



16th January 2024

Subject: Appeal FAC 033/2023 against licence decision LS09-FL0194

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

A hearing of appeal FAC 033/2023 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

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.

Decision

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 LS09-FL0194. 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 Glenconra, Co. Laois. The application as submitted is dated 24/03/2023 and included operational and environmental information, a number of maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2025 of an existing plantation which at that stage would be 33 years old. It comprises an area of 10.94 ha in two plots (a plot comprising 7.53 ha which is 95% Sitka spruce and 5% Japanese Larch and a plot comprising the balance which is shown to be Sitka spruce). The site would be replanted with 75% Sitka spruce, 20% scots pine and 5% being left unplanted. The licence was granted with conditions on 09/08/2023.

Appropriate Assessment Pre-Screening Report and NIS (Applicant's)

The FAC finds on file a document entitled Appropriate Assessment Pre-Screening Report, dated 16th May 2023, prepared on behalf of the Applicant. This report which is marked as being for Clearfell and Reforestation project LS09-FL0194, located at Newtown and Rochestown, 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 identifies eight European sites within 15km.

- Coolrain Bog SAC (002332) (Terrestrial Distance: 5,339 metres)
- Island Fen SAC (002236) (Terrestrial Distance: 11,054 metres)
- Knockacoller Bog SAC (002333) (Terrestrial Distance: 9,048 metres)
- Lisduff Fen SAC (002147) (Terrestrial Distance: 14,196 metres)
- River Barrow and River Nore SAC (002162) (Terrestrial Distance: 5,467 metres)
- River Nore SPA (004233) (Terrestrial Distance: 6,883 metres)
- Slieve Bloom Mountains SAC (000412) (Terrestrial Distance: 1,162 metres)
- Slieve Bloom Mountains SPA (004160) (Terrestrial Distance: 0 metres)

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, River Barrow and River Nore SAC, River Nore SPA and Slieve Bloom Mountains SPA. The FAC also finds on file a Natura Impact Statement for Clearfell and Reforestation project LS09-FL0194, located at Newtown and Rochestown, Co. Laois as submitted by the applicant. Potential significant effects are outlined in relation to the interests identified in the pre-screening document and measures are outlined.

DAFM Appropriate Assessment screening Report & Determination (AASRD)

An 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-FL0194, at Glenconra, Co. Laois*' and records considerations of the same eight 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 one European Site, ie. Slieve Bloom Mountains SPA.

DAFM Appropriate Assessment Determination (AAD)

An AAD for Felling and Reforestation project LS09-FL0194 dated 01/08/2023 at Glenconra, Co. Laois 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). It states that documents / matters such as the application information and NIS, the DAFM screening, and submissions from consultation bodies were taken into account. The AAD refers to the Ministers screening and records that three European sites are screened in. The DAFM screening on file screens in one European site only. The AAD goes on to set out measures in relation to the three screened in European sites and provides reasons for the measures.

DAFM In-Combination Assessment dated 27/07/2023

There is an In-Combination Assessment for Felling and Reforestation project LS09-FL0194 dated 27/07/2023 on file which addresses screened out sites. It is titled as 'Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0194' and includes the following statement:

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS09-FL0194 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 Assessment dated 31/07/2023

There is an In-Combination Assessment for Felling and Reforestation project LS09-FL0194 dated 31/07/2023 on file. It is titled as an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0194' and addresses screened in sites.

Referrals

The application was referred to Laois County Council and the National Parks and Wildlife Service (NPWS). The Local Authority response submitted that the proposal was not within an Architectural/Archaeological Site or Prime Scenic Area but it is within an SPA or NHA and that AA was required. The NPWS response submitted 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)

The NPWS submitted that for replanting it is proposed to plant the site with Sitka spruce (75%) and scots pine (20%) and pointed out that Department guidelines stipulate that the replanting should consist of 'appropriate alternative species' citing (Reconstitution and Underplanting Scheme (Ash Dieback), Department of Agriculture, June 2020). It stated therefore that any replanting of the site should contain a suitable percentage of broadleaf species and that current guidance is for a minimum of 10% broadleaf species to increase diversity within forestry plantings. It submitted that typical and acceptable species include rowan, oak, birch, as site conditions allow. It submitted that there is insufficient provision for Areas of Biodiversity Enhancement (ABE), that the application indicates that an area of 5% to remain as unplanted, that Forest Service guidelines recommend a minimum of 15% and that the additional space can include the revised area of the setback. The submission also sets out that in addition, it is advised that the ABE's are situated where they provide the best opportunity for enhancing the biodiversity within the compartment and that a significant portion may form part of the 'setback' area while including that pesticide and fertilizer use is prohibited in the setback area. The submission also attached an appendix containing more general points of relevance by way of assistance to the DAFM in its consideration of the application.

Appeal

One third party appeal was made against the decision to grant the licence and was received by the FAC on 22nd August 2023. 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.

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. 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).

Considerations of the FAC

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, 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 27/07/2023 appears to be an appendix to the DAFM AASRD 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).

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 LS09-FL0194 located at Newtown and Rochestown, Co. Laois whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS09-FL0194 located at Glenconra, 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 same and that it is misleading in the context of the publication of the NIS as it indicates an incorrect location for the project.

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-FL0194, 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 that the AASRD dated 28/07/2023, as carried out by the DAFM, concludes that one European Site (Slieve Bloom Mountains SPA) is 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 its 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.

The FAC also finds that mitigation K which is a condition of the licence provides that;

'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 Harvest Plan maps. 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 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 1992 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,

Seamus Neely,
On Behalf of the Forestry Appeals Committee

