



03/05/2024.

Subject: WD01-FL0232 FAC 016/2023

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 (DAFM). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal. A hearing of appeal FAC 016/2023 was held remotely by the FAC on 15th November 2023.

In attendance

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.

Secretary to the FAC: Ms. Vanessa Healy

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all other submissions received, and in particular, the following considerations, the FAC has decided that the decision should be set aside and remitted in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, and that prior to the making of a new decision, the Minister should complete a new screening for Appropriate Assessment of the proposal itself and in-combination with other plans and projects. The FAC also considers that the DAFM should address the other errors identified previously in this letter prior to the making of a new decision. The reasons for this decision are set out hereunder.

Background

A felling licence (WD01-FL0232) at Bleantasour, Bleantasourmountain, Glennaneane, Glennaneanemountain, Co Waterford was issued by the DAFM on the 04.07.2023.

The licence decision pertains to a project area of 17.39 ha composed of entirely plantation conifer high forest. The project area is made up of three sub compartments, which comprise entirely Sitka spruce, planted in 1983 and 1993, forming a closed canopy over the majority of the project area.

The project area is part of a larger conifer plantation of varying age and class to the south, north, northwest and is partially bordered by agricultural grassland to the southwest, southeast and by upland heath habitat to the north east. The surrounding area and wider landscape support agricultural grasslands, other conifer plantations, upland heath/grassland habitat and areas of scrub.

The project area is described in the documentation available on the Forestry Licence Viewer (FLV) as being located on mineral soils (AminDW and AminSW) and peaty gley soils (AminSRPT) on a moderate slope, sloping in a south easterly and south westerly direction. There are no aquatic features located within or in close proximity to the project area. The closest aquatic feature to the project area is an unnamed aquatic zone, (EPA RWB code: IE_SE_17C010100, segment code:17_168) (order 1), which is located approx. 250 metres southwest of the project area. There is no clear flow path from the project area to this aquatic zone. A buffer of agricultural grassland, conifer plantation and a local road L-51181-0* occurs between the project area and this aquatic zone.

This project lies in a rural landscape in the townlands of Bleantasour, Bleantasourmountain, Glennaneane, Glennaneanemountain, Co. Waterford in the River Sub-basin COLLIGAN_010 (IE_SE_17C010100). This sub-basin has approximately 21% forest cover, compared to the national average of 11%. At 17.39 hectares the project is considered large in scale. The water quality status for the COLLIGAN_010 River Waterbody is 'Good' and "Not at Risk" based on the latest EPA RWB data.

Appropriate Assessment Pre-Screening Report (AAPSR)

The applicant provided an AAPSR and in it made the following statement.

"All European sites within a distance of 15 km surrounding the project area were identified and considered in relation to hydrological pathways for likely significant effect. In this case, there are no hydrologically connected European sites within 15 km of the project area. In addition, the potential for hydrological pathways for likely significant effect with European sites at distances of greater than 15 km was also considered: In this case, there are no hydrologically connected European sites beyond 15 km of the project area".

Based on the findings of the AAPSR, the applicant provided the following conclusions.

"Following an evaluation of the information set out in this report, it is concluded beyond reasonable scientific doubt, in view of best scientific knowledge, on the basis of objective information and in light of the conservation objectives of the relevant European sites, that the proposed project, individually or in combination with other plans and projects, will not have a significant effect on any European Site. Based on this information, we contend that the competent authority can determine that there is no requirement for this project to proceed to Appropriate Assessment (Stage 2)".

DAFM Assessment

The application was subject to a desk assessment by the DAFM.

An Appropriate Assessment Screening Report & Determination (AASRD) is found on file dated 27/06/2023. It determined that there are 6 Natura 2000 sites located within 15km of this project area.

- Blackwater River (Cork/Waterford) SAC (002170)
- Comeragh Mountains SAC (001952)
- Dungarvan Harbour SPA (004032)
- Glendine Wood SAC (002324)
- Lower River Suir SAC (002137)
- Nier Valley Woodlands SAC (000668)

The DAFM's AA screening states that in undertaking the 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, DAFM's 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. Combined with the project details and site characteristics summarised above, 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.*

The DAFM's AA Screening Report & Determination considers each site in turn and records a screening conclusion and reasons. In relation to the Comeragh Mountains SAC, the DAFM's screening conclusion states in Section 5 that the details of this European site have been reviewed, including its QIs and conservation objectives, as published by National Parks & Wildlife Service at <http://www.npws.ie/protected-sites/sac/001952>. The DAFM go on to state that:

This European site is 2.5 kilometres east northeast of the project area. Having examined, analysed and evaluated, in the light of the best scientific knowledge in the field, the following aspects of the project:

- *the nature of the proposed works (including associated operations and ancillary works) and location;*
- *the above European site together with its QIs and conservation objectives, and*

➤ *potential sources and pathways relevant to this European site, it can be ruled out, based on objective scientific information, that the project itself (i.e. individually) will have a significant effect on this European Site, in light of the above information and the following rationale:*

➤ *Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.*

The following determination is offered.

