



24<sup>th</sup> May 2024

**Subject:** Appeal FAC 092/2023 against licence decision CK03-FL0078

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 092/2023 was held remotely by the FAC on 15<sup>th</sup> May 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, Mr Donal Maguire, & Mr. Luke Sweetman.

Secretary to the FAC: Ms. Vanessa Healy and Ms. Aedin Doran (Observer).

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 CK03-FL0078. 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 Glennakeel West, Co. Cork. The application as submitted is dated 24/03/2023 and included operational and environmental information, and maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2025 of an existing block of commercial forestry on an area of 13.33 ha comprising Sitka spruce. The felling age of the trees is described as being 35 years in 2025. The site would be replanted with approximately 93% Ss, 2% Bi (described in the AAS as Birch) and 5% being open space. The licence was granted with conditions on 21/11/2023.

### **Appropriate Assessment Pre-Screening Report dated 31/05/2023**

The FAC finds on file a document entitled Appropriate Assessment Pre-Screening Report, dated 31/05/2023. This report which is marked as being *for Clearfell and Reforestation project CK03-FL0078, located at Banagher, Co. Cork*, describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. This document describes the proposal site as being mostly covered by Conifer Plantation with the remaining 2% covered by lowland blanket bog. The Harvest Block (HB) is stated to be spread across 7 sub compartments all of which are entirely comprised of Sitka spruce planted in 1990. It states that an area of windblow/snap (approx. 0.40 hectares) is present within the southwestern portion of the project site and that a temporary water crossing point is required towards the northeast of the HB. It states that two areas of biodiversity (approx. 1.09 hectares) are located adjacent to the south-eastern boundary of the site. The project site is said to be mostly underlain by Blanket peats (77%) with the remaining 23% underlain by Peaty gleys.

In relation to access it states that site access is available via the L-1011-30 and Forest Road CK03R0080 which extends southwest through the south of HB for approximately 150 metres and joins the above identified L-1011-30 and Forest Road CK03R1031 for which a road permit is said to be required and which travels southwest through the central portion of the site and joins Forest Road CK03R0080 to the immediate southwest. It also states that any new forest road(s) to access the site will be subject to a separate Appropriate Assessment(s) and will consider this Appropriate Assessment for a felling licence application in the In-combination impact assessment.

In relation to hydrology the project site is said to be within the River Sub-basin GLENACARNEY\_010 (IE\_SH\_23G060300). The project site is said to overlap with the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161). It also states that there are no relevant watercourses within/adjacent to the project site and that there is one aquatic zone within to the project site (CK03-W-0471) which flows northwest through the northeast of the project site for approximately 210 metres. The project site is said to be entirely located in Habitats suitable for FWPM Population.

The report states that there are 4 Natura 2000 sites within 15km of the project namely 3 SACs and 1 SPA. The project site overlaps with the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161). The other three Natura 2000 sites within 15km of the proposal are the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC (000365), the Lower River Shannon SAC (002165) and the Blackwater River (Cork/Waterford) SAC (002170).

The project site is described as being located within an existing forestry block and is surrounded by forestry plantations on the western and eastern boundaries. The north of the project area is said to border an area of open space, while the southern boundary is described as being adjacent to an area of peatland. The wider surrounding landscape is described as interspersed forestry plantations, improved agricultural grassland and areas of bogland. The pre-screening determines that Appropriate Assessment should be

undertaken in relation to specified Qualifying Interests of two European Sites, Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and the Lower River Shannon SAC.

### **NIS (Applicants) 31/05/2023**

The FAC also finds on file a Natura Impact Statement (NIS) for Clearfell and Reforestation project CK03-FL0077, CK03-FL0078 and CK03-FL0079, located at Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and Rathcarrick, Co. Cork. At page 4 of the NIS in Section 1 it 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 Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and Rathcarrick, Co. Cork. This report forms part of the supporting documentation for a forestry licence application in conjunction with three pre-screening report.' and further states 'This NIS takes into consideration three PSRs namely CK13-FL0077, CK03-FL0078 and CK03-FL0079 located in the townlands Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and Rathcarrick, Co. Cork that occur in the River Sub-basins BREANAGH\_010 (IE\_SH\_23B020300) and GLENACARNEY\_010 (IE\_SH\_23G060300)'. The potential significant effects on screened in sites are outlined in relation to the interests identified in the pre-screening document and measures are outlined. The NIS at pages 5 and 6 provide details of it's authors and their qualifications.

