



28th May 2024

Subject: Appeal FAC028/2023 against licence decision LS09-FL0187

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

A hearing of appeal FAC 028/2023 was held remotely by the FAC on 6th December 2023. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Iain Douglas, Mr. John Evans & Mr. Luke Sweetman.
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 (DAFM) to grant licence LS09-FL0187. The reasons for this decision are set out in this letter.

Background

The application for the licence decision under appeal relates to the granting of a felling licence at 'Ballaghlyragh or Nealstown, Barnaboy, Tubbrid', Co. Laois. The application as submitted is dated 24/03/2023 and included operational and environmental information, a number of maps outlining the licence area and operational and environmental features. The operations would involve the clearfelling in 2025 of an existing plantation which at that stage would be 29 years old. It comprises an area of 13.26 ha comprising 87% Sitka spruce and 13% Lodgepole pine. The site would be replanted with 95% Sitka spruce and 5% being left unplanted. The licence was granted with conditions on 09/08/2023.

Appropriate Assessment Pre-Screening Report and Natura Impact Statement (NIS)

The FAC finds on file a document entitled AA Pre-Screening Report, dated 16th May 2023, prepared on behalf of the Applicant. This report which is marked as being for Clearfell and Reforestation project LS09-FL0187, located at Bantry Commons, Co. Laois, describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. This document identifies seventeen European sites that require consideration of possible effect.

- Coolrain Bog SAC (002332)
- Island Fen SAC (002236)
- Knockacoller Bog SAC (002333)
- Lisduff Fen SAC (002147)
- River Barrow and River Nore SAC (002162)
- River Nore SPA (004233)
- Slieve Bloom Mountains SAC (000412)
- Slieve Bloom Mountains SPA (004160)
- Sharavogue Bog SAC (000585)
- Dovegrove Callows SPA (004137)
- River Little Brosna Callows SPA (004086)
- Middle Shannon Callows SPA (004096)
- River Shannon Callows SAC (000216)
- Lough Derg North-east Shore SAC (002241)
- Lough Derg (Shannon) SPA (004058)
- Lower River Shannon SAC (002165)
- River Shannon and River Fergus Estuaries SPA (004077)

Each qualifying interest or special conservation interest is considered in turn. The report also identified other plans and projects considered in-combination with the proposal. The pre-screening determines that Appropriate Assessment should be undertaken in relation to specified interests of three European Sites (River Barrow and River Nore SAC, River Nore SPA and Slieve Bloom Mountains SPA). The FAC also finds on file an NIS for Clearfell and Reforestation project LS09-FL0187 located at located at Bantry Commons, Co. Laois as submitted by the applicant. Potential significant effects are outlined in relation to the interests identified in the pre-screening document and mitigation measures are proposed.

DAFM AA Screening Report & Determination (AASRD)

An AASRD dated 28/07/2023 is to be found on file as prepared by a DAFM Forestry Inspector, on behalf of the Minister. The screening refers to "Felling and Reforestation project LS09-FL0187, at Ballaghlyragh or Nealstown, Barnaboy, Tubbrid, Co. Laois" and records considerations of eight European sites as below:

- Slieve Bloom Mountains SAC IE0000412
- River Nore SPA IE0004233
- Coolrain Bog SAC IE0002332
- River Barrow and River Nore SAC IE0002162
- Knockacoller Bog SAC IE0002333
- Island Fen SAC IE0002236
- Lisduff Fen SAC IE0002147

- Slieve Bloom Mountains SPA IE0004160.

The AA screening considers each site in turn and records a screening conclusion and reasons. Other plans and projects are stated as having been considered in combination with the proposal as per the reference to an Appendix A at page 21 with a note to see file. The FAC finds on file a separate document titled 'Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0187' which it understands to be the Appendix as referenced at page 21 of the AASRD. The screening document concludes that an AA was required in relation to one European Site, i.e. Slieve Bloom Mountains SPA.

DAFM AA Determination (AAD)

An AAD dated 01/08/2023 for "Felling and Reforestation project LS09-FL0187 located at Ballaghlyragh or Nealstown, Barnaboy, Tubbrid, Co. Laois" is to be found on file. It is marked as having been prepared by a consultant with the determination decision made by a separate consultant on behalf of the Minister for Agriculture, Food and the Marine. The AAD states that documents / matters such as the application information and NIS, the DAFM screening, and submissions from consultation bodies were taken into account. The AAD refers to the Minister's screening and records that five sites are screened out and three sites are screened in. The screened in sites are as set out below.

- Slieve Bloom Mountains SPA IE0004160
- River Barrow and River Nore SAC IE0002162
- River Nore SPA IE0004233.

The AAD prescribes measures in relation to the three screened-in European sites and provides reasons for the measures.

