



4th September 2024

Subject: Appeal FAC093/2023 against licence decision CK03-FL0079

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 ("the 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

Appeal reference FAC 093/2023 was considered during a sitting of the FAC held remotely on 15th May 2024. In attendance:

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

FAC Administration: Ms. Vanessa Healy Quinn.

Having regard to the particular circumstances of this case, 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 information before it, including the record of the decision on the Forestry Licence Viewer (FLV), the notice of appeal, and the Department of Agriculture, Food, and the Marine (DAFM) Statement of Fact (SoF), the FAC has decided to set aside and remit the decision of the Minister to grant felling licence CK03-FL0079 for the reasons set out hereunder.

Background

The licence under appeal was issued on 21st November 2023 and is for the clearfell of 12.84ha of coniferous plantation forestry in the townlands of Knockaclarig, Tooreenfineen, Co. Cork. The species to be harvested is 100% Sitka spruce planted in 1990. Schedule 3 of the licence states that the restock species are 86% Sitka spruce, 4% Other Broadleaves, 2% Birch and the application included that 0.94ha would be open space. The licence includes 16 conditions which include, *inter alia*, a requirement to adhere to specific guidelines etc., and provision for "minor site level changes" during harvesting or reforestation works, in the interest of environmental protection are permitted.

The applicant's Natura Impact Statement (NIS) states that the project site is on a moderate slope (approx. 4%), sloping east (250m to 230m elevation), the site is underlain by 100% Blanket peats, and is entirely covered by "WD4" Conifer Plantation. The project site overlaps with the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA by approx. 12.64 hectares. The NIS outlines that

there are three aquatic zones within/adjacent to the project site, with a number of relevant watercourses present merging with two of these aquatic zones. All three aquatic zones are described as following the same downstream hydrological flowpath to the Lower River Shannon SAC (approx. 2.6km downstream) before subsequently discharging to the Atlantic Ocean.

The NIS indicates the project site is entirely located in Habitats suitable for FWPM Population (Orange). The proposal is split across two River Sub-basins with a small portion (c.0.37ha) in the west in the BREANAGH_010 (High Status by monitoring, not at risk) and the remainder of the site (12.47ha) in the GLENACARNEY_010 (Good Status by monitoring, not at risk). The proposal is underlain by the Abbeyfeale Ground Waterbody which is also of Good status and Not at Risk.

Appropriate Assessment (AA)

The AA documents on the FLV are;

1. The 1st Appropriate Assessment Pre-Screening Report (AAPSR) which is titled as being “for Clearfell and Reforestation project CK03-FL0079, located at Drinaghan and Grange East and Rathcarrick, Co. Cork”, was produced by the Applicant and is dated the 31st May 2023.
 - a. The 1st AAPSR screens three European sites within 15km of the proposal: the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, the Blackwater River (Cork/Waterford) SAC, and the Lower River Shannon SAC. The Blackwater River (Cork/Waterford) SAC was screened out for Stage 2 AA and the other two sites were screened in and an NIS was prepared.
2. The 1st NIS is titled as being “for the Clearfell and Reforestation project CK03-FL0077, CK03-FL0078 and CK03-FL0079, located at Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and Rathcarrick, Co. Cork” and was produced by the applicant on the 31st May 2023.
 - a. The 1st NIS sets out the site details specific to CK03-FL0079 (along the other proposals) and the reforestation details common to the three projects covered by the NIS. The NIS considers the potential for each project to create an adverse effect on the Qualifying Interests (Qis) and Special Conservation Interest (SCIs) of the screened-in European sites and the achievement of the corresponding Conservation Objectives and proposes mitigation where considered necessary. The 1st NIS concludes that “It is objectively concluded, beyond reasonable scientific doubt, in light of the above objective scientific information, that, when the above mitigation measures are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites, in view of their conservation objectives and in view of best scientific knowledge”.
3. The DAFM AA Screening Report & Determination (AASRD) was completed by a Forestry Inspector and is dated the 7th November 2023.
 - a. The AASRD screened the same three European sites as the AAPSR and had the same conclusions. It states that in undertaking the screening for AA, the DAFM took into account, *inter alia*, the initial application, including all information submitted by the applicant. The AASRD concludes that the project must advance to AA in relation to the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, and the Lower River Shannon SAC.
 - b. Appendix A of the AASRD is labelled: In-Combination Report for Felling and Reforestation proposed under CK03- FL0079 and states “See file”.