“Following AA screening, and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 32 of 2020), DAFM has determined that there is no likelihood of the Felling and Reforestation project proposed under WD01-FL0232 having any significant effect, either individually or in combination with other plans or projects, on any of the...European sites identified”.

Referrals

The application was referred to Inland Fisheries Ireland, Waterford County. Council. and Inland Fisheries Ireland, all on the 12/04/23 who did not respond.

Decision

The decision was to approve and the licence was issued on the 04/07/2023 and marked as uploaded to FLV on the same date subject to standard conditions.

Appeal

There is one appeal against the decision to grant the licence. The full grounds of appeal were considered by the FAC and are to be found on file and the Notice of Appeal and full grounds of appeal were provided to the parties.

In summary, the grounds submitted that the criteria used in this application and decision are not “according to the judgement of the High Court” regards screening for AA, referring to judgements Kelly v An Bord Pleanála, CJEU C 323-17 and CJEU 258 -11; there are 20 harvesting applications in the Catchment which were not considered in the Appropriate Assessment Screening Determination and it is not known how many of these are “also designated for Hen Harrier”, reference is made to the Comeragh Mountains SAC and an excerpt from its Site Synopsis which states that Peregrine and Hen Harrier breed within the site, there was inadequate public consultation provided for in light of the requirements of Article 5(1) of the EIA Directive; reference is made to the “Appropriate Assessment Determination” and the basis for screening out sites and bird species and states that “Hen Harriers are birds who fly, they don’t swim”.

The grounds of appeal include a number of points related to the functioning of the FAC.

DAFM Statement

The DAFM provided a response to the grounds of appeal (SOF) which was provided to the other parties. In summary, the statement provides an overview of the processing of the application and addresses the

grounds of appeal. This records the consultation with various bodies as appropriate and that the application was subject to public consultation. It indicates that the decision was issued in accordance with DAFM procedures, SI 191/2017 and the Forestry Act.

In relation to the grounds of appeal the SOF submits in relation to public consultation the 14-day period allowed for making an appeal to the Forestry Appeals Committee (FAC) is a statutory requirement, pursuant to Regulations 5(1) of the Forestry Appeals Committee Regulations 2020 (S.I No 418 of 2020), as amended by Regulation 3 of the Agricultural Appeals Act 2001 9Section 14A Regulations 2021 (S.1. No 353 of 2021).

With regard to EIA, the DAFM noted *“It is the position of the Department that clear-felling and replanting an already established plantation forest is a standard operational activity and does not involve an activity or project that falls within the specified categories of forestry activities or projects subject to the requirements of the EIA Directive, as transposed and set out nationally in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended, and in Regulation 13(2) of the Forestry Regulations 2017 (and wherein relevant national mandatory thresholds and criteria for EIA are also prescribed)”*.

The DAFM SOF also stated: *“This AA screening exercise concluded that the site was 2.5km from the Comeragh Mountains SAC IE0001952 and had no hydrological connection to that SAC, hence the reason for the screen out conclusion. No reference to Peregrine or Hen Harrier could be located in the application, pre-screening report, AA Screening Determination, In Combination or licence”*.

Consideration of FAC

The remit of the FAC 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 series of errors, was made in the making of the decision under appeal and whether the decision was made in compliance with fair procedures. In addressing the grounds of appeal, the FAC considered the requirements of the EIA and Habitats Directives, the FAC considered the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

The FAC 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.

From the procedure adopted in relation to the processing of this application that there is an absence of clear consistency in the reasoning in the assessment undertaken by the Minister with that of the documentation submitted by the applicant.

In this instance, the FAC is of the view that there is contradictory information within the pre-screening submitted by the applicant and the Appropriate Assessment screening undertaken by the Minister. While the Applicants Screening document in Section 4 page 92 states ‘This project lies in a rural landscape in

the townlands Killavally and Lisnatubbrid, Co. Waterford in the River Sub-basin COLLIGAN_010 (IE_SE_17C010100) the FAC finds that the Pre-Screening submitted by the applicant is described as being for a Clearfell and Reforestation project WD01-FL0232, located in the vicinity of Killavally and Lisnatubbrid, Co. Waterford Clearfell whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project WD01-FL032 located at Bleantasour, Bleantasourmountain, Glennaneane, Glennaneanemountain, Co. Waterford. The FAC considers that these contradictions have not been addressed in the assessment and reasoning recorded in the documentation of the Minister.