### **DAFM Appropriate Assessment Screening Report & Determination (AASRD) dated 07/11/2023**

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 07/11/2023. The screening refers to 'Felling and Reforestation project CK03-FL0078, at Glennakeel West, Co. Cork'. This AASRD 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](http://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 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.

It records considerations of four European sites within 15km of the project area namely the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161, the Blackwater River (Cork/Waterford) SAC IE0002170, the Lower River Shannon SAC IE0002165, and the Killarney National Park, Macgillycuddy's Reeks And Caragh River Catchment SAC IE0000365. The AA screening considers each site in turn and records a screening conclusion and reasons. The screening document concludes that an AA was required in relation to two European Sites, ie Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161 and the Lower River Shannon SAC IE0002165. This report references an 'Appendix A: In-Combination Report for Felling and Reforestation proposed under CK03-FL0078' with the commentary 'See File'.

#### **DAFM In Combination Report 07/11/2023**

There is an In-combination report 'for Felling and Reforestation project CK03-FL0078' dated 07/11/2023 on file which deals with the screened-out sites. It includes the following statement:

*'It is concluded that there is no likelihood of the proposed Felling and Reforestation project CK03-FL0078, 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 In Combination Report 08/11/2023**

There is an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project CK03-FL0078' dated 08/11/2023 on file. This assessment deals with screened-in sites. It includes the following statement:

*'It is concluded that there is no possibility that the Felling and Reforestation project CK03-FL0078, 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 CK03-FL0078 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 (AAD) dated 10/11/2023**

A separate Appropriate Assessment Determination (AAD) for *Felling and Reforestation project CK03-FL0078, at Glennakeel West, Co. Cork*, (marked as made by Niall Phelan, Environmental Facilitation Ltd and prepared by Chris Brennan on behalf of the Minister for Agriculture, Food and the Marine and dated 10/11/2023. It records what was taken into account in undertaking the Appropriate Assessment including 'any Natura Impact Statement provided by the applicant on foot of a request by the Minister, or otherwise'.

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 CK03-FL0078 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 12/04/2023 as part of a list of projects and was described as a project at Glennakeel West, Co Cork. There is no record of a response on file from the Local Authority.

#### **NPWS Referral and Response**

The application was referred to the National Parks and Wildlife Service (NPWS) on 12/04/2023 who responded on 13/07/2023 and stated that while the NPWS was not in a position to provide specific observations on this project as referred from DAFM at the time, it attached an appendix which provided some general observations from NPWS in relation to forestry applications referrals which should be taken into account.

#### **IFI Referral and Response**

The application was referred to the IFI on 12/04/2023 who responded on 24/04/2023 and set out that Inland Fisheries Ireland had no objection in principle to the proposed felling and set out what it required, as a condition of any felling licence granted.

### **Appeal**

One third party appeal was made against the decision to grant the licence. The Notice of Appeal and grounds of appeal were provided to the parties. In summary, the grounds submitted that no assessment has been carried out into the replanting of this SAC, quoting from case CJEU Case 258/11 and submitting that an Appropriate Assessment must comply with same, and contending that there is no evidence that the original planting complied with the Birds Directive and the Environmental Impact Assessment Directive.

### **Minister's Statement (SOF)**

The Minister provided a statement responding to the appeal which was provided to the parties. This statement disputes the appellant's assertion that there are lacunae in the Appropriate Assessment process. The Appropriate Assessment Determination, it states, is created following a detailed and thorough process that delivers precise, complete, and definitive findings and sets out the steps taken by the Department underpinning its compliance with article 6(3) of the Habitats Directive. The SOF sets out steps taken in the processing of the application and provides comment in relation to the replanting assessment of the proposal.

### **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, an AAD and two In-combination assessments (one for screened in sites and the second for screened out sites) as prepared on behalf of the Minister. The In-Combination Assessment dated 07/11/2023 appears to be an appendix to the DAFM AASRD and the In-Combination Assessment dated 08/11/2023 is described as being an appendix to an Appropriate Assessment Report which does not appear to be 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 pre-screening and NIS submitted by the applicant and the screening and assessment undertaken by the Minister. The Pre-Screening submitted by the applicant is described as being for a Clearfell and Reforestation project *CK03-FL0078, located at Banagher, Co. Cork*, and the NIS submitted by the applicant is described as being for a Clearfell and Reforestation project *CK03-FL0077, CK03-FL0078 and CK03-FL0079, located at Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and*

*Rathcarrick*, whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project *Felling and Reforestation project CK03-FL0078, at Glennakeel West*, located at Carriganes, Co. Cork.

