



26<sup>th</sup> January 2024

**Subject:** Appeal FAC031/2023 against licence decision LS10-FL0036

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 FAC031/2023 was held remotely by the FAC on 17<sup>th</sup> 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 LS10-FL0036. The reasons for this decision are set out hereunder.

#### **Background**

The decision under appeal relates to the granting of a felling licence at Lacka, Rossadown, Co. Laois. The felling would occur across three plots which are currently comprised of primarily Sitka spruce with smaller areas of Japanese larch, birch and ash. The fell age in 2025 is given as 34-72 years. Replanting would be with a mixture of Sitka spruce and oak. The application included operational and environmental information, a series of maps and an Appropriate Assessment pre-screening report and a Natura Impact Statement (NIS). The pre-screening report/NIS describes the site and operations in more detail and its location with reference to European sites. The plots are bounded to the north and the south by public roads and served by an existing forest road that meets the public road to the east. A number of dwellings are present along the public road to the north. The site is not crossed by an aquatic zone but a number of relevant watercourses circumvent and cross the site and drain easterly. The lands are situated in the

Delour\_020 sub-basin but the relevant watercourses at the east and south flow into the Mountrath\_020 sub-basin as described in the application.

The land is described as being on a moderate slope on a primarily mineral soil with a small area of cutover bog at the south-west and comprised of conifer plantation. The applicant's screening report screens 7 European sites in detail with reference to their interests and conservation objectives. The plantation is situated within the Slieve Bloom Mountains SPA. The lands are described as being hydrologically connected to River Barrow and River Nore SAC (002162) (approx. 4.4km downstream) and the River Nore SPA (004233) (approx. 12km downstream).

Three sites are screened in, River Barrow and River Nore SAC (002162), River Nore SPA (004233), and Slieve Bloom Mountains SPA (004160). The NIS describes the site and operations and the identified potential significant effects on specific interests and conservation objectives of the European sites. In relation to River Barrow and River Nore SAC (002162) and River Nore SPA (004233) the effects are stated to be indirect and the proposed measures primarily relate to the protection of water quality and the removal of pathways. In relation to Slieve Bloom Mountains SPA (004160) it is stated that the lands do not currently provide suitable foraging, nesting or roosting habitat for breeding Hen Harrier and are not located within 1.2 km of a known Hen Harrier nesting site and that no direct effects would arise. The measures proposed relate to the exclusion of works during 1st March to 15th August, inclusive, should the NPWS notify the DAFM of new nesting sites. The NIS concludes,

*It is objectively concluded, beyond reasonable scientific doubt, in light of the above objective scientific information, that, when the above mitigation measures are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites, in view of their conservation objectives and in view of best scientific knowledge.*

The application was referred to the National Parks and Wildlife Service, Department of Housing, Local Government and Heritage (NPWS/DHLGH), Local Authority and Inland Fisheries Ireland (IFI). Laois County Council responded on 2nd May 2023 submitting that the site is not within an Architectural/Archaeological site nor a Prime Scenic/Amenity area. They submit that it is within an SPA or NHA and that as it is within a Natura 2000 Site that Appropriate Assessment is required. The NPWS/DHLGH responded on 13th June 2023 submitting that the compartment is situated wholly within the Slieve Bloom Mountains SPA and that it is recommended the proposed works take place from August 15th to February 28th and that if works take place outside of those dates that Appropriate Assessment screening should take place. Further, it is submitted that appropriate aquatic buffer zones should be established along all aquatic zones.

The DAFM undertook an Appropriate Assessment screening dated 28th July 2023. This describes the site and proposal in text and through mapping and identifies the same seven European sites as the Applicant. Each site is considered in turn with its interests and conservation objectives and screening conclusions and reasons are recorded. The DAFM screen-in the same three European sites for Appropriate Assessment as the Applicant.

The DAFM recorded an Appropriate Assessment Determination (AAD) dated 3rd August 2023. This describes the screening conclusions and records the sources that were referred to in the determination which includes the screening by the DAFM, submissions received and the application and NIS of the applicant. The AAD records that the application and NIS were subject to a public consultation period of 30 days. There is no record of a submission during this period. The AAD specifies the measures to be adhered to in undertaking the operations and describes the basis for the measures. The AAD concludes,

*Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.*

The licence was granted on 09/08/2023 subject to conditions including adherence with the AAD measures.

### **Appeal**

There is one third party appeal against the decision to grant the licence, received by the FAC on 22nd August 2023, and the notice of appeal and full grounds have been provided to the parties. In summary, the grounds submit that there has been no Appropriate Assessment carried out in relation to the replanting and that the decision of the Minister does not fulfil the basic requirements of European Union legislation and case law. It is submitted 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 DAFM provided a statement in response to the appeal, which was provided to the parties, and referred to the documents on the Forestry Licence Viewer as forming the document required to be provided to the FAC under the Forestry Appeals Committee Regulations 2020. The FAC relied on the submissions from the parties and the documents on the FLV in considering the appeal as the parties were advised. The statement from the DAFM outlines the processing of the application and submits that the decision was made in keeping with DAFM procedures, SI 191 of 2017, and the Forestry Act 2014. The statement submits that the replanting was considered in the Appropriate Assessment and refers to the application and NIS documents and the screening and determination documents of the DAFM, including specific measures that refer to replanting. The statement further submits that the position of the DAFM is that the clearfelling and replanting of an established plantation is a standard operational activity and does not involve an activity or project that falls within the projects subject to the requirements of the EIA Directive as transposed in national legislation.

