



27th June 2024

Subject: Appeal FAC 020/2024 against licence decision CK12-FL0229

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 and Decision

A hearing of appeal FAC 020/2024 was held remotely by the FAC on 12th June 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Vincent Upton & Mr. Iain Douglas.
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. 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 CK12-FL0229. The reasons for this decision are set out hereunder in this letter.

Background

The application for the licence decision under appeal relates to the granting of a felling licence at Carrigduff, Co. Cork. The application as submitted is dated 02/10/2023 and included operational and environmental information, and maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2024 of an existing block of commercial forestry on an area of 3.98 ha comprising Sitka spruce and a very small area of lodgepole pine. The felling age of the trees is described as being 53 years in 2024. The site would be replanted with approximately 90% Sitka spruce, 5% Broadleaves and the remainder being open space. The licence was granted with conditions on 02/02/2024.

Appropriate Assessment Pre-Screening Report dated 05 /12/2023 (Applicants)

The applicant submitted a document entitled 'Appropriate Assessment Pre-Screening Report', dated 05/12/2023 which is marked as being for 'Clearfell and Reforestation project CK12-FLO229, located at Carrigduff, Co. Cork'. It describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. The proposal site is described as consisting entirely of plantation conifer high forest comprising mainly Sitka Spruce planted in 1971 and forming a closed canopy over the majority of the project area. The report also states that there are several pockets of windblown forestry (approx. 0.56 ha in total) present within the project area, accounting for approximately 14% of the total project area. The project area is described as being split into two separate felling sites, one to the west and a smaller one to the east, located approximately 95 metres apart.

An aquatic zone, the Nadanuller Beg River (order 1), is said to flow in close proximity to the southern boundary of the project area and that this river provides a hydrological connection with the Blackwater River (Cork/Waterford) SAC at a downstream distance of approximately 6.3 km. The Nad River is said to continue north-east and joins the Glen [Banteer] River (order 4), which flows north into the Blackwater [Munster] River (order 5). The Blackwater [Munster] River is said to flow east, providing a hydrological connection with the Blackwater Callows SPA at a downstream distance of approximately 74.4 km. The Blackwater [Munster] River is said to then continue east before turning to flow in a southerly direction, providing a hydrological connection with the Blackwater Estuary SPA at a downstream distance of approximately 121.3 km and ultimately discharges into the Youghal Harbour which is approximately 132 km downstream from the project area.

The report sets out that taking a precautionary approach that potential hydrological connectivity exists between the project area and the Blackwater River (Cork/Waterford) SAC, the Blackwater Callows SPA and the Blackwater Estuary SPA and that a potential pathway for effect was identified in the form of deterioration in water quality as a result of sedimentation during forestry activities and that the Blackwater River (Cork/Waterford) SAC is considered to be within the likely Zone of Impact. The report sets out that the project area is located within the Munster Blackwater Catchment and that this is a SAC designated catchment for the protection of Freshwater Pearl Mussel (*Margaritifera margaritifera*). It states that the nearest downstream live record of Freshwater Pearl Mussel is located more than 6 km from the project area. It also states that the project area is part of a larger conifer plantation of varying age and class. It states that the surrounding area and wider landscape support additional conifer plantations, upland heath and peatland habitats and agricultural grasslands. It states that the project area is located on blanket peat soils (BktPt) and peaty gley soils (AminPDPT), on a moderate slope, sloping in an easterly direction.

The report identifies four Natura 2000 sites located within 15km of the project area namely, Blackwater River (Cork/Waterford) SAC (002170), Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC (000365), Mullaghanish Bog SAC (001890), and Mullaghanish to Musheramore Mountains SPA (004162).

The project area is described as being accessible via the existing forest road CK12R0143, which is located to the south of the project area. The report sets out that there is one hydrologically connected European site within 15km of the project area namely the Blackwater River (Cork/Waterford) SAC (Site Code: 002170) at a distance of approximately 6.3 km. It also states that the potential for hydrological pathways for likely significant effect with European Sites at distances greater than 15km, namely the Blackwater Callows SPA (Site Code: 004094) at a distance of approximately 74.4 km and the Blackwater Estuary SPA (Site Code: 004028) at a distance of approximately 121.3 km, was considered and concluded that in this case, based on the nature and scale of the project, the large distance and the assimilative capacity of the intervening watercourses, that there is no potential for significant effect on any European Sites beyond 15km. The pre-screening determines that Appropriate Assessment should be undertaken in relation to specified interests of Blackwater River (Cork/Waterford) SAC.

