



16th January 2024.

Subject: Appeal FAC 035/2023 regarding LS09-FL0193

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 (DAFM). 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

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. A hearing of appeal FAC 035/2023 was held remotely by the FAC on 12th December 2023.

In attendance

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Vincent Upton.

Secretary to the FAC: Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and in particular, the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence LS09-FL0193. The reasons for this decision are set out hereunder.

Background

A felling licence (LS09-FL0193) at Cooleeshill/Kilcreman, County Offaly was issued by the DAFM on the 9th August 2023.

The licence decision pertains to the felling of an area of 16.47 hectares. The application was submitted on the 24th March 2023 and included operational and environmental information and a number of maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling of an existing plantation in 2025 comprising one plot planted in 1993 comprised predominantly of Sitka Spruce (80%) with the remainder comprised of Douglas Fir (15%) and Japanese Larch (5%). The site would be replanted with 80% Sitka Spruce, 10% Oak @, 5% Other Broadleaves and

5% Open Space with setback areas bordering the aquatic zone and watercourses being left unplanted. Ground preparations of the area will be re-established by windrow and mounding and then planting.

The site is accessed via an onsite tracks/forest roads which connects to the public road network and is part of a wider forestry. There are no watercourses crossing the site. The project area is described in the documentation as a moderate sloping site of approx. 8%, sloping south at 230m to 170m elevation with a soil composition of acid brown earths and brown podzolics and the habitat is WD4 (Conifer Plantation).

The site is shown to be located on EPA mapping within the River Sub-Basins NORE_040 (IE_SE_15N010300) and BUNOW_010 (IE_SH_25B250100). Mapping data indicates the status of both as good and in terms of risk is indicated as not at risk.

Applicant Documentation

The application submitted included an application pack which includes details relating to species and general mapping which were uploaded on the Forestry Licence Viewer (FLV) on the 5th April 2023.

The application also included a document entitled Appropriate Assessment (AA) Pre-Screening Report, for Clearfell and Reforestation project LS09-FL0193, located at Harperstown, Co. Offaly which is dated 16th May 2023 and was prepared on behalf of the Applicant. This describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. This document identifies nine Natura 2000 sites, seven Special Conservation Areas (SAC) and two Special Protection Areas SPAs within 15km of this project. Slieve Bloom Mountains SAC IE0000412; River Nore SPA IE0004233; Coolrain Bog SAC IE0002332; Knockacoller Bog SAC IE0002333; Island Fen SAC IE0002236; Lisduff Fen SAC IE0002147 and Sharavogue Bog SAC IE0000585 Slieve Bloom Mountains SPA IE0004160 and River Barrow And River Nore SAC IE0002162.

Each qualifying interest or special conservation interest associated with a Special Conservation Area (SAC) or Special Protection Area (SPA) is considered in turn. The report also identified other plans and projects considered in-combination with the proposal.

The pre-screening determines that Appropriate Assessment should be undertaken in relation to specified interests of three European Sites as the project site is located within the Slieve Bloom Mountains SPA (004160) (overlapping by approx. 16.19 hectares) and the project site is potentially hydrologically connected to three Natura 2000 sites downstream namely the Slieve Bloom Mountains SPA (004160) (overlapping by approx. 16.19 hectares), the River Nore SPA (004233) (approx. 9.7km downstream) and the River Barrow and River Nore SAC (002162) (approx. 18km downstream).

The FAC also finds on file a document entitled Natura Impact Statement for Clearfell and Reforestation project LS09-FL0193, located at Harperstown, Co. Offaly. Potential threats arising from the project are outlined in relation to the Qualifying Interests (QIs) and mitigation measures are outlined in the pre-screening document and measures are outlined.

The Appropriate Assessment (AA) Pre-Screening Report and Natura Impact Statement (NIS) were uploaded on the FLV on the 15th June 2023.

DAFM Assessment

The application was subject to desk assessment by the DAFM.

An Appropriate Assessment Screening Report & Determination (AASRD) dated 28/07/2023 is to be found on file as prepared by a Forestry Inspector, Department of Agriculture, Food and the Marine on behalf of the Minister. The screening refers to *"Felling and Reforestation project LS09-FL0193, at Cooleeshill, Kilcreman, Co. Offaly"* and records considerations of the same nine 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 AA was required in relation to two European Sites, the Slieve Bloom Mountains SPA and the River Nore SAC.

DAFM Appropriate Assessment Determination (AAD)

An AAD for Felling and Reforestation project LS09-FL0193, at Cooleeshill, Kilcreman, Co. Offaly dated 01/08/2023 is to be found on file. It is marked as Made by Niall Phelan, Environmental Facilitation Ltd and prepared by Chris Brennan on behalf of the Minister for Agriculture, Food and the Marine) and uploaded on the FLV on the 09/08/2023. It states that documents / matters such as the application information and NIS, the DAFM screening, and submissions from consultation bodies were taken into account.