### **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 that have occurred or may occur as a result of the proposed operations.

As the parties were notified the FAC had regard to the documentation provided through the DAFM's Forestry Licence Viewer (FLV), the Notice of appeal and the statement provided by the DAFM. The FAC understands from the DAFM response that the FLV contains the material required to be provided by the Minister to the FAC under the Forestry Appeals Regulations 2020. 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 a screening and Appropriate Assessment Determination (AAD) prepared on behalf of the Minister.

The procedure adopted involved the preparation of an NIS 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 reasoning in the assessment undertaken by the Minister 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 and incorrect information within the pre-screening and NIS. The FAC further considers that these contradictions have not been addressed in the assessment and reasoning recorded in the documentation of the Minister and that the provision of incorrect information might interfere with the public consultation process.

The FAC considers that of particular significance is the contradictions in relation to the Nore Pearl Mussel (*Margaritifera durrovensis*). In the pre-screening/NIS document submitted by the Applicant, a contradiction is stated between the proximity to a recorded population of Nore Pearl Mussel which is recorded as being both less than (page 7) and greater than (page 31) 20km in the pre-screening document, while the operations are recorded as taking place within a catchment containing the species. This species is particularly sensitive to changes in water quality and the proposal has the potential to impact on water quality through sedimentation and runoff according to the information submitted by the Applicant. While a threshold of 20km might itself constitute a precautionary approach neither the Applicant nor the Minister record why this threshold was employed with reference to the available scientific evidence. While the AAD records that,

*Freshwater Pearl Mussel (FPM) is also a QI of this SAC, and the project lies entirely within a "sensitive area" for this species, however there are no known live, validated records of the species present within a distance of concern downstream.*

This is stated in relation to Freshwater Pearl Mussel and not Nore Pearl Mussel and it is unclear as to what sensitive area is being referred to in relation to FPM as this is not recorded in the AA and the contradiction in relation to proximity to Nore Pearl Mussel is not resolved. The FAC considers 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 pre-screening and NIS of the Applicant which contains errors not addressed by the Minister.

The FAC considered that this constitutes a serious error such that the decision should be set aside and remitted to ensure an appropriate assessment in keeping with the requirements of the Forestry Regulations 2017 and EU Habitats Directive was completed.

In relation to the submissions that were 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. The NIS which the FAC understands was subject to public consultation contains the following description,

*This NIS takes into consideration three PSRs namely LS08-FL0151, LS08-FL0154 and LS10-FL0036 located in the townlands of Ballynestragh Demesne and Coolnagloose and Curragh and Curraghwood, Kilanerin, Rahee, Forth Commons and Shelmalierre Commons, Co. Laois and occurs in the River Sub-basin DELOUR\_020 (IE\_SE\_15D010150).*

The Appropriate Assessment Pre-Screening Report and NIS in their titles refers to Clearfell and Reforestation project LS10-FL0036, located at Forth Commons and Shelmalierre Commons, Co. Laois whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS10-FL0036 located at Lacka, Rossadown, 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 specification of the incorrect townland might constitute an obvious error given the project description and mapping but it also further highlights the concern regarding the lack of clarity regarding proximity to a Nore Pearl Mussel population and could have impacted on the consultation process.

In reviewing the AAD, the FAC also noted the following measure which was subsequently conditioned in the licence,

*F. Prior to the commencement of operations onsite, install silt and sediment controls at the locations marked on the Harvest Plan*

The Applicant has submitted that sedimentation might be a risk from the proposal however there is no Harvest Plan, as described in the DAFM Felling and Reforestation Standards submitted with the application, although the operations are well described in the application and pre-screening documents. There is a Harvest Plan map and it is unclear if this was what was being referred to and this does not mark

any silt or sediment controls. The pre-screening document specifies that *Silt traps may be required to the southeast end of the site* (page 6). The FAC considers the lack of clarity to represent an error. The FAC also noted that the documents include two in-combination reports with the one associated with the screening completed prior to the screening document but relying on its conclusions.

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, mitigation measures that ensure that the integrity of a European site does not occur. 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 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 conservation objectives of the Slieve Bloom Mountains SPA also refer to achieving an even and consistent distribution of age-class across the forest estate.

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. At the same time, the grounds do not substantiate the claims in any real way. In relation to qualifications, the AAD notes the authors as Ecologists and 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 at the latest in 1991 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,

  
Vincent Upton,  
On Behalf of the Forestry Appeals Committee