



23<sup>rd</sup> February 2024

**Subject:** Appeal FAC 044/2023 against licence decision LS08-FL0154

Dear Sir,

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 044/2023 was held remotely by the FAC on 31<sup>st</sup> January 2024. FAC Members in attendance were Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman. The secretary to the FAC was Ms. Vanessa Healy and Ms. Roisin Moore attended as an 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 LS08-FL0154. 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 Monasop, Co. Laois. The application as submitted is dated 24/03/2023 and included operational and environmental information, and maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2025 of an existing block of commercial forestry comprising an area of 4.17 ha in a single plot comprising Sitka spruce. The felling age of the trees is described as being 34 years in 2025. The site would be replanted mainly with Sitka spruce, some Broadleaves and just over 5% Open Space. The licence was granted with conditions on 17/08/2023.

#### **Appropriate Assessment Pre-Screening Report dated 12<sup>th</sup> May 2023**

The FAC finds on file a document entitled Appropriate Assessment Pre-Screening Report, dated 12/05/2023, prepared on behalf of the Applicant. This report which is marked as being for Clearfell and

Reforestation project LS08-FL0154, located at Raheen, 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 entirely covered in Conifer Plantation. It is stated that there are two areas of windblow/snap (approx. 0.52 ha) and (0.11 ha) noted within the project site. In relation to soil type the project site is said to be mainly underlain by Peaty gleys (90%) with the remainder underlain by surface water gleys and ground water gleys. The site is said to be accessible to the north via Forest Road: LS08R0066 and to the northwest via Forest Road: LS08R0083.

This project is described as lying within the River Sub-basin DELOUR\_020 (IE\_SE\_15D010150) and is entirely within the Slieve Bloom Mountains SPA. The applicant's pre-screening report indicates that there are two relevant watercourses within/adjacent to the project site and states that the LS08-W-0893 flows west to the eastern boundary of the project site and merges with aquatic zone LS08-W-0786 and that the LS08-W-0916 flows through the centre of the site in a southerly direction for approximately 200 metres and terminates just outside the project site. There is said to be one aquatic zone within/adjacent to the project site. This is the LS08-W-0786 which flows south along the eastern boundary for approximately 148 metres, leaves the site and continues in a southerly direction for approximately 865 metres and merges with the order 1 Cardtown stream (Segment Code:15\_1438). This stream is said to flow in a southerly direction for approximately 1.1km and merges with the order 4 Delour River (Segment Code: 15\_1815). The Delour River flows south for approximately 10.7km and enters the River Nore SPA (approximately 13km downstream). The river continues in a westerly direction for approximately 1.7km and merges with the order 5 Nore River (Segment Code: 15\_189). This river flows south for approximately 98.7km and merges with the order 6 Barrow River (Segment Code: 14\_9943) which flows south for approximately 31.3km and enters Wexford Harbour subsequently discharging into the Atlantic Ocean.

The project site lies within the Freshwater Pearl Mussel Nore Catchment (red) with a live population validated in 2005 located <25km downstream. There are seven Natura 2000 sites within 15km of this project of which five are SACs and two are SPAs. The nearest European site is the Slieve Bloom Mountains SPA (overlaps). The project site is said to be potentially hydrologically connected to three European sites downstream namely the Slieve Bloom Mountains SPA (004160) (overlaps), River Barrow and River Nore SAC (002162) (2km downstream) and the River Nore SPA (004233) (11km downstream). The project site is said to border on a forestry plantation on all boundaries except for the north-eastern boundary which borders on improved agricultural grassland. The project site is said not to border on suitable foraging grounds for Hen Harrier or Merlin. The wider surrounding landscape is comprised of forestry plantations, peatland, improved agricultural grassland and Slieve Bloom Mountains to the northwest. The seven Natura 2000 Sites identified as being located within 15km of the project area are listed below.

- Clonaslee Eskers and Derry Bog SAC (000859) 12,210 metres distant,
- Coolrain Bog SAC (002332) 7,021 metres distant,
- Knockacoller Bog SAC (002333) 7,642 metres distant,
- River Barrow and River Nore SAC (002162) 812 metres distant,
- River Nore SPA (004233) 6,608 metres distant,
- Slieve Bloom Mountains SAC (000412) 2,024 metres distant,
- Slieve Bloom Mountains SPA (004160) overlaps.