4. There are two In-Combination Reports (ICRs) on the FLV. The 1st is titled "Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project CK03-FL0079" and is dated the 7th November 2023. The 2nd is titled "Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project CK03-FL0079" and is dated the 8th November 2023. The FAC's understanding is that the 1st ICR deals with screened-out European sites and the 2nd deals with screened-in European sites.
 - a. The 1st ICR states "the potential for... CK03-FL0079 to contribute to an in-combination impact on European sites was considered... Various online planning systems and datasets (including DAFM's Forest Licence Viewer) were consulted on the 07/11/2023 in order to identify other plans and projects, focusing on the general vicinity of the project area in the River Sub-Basins BREANAGH_010 and GLENACARNEY_010."
 - b. This 1st ICR states that (emphasis added):

It is concluded that there is no likelihood of the proposed Felling and Reforestation project CK03-FL0079, 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.
 - c. The 2nd ICR is titled as being Appendix A of an "Appropriate Assessment Report" and states:

It is concluded that there is no possibility that the Felling and Reforestation project CK03- FL0079, 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...
5. The 2nd iterations of the AAPSR and the NIS have the same titles as the 1st versions and appear to contain the same information and conclusions as the 1st versions, but both documents are dated the 19th October 2023.
6. The AA Determination (AAD) on file is for "Felling and Reforestation project CK03-FL0079, at Knockclarig, Tooreenfineen, Co. Cork" and is dated the 10th November 2023.
 - a. The AAD contains mitigation measures in Section 4 which include redactions regarding Hen Harrier and location of project. Redactions are also included in the section describing the "basis for this AA Determination".

Referrals & Submissions

Based on the information available to the FAC there were no submissions on this application. The application was referred to Inland Fisheries Ireland (IFI), the National Parks & Wildlife Service (NPWS), and Cork County Council. Only the NPWS replied, indicating that they did not have any specific objections but included an appendix providing some general observations in relation to forestry applications referrals for the DAFM's consideration.

Appeal

There is one third-party appeal against the decision to grant the licence. The Notice of Appeal and grounds of appeal were provided to the parties. The grounds of appeal state that "No assessment has been carried out of the replanting of this SAC" and that an AA must comply with the findings in CJEU Case 258/11. The appellant also states that 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. In summary the Minister's statement:

- Outlined the processing of the application and the issuing of the licence.
- Disputes the appellant's submission that there are lacunae in the AA process and contends that the AAD is created following a detailed and thorough process that delivers precise, complete, and definitive findings.
- Sets out the DAFM's process in dealing with applications including advertisement, dealing with submissions, and how Shapefiles are submitted by the applicant to allow the DAFM complete spatial analysis using their Geographic Information System.
- Describes the DAFM's approach to screening the application for AA in accordance with Article 6(3) and (4) of the Habitats Directive 92/43/EEC.
- Explains that where a site is screened in for Stage 2 AA an NIS is typically submitted by the applicant or, where an NIS has not been prepared, the DAFM will prepare an AAR and that either way, the NIS or AAR is posted to the FLV and stakeholders and members of the public have a further 30 days to make submissions.
- Explains that prior to signing-off on the AAD a second "In combination" is prepared. This demonstrates that the project, in combination with other plans and projects, with conditions won't have an adverse impact on the European sites.

