



25th January 2024.

Subject: FAC 034/2023 regarding LS09-FL0192

Dear

I refer to your 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 034/2023 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

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-FL0192. The reasons for this decision are set out hereunder.

Background

A felling licence (LS09-FL0192) at Glenamoon, County Laois was issued by the DAFM on the 9th August 2023.

The licence decision pertains to the felling of an area of 5.97 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 1986 comprised predominantly of Sitka spruce (95%) with the remainder comprised of

Japanese Larch (5%). The site would be replanted with 95% Sitka spruce and 5% Open Space. 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 sloping site with an approximate gradient of 17%. It slopes south from a 390m to a 330m elevation with a soil composition of shallow acid brown earths/brown podzolics and the habitat is WD4. (Conifer Plantation).

The site is shown to be located on EPA mapping within the River Sub-Basins DELOUR_030 (IE_SE_15D010400) and KILLEEN (DELOUR)_010 (IE_SE_15K010400. Mapping data indicates the status of both as good and in terms of risk is indicated at risk.

Applicant Documentation

The application submitted included an application pack which includes details relating to species and general mapping which were marked as 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-FL0192, located at Clonmore Lower and Oulartleigh, Co. Laois 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 eight Natura 2000 sites, six Special Conservation Areas (SAC) and two Special Protection Areas SPAs within 15km of this project. The eight sites are 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) and Slieve Bloom Mountains SPA (004160).

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 one European Site as the project site is located within the Slieve Bloom Mountains SPA (004160) and due to possible effect on Hen Harrier Qualifying Interest (QI).

The FAC also finds on file a document entitled Natura Impact Statement for Clearfell and Reforestation project LS09-FL0192, located at Clonmore Lower and Oulartleigh, Co. Laois. 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 marked as uploaded on the FLV on the 15th June 2023.

DAFM Assessment

The application was subject to desk assessment by the 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 and marked as uploaded on the FLV on the 09/08/2023. The screening refers to "Felling and Reforestation project LS09-FL0192, at Glenamoon, 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. The screening document concludes that an AA was required in relation to one European Site, the Slieve Bloom Mountains SPA.

DAFM Appropriate Assessment Determination (AAD)

An AAD for Felling and Reforestation project LS09-FL0192, at Glenamoon, Co. Laois dated 01/08/2023 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) and marked as 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 sets out that in concluding the AA screening, the Minister has determined that there is no likelihood of the Felling and Reforestation project LS09-FL0192 having any significant effect, either individually or in combination with other plans or projects on seven sites and screened in one site as there is the likelihood of Felling and Reforestation project LS09-FL0192 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 AAD goes on to set out measures in relation to the screened in European site 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-FL0192' concluding;

"there is no likelihood of the proposed Felling and Reforestation project LS09- FL0192 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-FL0192 dated 31/07/2023 on file and marked as 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-FL0192*’ and addresses screened in sites concluding;

“there is no possibility that the proposed Felling and Reforestation project LS09- FL0192, 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)”.

Referrals

The application was referred to Inland Fisheries Ireland who did not respond and also to Laois County Council and the National Parks and Wildlife Service (NPWS).

Laois County Council in a response in a response dated 2nd May 2023 refer to the location of the site within a SPA and the requirement to carry out AA.

NPWS in a response dated 13th June 2023 submitted that the compartment is wholly situated within the Slieve Bloom Mountain SPA (site code 004160) and adjacent to the SAC and suitable nesting habitat. Mitigation measures in relation to the Slieve Bloom Mountain SPA recommended that 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 and that if works are to take place outside these dates, then an Appropriate Assessment Screening should be undertaken.

In relation to replanting the response submits in relation to the Slieve Bloom Mountain SPA that replanting this site at 95% coverage is incompatible with the site conservation objective to restore the favourable conservation condition of hen harrier in the Slieve Bloom Mountains SPA and in terms of the longer-term viability of the species, the Forest Service should consider the overriding environmental considerations of granting this felling licence. In relation to the Slieve Bloom Mountain SAC a screening for Appropriate Assessment of a plan or project, 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. and 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.” In relation to replanting the response also sets out that 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, that the proposed replant should be screened for AA.

