



16th February 2024

Subject: Appeal FAC 041/2023 against licence decision LS06-FL0077

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 041/2023 was held remotely by the FAC on 31st January 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman.
Secretary to the FAC: Ms. Vanessa Healy and Ms. Roisin Moore (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 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 LS06-FL0077. The reasons for this decision are set out hereunder.

Background

The application for the licence decision under appeal relates to the granting of a felling licence at Deerpark and Shanavour, Co. Laois. The application as submitted is dated 24/03/2023 and included operational and environmental information, maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2025 of an existing plantation comprising an area of 5.23 ha in two plots (Plot 77704S-1 comprising 4.24 ha which is 97% Sitka spruce and 3% JL and Plot 77704S-2 comprising 0.97 ha Sitka spruce). The felling age of the 5.23 ha is described at one point in the application as being 43 years and at another the felling age of the two plots is described as being 38 (4.24 ha) and 48 (0.97 ha) years. The site would be replanted 90% Sitka spruce, 5% Broadleaves and 5% Open Space. The licence was granted with conditions on 17/08/2023.

Appropriate Assessment Pre-Screening Report dated 22nd May 2023

The FAC finds on file a document entitled Appropriate Assessment Pre-Screening Report, dated 22/05/2023, prepared on behalf of the Applicant. This report which is marked as being for Clearfell and Reforestation project LS09-FL0191, located at Ballyteige, Co. Laois, 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 being located on the boundary of two river sub-basins. The majority of the project area (approx. 3.861 ha) lies within the Mountrath_030 river sub-basin. The remaining section of the project area to the west (approx. 1.373 ha) lies within the Mountrath_010 river sub-basin. It states that there are no aquatic features within or in close proximity to the section of the project area that lies within the Mountrath_030 river sub-basin. The closest aquatic feature to the project area is stated to be an aquatic zone, the Shanavaur River (order 1), which is said to be approximately 630 metres north-east of the project area. It states that there is no clear flow path between the project area and this aquatic zone. A buffer of additional conifer plantation, agricultural grassland, and hedgerow habitat is said to occur between the project area and the Shanavaur River.

There is said to be no aquatic features within or in close proximity to the section of the project area that lies within the Mountrath_010 river sub-basin and the closest aquatic feature to this part of the project area is stated to be an aquatic zone, the Mountrath 15 River (order 2), which is present approx. 415 metres west of the project area. There is said to be no clear flow path between the project area and this aquatic zone. A buffer of agricultural grassland, marginal grassland, residential areas, and hedgerow habitat is said to occur between the project area and the Mountrath 15 River.

It states that the project area overlaps entirely (approx. 5.23 ha) with the Slieve Bloom Mountains SPA and that the project area is not located within a Hen Harrier Red Zone. The project area is said to be part of a larger conifer plantation of varying age and class to the east with agricultural grassland being present along the north-western, western, and southern boundaries of the project area. It states that the surrounding area and wider landscape support additional conifer plantation, agricultural grassland, broadleaf woodland, a network of hedgerow habitat, private dwellings, and upland heath/peat habitat. The project area is said to be located on mineral soil (AminDW), on a moderate slope, and is described as sloping in a westerly and south-westerly direction.

This screening report identifies seven Natura 2000 Sites as being located within 15km of the project area.

- Clonaslee Eskers and Derry Bog SAC (000859)
- Coolrain Bog SAC (002332)
- Knockacoller Bog SAC (002333)
- River Barrow and River Nore SAC (002162)
- River Nore SPA (004233)
- Slieve Bloom Mountains SAC (000412)
- Slieve Bloom Mountains SPA (004160)

The project area is stated to be accessible via a forest road which runs through the northern section of the project area and a forest road located to the east of the project area. Each qualifying interest or special conservation interest is considered in turn. The report also identified other plans and projects consideration in-combination with the proposal. The pre-screening determined that Appropriate Assessment should be undertaken in relation to specified interests of one European Site, ie Slieve Bloom Mountains SPA (004160).

NIS (Applicants) 22nd May 2023

The FAC also finds on file a Natura Impact Statement for Clearfell and Reforestation project LS06-FL0077, located at Ballyteige, Co. Laois. At page 4 of the NIS in Section 1 it states that *'The purpose of this Natura Impact Statement is to provide supporting information to assist the competent authority, in this case the Forest Service DAFM, to conduct an Article 6(3) Appropriate Assessment of a clearfell and reforestation project, located at Ballyteige, Co. Laois. This report forms part of the supporting documentation for a forestry licence application in conjunction with a pre-screening report'*. Potential significant effects are outlined in relation to the interests identified in the pre-screening document and measures are outlined. The NIS at pages 5 and 6 provides details of it's authors and their qualifications.

