



11/06/2024

Subject: Appeal FAC042/2023 against licence decision LS06-FL0079

Dear Sir/Madam,

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 & Decision

Appeal reference FAC042/2023 was considered during a sitting of the FAC held remotely on the 31/01/2024 which was attended by the following participants:

FAC Members – Mr. Seamus Neely (Chairperson), Mr. Iain Douglas & Mr. Luke Sweetman.

FAC Administration – Ms. Vanessa Healy

Having regard to the particular circumstances of this case, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The record of the Minister's decision was made available to the FAC by way of the Forestry Licence Viewer (FLV). The FAC considered all of the evidence before it, including the record of the decision by the Department of Agriculture, Food, and the Marine (DAFM), the grounds of appeal, and the DAFM's Statement to the FAC in response to the grounds of appeal, before deciding to set aside and remit the Minister's decision to grant felling licence LS06-FL0079 for the reasons outlined hereunder.

Background

The Tree Felling Licence LS06-FL0079 was issued on the 17/08/2023 and is for the clearfell of 2.36ha of coniferous plantation forestry in Capard, Co. Laois. The species to be harvested is 100% Sitka spruce at 33yrs old during the fell year of 2025. Schedule 3 of the licence states that the restock species are 75% Sitka spruce and 11% Other Broadleaves and that the "% of open space not included". The licence was posted on FLV the day it was issued and contains 11 conditions including requirements for adherence to specified guidelines, as well as the mitigation measures prescribed in the appended Appropriate Assessment Determination (AAD), and provision for "minor site level changes" in the interest of the protection of the environment including aquatic habitats.

The project site lies entirely within the Slieve Bloom Mountains SPA. The Appropriate Assessment (AA) Pre-Screening Report/Natura Impact Statement (NIS) submitted by the Applicant states that the project site is on a Moderate slope of approx. 6% or less, sloping southeast (330m to 310m elevation), the site is mostly underlain by 86% Peaty gleys and 14% Blanket peats, and the project site is entirely covered by "WD4 " Conifer Plantation.

The proposal is in the Owenass_010 River Sub-Basin. The Owenass_010 Waterbody currently has 'Good' status (assessed by monitoring but with *no information or unknown* Status Confidence) and is 'Not at Risk'

according to Catchments.ie data. The site is underlain by the Rosenallis Ground Waterbody which also has 'Good' status and is 'Not at Risk'). There are no EPA-mapped watercourses within or adjacent to the site. The AA Pre-Screening Report states that there is an aquatic zone which flows southeast along the eastern project site boundary before leaving the site and flowing south for approx. 632 metres before joining the order 2 Owenass stream and entering the Slieve Bloom Mountains SAC.

AA Pre-Screening Report and NIS

The FAC finds on file an AA Pre-Screening Report for *Clearfell and Reforestation project LS06-FL0079, located at Killinure, Co. Laois*, submitted by the applicant and dated 12/05/2023. This report describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. This document identifies eight European sites within 15km of the proposal that require consideration of possible effect:

- Clonaslee Eskers and Derry Bog SAC
- Coolrain Bog SAC
- Knockacoller Bog SAC
- Mountmellick SAC
- River Barrow and River Nore SAC
- River Nore SPA
- Slieve Bloom Mountains SAC
- Slieve Bloom Mountains SPA

Each Qualifying Interest or Special Conservation Interest is considered in turn. The report also identified other plans and projects considered in-combination with the proposal. The pre-screening report determines that Stage 2 AA should be undertaken in relation to specified interests of three European Sites (River Barrow and River Nore SAC, Slieve Bloom Mountains SAC, and Slieve Bloom Mountains SPA). The FAC also finds on file an NIS for "*Clearfell and Reforestation project LS06-FL0078 and LS06-FL0079, located at Boley, Co. Laois*" as submitted by the applicant and dated 12/05/2023. Potential significant effects are outlined in relation to the European sites identified in the pre-screening document and mitigation measures are proposed. The FAC noted that the NIS references Slieve Beagh SPA several times in relation to felling project LS06- FL0079 and that Slieve Beagh SPA is located in Co. Monaghan. The FAC observed that several sections of the NIS appear to contain gaps in the information, and it is unclear whether or not this is an error on the applicant's behalf or if the document has been redacted. The FAC concluded that the decision in this case should be set aside and remitted for reasons set out elsewhere in this letter and the matter raised regarding potential errors / redactions in NIS should be clarified before a new decision is made on the application.