Natura Impact Statement (NIS) (Applicants) 05/12/2023

The FAC also finds on file a Natura Impact Statement (NIS) for *Clearfell and Reforestation project CK12-FL0229, located at Carrigduff, Co. Cork*. The NIS on its fourth page (marked as page 78) in Section 1 states that *'The purpose of this Natura Impact Statement is to provide supporting information to assist the competent authority, in this case the Forest Service DAFM, to conduct an Article 6(3) Appropriate Assessment of a clearfell and reforestation project, located at Carrigduff, Co. Cork. This report forms part of the supporting documentation for a forestry licence application in conjunction with a pre-screening report.'* The potential significant effects on the screened in site are outlined in relation to the interests identified in the pre-screening document and measures are outlined. The NIS on its fifth and sixth pages (marked 79 and 80) provides details of the NIS authors and their qualifications.

DAFM Appropriate Assessment Screening Report & Determination dated 24/01/2024 (AASRD)

An AA screening Report & Determination is to be found on file as prepared by the Forestry Inspector, Department of Agriculture, Food and the Marine dated 24/01/2024 on behalf of the Minister. The screening refers to *'Felling and Reforestation project CK12-FL0229, at Carrigduff, Co. Cork'* This AASRD states that in undertaking screening for 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);
- responses from consultation bodies and submissions from 3rd parties;
- any subsequent supporting documentation received from the applicant;
- any other plan or project that may, in combination with the plan or project under consideration, significantly affect a European Site;
- any information or advice obtained by the Minister;
- Conservation Objectives, Natura 2000 forms, site synopsis and supporting documents for each relevant European site, available from National Parks & Wildlife Service (www.npws.ie);
- available ecological and environmental information including aerial imagery, historical OS maps, DAFMs iFORIS system, QGIS and ArcGIS applications and data available at National Parks &

Wildlife Service (npws.ie), EPA Maps, GeoHive, Data and maps (gsi.ie), Biodiversity Maps (biodiversityireland.ie);

- any other relevant information.

The AASRD states that combined with the project details and site characteristics summarised previously in the report, that there is sufficient information within the application and available from elsewhere to form a sound judgement regarding the likelihood of the project having a significant effect on a European site. It records considerations of four European sites namely;

- Blackwater River (Cork/Waterford) SAC IE0002170,
- Mullaghanish to Musheramore Mountains SPA IE0004162,
- Killarney National Park, Macgillycuddy's Reeks And Caragh River Catchment SAC IE0000365, and
- Mullaghanish Bog SAC IE0001890.

The AA screening considers each site in turn and records a screening conclusion and reasons for each of the four sites. The screening document concludes that an AA was required in relation to one European Site, ie the Blackwater River (Cork/Waterford) SAC IE0002170. This report references an 'Appendix A: In-Combination Report for Felling and Reforestation proposed under CK12-FL0229' with the commentary 'See File'.

DAFM Appropriate Assessment Screening Report Appendix A: In-combination report for Coillte Felling project CK12-FL0229.

There is an In-combination report for Felling and Reforestation project CK12-FL0229, which is itself undated, and which the FAC understands is an appendix to the AASRD on file as dated 24/01/2024 and therefore appears to be the In Combination report for the screened out sites. It includes the following statement:

'It is concluded that there is no likelihood of the proposed Coillte Felling project CK12-FL0229, when considered individually, having a significant effect on the relevant European Site(s), as described elsewhere in the Screening Report. There is no likelihood of residual effects that might arise from this project, which are not significant in themselves, creating a significant effect in-combination with other plans and projects. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed elsewhere in the Screening Report, have been taken into consideration in reaching these conclusions. Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of other plans and projects are such that they will ensure that they do not have any significant effect on those same European Site(s). There is no likelihood that the proposed project will have, or contribute to, any significant effect on those same European Site(s), when considered in combination with other plans and projects. Note that those European Site(s) upon which, a likelihood of a significant effect arises when considering the project individually, are screened in and will be progressed to, and addressed in, Stage 2 Appropriate Assessment'.

