



2nd July 2024

Subject: Appeal FAC001/2024 against licence decision WW04-FL0123

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, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

A hearing of appeal FAC001/2024 was held remotely by the FAC on 12th June 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Vincent Upton
Secretary to the FAC: Ms. Aedin Doran

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 allow the appeal and set aside the decision of the Minister for Agriculture, Food and the Marine (Minister) to grant licence WW04-FL0123. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to a felling licence application on 3.37 hectares at Lugduff, Co. Wicklow dated 5th July 2022. The FAC considered the Notice of Appeal and submissions from the parties in addition to the documentation available on the DAFM Forestry Licence Viewer.

The felling would consist of the clear-felling of a commercial plantation across three plots which is comprised of Sitka spruce and vary in age between 37 and 51 years. The application included inventory, operational and environmental information and a number of maps. The property is shown to be adjoined

and crossed by an aquatic zone to the south and by an existing forest road to the north with a forest road transecting the eastern half of the site. Replanting of the site would comprise two plots with a section adjoining the aquatic zone designated as biodiversity with a mixture of open space and widely spaced broadleaf trees and the larger northern plot would be replanted with conifers. The maps show the felling property to be located within a larger section of managed forest which itself is bordered by a Special Area of Conservation and Special Protection Area.

The application documents included an Appropriate Assessment Pre-Screening Report dated 21st July 2022. This described the operations and environmental conditions in more detail. The site is on a moderate south-easterly site with a mixed, shallow mineral soil. The habitat is conifer plantation which is mature having been planted in 1973 and 1987 and has closed canopy. The screening described the hydrology and habitats of the site.

The pre-screening identifies six European sites (Natura 2000 sites) within 15km of the project area, Wicklow Mountains SPA, Wicklow Mountains SAC, Vale of Clara (Rathdrum Wood) SAC, Slaney River Valley SAC, Deputy's Pass Nature Reserve SAC, Poulaphouca Reservoir SPA. Each of the qualifying or special conservation interests of the sites is considered in turn and reasons are provided for those sites that are screened out. Wicklow Mountains SAC is screened in on the basis of potential significant effects on a number of its qualifying interests. Wicklow Mountains SPA is screened in on the basis of potential effects on Peregrine (*Falco Peregrinus*). The pre-screening records other plans and projects considered in-combination with the proposal. A Natura Impact Statement dated 21st July 2022 is also contained in the application documentation. The NIS addresses likely significant effects on the screened in interests of the European sites and specifies measures that would be implemented to address the effects. The document 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 Inland Fisheries Ireland and a response dated 21st July 2022 is on file which requested measures be included as conditions on the licence including adherence with best practice documents and notification of the IFI prior to the commencement of works. The application was also referred to the County Council and no response is on file.

The DAFM prepared an Appropriate Assessment screening dated 31st January 2023. This identified the same six sites as in the pre-screening document. Each site is considered in turn and the DAFM concluded that the same two European sites should be subject to Appropriate Assessment. The DAFM recorded a separate document in which other plans and projects considered in-combination with the licence are considered.

An Appropriate Assessment Determination is recorded and dated 9th February 2023. This specifies the sources of information on which the AA was based and the screening process. Measures are specified and reasoned. The document 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 subject to conditions on 4th January 2024. The conditions include adherence with the measures of the Appropriate Assessment Determination and to contact the IFI prior to the commencement of works.

Appeal

There is one third party appeal against the decision to grant the licence and the full grounds of appeal have been provided to the parties. In brief summary the grounds submit that,

- there has been inadequate and ineffective public notice in contravention of Article 6(2) of the Aarhus Convention,
- there was a failure to refer the application to the NPWS,
- the Harvest Plan is not consistent with the requirements of the Standards for Felling and Reforestation,
- there were failures in respect of Article 6(3) of the Habitats Directive, including in regards to a source, pathway, receptor not being identified, the use of the Habitats Table, the timing of the NIS and screening, incompatibility between the NIS and DAFM's AA Screening, the Appropriate Assessment, and reliance on outdated guidance and unvalidated measures,
- there is a lack of potential enforcement,
- that water quality mitigation is not scientifically sound.

The DAFM provided a statement in response to the appeal which was provided in full to the parties. In brief summary, the statement submits that,

- the DAFM does not consider that the application constitutes a development covered by the EIA Directive.
- public consultation is provided through the online Forestry Licence Viewer, which is the DAFM's chosen method, with a 30 day period for submissions after an application is advertised and a further 30 days period for submissions in relation to the submission of an NIS or an AAR,
- the Forestry Regulations provide for the erection of a site notice after the commencement of works,
- referrals to prescribed bodies are triggered automatically in response to certain spatial rules and also may be made on a discretionary basis. In this instance referrals were made to Wicklow County

Council and Inland Fisheries Ireland and that the licence conditions reflect the submission from the IFI.

