



24th May 2024

Subject: Appeal FAC055/2023 against licence decision CK04-FL0185

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (Minister). The FAC established in accordance with Section 14 A (1) of the Agriculture Appeals Act 2001, as amended, has now completed an examination of the facts and evidence provided by the parties to the appeal.

Hearing

A hearing of appeal FAC055/2023 was held remotely by the FAC on 17th April 2024. In attendance:

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

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

Decision

Having regard to the evidence before it, including the record of the decision, the notice of appeal, and submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister for Agriculture, Food and the Marine (Minister) to grant licence CK04-FL0185. The reasons for this decision are set out hereunder.

Background

The appeal relates to the decision of the Minister for Agriculture, Food and the Marine to grant a felling licence on 9.78 hectares of forest land at Knockawillin, Toorard, Co. Cork. The application included operational and environmental information and a number of maps. The forest is a commercial plantation of Sitka spruce (WD4) which would be felled in 2025 at 34 years of age. The forest is estimated to be stocked at 1,242 stems and contains 407 cubic metres in volume. The application shows the forest to be served by an existing forest road that runs easterly from the eastern boundary of the plot where the stacking area would be located. The soil type is comprised of a mixture of poorly drained mineral, organo-mineral and organic soils and lies on a shallow slope (1.9%).

The lands lie in the Blackwater (Munster) (18) WFD Catchment and straddles the Dalua_SC_010(18_18) 79% & Dalua_SC_020(18_26) 21% sub-catchments. The site lies between the ALLOW_050 (21%) & OWENANARE_020 (79%) rivers waterbodies with the mapping displaying the closest aquatic zones/waterbodies at some 273 metres (OWENANARE_020) to the south west and ALLOW_050 290 metres to the north east.

The documentation includes a screening for Appropriate Assessment under Article 6 of the EU Habitats Directive prepared by the Minister's officials. The site is not located in a European site and the screening identifies three Natura 2000 sites within 15km of the felling site. Blackwater River (Cork/Waterford) SAC IE0002170 (3.0 km north northwest), Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA IE0004161 (5.5 km west northwest) and Lower River Shannon SAC IE0002165 (11.7 km west northwest). Each site is considered in turn and the qualifying interests and conservation objectives are identified with reference to information made available by the NPWS. Other plans and projects considered with the proposal are identified in a separate document, an In-combination report. It was concluded for each site that there was no likelihood of the project having a significant effect on the European site, either individually or in-combination with other plans and projects and that Appropriate Assessment is not required.

The application was referred to Cork County Council and no response is recorded.

The Minister granted the felling licence subject to conditions on 05/10/2023.

Appeal

There is one third party appeal against the decision to grant the licence and the full grounds and the responding statement have been provided to all parties. In summary, the grounds submit that the "FSC" (sic) must assess this proposed development de novo under the EIA Directive and the Habitats Directive as well as the Water Framework Directive. The Appellant submits that the development has been wrongly screened out. The grounds refer to the text of the screening and submits that the NPWS did not place any restrictions on the description of the special conservation interest of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and questions the reasons provided for screening out that European site.

It is further submitted that there is no evidence that any of the other plans and projects listed in the screening was subject to an Environmental Impact Assessment or that one specified felling licence was screened for Environmental Impact Assessment. The grounds further submit that the Appellant is not stating that the development required Environmental Impact Assessment but that there is no evidence that it did not. It is further submitted that there is no limit of 5 years in the Directive or the decisions of the Courts of Justice of the European Union and there is a suggestion that quarries should explain this. There is reference to the signature on the screening and the licence and that there is no reference to the carrying out of either an Environmental Impact Assessment screening, an Appropriate Assessment screening or an assessment under the Water Framework Directive.

The grounds also question the screening in relation to the Blackwater River (Cork/Waterford) SAC and repeats the suggestion that cumulative assessment cannot in law be limited to five or three years and submits that the FAC must carry out a screening for Appropriate Assessment and cannot rely on the screening carried out by the "Forest Service" as the Appellant submits it does not comply with the law. The grounds go on to quote from a number of pieces of caselaw.