DAFM In-Combination Assessment dated 27/07/2023

There is an In-Combination Assessment for Felling and Reforestation project LS09-FL0187 dated 27/07/2023 on file which addresses screened-out sites. It is titled as "Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0187" and includes the following statement:

'It is concluded that there is no likelihood of the proposed Felling and Reforestation project LS09-FL0187 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.

Furthermore, it is considered that the regulatory systems in place for the approval, operation (including any permitted emissions) and monitoring of the effects of these other plans and projects are such that they will ensure that they too do not give rise to any significant effects on these European Sites.

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).

Note that the European Site(s) that have not been screened out by this screening exercise will be progressed to, and addressed in, Stage 2 Appropriate Assessment.'

DAFM In-Combination Assessment dated 31/07/2023

There is an In-Combination Assessment for Felling and Reforestation project LS09-FL0187 dated 31/07/2023 on file which addresses the three sites screened-in as per the AASRD. It is titled as an "Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project LS09-FL0187". The second paragraph of the statement included in this Assessment records the following wording:

'It is concluded that there is no possibility that the proposed Felling and Reforestation project LS09-FL0187, with mitigation measures set out in Section 4 of the AAD, will itself, i.e. individually, giving rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation Objectives'

Referrals

The application was referred to Laois County Council and the National Parks and Wildlife Service (NPWS) on 12th April 2023. The Local Authority responded submitting that the proposal was not within an Architectural/Archaeological Site or Prime Scenic Area, but it is within an SPA or NHA and that AA was required.

The NPWS responded submitting that the compartment to be felled is wholly situated within the Slieve Bloom Mountain SPA and that therefore it is recommended the proposed works should take place from August 15th to February 28th of the following year to avoid disturbance to breeding and nesting birds. It also states that if works are to take place outside these dates then an AA Screening should be undertaken as per Forest Service guidelines.

The NPWS submitted that for replanting that there is insufficient provision for Areas of Biodiversity Enhancement (ABE) and that the application indicates an area of under 5% remain as unplanted. It states that Forest Service guidelines recommends a minimum of 15%. It also states that in addition, it is advised the ABE's are situated where they provide the best opportunity for enhancing the biodiversity within the compartment and that a significant portion may form part of the 'setback' area. It points out that current guidance is for a minimum of 10% broadleaf species to increase diversity within forestry plantings and that this may form part of the forest edge planting where there is also a requirement to soften the hard forest edge. It states that typical and acceptable species include rowan, oak, birch, as site conditions allow. It also records that as per guidelines, the forest edge should be planted with native broadleaf species such as rowan, oak, birch, as site conditions allow in order to soften the hard forest edge and that this should take place on the forest side of the setback area. The submission also attached an appendix containing more general points of relevance by way of assistance to the DAFM in its consideration of the application.

Appeal

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

- No AA was carried out of the replanting
- The decision under appeal “does not fulfil the basic requirements of EU legislation and case law”
- There is no evidence that person who carried out the AA “had any qualifications”.
- There is no evidence that the original planting complied with the Birds Directive and the EIA Directive.

Minister’s statement

The Minister provided a statement responding to the appeal which was provided to the parties. This statement outlined the processing of the application and the issuing of the licence. The statement submits that the replanting of the site was assessed and refers to the maps and content of the documentation in relation to reforestation. The statement also refers to a number of measures contained in the AAD that are conditions on the licence and relate to the replanting. The statement further submits that 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).

Considerations of the FAC

The remit of the FAC, as set out in Section 14B of the Agriculture Appeals Act 2001, as amended, is to consider appeals against certain decisions of the Minister for Agriculture, Food, and the Marine, and to determine if a serious or significant error, or a series of errors, was made in making the decision under appeal, and if the decision was made in compliance with fair procedures. The FAC considered that the grounds of appeal raise general concerns in relation to the AA recorded by the Minister but does not submit any specific concerns in relation to significant effects or impacts on European sites and their qualifying interests or conservation objectives.

The FAC had regard to the documentation provided through the DAFM’s Forestry Licence Viewer (FLV) as notified to the parties, the notice of appeal, and the statement provided by the DAFM. In relation to AA the documents included a pre-screening report and NIS submitted by the Applicant in addition to other application information, two In-Combination Assessment documents (the assessment dated 27/07/2023 appears to be an appendix to the DAFM AASRD and the assessment dated 31/07/2023 is described as being an appendix to an AA Report which does not appear to be on the FLV) and an AA screening and AAD, both prepared on behalf of the Minister.

From the procedure adopted in relation to the processing of this application it appears that the NIS was prepared before the screening was undertaken by the Minister. Having regard to the Forestry Regulations 2017, the FAC considers that this may be acceptable in practice where there is a clear consistency in the

reasoning in the assessment undertaken by the Minister with that in the NIS or that any significant inconsistencies are explained and where the assessment and conclusions are clear, definitive, and complete.