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 determines that Appropriate Assessment should be undertaken in relation to specified interests of three European sites, Slieve Bloom Mountains SPA (004160), River Barrow and River Nore SAC (002162), and River Nore SPA (004233).

#### **NIS (Applicants) 22nd May 2023**

The FAC also finds on file a Natura Impact Statement for Clearfell and Reforestation project LS08-FL0151, LS08-FL0154 and LS10-FL0036, located at Forth Commons and Shelmalierre Commons, 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 Ballynestragh Demesne and Coolnagloose and Curragh and Curraghwood, Kilanerin, Rahee, Forth Commons and Shelmalierre Commons, 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 the authors of the NIS and their qualifications. The correct location of the project does not appear to be mentioned in either the Applicant's screening document or the NIS as submitted.

#### **DAFM Appropriate Assessment Screening Report & Determination dated 4<sup>th</sup> August 2023 (AASRD)**

An Appropriate Assessment Screening Report & Determination (AASRD) is to be found on file as prepared by a Forestry Inspector of the Department of Agriculture, Food and the Marine, on behalf of the Minister and dated the 04/08/2023. The AASRD was ecologically reviewed by a DAFM ecologist on the 15/08/2023. The screening refers to *'Felling and Reforestation project LS08-FL0154, at Monasop, Co. Laois'* and records considerations of the same seven European sites as identified in the Applicant pre-screening report. The AA 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 two European Sites, ie Slieve Bloom Mountains SPA IE0004160, and River Barrow and River Nore SAC IE0002162. This AASRD has an Appendix C which contains a screening validation by a DAFM ecologist. In this appendix the screening conclusion reached in the body of the AASRD in relation to the River Nore SPA was not upheld and accordingly same was also screened in for Appropriate Assessment. It is noted therein that *"this determination is in agreement with the AA Pre-Screening Report"*. The AASRD also references an *'Appendix A: In-Combination Report for Felling and Reforestation proposed under LS08-FL0154'* with the commentary *'See File'*.

#### **DAFM In Combination Report 04/08/2023**

There is an In-combination report for Felling and Reforestation project LS08-FL0154 dated 04/08/2023 on file and this appears to be the assessment for the screened out European sites. It includes the following statement:

*'It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS08-FL0154 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 LS08-FL00154 dated 09/08/2023 on file. It is titled as an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS08-FL0154'. This appears to be the assessment for the screened in European sites and it includes the following statement:

*'It is concluded that there is no possibility that the proposed Felling and Reforestation project LS08-FL0154, 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 LS08-FL0154 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 15<sup>th</sup> August 2023 (AAD)**

A separate Appropriate Assessment Determination (AAD) for Felling and Reforestation project LS08-FL0154, at Monasop, Co. Laois, is on file (marked as prepared by a Marine Ecologist on behalf of the Minister for Agriculture, Food and the Marine Date: 15/08/2023). This AAD states that it took into account documents including the initial application, 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 (the SOF on file records N/A in respect of *Submissions Received*), any subsequent supporting documentation received from the applicant, the In-Combination assessments, the AASRD for the project, the NIS, 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](http://www.npws.ie)), 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](http://npws.ie)), EPA Maps, GeoHive, Data and maps ([gsi.ie](http://gsi.ie)), and Biodiversity Maps ([biodiversityireland.ie](http://biodiversityireland.ie)).

The AAD states that the Minister has determined that there is the likelihood of Felling and Reforestation project LS08-FL0154 having a significant effect, either individually or in combination with other plans and projects and lists three European sites (Slieve Bloom Mountains SPA IE00041600, River Barrow And River Nore SAC IE0002162 and River Nore SPA IE0004233) as being screened in. The AAD goes on to set out measures in relation to the screened in European sites and provides reasons for the measures.

#### **Referrals**

The application was referred to Laois County Council on 12/04/2023 and described the project as being at Monasop, Co Laois. 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 NHA and that an Appropriate Assessment of the proposed development was required.

