



4th January 2024

Subject: Appeal FAC 032/2023 regarding LS13-FL0080.

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 Statements 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 LS13-FL0080.

THE LICENCE.

Licence LS13-FL0080 is for felling of 3.05 Ha. of Sitka spruce located in the townlands of Aghoney & Fossy Upper, Knocklead, Co Laois and the replanting 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 9th 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 6th of December 2023 which considered the appeal (FAC 032/2023) against the decision to issue the licence on the 9th of August 2023. The FAC members present were: Mr. Seamus Neely (Chairperson), Mr. John Evans, Mr. Luke Sweetman and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy.

BACKGROUND.

The proposal consists of the felling of 3.05 Ha. of Sitka spruce and its replanting with Sitka spruce and Other Broadleaved species. The soils on the site are described as predominantly Surface Water Gleys/Ground Water Gleys and the average slope across the site is moderate (15% or less, sloping in a south-westerly direction). The habitat on the site is conifer plantation high forest.

The site lies in the Nore Water Framework Directive (WFD) Catchment and the Nore_SC_060 Sub-catchment. The site is located within the Owveg (Nore)_010 River Sub-Basin. The Scotland Stream, a section of the WFD River Waterbody Owveg (Nore)_010 forms the eastern site boundary and was of Good status in the 2016-2021 monitoring period and is stated as not being at risk. The underlying groundwater body is the Ballingarry IE_SH_G_009 which was of Good status in the 2016-2021 monitoring period and is stated as not being at Risk. Forestry is not stated to be a pressure in this Sub-catchment.

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 & NIS submitted as prepared by the applicant and both are dated 29th 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 not within a SAC or SPA, is not within an archaeological/architectural site and is not within a prime scenic/ amenity area.

The DAFM file on the Forest Licence Viewer (FLV) includes a DAFM Appropriate Assessment Screening Report & Determination (AASRD) (incl. an In-combination Statement) dated the 1st of August 2023, and a DAFM Ecologist AAD (incl. an In-combination Statement) dated 2nd of August 2023.

The applicant's Appropriate Assessment Pre-Screening Report identified four Natura 2000 sites within 15 km of the proposed felling & replanting: Ballyprior Grassland SAC (Site Code 002256), Lisbigney Bog SAC (Site Code 000869), the River Barrow and River Nore SAC (Site Code 002162) and the River Nore SPA (Site Code 004233). On the basis that the site is hydrologically connected to the River Barrow and River Nore SAC and the River Nore SPA, the proposal proceeded to AA and the applicant prepared a Natura Impact Statement (NIS) which included mitigation measures.

The DAFM AASRD identified the same four Natura 2000 sites and screened in only the River Barrow and River Nore SAC as requiring AA. The River Nore SPA was screened out due to the distance of the proposal from the SPA and the Special Conservation Interest for which the site is designated (Kingfisher: *Alcedo atthis*).

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 was no third-party submission on the licence.

THE APPEAL.

There is one third-party appeal against the decision to approve this licence application. The grounds of appeal are as follows:

1. That no AA was carried out for the replanting.
2. That the Minister's decision does not fulfil basic requirements of EU legislation or case law.
3. That there is no evidence that person who carried out the AA had any qualifications.
4. That there is no evidence that the original planting complied with the Birds Directive & the EIA Directive.

CONSIDERATION BY THE FAC.

At its sitting on the 6th of December 2023, 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 19th 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 response to the first and fourth grounds of appeal.

GROUNDINGS OF APPEAL.

The FAC considered the appellant's grounds of appeal under the headings, AA & replanting, EU Legislation & Case Law, AA & Qualifications, Original planting, and the Birds & EIA Directives.

AA & replanting.

This ground of appeal contends that no AA was carried out for the proposed replanting. The FAC noted that the appellant has adduced no evidence that the Minister did not carry out Appropriate Assessment of the proposed replanting. 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 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.

EU Legislation & Case Law.

This ground of appeal contends that the Minister's decision does not fulfil basic requirements of EU legislation or case law. The FAC noted that the appellant has adduced no evidence as to how the Minister's decision does not fulfil basic requirements of EU legislation or case law. The FAC considers that the DAFM has not erred with regard to this ground of appeal.

AA & Qualifications.

This ground of appeal contends that there is no evidence that person who carried out the AA had any qualifications. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, and whether that decision was made in compliance with fair procedures. The FAC does not consider that the matter submitted in this ground of appeal falls within the remit of the FAC itself to determine.

Original planting and the Birds Directive & EIA Directive.

This ground of appeal questions whether the original planting of the lands was in compliance with "the Birds Directive & Environmental Impact Assessment Directive". The FAC understands this to be the EU Habitats and EIA Directives. The application documentation indicates that the forest which is intended for felling, and replanting was planted in 1992. The FAC noted that this date was after the

transposition of the original EIA Directive by Ireland in 1989 (85/337/EEC). The appellant has adduced no evidence that the planting of these lands in 1992 did not comply with the regulations in force at the time. The FAC is not satisfied that the Minister has erred in relation to these grounds.

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 townlands of Aghoney &, Fossy Upper, Knocklead Co. Laois but that the applicant's AA Pre-screening Report and NIS refer to townlands that are different to that within which licence LS13-FL0080 is located and considers that this constitutes a serious error in both documents. The FAC further noted that at Section 3 of the DAFM Appropriate Assessment Determination on file as dated 2nd 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 29/05/2023) 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 LS13-FL0080 was required in relation to this project was the 1st 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 29th 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 NIS should have post-dated the said AASRD which is not the case.

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.

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 01/08/2023, 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"*. The FAC consider that an in-combination assessment conducted at AA screening stage should not consider the potential "residual" effects of a proposed plan or project. In the case of the in-combination report dated the 02/08/2023, which is the same date as the AAD 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"*. The FAC consider that this wording is ambiguous as it is not clear whether residual

effects are being considered cumulatively in-combination with other plans and projects, or individually in-combination with other plans and projects, and that as a result it is unclear if the proper test has been applied.

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 Landscape however these Guidelines have not been attached as a condition of the licence. Furthermore, compliance with the DAFM document "Environmental Requirements for Afforestation" is a mitigation measure set out in the AAD and it is a condition of the licence to adhere to those mitigation measures. In the "Environmental Requirements for Afforestation" it is stated that it replaces the *Forestry & Water Quality Guidelines*, *Forestry & Archaeology Guidelines*, *Forestry & the Landscape Guidelines*, and *Forest Biodiversity Guidelines*. The FAC considers that reliance on the out-of-date guidelines quoted in condition 1 and compliance with the ERA which supersedes those guidelines is confusing and contradictory and therefore constitutes a serious error in the processing of this licence.

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 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.

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 LS13-FL0080. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence LS13-FL0080 to ensure that the project is subjected to the Appropriate Assessment process such that the requirements of the law are met either through carrying out 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 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