Minister's statement

A statement responding to the appeal was submitted by the Minister. This disputed a number of the grounds and described the Appropriate Assessment screening procedure adopted by the Minister in making licence decisions. It is submitted that the application was not required to be subject to EIA. A list of DAFM procedures and policy documents and other publications was also provided.

Considerations of the FAC

The grounds submit that the FAC must assess the development "de novo" under the EIA Directive, Habitats Directive and the Water Framework Directive. The FAC understand this to relate to the form of appeals process established under the Agriculture Appeals Act 2001 in relation to certain decisions of the Minister. The 2001 Act does not establish a de novo appeals system in the first instance and the FAC does not agree with the Appellant's contention.

In relation to the Water Framework Directive (WFD), it has been established that an authority is required to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive. The grounds do not allege that the proposal could have such an effect but make a general reference to the requirements of the WFD. The Minister did identify the waterbodies in the general area and the application shows no pathway to these bodies. The data laid out in page 5 (Table Nearest EPA water features.) of the screening document lists the code and name of each body. It would appear that the name employed is not in fact the WFD waterbody name but a common name employed by the EPA. The code is correct for each waterbody, however, and the FAC is satisfied that the naming issue is a minor clerical error. Of more significance however is the status listed for each waterbody. The FAC would understand that the status is a key measure by which achievement of the WFD objectives is measured. It appears from the table that the status considered is that of the period 2013-2018 while the EPA provides more recent figures for 2016-2021. It would appear to the FAC that the most appropriate status to consider is the most recent to the licence under consideration and that this constituted a serious error.

The licence does include a number of conditions that relate to the protection of the local environment, including adherence with a number of published operational standards and guidelines developed by the DAFM. The FAC noted that the wording of some of these documents appeared with errors. There is a reference 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, 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 well recognised and available in practice. Of more significance is the absence of any

reference to the *Standards for Felling and Reforestation* (DAFM, 2019). These standards are identified in the statement submitted in response to the appeal but are not included in the licence conditions. The standards state,

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

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

The grounds make general commentary in relation to the appropriate assessment screening undertaken by the Minister. The grounds suggest that the proposal was wrongly screened out but does not identify or allude to any significant effects on a European Site that could arise as a result of the licenced activity.

The grounds contend that the consideration of cumulative effects cannot be limited to five or three years by law but does not identify any plans or projects which they consider should have been considered but were not. The grounds also do not suggest how the proposal may have a significant effect on a European site. The FAC considers that the Minister does not fully contest these grounds. The in-combination report specifies only plans and projects from the previous five years and this was relied on in the screening. Neither this report nor the statement provide an explanation as to why this limit was adopted. The FAC considers that the adoption of a set limit in this manner, without stated reasons, is not appropriate as there may be plans or projects that pre-date this limit which are having an effect on a European site. Advices published by the Department of the Environment (*Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities*) and the Office of Planning Regulator (*OPR Practice Note PN01 - Appropriate Assessment Screening for Development Management*) state that decision makers should consider plans and projects that are completed, permitted and proposed. In relation to some licenced activities they may not be exercised until after a five year period, for example a 10 year tree felling licence, or may have been licenced/permitted prior to 5 years but are having an ongoing effect on a European site.

However, whether the proposal could have a significant effect in-combination with plans and projects would depend on its capacity to have an effect on a European site, in addition to any effects arising from other plans or projects. In considering this matter, the FAC noted, furthermore, that the Minister recorded that they had regard to what appears to be an outdated County Development Plan as a new plan was adopted in 2022. In addition, the Forestry Programme 2014-2020 is referenced which, according to the DAFM website, was extended only to 2022 and has since been replaced.

The FAC also noted the reference to residual effects in the in-combination section. 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.

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.

Ultimately the FAC was satisfied that there are a series of errors on the record of the Appropriate Assessment screening such that it should be undertaken again with these errors addressed.

