.

The grounds submit that the assessment does not consider the deforestation of the lands and the conversion of the lands to other habitat. However, such a project was not applied for nor is the Minister empowered to bring about the Appellant's desired outcome. The grounds allege that the Minister conditioning the replanting of the lands is discretionary but the Minister would have to have regard to their own policies and government policies including those related to the protection of forests and Climate Change. The proposal, as applied for, included the replanting of the lands which is standard practice in commercial forestry and does not involve a change in land use. If the Minister did not condition the replanting of the site the applicant could replant the land without further conditions or could leave the trees in place and not fell it. The FAC considered that the primary objection of the appellant in this regard related to the overall designation and management of the European site which the FAC does not consider to fall within the licencing powers of the Minister for Agriculture, Food and the Marine under the Forestry Act 2014 and the Forestry Regulations 2017.

The grounds allege that the lands are in or partially in a "Red Zone" but provide no basis for this claim. The DAFM assessed the proposal as not being in a "Red Zone" and restated this in the appeal statement and are the competent authority to undertake the Appropriate Assessment. The application was referred to the NPWS which requested that the agreed protocol be followed and that notification of the ranger be given at least six weeks prior to operations commencing. The NPWS is clearly the source of the data. However, in the context of the grounds the FAC noted that the licence conditions, separate from the AAD, included the notification of the NPWS with the reason *"In the interest of protecting the hen harrier."* The grounds contend that submissions received by the Minister were not considered as part of the assessment and that there is a time delay between the data provided by the NPWS, the assessment and the undertaking of the operations. The FAC considered that based on the specific circumstances of the proposal, the assessment and measures of the Minister and the reasons for the licence condition, that the requirement of notifying the NPWS would be more appropriately considered a mitigation measure that should have been included as part of the Appropriate Assessment process.

In considering the grounds that contended a failure to consider submissions made, the FAC further noted that Inland Fisheries Ireland (IFI) had requested notification of their local office prior to operations commencing. While notification of the NPWS and the local authority are conditioned, there is no condition to notify the IFI. The assessment undertaken by the DAFM and the conditions on the licence do make reference to best practice measures and other matters raised in the IFI submission. While the FAC would understand that the Minister is required to have regard to submission and would not be bound by them, the FAC does not consider that there is any reason provided as to why the Minister would not accede to the notification request by a prescribed body. The FAC is satisfied that this constitutes a serious error.

The grounds allege deficiencies in the consideration of other plans and projects in-combination with the proposal. The FAC does not consider that the grounds provide a basis for determining that the screening and assessment were deficient in this regard. However, the consideration of other plans and projects would occur in the context of the likely effects of the proposal itself and, as previously noted, the FAC does consider that the screening and assessment are deficient in this regard. In considering the content of the screening In-Combination Report, the FAC further noted the DAFM's use of the word "residual" in their conclusion. The FAC considered that, in the context of AA screening and 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 an appropriate assessment. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on AA titled *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. For the reasons outlined above, the FAC is satisfied that the DAFM's AA screening contains serious errors and that the decision to grant the licence should be set aside and remitted to consider whether the felling is likely to have a significant effect, either individually or in combination with other plans or projects, on European sites in view of the sites' conservation objectives.

In considering the appeal, the FAC had regard to the record of the decision, the grounds of appeal and submissions received. The FAC is satisfied that serious and significant errors were made in the making of the decision in this case. The FAC considered that serious errors had been made in the screening for Appropriate Assessment and that the decision should be set aside and remitted to the Minister for a new screening to be undertaken, and Appropriate Assessment as required, before a new decision is made. In making a new decision, the Minister should address the other errors outlined in this letter.

Yours sincerely,

-
Vincent Upton,
On Behalf of the Forestry Appeals Committee