The FAC finds that the correct location of the project does not appear to be mentioned in either the Applicant's pre-screening document or the NIS. 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 considers that it is a significant error to rely on an NIS which has been carried out having recorded an incorrect location for the project as this may have impacted on the accuracy of any spatial analysis done to inform same and that it is misleading in the context of the publication of the NIS as it indicates an incorrect location for the project.

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 dated 07/11/2023 on file 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 the In-Combination assessment dated 08/11/2023 is described as being an Appendix to an 'Appropriate Assessment Report' however no Appropriate Assessment Report is to be found on file. This In-Combination assessment contains the following passage as part of its statement.

*'It is concluded that there is no possibility that the Felling and Reforestation project CK03-FL0078, 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...'*

From this passage the FAC notes that the In-Combination Assessment which is dated 08/11/2023 relies on a report (Appropriate Assessment Report) that does not appear on the face of the record available to the FAC. The FAC considers this to be a further error in the processing of the application. The grounds make a general reference to the replanting of the lands (in an SAC) not being assessed which is contested by the Minister. The FAC finds that the proposal area in this case is in an SPA namely the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (004161). The FAC has already recorded that the Appropriate Assessment process should be undertaken again but it does note that the application provided details of the replanting following felling and that the NIS and AAD referred to effects from the replanting operations.

The appellant refers to the original planting consent relating to the proposal area and whether it complied with the Birds Directive and the Environmental Impact Assessment Directive. The FAC considered that some of the grounds of appeal were not fully addressed in the statement provided on behalf of the Minister, in particular those relating to the original consent process for the afforestation of the lands. Notwithstanding, the FAC considers that the grounds do not identify any significant effects on the environment that have occurred since the establishment of the forest nor a basis for assuming that the original planting was regulatorily deficient. Apart from this, the FAC considers that its remit is to make a determination on the decision under appeal in line with the requirements of the Agriculture Appeals Act 2001, as amended.

In reviewing the documentation on file, the FAC noted that condition 12 of the licence states that *'During harvesting or reforestation works, only minor site level changes in the interest of environmental protection are permitted. The applicant must keep a record of any changes made. Reason: In the interest of the protection of the environment including aquatic habitats.'* 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 significant error in the making of the decision in this case.

The FAC noted that mitigation marked (T), as set out in the AAD, states *'Prior to the commencement of operations onsite, install silt and sediment controls at the locations marked on the Harvest Plan. Additional silt and sediment control measures shall be installed immediately and prior to commencement of operations, where required, along the channel of all relevant watercourses that are connected, directly or indirectly, to any aquatic zone. Silt and sediment control measures must be of an appropriate type, (including porosity where a geotextile is used), of sufficient number and size to provide adequate interception and retention time for the deposition of silt, with consideration of the weather and site conditions in the area. Reason: In the interest of the protection of water quality'*. The FAC considers that it is a significant error to place a reliance in the conditions of licence, on a project specific document (in this case a Harvest Plan), that does not appear on the face of the record for the licence application in this case.



The FAC notes that the licence includes a number of conditions that relate to the protection of the local environment, including adherence with a number of published standards and guidelines developed by the DAFM. The FAC noted that the wording of some of these documents appeared with errors. There is a reference in condition 3 of the licence to "forestry biodiversity" whereas the FAC would understand this should be Forest Biodiversity Guidelines. The FAC would consider that such documents should be clearly identified, ideally with the associated date to avoid any confusion, and readily available. However, the FAC considers this to be a minor error as these documents are, in general, well recognised in practice. Of more significance is the absence of the requirement for full compliance with the Standards for Felling and Reforestation (DAFM, 2019). These 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 there was a stated reason otherwise. In addition, 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 full compliance with these standards as a condition on the licence represents a significant error.

The FAC concluded that the decision in relation to licence CK03-FL0078 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. 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,

  
Seamus Neely,  
On Behalf of the Forestry Appeals Committee