DAFM AA Screening Report & Determination (AASRD)

The record of the decision includes an AASRD, dated 04/08/2023, and prepared by a DAFM Forestry Inspector. The AASRD refers to *Felling and Reforestation project LS06-FL0079, at Capard, Co. Laois* and records considerations of the same eight European sites as the applicant's AA Pre-Screening Report. The DAFM's screening considers each site in turn and records a screening conclusion and reasons. Other plans and projects are stated to have been considered in combination with the proposal and reference is made to an "Appendix A: In-Combination Report for Felling and Reforestation proposed under LS06- FL0079" at page 21 with a note to "see file". The FAC finds on file a separate document titled "Appendix A: In-combination report for Felling and Reforestation project LS06-FL0079" which appears to be the document referenced at page 21 of the AASRD. The AASRD screened out the Slieve Bloom Mountains SAC due to "the absence of a direct upstream hydrological connection, and subsequent lack of any pathway,

hydrological or otherwise". The DAFM's screening concludes that an AA was required in relation to two European Sites; Slieve Bloom Mountains SPA and the River Barrow and River Nore SAC.

DAFM AA Determination (AAD)

The record of the decision includes an AAD, dated 14/08/2023, and prepared by a DAFM Ecologist for "Felling and Reforestation project LS06-FL0079, at Capard, Co. Laois". The AAD states that documents/matters such as the application information and NIS, the DAFM screening, and submissions from consultation bodies were taken into account. The AAD refers to the Minister's screening and records that six European sites were screened out and two sites were screened in for AA. The AAD prescribes measures in relation to the two screened-in European sites and provides reasons for the measures. The FAC noted that the AAD appears to contain gaps in the information in certain parts regarding Hen Harrier and the location of the project and it is unclear whether or not this is an error on the DAFM's behalf or if the document has been redacted. The FAC concluded that the decision in this case should be set aside and remitted for reasons set out elsewhere in this letter and the matter raised regarding potential errors/redactions in the AAD on the record of the file should be clarified before a new decision is made on the application.

DAFM In-Combination Assessment

There are two DAFM In-Combination Reports to be found on file, one labelled as Appendix A to the DAFM's AA Screening Report and dated 04/08/2023. The second appears to be labelled as Appendix A to an AA Report and dated 09/08/2023.

DAFM In-Combination Assessment dated 04/08/2023

This In-Combination Assessment addresses screened-out sites. It is titled as "Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS06-FL0079" and includes the following statement:

It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS06-FL0079 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.

DAFM In-Combination Assessment dated 09/08/2023

The second In-Combination Assessment on file is labelled as "Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS06-FL0079". The in-combination statement at Section 2 includes the following wording:

It is concluded that there is no possibility that the proposed Felling and Reforestation project LS06-FL0079, 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 & Submissions

The application was referred to Laois County Council (LCC) and the National Parks and Wildlife Service (NPWS). LCC responded by letter dated the 02/05/2023 and noted the location of the proposal as being within an "SPA or NHA" but not within an architectural/archaeological site and not within a prime

scenic/amenity area. LCC's response also states that as the proposal is within a European site, the DAFM "are required to carry out an appropriate assessment".

