



22nd January 2024

Subject: Appeal FAC036/2023 against licence decision LS09-FL0191

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 FAC036/2023 was held remotely by the FAC on 17th January 2024. 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-FL0191. The reasons for this decision are set out in this letter.

Background

The application for the licence decision under appeal relates to the granting of a felling licence at Glendine, 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 comprising an area of 7.18 ha in five sub-compartments (Plot 77809J-2 comprising 0.09 ha which is 53% Sitka spruce and 47% LPS, Plot 77810C-10 comprising 3.65 ha Sitka spruce, Plot 77811U-4 comprising 2.37 ha Sitka spruce, Plot 77815A-3 comprising 0.51 ha Sitka spruce and Plot 77810C-16 comprising 0.56 ha Sitka spruce). The felling age of the 7.18 ha is described at one point in the application documentation as being 44 years and at another the felling age of the five plots is described variously as being 35 and 56 years. The site would be

replanted 55% Sitka spruce and 45% Open Space. The project site is described in the applicant's Pre-Screening Report as being entirely within the Slieve Bloom Mountains SPA and overlapping the Slieve Bloom Mountains SAC by approx. 0.06 ha. It also states that there are many (>8) relevant watercourses within/adjacent to the project site, all of which flow southward and feed into the unnamed order 1 (Segment Code: 15_294) aquatic zone along the southwestern boundary of the site and it is stated that there are two aquatic zones within/adjacent to the project site. The project site is described as being within the Freshwater Pearl Mussel Nore Catchment (red) with a live population validated in 2005 located <29km downstream. 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-FL0191, located at Camaross and Rathkyle, 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 and examines eight European sites.

- Clonaslee Eskers and Derry Bog SAC (000859) (10,342 metres)
- Coolrain Bog SAC (002332) (8,331 metres)
- Island Fen SAC (002236) (11,314 metres)
- Knockacoller Bog SAC (002333) (10,619 metres)
- River Barrow and River Nore SAC (002162) (5,159 metres)
- River Nore SPA (004233) (9,200 metres)
- Slieve Bloom Mountains SAC (000412) (0 metres)
- Slieve Bloom Mountains SPA (004160) (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 four European Sites (Slieve Bloom Mountains SAC (000412), Slieve Bloom Mountains SPA (004160), River Barrow and River Nore SAC (002162), and River Nore SPA (004233). The FAC also finds on file a Natura Impact Statement for Clearfell and Reforestation project LS09-FL0188 and LS09-FL0191, located at Bantry Commons, Co. Laois, as submitted by the applicant. At page 4 (in Section 1) the NIS states that '*This NIS takes into consideration two PSRs namely LS09-FL0188 and LS09-FL0191 located in the townlands of Bantry Commons and Camaross and Rathkyle, Co. Laois and occurs in the River Sub-basin KILLEEN (DELOUR)_010 (IE_SE_15K010400)*'. 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-FL0191, at Glendine, Co. Laois*' and records consideration of eight European sites as below.

- Clonaslee Eskers and Derry Bog SAC (000859)
- Coolrain Bog SAC (002332)
- Island Fen SAC (002236)
- Knockacoller Bog SAC (002333)
- River Barrow and River Nore SAC (002162)
- River Nore SPA (004233)
- Slieve Bloom Mountains SAC (000412)
- Slieve Bloom Mountains SPA (004160)

The AA screening considers each site in turn and records a screening conclusion and reasons. Other plans and projects that may, in combination with the plan or project under consideration, significantly affect a European Site, are stated to have been taken into account. The FAC finds on file a separate document titled '*Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0191*' which it understands to be the Appendix A as referenced in the AASRD. The AASRD screening document concludes that an AA was required in relation to three European Sites, i.e. Slieve Bloom Mountains SAC (IE0000412), Slieve Bloom Mountains SPA (IE0004160), and River Barrow And River Nore SAC (IE0002162) and references at page 21 an 'Appendix A: In-Combination Report for Felling and Reforestation proposed under LS09-FL0191' with the commentary 'See File'.

DAFM Appropriate Assessment Determination (AAD)

An AAD dated 01/08/2023 for Felling and Reforestation project LS09-FL0191 located at Glendine, Co. Laois is to be found on file. It is marked as Made by Niall Phelan, Environmental Facilitation Ltd and prepared by Janet Rumley 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, submissions from 3rd parties, submissions from consultation bodies, and Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site, available from National Parks & Wildlife Service were taken into account. The AAD refers to the Ministers screening and records that four sites are screened out and four sites are screened in. The screened in sites are as set out below.

- Slieve Bloom Mountains SAC (IE0000412)
- Slieve Bloom Mountains SPA (IE0004160)
- River Barrow And River Nore SAC (IE0002162)
- River Nore SPA IE0004233.