DAFM Appropriate Assessment Screening Report & Determination dated 4th August 2023 (AASRD)

An Appropriate Assessment Screening Report & Determination is to be found on file as prepared a Forestry Inspector, Department of Agriculture, Food and the Marine, on behalf of the Minister. It is dated 04/08/2023 and the screening refers to *'Felling and Reforestation project LS06-FL0077, at Deerpark, Shanavaur, Co. Laois'* and records considerations of the same seven European sites as identified in the Applicant pre-screening report. The AASRD screening considers each site in turn and records a screening conclusion and reasons. Other plans and projects considered in-combination with the proposal are recorded. The screening document concludes that an Appropriate Assessment was required in relation to one European Site, ie Slieve Bloom Mountains SPA IE0004160. This report references an *'Appendix A: In-Combination Report for Felling and Reforestation proposed under LS06-FL0077'* with the commentary *'See File'*.

DAFM In Combination Report 04/08/2023

There is an In-Combination report for Felling and Reforestation project LS06-FL0077 dated 04/08/2023 on file and this appears to be the assessment for the screened out sites. It includes the following statement:

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS06-FL0077 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. Similarly, 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.'

Therefore, there is no potential for the proposed project to contribute to any significant effect on those same 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 significant effects on these European Sites.

Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s).

Note that the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment'.

DAFM In-Combination Report 09/08/2023

There is an In-Combination Assessment for Felling and Reforestation project LS06-FL00077 dated 09/08/2023 on file. It is titled as an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS06-FL0077'. This appears to be the assessment for the screened in site and it includes the following statement:

'It is concluded that there is no possibility that the proposed Felling and Reforestation project LS06-FL0077, with mitigation measures set out in Section 4 of the AAD, will itself, i.e. individually, giving rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives:

Similarly, there is no likelihood of any residual effect(s) that might arise, which do not in themselves have an adverse effect, creating an adverse effect in-combination with other plans and projects.

Therefore, there is no potential for the proposed project to contribute to any adverse effect on the integrity of the European Site(s) listed in the main body of this report, 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 these European Sites.

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 the above European Site(s).

Note that this relates to the proposed activities under LS06-FL0077 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted'.

DAFM Appropriate Assessment Determination dated 14th August 2023 (AAD)

A separate Appropriate Assessment Determination (AAD) for Felling and Reforestation project LS06-FL0077, at Deerpark, Shanavaur, Co. Laois, (marked as prepared by a Marine Ecologist on behalf of the Minister for Agriculture, Food and the Marine Date: 14/08/2023). This AAD states that it took into account, inter-alia, documents including 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). It also records that it took into account a number of other pieces of information including responses from consultation bodies, 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, the AA Screening Report and Determination for this project, and the Natura Impact Statement provided by the applicant, any supplementary information furnished in relation to any such report or statement, Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site as 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), and Biodiversity Maps (biodiversityireland.ie). The AA Determination states that the Minister has determined that there is the likelihood of Felling and Reforestation project LS06-FL0077 having a significant effect, either individually or in combination with other plans and projects and lists one European site (Slieve Bloom Mountains SPA IE00041600) which it deals with as being screened in. The AAD goes on to set out measures in relation to the screened in European site and provides reasons for the measures.

Referrals

The application was referred to Laois County Council and the National Parks and Wildlife Service (NPWS). The Local Authority responded on 02/05/2023 submitting that the proposal was not within an Architectural/Archaeological Site or Prime Scenic Area but it is within an SPA or an SAC and that an Appropriate Assessment of the proposed development was required.

The NPWS responded on 13/06/2023 under two headings submitting that for felling that any native trees species, such as willow, rowan, birch etc along the boundaries of the site should be left in-situ, so too should the remnants of old field boundaries (hedgerows). In relation to replanting the response included the following.

- *'It is proposed to plant the site with sitka spruce (90%). Department guidelines stipulate the replanting should consist of 'appropriate alternative species - Therefore, any replanting of the site should contain a suitable percentage of broadleaf species. Current guidance is for a minimum of 10% broadleaf species to increase diversity within forestry plantings. Typical and acceptable species include rowan, oak, birch, as site conditions allow.*

- *There is insufficient provision for Areas of Biodiversity Enhancement (ABE). The application indicates an area of under 5% remain as unplanted. Forest Service guidelines recommends a minimum of 15%. The additional space can include the revised area of the setback.*
- *In addition, it is advised the ABE's are situated where they provide the best opportunity for enhancing the biodiversity within the compartment. A significant portion may form part of the 'setback' area.*
- *Pesticide and fertilizer use is prohibited in the setback area'.*

It also referenced an attached appendix containing more general points of relevance by way of assistance to the DAFM in it's consideration of the application. This appendix does not appear to be loaded on the Forestry Licence Viewer (FLV).