The NPWS responded by email on the 13/06/2023 with comments that appear to contain gaps in the information and, as with several other documents on file, it is unclear whether or not this is an error on the author's behalf or if the document has been redacted. The NPWS noted the position of the project site as being wholly situated within the Slieve Bloom Mountain SPA. They stated that "In addition the proposed road is possibly within [redacted] Therefore it is recommended the proposed works should take place from August 15th to March 31st 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". The NPWS also attached an appendix containing more general points of relevance. The FAC concluded that the decision in this case should be set aside and remitted for reasons set out elsewhere in this letter and the matter raised regarding potential errors/redactions in the submission from the NPWS should be clarified before a new decision is made on the application.

There are no third party submissions on this application recorded on the FLV.

Appeal

One third party appeal was made against the decision to grant the licence. The Notice of Appeal and full grounds of appeal were provided to all parties. The grounds of appeal state that:

"These developments are within the Slieve Bloom SPA 1E0004160. No Appropriate Assessment as explained in no. 44 of the Decision of the CJEU Case 258/11 was carried out for the replanting."

DAFM Statement

The DAFM provided a statement to the FAC in response to the grounds of appeal, which was circulated to all parties. This statement outlined the processing of the application and the issuing of the licence. The statement submits that the application was desk-assessed and that:

- The application contains a detailed reforestation map along with the proposed species mix at replanting. Replanting is referred to throughout the applicant's AA Pre-Screening Report and NIS e.g. details of ground preparation prior to replanting, planting method, and the treatment of plants to protect against pine weevil. Section 3 of the AAD lists the documents that were considered during the AA which includes the application and the NIS.
- The titles of the Department's AA In-Combination Assessment, AASRD and AAD include the word 'Reforestation'.
- Section 4 of the AAD includes a statement to the effect that the AA has been carried out on a Felling and Reforestation project. Included in this section are numerous conditions which apply at replanting, and which are specifically designed to protect water quality during the replanting operations with examples provided.

Considerations of the FAC

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against certain decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision under appeal, and if the decision was made in compliance with fair procedures. The grounds of appeal note the location of the proposed project within the Slieve Bloom Mountains SPA and submit that "No Appropriate Assessment as explained in no. 44 of the Decision of the CJEU Case 258/11 was carried out for the

replanting.” Having regard to the details of the case in question, the FAC considers this to mean that the appellant is contending that the DAFM’s AA contains *lacunae* and does not contain complete, precise, and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. However, the FAC noted that the Appellant has not submitted any further details or evidence to support this contention.

The FAC had regard to the documentation provided through the DAFM’s FLV as notified to the parties, the notice of appeal, and the statement provided by the DAFM. In relation to AA, the documents included a pre-screening report and NIS submitted by the Applicant in addition to other application information, two In-Combination Assessment documents (the first of which appears to be an appendix to the DAFM’s AASRD while the second is described as being an appendix to an AA Report which does not appear to be on the FLV) and an AA screening and 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 and NIS submitted by the Applicant are described as being for a Clearfell and Reforestation project LS06-FL0079, located at Killinure, Co. Laois and Boley, Co. Laois respectively. Whereas the DAFM’s AASRD and AAD, correctly, refer to the location of the proposal as being in Capard, Co. Laois. The FAC noted that the NIS also contains references to the project site in relation to Slieve Beagh SPA which is located in Co. Monaghan.

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 noted that the AAD states in Section 4 that “It was determined that adequate information was available to enable an Appropriate Assessment Determination to be reached for this project”. 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 and which includes references to Slieve Beagh SPA as this may have impacted on the accuracy of any spatial analysis informing same and that it is misleading in the context of the publication of the NIS as it indicates an incorrect location for the project.

The FAC noted that the DAFM’s AAD states: “In undertaking the Appropriate Assessment, the following were taken into account:

- the initial application, including all information submitted by the applicant, information available via iFORIS (including its GIS MapViewer) and input from the District Inspector (including information following field inspection)”. However, in this case the DAFM’s statement to the FAC states that the site was only Desk-Assessed.