- the submission of a Harvest Plan is not a requirement and that the DAFM had sufficient information to process the application.
- there are no lacunae in the assessment and that the DAFM has developed policies and procedures with expert input. This was accompanied by reference to DAFM and other documentation.
- there are legislative provisions regarding invasive species which the licence does not remove.
- the in combination consideration of other plans and projects is undertaken at the screening stage and the documentation are available. That the submission of a pre-screening assessment and NIS by the Applicant was undertaken on their own behalf and the DAFM Ecologist considered the NIS and assessment of the Applicant in addition to the DAFMs own screening and assessment.
- the DAFM undertake an enforcement system based on a sampling and seriousness of infringement.
- the mitigation measures meet the requirements of an Appropriate Assessment.

Considerations of the FAC

The grounds suggest that the decision does not meet the requirements of the Aarhus Convention. The FAC understands the Aarhus Convention to be a convention under the UNECE and that it does not form part of domestic legislation as such. The Aarhus Convention has been transposed through a number of pieces of EU legislation, including the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). EU EIA Directive sets out in Annex I, a list of projects for which Environmental Impact Assessment (EIA) is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation, or a class of development related to the proposal under appeal, are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) of Annex II).

The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified threshold where the Minister considers such development would be likely to have significant effects on the environment. The decision before the FAC relates to a felling of trees in a commercial plantation which would be replanted and does not constitute afforestation or deforestation for the purposes of land use change. The FAC does not consider that there was a requirement to undertake a screening for Environmental Impact Assessment or an Environmental Impact Assessment in processing the application.

The decision was subject to Appropriate Assessment and the Forestry Regulations 2017 provide for the Minister to undertake an Appropriate Assessment. SI 477/2011 also provides for Appropriate Assessments by public authorities and includes a requirement to undertake a public consultation and to publish a notice in a manner to be determined by the public authority. In this instance, the Minister provided for two periods of public consultation, at application and in relation to the AA. The DAFM website¹ states that the procedure for public consultation includes the publishing of documentation on the Forestry Licence Viewer, which was undertaken in this case.

As noted in the grounds the Forestry Regulations 2017 require a felling licence holder to erect a site notice before the commencement of operations. The licence includes a condition to erect a site notice which the FAC considers is in keeping with the requirements of the Forestry Regulations 2017. The grounds make a reference to a site notice not currently being erected but the felling of trees or timber extraction does not appear to be currently undertaken. The FAC is not a licence enforcement authority. If the Appellant considers that a licence holder is not adhering with the conditions of a licence they should raise the matter with the Minister in the first instance. The erection of a site notice when a felling application is made is not provided for under the forestry legislation.

The FAC is not satisfied that the Minister erred in making a decision under section 7 of the Forestry Act 2014 or the Forestry Regulations 2017 in relation to these grounds of appeal.

in relation to the Appropriate Assessment of the project, the grounds contend that the Minister was required to refer the application to the NPWS. The forestry legislation does not require the referral of an application to a prescribed body but provides discretion to do so. The proposal lies outside of a European site and was subject to public consultation. The grounds refer to a study on Sitka spruce regeneration but this study recommends a setback of 200 metres which is beyond the distance to the closest SAC. The grounds also include a general reference to a project but does not provide any scientific evidence or report to substantiate the claims. In any case, the decision before the FAC relates to the felling of mature trees which would reduce the availability of seed on the site. The grounds provide no convincing scientific basis to counter the Ministers screening and Assessment.

The FAC reviewed the documentation available to it and considered that the Minister in preparing the Appropriate Assessment Determination had included several measures and conclusions that went beyond the assessment contained in the NIS but did not substantiate or explain them sufficiently. As noted in the grounds the Minister included measures in relation to the control of invasive species but it is unclear what formed the basis for the inclusion of these measures or where they are assessed in the context of likely significant effects on European sites. Indeed, the documentation submitted with the application excludes the likelihood of significant effects from invasive species in relation to a number of interests of European sites. In relation to the Wicklow Mountains SPA, the pre-screening and NIS specifies measures in relation to peregrine but states that no measures are required for merlin. The Minister screened in the SPA in a

¹ <https://www.gov.ie/en/publication/e305a-public-consultation-on-licence-applications-for-felling-afforestation-forest-roads-and-aerial-fertilisation/>

general manner and specifies that measures are required in relation to both species. The FAC considers that it is appropriate that the Minister might specify measures that go beyond or differ from those submitted by an Applicant but that in the context of the Appropriate Assessment that this would be reasoned and assessed.

There is a number of examples in which the Minister has specified measures but the assessment of these measures cannot be readily identified in the documentation and in, some instances, the basic premise or the necessity for the measures has not been subject to public consultation or clearly stated. The FAC considers this to represent a serious error.