The application was referred to the National Parks and Wildlife Service (NPWS) on 12/04/2023 who responded on 13/06/2023 under two headings submitting that for felling;

- *'The compartment is wholly situated within the Slieve Bloom Mountain SPA (site code 004160). Therefore it is recommended the proposed works should take place from August 15th to February 28th of the following year to avoid disturbance to breeding and nesting birds. If works are to take place outside these dates then an Appropriate Assessment Screening should be undertaken as per Forest Service guidelines.*

- *The felling site is within the Delour river catchment and a number of drains connect the site to the river. The Delour River is designated as an SAC (River Barrow and River Nore SAC – 002162) and a proposed NHA (Delour River near Lacca Manor – 000864). All necessary measures must be incorporated to ensure runoff and sediment loss from the site are effectively eliminated through appropriate design and safe working practices in accordance with current guidelines’.*

In relation to replanting the response sets out that;

- *‘There is no indication in the application as to the level of setback from water features on the site. The applicant must provide a buffer of natural ground vegetation positioned between defined water features and the forest crop and associated operations in order to protect water quality and aquatic ecosystems from possible sediment and nutrient runoff from the site. In addition, the setback should be of various widths at various points along its length, to include adjoining wet hollows and other low-lying areas where water gravitates towards as it drains from the land’.*

The NPWS submission also referenced an attached appendix containing more general points of relevance by way of assistance to the DAFM in its consideration of the application. This appendix does not appear to be available 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 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. Included in this section are many conditions which apply at replanting and which are specifically designed to protect water quality during the replanting operation and during the period the new crop is becoming established. Some examples of these conditions are as follows;*
  - *At reforestation install a 10m wide undisturbed and unplanted water setback alongside the aquatic zone(s), in accordance with Table 5 of the Environmental Requirements for Afforestation.*
  - *Plant a 10 metre wide band of broadleaves immediately adjacent to this setback. This shall be achieved by planting at 2 m x 2 m spacing (or 3.3 m x 3.3 m spacing, where tree guards are required). This planting must not encroach into the prescribed water setback itself. Use native species appropriate to the immediate site conditions and, where possible, of Irish provenance. Trees to be protected from grazing and maintained as necessary.*
  - *At reforestation, install a 5 metre wide water setback along all relevant watercourses onsite. Setbacks to remain unplanted'*

#### **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 AASRD and AAD both prepared on behalf of the Minister. Also on file are two In-Combination Assessment documents prepared on behalf of the Minister. The In-Combination Assessment dated 04/08/2023 appears to be an appendix to the DAFM AASRD and the In-Combination 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 submitted by the applicant is described as being for a Clearfell and Reforestation project LS08-FL0154, located at Raheen, Co Laois and the NIS submitted by the applicant is described as being for a Clearfell and Reforestation project LS08-FL0151, LS08-FL0154 and LS10-FL0036, located at Forth Commons and Shelmalierre Commons, Co. Laois whereas the screening and assessment

undertaken by the Minister refers to the correct location that being for project LS08-FL0154 located at Monasop, Co. Laois.

The FAC finds that the correct location of the project does not appear to be mentioned in either the Applicants pre-screening document or the NIS. 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 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. In the FAC's view, the reference to 'residual effects' in the In-Combination report / assessment 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 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 LS08-FL0154, 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 In-Combination Assessment which is dated 09/08/2023 relies on a report (AAD) that postdates it (15/08/2023). 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.



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.

The FAC also noted that mitigation as set out in the AAD states *‘Silt and sediment control measures shall be installed, where required, along the channel of all relevant watercourses that are connected, directly or indirectly, to any aquatic zone. Silt and sediment control measures must be of an appropriate type, (including porosity where a geotextile is used), of sufficient number and size to provide adequate interception and retention time for the deposition of silt, with consideration of the weather and site conditions in the area. Silt and sediment control measures to adhere to the specifications set out in Section 7 of the Standards for Felling & Reforestation (or acceptable alternatives). Vegetation within the relevant watercourse is to be left intact Reason: In the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations.’* The FAC considers that the wording of this condition is insufficiently clear as to the meaning of the words “where required” and therefore the words are open to interpretation. The FAC considers that the lack of a consistent and objective interpretation of “where required” 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.

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. 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,

 Seamus Neely,  
On Behalf of the Forestry Appeals Committee