Decision

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

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 were 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 Applicants Screening document in Section 4 page 47 states 'This project lies in a rural landscape in the townlands Clonmore Lower and Oulartleigh, Co. Laois in the River Sub-basins DELOUR_030 (IE_SE_15D010400) and KILLEEN (DELOUR)_010 (IE_SE_15K010400) and the NIS at Section 1 page 4 states that it 'takes into consideration one PSR namely LS09-FL0192 located in the townlands Clonmore Lower and Oulartleigh, Co. Laois' the FAC finds that the Pre-Screening and NIS submitted by the applicant is described in their respective titles as being for a Clearfell and Reforestation project LS09-FL0192, located at Clonmore Lower and Oulartleigh, Co. Laois whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS09-FL0192 located at Glenamoon, Co. Laois. The FAC considers that these contradictions have not been addressed in the assessment and reasoning recorded in the documentation of the Minister. The FAC further 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.

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-FL0192, 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 considers that this is a further error in the processing of the application.

In relation to the Hen Harrier and mitigation measures outlined in the AAD the FAC 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 . 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 also finds that there appears to be gaps in the wording in the AAD (final page) for the project as uploaded to the FLV as evidenced by the gaps as shown below.

The nearest mapped aquatic zone to the project site is approx. 75 metres east of the site. Due to the intervening landscape comprised of forestry plantation and a forest road, no relevant watercourses or aquatic zones within the project site, a general southeasterly slope onsite, in combination with the intervening distance, a hydrological connection is not considered likely in this instance. The site is located entirely within the Slieve Bloom Mountains SPA, where Hen Harrier is a Special Conservation Interest

feature. As the project area lies within , measures to mitigate disturbance impacts to been stipulated. A proposed Natural Heritage Area is located 45m northwest of the project area. The above conditions in combination, along with strict adherence to the guidance cited, will eliminate pathways of impact of significance to European sites'

The FAC also notes that the pre-screening report records (page 7) the following,

'The nearest mapped aquatic zone to the project site is LS09-W-0314 approx. 75 metres east of the site. Due to the intervening landscape comprised of forestry plantation and a forest road, no relevant watercourses or aquatic zones within the project site, a general southeasterly slope onsite, in combination with the intervening distance, a hydrological connection is not considered likely in this instance.

The project site is entirely located within the Nore Margaritifera Catchment and Habitats suitable for FWPM Population (Red)'.

The absence of a hydrological connection is then relied on in the screening conclusions in relation to a number of interests in the pre-screening. The Minister's screening relies on this conclusion as the sole reason to screen out a number of European sites and provides this description as a basis for the AA determination. The FAC considers that this reason was not reached with a sufficient degree of confidence. The site is on a steep slope with a mixture of shallow and deep mineral soil. The FAC considers given the nature of the operations and the site conditions and the location of the proposal, that the statement that *a hydrological connection is not considered likely* would not meet the requirements of an Appropriate Assessment screening. Where relied upon in this way, the conclusion should have been based on the establishment, to a reasonable degree including through ground truthing if necessary, that no hydrological pathway was present.

In relation to the submissions made, the FAC noted that the application and NIS were subject to a period of public consultation. Furthermore, the Minister is required to have regard to the submissions made by prescribed bodies and the public in making a decision.

In relation to the submission of NPWS, the FAC noted that the project of felling and reforestation was the subject of Appropriate Assessment and that in relation to the Slieve Bloom Mountain SAC a screening for Appropriate Assessment was undertaken and the site was screened out. In relation to replanting 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 referred to in the submission the FAC noted that the site is currently a WD4 plantation consisting of 95% Sitka Spruce and 5% Japanese Larch, is located outside of the SAC, there is no hydrological connection to the SAC and is located in a wider established area of forestry plantation. In relation to the restoration of the favourable conservation condition of hen harrier in the Slieve Bloom Mountains SPA the conservation objectives of the Slieve Bloom Mountains SPA refer to achieving an even and consistent distribution of age-class across the forest estate. The SPA was also the subject of AA and mitigation measures specific to the Hen

Harrier species (albeit that there appears to be some gaps in the wording of same as alluded to above) were identified in the AAD and included in the conditions of the licence.

While the FAC considered that the submission from the NPWS contains reference to matters relating to replanting in relation to the Slieve Bloom SPA and Slieve Bloom SAC and attributes powers to the Minister for Agriculture which the Minister does not appear to possess in general the FAC would anticipate that the Minister might address the submission and matters raised as part of a future assessment process.

The grounds make a general reference to the replanting of the lands not being assessed which is contested by the Minister. The grounds do not substantiate any particular concern. The FAC has already noted 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.

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 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 on the application.

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 DELOUR_030 (IE_SE_15D010400) and KILLEEN (DELOUR)_010 (IE_SE_15K010400. Mapping data indicates the status of both as good. It is noted that the conditions of the licence decision require that all felling and planting operations are carried out in accordance with Forestry guidelines as they relate to water quality and the Code of Best Forest Practice.

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 1986 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