Appeal

One third party appeal was made against the decision to grant the licence and was received by the FAC on 31/08/2023. The Notice of Appeal and full grounds of appeal were provided to the parties. In summary, the grounds submitted that these developments are within the Slieve Bloom Mountains SPA and that no Appropriate Assessment was undertaken in relation to the replanting.

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 AAD that are conditions on the licence and relate to the replanting as below.

'The Appropriate Assessment was carried out on replanting as demonstrated by the following;

- *The application contains a detailed reforestation map along with the proposed species mix at replanting. Throughout the applicants own Pre-Screening Report and Natura Impact Statement (NIS) replanting is referred to throughout. The NIS for example goes into detail on how the ground will be prepared for replanting, how trees will be physically put in the ground and the treatment of plants to protect against pine weevil. Section 3 of the AAD lists the documents that were taken into account in the AA which includes the application and the NIS.*
- *The title of the Department's AA In combination Report, AA Screening Report and Determination and AA Determination (AAD) includes 'Reforestation' in the title.*
- *Section 4 of the AAD includes a statement to the effect that the AA has been carried out on a Felling and Reforestation project',*

Considerations of the FAC

The FAC had regard to the documentation provided through the DAFM's 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 and Natura Impact Statement submitted by the Applicant in addition to other application information, and an Appropriate Assessment Screening and Appropriate Assessment Determination (AAD) both prepared on behalf of the Minister. Also on file are two In-Combination Assessment documents prepared on behalf of the Minister. The assessment dated 04/08/2023 appears to be an appendix to the DAFM AASRD of the same date and the assessment dated 09/08/2023 is described as being an appendix to an Appropriate Assessment Report which does not appear to be on the FLV.

From the procedure adopted in relation to the processing of this application it appears that the NIS was prepared before the screening was undertaken by the Minister. Having regard to the Forestry Regulations 2017, the FAC considers that this may be acceptable in practice where there is a clear consistency in the reasoning in the assessment undertaken by the Minister with that in the NIS 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 Pre-Screening and NIS submitted by the applicant and the screening and assessment undertaken by the Minister. The Pre-Screening and NIS submitted by the applicant is described as being for a Clearfell and Reforestation project LS06-FL0077, located at Ballyteige, Co. Laois whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS06-FL0077 located at Deerpark and Shanavour, Co. Laois. 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 it is a significant error to rely on an NIS which has been carried out having recorded an incorrect location for the project as this may have impacted on the accuracy of any spatial analysis done to inform the same and that it is misleading in the context of the publication of the NIS as it indicates an incorrect location for the project.

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 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. The reference to 'residual effects' in the In-Combination report / assessment on file that appears to deal with the screened-out sites is confusing as the FAC 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 finds that the In-Combination assessment dated 09/08/2023 is described as being an Appendix to an 'Appropriate Assessment Report' however no Appropriate Assessment Report is to be found on file. This In-Combination assessment contains the following passage as part of its statement.

'It is concluded that there is no possibility that the proposed Felling and Reforestation project LSO6-FL0077, with mitigation measures set out in Section 4 of the AAD, will itself, i.e. individually, giving rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives'.

From this passage the FAC notes that the assessment which is dated 09/08/2023 relies on a report (AAD) that postdates it (14/08/2023). The FAC considers this to be a further error in the processing of the application. 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 recorded 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.

The FAC also noted that condition 10 of the licence states that "only minor site level changes in the interest of environmental protection are permitted." The FAC considers that the wording of this condition is insufficiently clear as to the meaning of the words "only minor" and therefore the words are open to interpretation. The FAC considers that the lack of a consistent and objective interpretation of "only minor", that would ensure the implementation of the condition for its intended purpose, constitutes a serious error in the making of the decision in this case.

The FAC concluded that the decision should be set aside and remitted in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, 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 identifies and assesses likely significant effects on European sites, of the proposal itself and in-combination with other plans and projects, and, where they occur, mitigation measures and an assessment as to whether the proposal would impact on the integrity of a European site. Whichever approach is adopted, the FAC considers that a new period of public consultation should be undertaken.

Yours sincerely,


Seamus Neely,

On Behalf of the Forestry Appeals Committee