The FAC considered the submission in the grounds of appeal relating to the Environmental Impact Assessment (EIA) Directive. The EU EIA Directive sets out in Annex I a list of projects for which 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 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). The Irish Forestry Regulations 2017 (S.I. 191 of 2017), in relation to forestry licence applications, require mandatory EIA 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 parameters where the Minister considers such development would be likely to have significant effects on the environment. The decision before the FAC relates to the felling and replanting of an approved area of 17.39. The FAC concluded that the felling and replanting of trees, as part of a forestry operation with no change in land use, does not fall within the classes referred to in the EIA Directive, and is not covered by national regulations (S.I. No. 191 of 2017), and that screening for significant effects under the EIA Directive was not required in this case. As such, the FAC concluded that there is no breach of the provisions of the EIA Directive.

The FAC considered the appraisal of the licence application relating to Appropriate Assessment. The EU Habitats Directive requires that any plan or project not directly connected with or necessary to the management of a European site but likely to have a significant effect on it, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Furthermore, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned. Part 8 of the Forestry Regulations 2017 requires the Minister to screen and, if necessary, to undertake an Appropriate Assessment in relation to specific applications.

The FAC examined the record and statement from the DAFM and, using publicly available data from the EPA, identified the same 6 Natura 2000 sites located within 15km of this project area as the DAFM. These being,

- Blackwater River (Cork/Waterford) SAC (002170)
- Comeragh Mountains SAC (001952)
- Dungarvan Harbour SPA (004032)
- Glendine Wood SAC (002324)

- Lower River Suir SAC (002137)
- Nier Valley Woodlands SAC (000668)

The AA screening considers each site in turn and records a screening conclusion and reasons. The screening document concludes that an AA was not required.

One of the grounds of appeal cites the Comeragh Mountain SAC and mentions Hen Harrier and Peregrine. The FAC noted the DAFM response and concluded that the DAFM position with regard to this ground was reasoned. The FAC noted that the Comeragh Mountains SAC is not designated as a Natura site for either Peregrine or Hen Harrier, and that none of the Qualifying Interests of the Comeragh Mountains SAC are Bird species. The FAC also noted that the Site Synopsis for this European site states that “The integrity of the remaining areas of blanket bog and the general habitat diversity of the site are under threat from land use pressures such as grazing, burning, afforestation and leisure activities” and that the licence under appeal is for the felling and replanting of an existing forest.

The FAC considered grounds of appeal relating to undue process. The FAC was established under the Agriculture Appeals Act 2001 to hear and determine appeals against a decision of the Minister for Agriculture under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017. In relation to this it is noted that the FAC consideration and determination of this appeal is made in accordance with the statutory provisions as set out in Section 14B (13) of the Agriculture Appeals Act 2001 as amended. The FAC noted the response made to it relating to this ground of appeal by the DAFM in its statement wherein it set out that standard practice was followed and that the documents were uploaded on the FLV. The FAC also noted that the project was advertised as provided for in statutory provisions. The FAC does not consider that the DAFM has erred in its processing of the application as it relates to this ground of appeal.

The FAC noted that other plans and projects are recorded which were considered in-combination with the proposal and that an In-combination statement, completed on the 26/06/2023, was prepared in relation to the project. The FAC considered the grounds of appeal relating to other felling applications within the same Catchment as the proposal. The appellant did not provide a list of which specific applications are being referred to. The FAC noted that the In-Combination Statement lists seven thinning and 20 felling licences, totalling approximately 215ha, located within the vicinity of the project area which were approved between 2018 and 2023.

The In-Combination Statement includes the passage,

“It is concluded that there is no likelihood of the proposed Felling and Reforestation project WD01-FL0232 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... Therefore, it is deemed that this project, when considered in combination with other plans and projects, will not give rise to any significant effect on the above European Site(s)".

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. The FAC considered that 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 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, with the reference to 'residual effects' in the In-Combination Statement on file 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'.

In reviewing the documentation on file, the FAC 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. 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 constitutes a serious and significant error in the making of the decision in this case.

Conclusion

In considering the appeal in this case the FAC had regard to the record of the decision, the submitted grounds of appeal, the DAFM's SOF, and all submissions received. The FAC concluded that the decision should be set aside and remitted in accordance with Section 14B of the Agriculture Appeals Act 2001, as amended, and that prior to the making of a new decision, the Minister should complete a new screening for Appropriate Assessment of the proposal itself and in-combination with other plans and projects. The FAC also considers that the DAFM should address the other errors identified previously in this letter prior to the making of a new decision.

Yours sincerely,

4

Donal Maguire
On Behalf of the Forestry Appeals Committee