In this instance, the FAC is of the view that there is contradictory information within the pre-screening and NIS submitted by the applicant and the screening and assessment undertaken by the Minister. The pre-screening and NIS submitted by the applicant is described as being for a Clearfell and Reforestation project LS09-FL0187, located at Bantry Commons, Co. Laois whereas the screening and assessment undertaken by the Minister refers to the correct location that being for project LS09-FL0187 located at Ballaghlyragh or Nealstown, Barnaboy, Tubbrid, Co. Laois. The FAC further considers that these contradictions have not been addressed in the assessment and reasoning recorded in the documentation of the Minister. The FAC noted that the AAD states in Section 4 that "It was determined that adequate information was available to enable an Appropriate Assessment Determination to be reached for this project". The FAC considers that it is a significant error to rely on an NIS which has been carried out having recorded an incorrect location for the project 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.

The FAC considered the In-Combination report for the screened-out sites (dated 27/07/2023) and the DAFM's use of the word "residual" in this document. In the context of AA, the term residual effects is more commonly employed in relation to the consideration of what effects remain after mitigation measures have been assessed as part of the AA. For example, the Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment entitled Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states on page 40,

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

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

The FAC finds that the In-Combination assessment dated 31/07/2023 is described as being an Appendix to an *Appropriate Assessment Report* however no AA Report is to be found on file. As alluded to earlier in this letter, this In-Combination assessment contains the following passage as part of its statement;

It is concluded that there is no possibility that the proposed Felling and Reforestation project LS09-FL0187, with mitigation measures set out in Section 4 of the AAD, will itself, i.e. individually, giving rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests / Special Conservation Interests and Conservation.

From this passage the FAC notes that the assessment which is dated 31/07/2023 relies on a report (AAD) that postdates it (01/08/2023). The FAC considers that this is a further significant error in the processing of the application.

The FAC concluded that the decision should be set aside and remitted and given the nature of the errors, the FAC considered that the Minister should request a new NIS or prepare an AA Report that identifies and assesses likely significant effects on European sites and, where they occur, prescribes mitigation measures which ensure that the integrity of a European site will not be adversely affected. Whichever approach is adopted, the FAC considers that a new period of public consultation should be undertaken.

The FAC noted that mitigation H in the AAD, adherence to which is a condition of the licence, provides that;

'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 the Minister has set a minimum standard for the content of Harvest Plans in the Standards for Felling & Reforestation (DAFM, 2019), and that the application included Harvest Plan maps, and no silt traps are marked on these. The FAC considers that the DAFM erred in its processing of the application in this case by placing a reliance in a condition of the licence on a document which is not part of the application file. In addition to this, mitigation measure E in the AAD requires that "a copy of the Harvest Plan and list of licence conditions will be retained by all machine operators".

In reviewing the documentation on file, the FAC noted that Licence Condition 1 requires adherence to a list of specified guidelines and standards but does not include the Standards for Felling & Reforestation (DAFM, 2019). 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 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 these standards as a condition on the licence represents a serious error.

The FAC considers that the Minister has set a minimum standard for the content of Harvest Plans in the Standards for Felling & Reforestation, and the application included Harvest Plan maps but does not include a document titled Harvest Plan. In addition to this, mitigation measure E in the AAD requires that “a copy of the Harvest Plan and list of licence conditions will be retained by all machine operators”.

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

The grounds make a general reference to the replanting of the lands not being assessed which is contested by the Minister. The FAC has already recorded that the AA process should be undertaken again but it does note that the application provided details of the replanting following felling and that the NIS and AAD referred to effects from the replanting operations and specified measures relating to same. The 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.

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 qualifications of the individuals undertaking the assessment and the original consent process for the afforestation of the lands. In relation to qualifications, the AAD notes that the applicant’s NIS was reviewed by an ecologist. The Appellant has not submitted any substantial concerns or expressed how they consider the qualifications to be lacking. The FAC considered that the Minister may provide further clarification of this in the event that a new assessment is undertaken, and new decision made.

Based on the evidence before it, as outlined above, the FAC found that the DAFM made significant errors in their processing of the application prior to issuing LS09-FL0187. In these circumstances, the FAC decided to set aside and remit the decision to the Minister to carry out a new AA of the proposed project both individually and in combination with other plans and projects, before making a new decision. The FAC considers that in the event that a new felling licence is issued, any licence conditions attached to same should be clear and definitive and require adherence to the relevant standards and guidelines.

Yours Sincerely,



Luke Sweetman on behalf of the Forestry Appeals Committee