The FAC considered the fact that the DAFM’s AASRD screening conclusion differed from the Applicant’s AA Pre-Screening Report and subsequent NIS regarding the Slieve Bloom Mountains SAC. The DAFM screened out this European site due to “the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise”. The AA Pre-Screening Report states that “There is one aquatic zone within the site... LS06-W-0482 flows southeast along the eastern project site

boundary for approx. 244 metres, leaves the site and flows south for approx. 632 metres and joins, the order 2 Owenass stream (Segment Code: 14_298) and enters the Slieve Bloom Mountains SAC (000412) (approx. 632 metres downstream of the project site).” This hydrological connection also appears to be indicated on the Harvest Plan Map and Reforestation Maps submitted by the applicant in their Application Pack. The DAFM have not provided any commentary in their AA documents on the fact that their AASRD contradicts the AA Pre-Screening report regarding the presence of a hydrological connection between the project site and the Slieve Bloom Mountains SAC. In these circumstances, the record of the decision before the FAC indicates that the DAFM made a significant error in their AA process in not identifying a hydrological connection between the proposal and the Slieve Bloom Mountains SAC.

The FAC considered the In-Combination report for the screened-out sites (dated 04/08/2023) and the DAFM’s use of the word “residual” in this document. In the context of AA, the term residual effects is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment entitled Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states on page 40,

“If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions”.

While the FAC considers that it is clear what the intention of the statement was, this language should be amended to avoid any confusion in the process.

The FAC finds that the In-Combination assessment dated 09/08/2023 is described as being an Appendix to an *Appropriate Assessment Report* however no AA Report is to be found on file. As referenced earlier in this letter, 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 LS06-FL0079, 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 09/08/2023, relies on a report (AAD) that post-dates it (14/08/2023). The FAC considers that this is a further significant error in the processing of the application.

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 AA Report that identifies and assesses likely significant effects on European sites and, where they occur, prescribes mitigation measures which ensure that the integrity of a European site will not be adversely affected. Whichever approach is adopted, the FAC considers that a new period of public consultation should be undertaken.

The FAC noted that the application pack submitted in support of the proposal includes a Harvest Plan Map but does not include a Harvest Plan which meets the requirements of Section 2 of the Standards for Felling & Reforestation (v. Oct. 2019). Mitigation measure “gg” in the AAD requires adherence to, *inter alia*, the Standards for Felling & Reforestation (v. Oct. 2019) and the FAC considers that the Minister has set a minimum standard for the content of Harvest Plans in these standards.

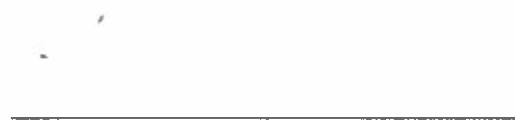
The FAC also noted that Condition 10 of the licence states that “only minor site level changes in the interest of environmental protection are permitted.” The FAC considers that the wording of this condition is insufficiently clear as to the meaning of the words “only minor” and therefore the words are open to a wide interpretation and not adequately addressed in the context of AA of likely impacts and effects. The FAC considers that the lack of a consistent and objective interpretation of “only minor” that would ensure the implementation of the condition for its intended purpose, which is stated as in the interest of environmental protection, constitutes a significant error in the making of the decision in this case.

The grounds of appeal 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 AA 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 also finds that mitigation A in the AAD states that “The project is within _____ as per current information provided by NPWS. Therefore, no potential disturbance operation(s) associated with this project shall take place during the Hen Harrier breeding season (1st March to 15th August, inclusive)”. The FAC considers that, along with the NIS, and the response from the NPWS, 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. As referenced earlier in this letter it is unclear whether or not these “spaces” represent errors in the individual documents or if the documents have been redacted.

Based on the evidence before it, as outlined above, the FAC found that the DAFM made significant errors in their processing of the application prior to issuing LS06-FL0079. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to carry out a new AA of the proposed project both individually and in combination with other plans and projects, before making a new decision. The FAC considers that in the event that a new felling licence is issued, any licence conditions attached to same should be clear and definitive and require adherence to the relevant standards and guidelines.

Yours Sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee

