



22nd February 2024

Subject: Appeal FAC 043/2023 regarding Licence Ref: LS08-FL0153.

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 (The Minister). The FAC established in accordance with Section 14A(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.

DECISION.

Having regard to the evidence before it, including the Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statement of Fact (SoF) provided by the DAFM, all materials on file, the notice, and grounds of appeal and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence LS08-FL0153.

THE LICENCE.

Licence LS08-FL0153 is for felling of 2.6 Ha. of Sitka spruce & Douglas fir located in the townland of Bordowin, Co. Laois with replanting being of Sitka spruce and Other Broadleaved species.

The application for the licence was submitted to the DAFM on the 24th of March 2023. A decision approving the licence was issued on the 17th of August 2023 with a requirement for replanting subject to 12 conditions including adherence to the mitigation measures set out in an Appropriate Assessment Determination (AAD) which was stated to be attached to the licence.

FORESTRY APPEALS COMMITTEE.

A sitting of the FAC was held remotely on the 31st of January 2024 which considered the appeal (FAC 043/2023) against the decision to issue the licence on the 17th of August 2023. The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. Luke Sweetman and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy and Ms. Roisin Moore (Observer).

BACKGROUND.

The proposal consists of the felling of 2.6 Ha. of Sitka spruce & Douglas fir stated to have been planted in 1980, and its replanting with Sitka spruce and Other Broadleaved species. The soils on the site are described as predominantly shallow Surface Water Gleys & Ground Water Gleys and the average slope across the site is steep (between 25% and 27.6% sloping in westerly direction). The habitat on the site is 100% conifer plantation high forest.

The site lies in the Water Framework Directive (WFD) Nore Catchment and the Nore_SC_020 Sub-catchment. The site is located within the Delour_010 River Sub-Basin. The WFD River Waterbody, Bordowin Stream, a 1st Order Stream part of the Delour_010 river water body runs N-S circa 90m west of the site. The Delour_010 river water body had Good status in the period 2016-2021 and its status is under review in the WFD 3rd cycle. Forestry is not identified as a pressure in the river sub-basin. The underlying groundwater body is the Camross IE_SE_G_027 which was of Good status in the 2016-2021 monitoring period and is stated as not being at Risk.

The application documents before the FAC included an Application Pack dated 24th of March 2023 consisting of an Application form, Application Map, Location Map, Harvest Plan Map, Replanting Maps, and a Replanting Schedule. There was also an Appropriate Assessment Pre-Screening Report & Natura Impact Statement (NIS) submitted as prepared by the applicant and both are dated 12th of May 2023.

The licence application was referred to Laois County Council on the 12th of April 2023 which replied on the 2nd of May 2023 stating the area of the application, that the site is within a SAC or SPA, is not within an archaeological/architectural site and is not within a prime scenic/amenity area and that as the site is within a Natura 2000 site an Appropriate Assessment is required.

The licence application was referred to Inland Fisheries Ireland on the 12th of April 2023. No response was received.

The licence application was referred to the National Parks & Wildlife Service on the 12th of April 2023 which replied on the 13th of June 2023 stating that as the site is wholly situated within the Slieve Bloom Mountain SPA works should take place between August 15th to February 28th of the following year to avoid disturbance to breeding and nesting birds and that if any works are to be undertaken outside of these dates AA Screening should be carried out, and AA requirements are attached as an Appendix to the NPWS reply. (It is noted the Appendix is not available on the FLV).

The DAFM file on the Forestry Licence Viewer (FLV) includes a DAFM Appropriate Assessment Screening Report & Determination (AASRD) (incl. an In-combination Statement) dated the 4th of August 2023, and a DAFM Ecologist AAD dated 15th of August 2023 and a further In-combination Statement dated the 9th of August 2023.

The applicant's Appropriate Assessment Pre-Screening Report (AAPSR) identified seven Natura 2000 sites within 15 km of the proposed felling & replanting: Slieve Bloom Mountains SPA (Site Code 0004160), Slieve Bloom Mountains SAC (Site Code 0000412), River Barrow And River Nore SAC (Site Code 0002162), Clonaslee Eskers and Derry Bog SAC (Site Code 0000859), River Nore SPA (Site Code 0004233), Coolrain Bog SAC (Site Code 0002332), and Knockacoller Bog SAC (Site Code 0002333). On the basis that the site is hydrologically connected to the River Barrow and River Nore SAC and the fact that the site is within the Slieve Bloom Mountains SPA the applicant concluded that the proposal should proceed to AA and the applicant prepared a NIS which included mitigation measures.