In relation to the consideration of other plans and projects the grounds refer to the application documentation and the document prepared by the Minister as part of the Appropriate Assessment Determination. There is no record that the Minister has considered the potential for in-combination effects to arise in relation to sites that were "screened-out" by the Minister during the screening process. The screening document refers to the file in relation to other plans and projects. There is an *Appropriate Assessment Screening Report and Determination Appendix A: In-combination report for Felling and Reforestation project WW04-FL0123* on file but this refers to the conclusion of the AA process and not the screening. The FAC considers this to be a serious error.

The "in-combination document" also appears to refer to an out of date county Development Plan and Forestry Programme which were not relevant at the time of the decision and had been replaced and to limit itself to considering plans and projects from the proceeding five years, including felling licences, without providing a rationale.

In addition to the AAD, the licence includes a number of conditions that relate to the protection of the local environment, including adherence with a number of published operational standards and guidelines developed by the DAFM but this does not appear to fully require adherence with the Standards for Felling and Reforestation (DAFM, 2019). These standards are identified in the statement submitted in response to the appeal but are not included in full in the licence conditions. The standards state,

This document sets out the universal standards that apply to all felling (thinning, clearfelling) and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the Department of Agriculture, Food & the Marine under the Forestry Regulations 2017 (S.I.191 of 2017). (Pg 1)

The FAC understand this to be a policy statement and that it is the adopted policy of the Minister for Agriculture, Food and the Marine to condition adherence with these standards on felling licences unless perhaps there was a stated reason otherwise. The FAC considers this to be reflected in the statement of fact from the DAFM. In addition, the FAC considers that the Forestry Regulations 2017 require the Minister to have regard to such standards in making licencing decisions. The FAC considers that the failure to include these standards as a condition on the licence represents a serious error.

The grounds also allege that the application did not include a Harvest Plan that was in keeping with the requirements of the Standards for Felling and Reforestation (2019). In considering this ground the FAC referred to the Felling and Reforestation Policy (2017) and the Standards for Felling & Reforestation (2019), in addition to the relevant legislation. While the FAC could not identify a provision for the mandatory submission of a Harvest Plan, the FAC noted the following provision in the Felling and Reforestation Policy (2017) as it relates to the BIO reforestation objective,

Felling Licence application to be accompanied by a management plan and map setting out the justification for selecting this objective, site preparation and fencing details, the proposed species composition and details of the future management regime (including provisions for natural regeneration – see below). Page 25

The FAC understands that this policy document is still relevant and that the Minister is required to have regard to such documents in making decisions. The document does provide some leeway to adapt prescriptions but this is based on agreement between the DAFM and an applicant. The requirement to submit a management plan in relation to a BIO reforestation objective is also stated in the guidance note for felling licence applications provided on the DAFM website². While the application contains information on operational and environmental matters, the FAC does not consider that the application as submitted contained the information that is stated to be necessary under the Felling and Reforestation Policy in relation to a reforestation objective of BIO (Reforestation for Biodiversity and Water Protection) and that this constitutes a serious error. As the error relates to the application as made the FAC does not consider that remittal in this instance is appropriate and so the decision must be set aside.

The grounds contend that there is a lack of potential enforcement with reference to a lack of notification of when works commence. The statement submitted in response to the appeal outlined the enforcement procedures adopted by the DAFM and implemented through the staff of the DAFM including regionally based Forestry Inspectors. The FAC does not consider that there is any basis to conclude a serious or significant error in the making of the decision in relation to this ground.

The grounds suggest that as the Minister is funding research on the effectiveness of mitigation measures in relation to forestry operations that the decision does not meet the requirements of the Habitats Directive or the Water Framework Directive as this suggests that there is information lacking in relation to the measures. The FAC considers that the suggestion that scientific knowledge should be or can be absolute and that research can reach a terminal end point is entirely at odds with the fundamental principles of the scientific method and is unreasonable. It is entirely appropriate for public authorities to fund scientific research on an ongoing basis as scientific research is an ongoing process. The measures conditioned by the Minister are also in-keeping with those recommended by Inland Fisheries Ireland in their submission on the licence and are reflective of established best practice measures.

² <https://www.gov.ie/en/service/beb13-apply-for-tree-felling-licence/>

The appeal concludes with some general commentary on the appeals process which relates to the provisions of the Agriculture Appeals Act 2001 and it is not for the FAC to comment on these matters.

The FAC is satisfied that serious errors were made in the making of decision WW04-FL0123, including errors in the application. The FAC is therefore allowing the appeal and setting aside the decision of the Minister for Agriculture, Food and the Marine.

Yours sincerely,


Vincent Upton,
On Behalf of the Forestry Appeals Committee