DAFM Appropriate Assessment Report Appendix A: In-combination report for Coillte Felling project CK12-FL0229

The FAC also finds on file an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project CK12-FL0229' which is undated and while described as an Appendix to an Appropriate Assessment Report no such report is to be found on file. This In-Combination assessment appears to be in respect of the screened in site. It includes the following statement:

'It is concluded that there is no possibility that the Coillte Felling project CK12-FL0229, with the mitigation measures set out in Section 4, will itself, i.e. individually, adversely affect the integrity of those European Site(s) screened in (as listed elsewhere in this AA Report. The relevant Qualifying Interests / Special Conservation Interests and Conservation Objectives have been considered in reaching this conclusion. There is no likelihood of any residual effects that might arise, which do not in themselves have an adverse effect, creating an adverse effect on the integrity of the site(s) 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 other plans and projects are such that they will ensure that those plans and projects do not give rise to any adverse effect on the integrity of those same European Sites. It is concluded that this project, when considered in combination with other plans and projects, will not adversely affect the integrity of those same European Site(s). Note that this relates to the proposed activities under CK12-FL0229 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an in-combination assessment, prior to any future consent being granted'.

DAFM Appropriate Assessment Determination dated 30/01/2024 (AAD)

A separate AA Determination for *Felling and Reforestation project CK12-FL0229, at Carrigduff, Co. Cork*, marked as prepared by Robbie Mc Namara, Ecologist, Envirico Ltd, on behalf of the Minister for Agriculture, Food and the Marine and dated 30/01/2024, records the information and sources taken into account in undertaking the Appropriate Assessment. The AA Determination states that *'It was determined that adequate information was available to enable an Appropriate Assessment Determination to be reached for this project. The Minister has carried out the Appropriate Assessment of the potential impacts of the likely significant effects of Felling and Reforestation project CK12-FL0229 on those European sites 'screened in' (as listed above) and has made certain, based on best scientific knowledge in the field and the European Communities (Birds & Natural Habitats) Regulations 2011 (as amended) and the Forestry Regulations 2017, as amended, and Article 6(3) of the Habitats Directive, that the proposed project, individually or in combination with other plans or projects, will not adversely affect the integrity of any of the aforementioned European Sites, having regard to their conservation objectives, provided the following mitigation is implemented...'* The AAD report then goes on to set out the mitigation proposed.

County Council Referral

The application was referred to Cork County Council on 13/10/2023 as part of a list of projects and was described as a project at *'Carrigduff, Co Cork'*. There is no record of a response on file from the Local Authority.

Inland Fisheries Ireland (IFI) Referral

The application was referred to the IFI on 13/10/2023 as part of a list of projects. There is no record of a response on file from the Inland Fisheries Ireland.

The Licence

The licence was granted with conditions and bears the date 02/02/2024 (sic).

Appeal

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

‘No Appropriate Assessment as required by the decision of the Courts of Justice of the European Union in Case 258/11.

“So Far as concerns the assessment carried out under (sic) Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must 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”.

The AAD is not an assessment it is a list of mitigation measures proposed.

There is no assessment of the cumulative effects on the Blackwater River (Cork/Waterford) SAC (002170) of all permitted forestry (It is not Possible to prove a negative).

There is no consideration of the possible effects on the Freshwater Pearl Mussel’.

A guidance from the European Commission bearing the date December 2023 is said to be attached.

The appeal documentation also included a document titled *Guidance on Assessment and Construction Management in Margaritifera Catchments in Ireland* bearing the date December 2023.

Ministers Statement (SOF)

The Minister provided a statement responding to the appeal which was provided to the parties. This statement sets out the relevant processing dates for the application and states that the Department is satisfied that all criteria as outlined in the following standards and procedures have been adhered to in making a decision on the application. The Department disputes the appellant’s assertion that no appropriate assessment was carried out in line article 6(3) of the Habitats Directive and goes on to detail the steps taken by the Department underpinning its compliance with article 6(3) of the Habitats Directive. Part of the detail provided by the DAFM in relation to the AA process in this case is as follows;