Section 2 refers to Screening for Appropriate Assessment and in concluding the AA screening, the Minister has determined that there is no likelihood of the Felling and Reforestation project LS09-FL0193 having any significant effect, either individually or in combination with other plans or projects on six sites and screened in three sites as there is the likelihood of Felling and Reforestation project LS09-FL0193 having a significant effect, either individually or in combination with other plans and projects, on European Sites (or uncertainty exists in this regards), for the reasons set out, in view of their conservation objectives on the Slieve Bloom Mountains SPA due to possible effect due to the location of the project within the European site; the River Barrow And River Nore SAC due to possible effect due to the direct hydrological connectivity exists between the project area and this European site and the River Nore SPA due to possible effect due to the direct hydrological connectivity exists between the project area and this European site. The AAD goes on to set out measures in relation to the three screened in European sites and provides reasons for the measures.

In-Combination Assessment

There is an In-Combination Assessment for dated 27/07/2023 on file which addresses screened out sites titled as *'Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0193'* concluding;

“that there is no likelihood of the proposed Felling and Reforestation project LS09- FL0193 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”.

There is also an In-Combination Assessment for Felling and Reforestation project LS09-FL0193 dated 31/07/2023 on file and uploaded on the FLV on the 9th August 2023 which addresses screened in sites. It is titled as an ‘*Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0193*’ and addresses screened in sites concluding;

“there is no possibility that the proposed Felling and Reforestation project LS09- FL0193, 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 LS09-FL0193 only. Any subsequent forestry related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an incombination assessment, prior to any future consent being granted”.

Referrals

The application was referred to Offaly County Council and the National Parks and Wildlife Service (NPWS).

Offaly County Council in a response dated 10th May 2022 indicated no objections and outlined a number of recommendations relating to AA and water quality.

NPWS in a response dated 13th June 2023 which outlined nature conservation recommendations submitting that for felling that 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. The submission drew attention to a number of documents including:

- CIRIA Control of water pollution from linear constructions projects - Site Guide (C949D)
- Forestry and Water Quality Guidelines - (DAFM, 2000a)
- Forest Harvesting and Environmental Guidelines - (DAFM, 2000b)
- Forest Operations and Water Protection Guidelines - (Coillte, 2013)

Decision

The decision was to approve and the licence was issued on the 09/08/2023 subject to conditions which in addition to general related conditions included a condition referring to the requirements as set out in the AAD. The decision is marked as uploaded to FLV on the same date.

Appeal

There is one appeal against the decision to grant the licence. The full grounds of appeal were considered by the FAC and are to be found on file and the Notice of Appeal and full grounds of appeal were provided to the parties.

In summary, the grounds submitted that no Appropriate Assessment was undertaken in relation to the replanting and that the decision of the Minister does not fulfil the basic requirements of the European Union legislation and case law. The grounds submit that there is no evidence that the person who carried out the Appropriate Assessment had any qualifications and that there is no evidence that the original planting complied with the Birds Directive and the Environmental Impact Assessment Directive.

DAFM Statement

The DAFM provided a response to the grounds of appeal (SOF) which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the grounds of appeal. This records the consultation with prescribed bodies and that the application was subject to public consultation. It indicates that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act. In relation to the grounds of appeal the SOF submits that the Appropriate Assessment was carried out on replanting and refers to the maps and content of the documentation including the NIS 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.

The statement further submits that it is the position of the Department that clear-felling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed).

Consideration of FAC

In addressing the grounds of appeal, the FAC considered the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence. The FAC considered that the appeal raises general concerns in relation to the Appropriate Assessment recorded by the Minister but does not submit any specific concerns in relation to significant effects or impacts on European sites and their interests.

The FAC had regard to the documentation provided through the DAFM's Forestry Licence Viewer (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, an Appropriate Assessment Screening Report and Determination and Appropriate Assessment Determination (AAD) both prepared on behalf of the Minister and two In-Combination Assessments documents (the assessment dated 27/07/2023 appears to be an appendix to the DAFM Appropriate Assessment Screening Report and Determination and the assessment dated 31/07/2023 is described as being an appendix to an Appropriate Assessment Report (which does not appear to be on the FLV) both prepared on behalf of the Minister.