The AAD goes on to set out measures in relation to the four 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-FL0191 dated 27/07/2023 on file which the FAC understands addresses screened out sites. It is titled as '*Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0191*' and includes the following statement:

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS09-FL0191 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-FL0191 dated 31/07/2023 on file which the FAC understands addresses the four sites referenced in the AAD as being screened in. These four sites are the same as those screened in as per the applicants Appropriate Assessment Pre-Screening Report. This In-Combination assessment is titled as an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0191'. The second paragraph of the statement included in this Assessment records the following wording.

'It is concluded that there is no possibility that the proposed Felling and Reforestation project LS09-FL0191, 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'

Referrals

The application was referred to Laois County Council on 12th April 2023. The Local Authority responded submitting that the proposal is not within an Architectural/Archaeological Site or Prime Scenic Area nor is it within a Prime Scenic / Amenity area and that it is within a Natura 2000 Site 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 under two headings submitting that for Mitigation 'The compartment is wholly situated within the Slieve Bloom Mountain SPA (site code 004160) and adjacent to the SAC and suitable nesting habitat. Therefore it is recommended the proposed works should take place from August 15th to the 28th of

February 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’.

It submitted that for Replanting ‘*The site, proposed for replanting, bounds the Slieve Bloom Mountain SAC (sitecode 000412). Regulation 42(1) of European Communities (Birds and Natural Habitats) Regulations 2011 states:*

A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site.

Furthermore, Regulation 16 states “Notwithstanding any other provision of these Regulations, a public authority shall give consent for a plan or project, or undertake or adopt a plan or project, only after having determined that the plan or project shall not adversely affect the integrity of a European site.”

- 1. Given its proximity to the SAC, a site of European importance, and the potential impact on the SAC in terms of hydrology, peat damage and the potential deterioration of the site due to the spread of invasive self-seeding conifers, the proposed replant should be screened for AA’.*

It 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, applicants Pre-Screening Report, NIS 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, two In-Combination Assessment documents (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) and an Appropriate Assessment screening and Appropriate Assessment Determination (AAD) both prepared on behalf of the Minister.

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 LS09-FL0191, located at Camaross and Rathkyle, Co. Laois and the NIS submitted by the applicant is described as being for a Clearfell and Reforestation project LS09-FL0188 and LS09-FL0191, located at Bantry Commons, Co. Laois, whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS09-FL0191 located at Glendine, Co. Laois.

The FAC finds that in Section 1 the NIS at page 4 states that '*This NIS takes into consideration two PSRs namely LS09-FL0188 and LS09-FL0191 located in the townlands of Bantry Commons and Camaross and Rathkyle, Co. Laois and occurs in the River Sub-basin KILLEEN (DELOUR)_010 (IE_SE_15K010400)*'. 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 pre-screening document submitted by the applicant provides a detailed breakdown of what are considered the likely significant effects on each interest of the European sites considered. In relation to Nore Pearl Mussel (*Margaritifera durrovensis*) it is submitted that this is screened out for a number of reasons including that there is a downstream hydrological separation to a live population of >29km (page 33). This is contradictory to the description of the site in the same document that records that there is a live population validated in 2005 located <29km downstream (page 7). The NIS goes on to specify mitigation measures for a number of identified and described likely effects in relation to the screened in interests and sites, however not for this species as it was screened out. While the associated SAC has been screened-in as per the DAFM screening there is no description of the likely significant effects in relation to specific interests and the AAD relies on the NIS submitted by the Applicant, which screened out this species on the basis of a finding contradicted within the document. The sensitivity of the Nore Pearl Mussel is well-documented. Ultimately, while there is no reason before the FAC that significant effects on the species may occur there is a clear significant error in the reasons provided in the screening which is not addressed in the documentation of the Minister.

The FAC finds that the Minister has not recorded an assessment of the likely significant effects, mitigation measures, and how they avoid impacts on the integrity of a European site and appears to have relied on the NIS of the Applicant which contains errors not addressed by 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. As alluded to earlier in this letter this In-Combination assessment contains the following passage as part of it's statement;

'It is concluded that there is no possibility that the proposed Felling and Reforestation project LS09-FL0191, 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'.

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 considers that this is a further error in the processing of the application.

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 that the application included Harvest Plan maps, and no silt traps are marked on these. 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 also finds that mitigation A which is a condition of the licence provides that;

*‘The site of this project overlaps with Special
Conservation Interest of the SPA. Therefore, no potential disturbance operation(s) associated with this project shall take place during the (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 licensed project, which has the potential, through excessive noise, vibration, mechanical movement, artificial lights, etc. to disturb the Special. 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). Reason: In the interest of protecting the Special Conservation Interest of the Slieve Bloom Mountains SPA as per the Appropriate Assessment determination for LS09-FL0191’.*

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.

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 and, where they occur, set out mitigation measures that ensure that the integrity of a European site(s). 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 is stated variously in the application to be 35, 44 and 56 years at planned felling in 2025. While there appears to be some contradiction in these felling ages (which should be clarified before a new decision is made on this application), 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.