In relation to the specification of the special conservation interest of Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, the screening identifies the special conservation interest as *Circus cyaneus (Hen Harrier, permanent [breeding & wintering]) [A082]* and the grounds submit that the conservation objectives do not include any restrictions. The Minister does not provide an explanation that addresses the Appellant's submission but maintains that the screening was correct. While it is true that the conservation objectives, as published by the NPWS, state *Hen Harrier (Circus cyaneus) [A082]* and it would be preferable if this was adopted to avoid confusion, the conservation objectives relate primarily to breeding success and habitat suitability. This can be addressed by the Minister in undertaking a new screening.

The grounds suggest that referring to the felling site being 5.5km from the SPA as a reason for screening out the proposal from AA represents either *stupidity or fraud*. The FAC does not accept this position and notes that the Appellant provides no basis for this contention. The fact that the felling site is located a considerable distance from the designated Special Protection Area is of clear relevance in determining the likely significant effects on the European site, having regard to the conservation objectives of the site and the description of the site by the NPWS. The proposal itself is for the felling of a commercial coniferous plantation which is not generally considered to be a suitable habitat for the species and the site is located in a wider landscape of improved agricultural land. While the re-established plantation may represent a suitable foraging and nesting habitat for a limited period there is no reason to consider that this could result in significant effect on the conservation objectives of the SPA located 5.5km from it. The grounds do not identify or suggest that any significant effects on the SPA could arise.

In relation to the Blackwater River (Cork/Waterford) SAC the closest mapped aquatic zone lies some 273 metres from the site and the DAFM have submitted that there is no pathway of effects. The SAC lies 3 km from the felling site and its qualifying interests primarily include aquatic species and habitats. Potential effects that can arise from forestry activities on aquatic species and habitats relates to sedimentation,

acidification and eutrophication and are generally limited spatially and temporally. Where identified, such impacts have related to direct effects on surface water bodies through a given pathway. In this case the application as submitted identifies that the closest aquatic zone lies some 273 metres from the site edge and that there is no relevant watercourse leaving the site. The felling site is located outside of and 3km from the SAC. The DAFM have established that there is no pathway of effects. The grounds do not identify or suggest that any significant effects on the SAC could arise.

In relation to the Appropriate Assessment screening, the felling site is not located within a European site. The Minister has recorded a screening for Appropriate Assessment which identifies European sites within 15km of the proposal which are considered in turn with their qualifying interests/special conservation interests and conservation objectives along with other plans and projects considered in combination with the felling. As noted, the FAC considers this to contain a number of errors.

The appeal refers to an Appropriate Assessment Determination but there is no such document on the file nor was there a need to generate such a document as an Appropriate Assessment was not undertaken.

Having considered the appeal, the FAC is satisfied that the Minister made a series of errors in the screening for Appropriate Assessment, which should result in the screening being repeated.

The grounds make a reference to the EU EIA Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU) and the requirements in relation to afforestation and deforestation. The FAC considered that 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 is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II) and "Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment." (Class 13 (a) of Annex II). The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified 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 of 9.78 ha of commercial managed forest which would be replanted and no change of land use would occur. The FAC concluded that the felling of trees, as part of a forestry operation with no change in land use, does not fall within the classes referred to in the Directive, and is not covered by national regulations and that screening for significant effects under the EIA Directive was not required in this case.

The grounds make a general reference to the assessment of the original planting. 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. The decision under appeal is not an application for substitute consent nor does the forestry legislation provide for such a

process. The FAC is an administrative appellate body whose function is to determine appeals against certain decisions of the Minister for Agriculture, Food and the Marine made under Section 7 of the Forestry Act 2014 and the Forestry Regulations 2017 as provided in the Agriculture Appeals Act 2001.

The FAC is satisfied that serious errors were made in the making of decision CK04-FL0185 and is setting aside the decision and remitting it to the Minister to address the errors in relation to the WFD data and the failure to attach the conditions required by adopted policies, and to undertake a new screening of the likely significant effects on European sites of the project itself and in-combination with other plans and projects.

Yours sincerely,


Vincent Upton,
On Behalf of the Forestry Appeals Committee