‘Where the site is screened in for second stage appropriate assessment a Natura Impact Statement (NIS) is submitted by the applicant or where an NIS has not been prepared the Department will prepare an Appropriate Assessment Report (AAR). In either case the NIS or AAR is posted to the FLV and stakeholders

and members of the public have a further 30 days to make submissions. The opportunity to make submissions on these documents is also advertised on the Department's website and any submissions received are taken into account in preparing the Appropriate Assessment Determination (AAD). Prior to signing of on the AAD a second 'In combination' is prepared. This demonstrates that the project in combination with other plans and projects with conditions doesn't have an adverse impact on the European sites'. This passage from the SOF as above indicates (notwithstanding the reference in some of the file papers to a DAFM AAR) that no DAFM AAR was completed in that it states that an AAR is only done in the absence of an NIS being submitted. The SOF also sets out that in respect of 'Scientific Rational' that conditions included in felling licences are based on the following DAFM policies, procedures, guidelines and standards;

- Forests & Water Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (attached),
- Environmental Requirements for Afforestation, December 2023 (DAFM, 2023),
- Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019),
- Felling & Reforestation Policy (DAFM, 2017),
- Appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out the procedures regarding Hen Harrier and potential disturbance operations developed by the Forest Service of the DAFM and agreed by NPWS,
- Forestry Standards Manual (DAFM, 2015),
- Draft Plan for Forests and Freshwater pearl Mussel in Ireland,
- Kerry Slug and Otter Guidelines,
- AA Procedure Guidance Note & iFORIS SOP for DAFM Forestry Inspectors.

The SOF also sets out that experts within the Department then developed the standard mitigations based on these documents and their own expertise and lists a number of references and further reading included in 'Forests & Water Achieving Objectives under Ireland's River Basin Management Plan 2018-2021.' In relation to In-Combination Assessment the SOF states that DAFM's In-combination Report was drafted following extensive research and that in addition to Forestry Plans and projects the following sources of information were also examined;

- The Department of Housing, Planning and Local Government's website <https://www.housing.gov.ie> was examined for projects as having been (within the last five years), or in the process of being, granted planning permission by the Local County Council and located within the vicinity of the project area;
- An Bord Pleanála website www.pleanala.ie/index.htm was examined projects located within the vicinity of the project area,
- The Environmental Protect Agency website gis.epa.ie/EPAMaps/AAGeoTool was examined projects located within the vicinity of the project area,
- The current County Development Plan was examined, and extracts taken and added to the Report.

It states that the incorporation of the In-combination Report into the AA Screening Determination Report is testimony to its importance in making the screening decision. It also states that having listed all plans and projects including forestry projects within the vicinity of the project area that DAFM concludes that there is no potential for the proposed project to contribute to any cumulative adverse effect on the integrity of any European Site(s), when considered in-combination with other plans and projects. The SOF also sets out that by listing these projects, the Department is demonstrating that it has taken these projects including forestry projects into account when making the decision in relation to the licence decision for CK12-FL0229.

In relation to Freshwater Pearl Mussel (FPM) the SOF states that firstly, both Coillte and DAFM separately screened in the Blackwater River SAC having taken into account the qualifying interest of the SAC which included the Freshwater Pearl Mussel (FPM) and that it was concluded at screening stage that there could be an impact on the SAC and further assessment by means of a Stage 2 Appropriated Assessment was needed. The Stage 2 AA, the SOF states, was carried out to afford DAFM an opportunity to consider the potential impacts of the project, if any, on the FPM within the Blackwater River SAC. This, it states, demonstrates that at screening the Department did consider FPM.

The SOF also points out that Coillte's NIS documents significant analysis in relation to the FPM referencing Table 2.1.1 which it said to begin by setting out the various components of the Conservation Objectives (relevant information including attributes, conservation status & locations) for the Blackwater River SAC which are relevant to the CK12-FL0229 project and that this table goes on to provide a very detailed analysis regarding any potential for the project to create an adverse effect on the FPM. It points out that the NIS then proposes a list of mitigations that will protect the FPM from these risks under Schedule 3.1.1. It also sets out that in the Department's AAD the sources of information taken into account when preparing the AAD are listed and that principal amongst these is the Natural Impact Statement as prepared by Coillte. It states that the NIS and the other sources of information listed influence the final list of mitigations presented in the AAD many of which are specifically designed to protect water quality and aquatic habitats and stating that all of which are consistent with Coillte's list as presented in the NIS. The SOF contends that it is inaccurate to claim that the Department did not consider the possible effects of the project on the FPM.