From the procedure adopted in relation to the processing of this application in chronological sequence 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. While the NIS at Section 1 page 4 states that it *'takes into consideration one PSR namely LS09-FL0193 located in the townland Harperstown, Co. Offaly'* the FAC finds that the Pre-Screening and NIS submitted by the applicant is described elsewhere in both documents as being for a Clearfell and Reforestation project LS09-FL0193, located at Harperstown, Co. Offaly whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS09-FL0193 located at Cooleeshill/Kilcreman, Co. Offaly. 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, which could have impacted on the public consultation process.

In this instance, the FAC is of the view that there is contradictory information within the NIS and contradictory findings between the pre-screening and NIS prepared by the Applicant and the screening

and assessment undertaken by the Minister. 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 finds that the In-Combination assessment dated 31/07/2023 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 LS09-FL0193, 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 31/07/2023 relies on a report (AAD) that postdates it (01/08/2023).

The FAC also finds an inconsistency in relation to the AASRD dated 28/07/2023 as carried out by the DAFM concludes that two European Sites Slieve Bloom Mountains SPA and River Barrow And River Nore SAC be screened in for Appropriate Assessment and that the AAD dated 01/08/2023 was carried out on the basis that three European Sites Slieve Bloom Mountains SPA, River Barrow And River Nore SAC, and River Nore SPA are screened in for Appropriate Assessment. While the DAFM may have relied on the Applicants screening and NIS to inform the screening conclusions upon which it's AAD is based, the FAC considers that the DAFM should have provided a reasoning for its deviation from reliance on the findings of its own screening exercise as recorded on file.

In relation to the Hen Harrier, the NIS prepared by the Applicant and the screening and AAD recorded by the Minister are in direct contradiction with the NIS finding that specific temporal restrictions are required during the breeding season unless an appropriate pre-felling survey by a suitably qualified bird surveyor indicates that this timing restriction is not required while the Minister's screening and AAD found that such restrictions were not required to be specified by condition unless information from the NPWS changed. While it may be that the Minister had access to different and more update information than the Applicant the FAC would anticipate that such a contradictory finding given the requirement of adopting a precautionary approach to the conservation of the species would be explained in the documentation. The FAC also notes in the NIS reference to *project LS09-FL0193 lies wholly within a Green Area in relation to Hen Harrier, the Special Conservation Interest of the Slieve Aughty Mountains SPA*, though this reference is included under the section of the NIS Table 2.3.1 Slieve Bloom Mountains SPA and that the Slieve Bloom Mountains SPA is generally referred to in the NIS and considers this to be a typographical error.

The FAC also noted another measure Mitigation F which states;

Prior to the commencement of operations onsite, install silt and sediment controls at the locations marked on the Harvest Plan. Additional silt and sediment control measures shall be installed immediately and prior to commencement of operations, 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. Reason: In the interest of the protection of water quality.

The FAC considers that the Minister has set a minimum standard for the content of Harvest Plans in the Standards for Felling & Reforestation (DAFM,2019), and the application included a Harvest Plan map but no silt traps are marked on this. The application also refers to the applicant providing an operational plan to its staff and contractors before commencing work and based on the content of the application and the language employed it is unclear which is being referred to in this condition.

The FAC concluded that the decision should be set aside and remitted 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 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 and specified measures relating to same.

The FAC considered that some of the grounds of appeal were not fully addressed in the statement provided on behalf of the Minister in particular those relating to the qualifications of the individuals undertaking the assessment and the original consent process for the afforestation of the lands. In relation to qualifications, the AAD notes that the applicants NIS was reviewed by an ecologist. The appellant has not submitted any substantial concerns or expressed how they consider the qualifications to be lacking. The Minister may provide further clarification of this in undertaking a new assessment and decision.

In relation to the Water Framework Directive and effects on water quality generally the FAC viewed the information on the EPA and Irish Catchments websites and current mapping and data which confirmed information contained on the DAFM file that the project is within the River Sub-Basins NORE_040 (IE_SE_15N010300) and BUNOW_010 (IE_SH_25B250100). Mapping data indicates the status of both as good and in terms of risk is indicated as not at risk. It is noted that in addition to standard conditions, there are conditions in the mitigations outlined in the AAD which set out specific requirements in relation to setbacks from watercourses for the protection of the environment and species.

In relation to the afforestation of the lands, the appellant has submitted no reasons as to why they consider that the original consent was deficient in some way. The current crop was planted in 1993 before the designation of many SACs and SPAs and the documentation does not establish that the land was afforested at that time. The appellant has not expressed any specific concern in relation to the lands which are the subject of the decision that has been appealed or if or how they consider that a significant effect on the environment or an impact on the integrity of a European site has come about. In any case the FAC is setting aside the decision and remitting it to the Minister.

Yours sincerely,

Derek Daly On Behalf of the Forestry Appeals Committee