The DAFM AAD took into account *inter alia* the applicant's NIS and determined that, subject to the implementation of detailed site-specific mitigation measures, the proposed felling & replanting by itself and when considered in-combination with other plans and projects, would not give rise to the possibility of significant effects on any European site. The AAD concluded that based on objective information, no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The file records that there were no third-party submissions on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application. The ground of appeal is:

“No Appropriate Assessment as explained in no. 44 of the decision in CJEU Case 258/11 was carried out for the replanting.”

CONSIDERATION BY THE FAC.

At its sitting on the 31st of January 2024, the FAC had before it the full DAFM record of the decision as made available on the FLV, the Notice of Appeal Form, the grounds of appeal, the Statement of Fact (SoF) provided by the DAFM and all materials on file. The FAC having reviewed all the documentation and submissions, including that of the appellant, considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing.

DAFM STATEMENT OF FACT.

The SoF provided by the DAFM for the appeal which is dated the 24th of October 2023 confirms the administrative details of the licence application. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

The SoF also contains a statement from the Forestry Inspectorate dated the 27th of September 2023 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and containing a response to the ground of appeal.

GROUND OF APPEAL.

The FAC considered the appellant’s ground of appeal under the headings, AA & CJEU Case 258/11

AA & replanting.

The ground of appeal contends that no AA was carried out for the proposed replanting. The FAC noted that the appellant has not provided reasons in support of this contention. The FAC further noted the response from the Forestry Inspectorate dated 27th of September 2023. The FAC, having reviewed the applicant’s AA Pre-Screening Report & NIS and the DAFM AASRD and AAD is satisfied that the proposed project for the clear-felling and replanting of an already established plantation forest is one project and that the replanting element of that project has been subject to AA, particularly as site-specific mitigation measures are included for replanting. The FAC considers that the DAFM has not erred with regard to the principle of this ground of appeal.

CJEU Case 258/11.

The ground of appeal refers to “no. 44 of the decision in CJEU Case 258/11” which the FAC has taken to mean paragraph 44 of the Judgment of the European Court of Justice (Third Chamber) given on the 11th of April 2013 in Case C-258/11 which states:

“So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 Commission v Spain, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”

The FAC noted that the appellant has not provided reasons supporting their contention that “No Appropriate Assessment as explained in no. 44 of the decision in CJEU Case 258/11 was carried out for the replanting or how the Minister’s decision does not fulfil basic requirements of EU legislation or case law.

In reviewing the documentation on file, the FAC noted that the application form submitted by the applicant states that the trees to be felled are located in the townland of Borodwin, Co. Laois but that the title page of the applicant’s AA Pre-screening Report refers to the townlands of Bolinahaney and Coolmela, “Co. Laois”, both of which are in County Wexford. The title page of the applicant’s NIS refers a number of different projects and the townlands in which they are located, however the townland of Borodwin within which licence LS08-FL0153 is located is omitted. The FAC noted that the NIS was subject to public consultation and that it was published with the address of licence LS08-FL0153 omitted. The FAC considers the publication of documentation on the FLV and for public consultation with incorrect and missing addresses constitutes a serious error in the processing of the licence.

In reviewing the documentation on file, the FAC noted that at Section 3 of the DAFM Appropriate Assessment Determination on file as dated 15th August 2023 it states,

“Accordingly, the Minister determined that an Appropriate Assessment of the activity proposed under LS13-FL0080 was required in relation to the above screened in European sites. For this reason, the applicant submitted a Natura Impact Statement (dated 12/05/2023) to facilitate the Minister carrying out an appropriate assessment. An Ecologist subsequently evaluated the submitted NIS, defined as “a report comprising the scientific examination of a plan or project and the relevant European Site or European Sites, to identify and characterise any possible implications of the plan or project individually or in combination with other plans or projects in view of the conservation objectives of the site or sites, and any further information including, but not limited to, any plans, maps or drawings, scientific information or data required to enable the carrying out of an Appropriate Assessment”.

It appears to the FAC from the information contained in the DAFM AASRD on file that the date of the Minister’s determination that an Appropriate Assessment of the activity proposed under LS08-FL0153 was required in relation to this project was the 4th of August 2023 as this was the date of the AASRD that recorded the same. However, in the DAFM AAD, the NIS which is dated the 12th of May 2023 is referenced, and it is stated that the reason for the submission of that NIS was because of the conclusion reached in the Minister’s AASRD. It therefore appears on the face of the record that the DAFM AASRD and the NIS are not sequential as indicated in the DAFM AAD as the NIS pre-dates the AASRD.

Notwithstanding this confusion as to the sequencing of reports that make up the Appropriate Assessment process in this case, it appears that the DAFM have relied on the NIS only and did not prepare an Appropriate Assessment Report although this is not confirmed in the AAD or elsewhere on the record of the decision before the FAC. The FAC considers that as there are serious errors in the applicant’s AA Pre-screening and NIS documentation as submitted, that in the absence of an Appropriate Assessment Report or further information provided by the applicant, this constitutes a serious error in the processing of this licence application in so far as Appropriate Assessment is concerned. In making this conclusion, the FAC noted that an *Appropriate Assessment Report* is a term used by DAFM to refer to a document that fulfils the requirements of an NIS as defined in Regulation 2 of the European Communities (Birds and Natural Habitats) Regulation of 2011 (SI 477/2011) where such a document is prepared by or on behalf of the DAFM. Furthermore, the FAC noted that the In-combination Report of 09/08/2023 is titled *Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS08-FL0153* when in fact no Appropriate Assessment Report had been carried out.

In reviewing the documentation on file, the FAC noted that both the AAD and AASRD rely on in-combination assessments, which are recorded in In-combination reports on file. In the case of the in-combination report dated the 04/08/2023, which is the same date as the AASRD, this includes the statement: *“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”*. In the case of the in-combination report dated the 09/08/2023, prepared for the AAD of 15/08/2023 includes the same statement: *“Similarly, there is no likelihood of residual effect(s) that might arises, which are not significant in themselves, creating a significant effect 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 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 not considered 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 noted that the In-combination Report dated the 9th of August contains the statement *“It is concluded that there is no possibility that the proposed Felling and Reforestation project LS08-FLO153, 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”* but that the AAD was not completed until the 15th of August 2023.

In reviewing the documentation on file, the FAC noted that licence condition 1 refers to and relies on DAFM Guidelines in relation to Water Quality, Biodiversity, Archaeology and that the *Assessment to Determine EIA Requirement* refers to and relies on the same and other Guidelines in relation to Water Quality, Biodiversity, Archaeology and Landscape however these Guidelines have not been attached as a condition of the licence. Furthermore, in the Environmental Requirements for Afforestation 2016 (ERA), adherence with which is specified in the AAD, it is stated that the ERA replaces a number of existing guidelines. The FAC considers that reliance on the superseded guidelines quoted in condition 1 and compliance with the ERA which supersedes those guidelines is confusing and contradictory and therefore constitutes an error in the processing of this licence. The FAC further noted that the ERA is no longer available on the DAFM website and that a search on the DAFM website for the term “Environmental Requirements for Afforestation” on 01/02/2024 shows a document titled *“Environmental Requirements for Afforestation Working Document v.31Aug23”*. It is not clear whether this document supersedes the 2016 edition or whether this document has formal status within the DAFM licencing process as it is titled *“Working Document v.31Aug23”*. The FAC considers that this creates unnecessary confusion and a lack of clarity in the processing of the decision.

In reviewing the documentation on file, the FAC 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 a wide 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 and significant error in the making of the decision in this case.

In reviewing the documentation on file, the FAC finds that mitigation (a.) which is a condition of the licence provides that;

“The project is within as per current information provided by NPWS. Therefore, no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st March to 15th August, inclusive). To do so will lead to the immediate cancellation of this licence and may represent an offence under the Birds & Habitats Regulations (2011) (S.I.477 / 2011). (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.)”

The FAC considers that this mitigation wording appears to be incomplete as evidenced at the spaces included within it based on the documentation relevant to the appeal furnished by the Minister to the FAC which is required under Regulation 7 of the Forestry Appeals Committee Regulations 2020.

Conclusion

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, and the SoF submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001 (as amended) the FAC is satisfied that a series of significant or serious errors was made in the making of the decision in relation to licence LS08-FL0153. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence LS08-FL0153 to ensure that the project is subjected to the Appropriate Assessment process such that the requirements of the law are met either through the carrying out of a new Appropriate Assessment screening of the proposal itself and in combination with other plans or projects under Article 6(3) of the EU Habitats Directive, and having in place an Appropriate Assessment Report for the project should the findings of the screening require same, or have in place an updated NIS to address the errors therein and to address other errors identified by the FAC earlier in this letter before a new decision is made.

Yours sincerely,

Iain Douglas,
On Behalf of the Forestry Appeals Committee