Considerations of the FAC

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 Appropriate Assessment the documents included a Pre-Screening Report and Natura Impact Statement submitted by the Applicant in addition to other application information, and an AASRD and AAD both prepared on behalf of the Minister. Also on file are two In-Combination Assessment documents prepared on behalf of the Minister. The In-Combination Assessment for the screened out sites appears to be an appendix to the DAFM AASRD of 24/01/2024 and the In-Combination Assessment for the screened in site, which is itself undated, is described as being an appendix to an Appropriate Assessment Report which does not appear on the FLV.

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 NIS submitted by the applicant and the Appropriate Assessment Determination by the Minister. For instance the mitigation set out in Section 3 Schedule 3.1.1 of the NIS in relation to reforestation setbacks sets out that *'A setback area of 10m will be applied along the aquatic zone present in the project area, as specified in Section 14 of the Standards for Felling & Reforestation (DAFM, 2019)'* whereas the AAD in mitigation no 8 sets out a requirement to *'Add a further 10 metres unplanted and undisturbed water setback in peatland sites with a further 5 rows of broadleaves at 2m X 2m spacing directly outside the water setback. For sites susceptible to deer damage use tree guards and plant at 3.3 m x 3.3 m spacing (3 rows). For unsuitable sites, instead of planting broadleaves, extend the original water setback by 20m. Use a mix of native species appropriate to the immediate site conditions and, where possible, of Irish provenance. Reason: In the interest of the protection of water quality'*. The documentation does not appear to explain why the Minister has determined that this measure is considered necessary in the context of an Appropriate Assessment. Furthermore, the term peatland can be interpreted differently depending on its context and the condition appears to be open to interpretation. The felling site is located mainly, although not exclusively, on a blanket peat type soil. The Minister should specify clearly whether the condition of including an additional planted setback is required in this instance and, in the context of undertaking an Appropriate Assessment, the record should provide some explanation as to why measures that differ from the NIS are required. The FAC also noted that the AAD includes measures in relation to invasive species while the NIS does not include such measures and screens out a risk from invasive species for a number of interests.

The FAC considers that a number of measures have not been fully addressed in the assessment and reasoning recorded in the documentation of the Minister. The FAC considers that this is a significant error in the processing of the application as it relates to Appropriate Assessment.

In relation to In-Combination assessment the FAC would understand that the consideration of other plans and projects should take place as part of the process to ascertain whether the project, either individually or in-combination with other plans or projects, is likely to have a significant effect on a European site and an Appropriate Assessment of the implications of the project and such effects on the European site, having regard to the conservation objectives of the site concerned. As stated on the record, it appears to the FAC it is not clear that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as these were ruled out at screening stage for screened out sites on the basis that 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. In the FAC's view, the reference to *'residual effects'* in the In-Combination report / assessment on file dated 24/01/2024 that appears to deal with the screened-out sites, creates confusion as it is not clear what effects are being referred to in this instance and there is no explanation as to what gives rise to these

effects such that they can be described as being 'residual'. The FAC would understand that the term residual is generally used in the context of what remains after an action is undertaken. In the context of Appropriate Assessment (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,

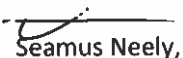
'If the competent authority considers that residual adverse effects remain, then the plan or project may not proceed without continuing to stage 3 of the AA process: Alternative Solutions'.

In the context of undertaking the screening again the FAC considers that the Minister should correct this language to avoid the introduction of any unnecessary confusion.

The FAC finds that an undated In-Combination assessment on file which relates to the screened in site is described as being an Appendix to an *'Appropriate Assessment Report'* and that no Appropriate Assessment Report is to be found on file. The FAC considers that the reliance on an undated In-combination report which is described as being an appendix to a report that is not to be found on the face of the record for the licence application is a further error in the processing of the application.

The FAC concluded that the decision in relation to licence CK12-FL0229 should be set aside and remitted in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, 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 prior to the making of a new decision.

Yours sincerely,


Seamus Neely,

On Behalf of the Forestry Appeals Committee