Regarding replanting the Minister's statement submits that:

- The application contains a detailed reforestation map which includes the species to be replanted. Replanting is referenced throughout the applicant's own Pre-Screening Report and NIS.
- "Reforestation" is included in the title of the Department's AA In combination Report, AA Screening Report and Determination and AA Determination (AAD)
- Section three of the AAD lists the documents that were taken into account in the AA which includes the application and the NIS.
- Section four of the AAD includes many conditions which apply at replanting and which are specifically designed to protect water quality during the replanting operation and during the period the new crop is becoming established.

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 specified decisions of the Minister 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.

In considering the DAFM's AA process, the FAC had regard to the record of the decision on the FLV, the notice of appeal, and the Minister's statement. The suite of documents relating to AA on the FLV were summarised previously in this letter. Having considered these documents, it appears to the FAC that the most recent versions of the AAPSR and NIS were completed in October 2023 and form the basis for the Minister's assessment and determination, which were completed in November 2023. 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 AAPSR, and NIS submitted by the applicant, and the screening and assessment undertaken by the Minister. For clarity, the FAC considered the October 2023 versions of these documents to be the ones relied upon in the making of the decision under appeal. The AAPSR submitted by the applicant is described as being for "Clearfell and Reforestation project CK03-FL0079, located at Drinaghan and Grange East and Rathcarrick, Co. Cork" and the NIS for the "Clearfell and Reforestation project CK03-FL0077, CK03-FL0078 and CK03-FL0079, located at Glendavock, Glenummera, Tawnyard, Banagher, Drinaghan, Grange East and Rathcarrick, Co. Cork". The AASRD and the AAD completed by the Minister refer to the correct location for the proposal at Knockaclarig, Tooreenfineen, Co. Cork. 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.

In considering the AA documents on file, the FAC noted that the 1st ICR appears to be an appendix to the DAFM's AASRD and the 2nd ICR is described as being an appendix to an AA Report which does not appear to be on the FLV. The FAC considered the 1st ICR, which is for the screened-out European site 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 AA titled *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 2nd ICR is described as being an Appendix to an *Appropriate Assessment Report* however no AA Report is found on the record of the decision. As referenced previously in this letter, this ICR contains the following passage as part of its statement:

It is concluded that there is no possibility that the Felling and Reforestation project CK03- FL0079, 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 2nd ICR appears to rely on mitigation measures set out in an AAR which does not appear to have been produced. The FAC considers that this is a further significant error in the processing of the application.

The FAC understands that further to the changes in the European Union (Birds and Natural Habitats) (Amendment) Regulations, 2021, (S.I. No. 293 of 2021) a 30-day consultation period is required after receipt of an NIS (or after an AA Report is produced by the DAFM), and relevant documentation will be published on the FLV. In this case, the 2nd NIS is dated 19th October 2023 and the AAD is dated the 10th November 2023. The FAC found that this is too short a period for publication of the 2nd NIS in advance of making an AAD in order to allow for the required 30-day consultation period.

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.

In reviewing the documentation on file, the FAC noted that Licence Condition 3 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 significant error.

The FAC noted that mitigation R in the AAD, adherence to which is a condition of the licence, requires that (emphasis added):

*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, but it appears that 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 measures in the AAD require that “a copy of the Harvest Plan and list of licence conditions will be retained by all machine operators”. The FAC also found that the Minister has set a minimum standard for the content of Harvest Plans in the Standards for Felling & Reforestation (DAFM, 2019), and the application included Harvest Plan maps but does not include a document titled Harvest Plan.

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 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 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 mitigation measures relating to same. The appellant raises the issue of 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 and in particular those relating to the original consent process for the afforestation of the lands. Notwithstanding this, 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.

Based on the evidence before it, as outlined above, the FAC is satisfied that serious errors were made in the making of decision CK03-FL0079. In these circumstances the FAC decided to set aside and remit the decision to the Minister to carry out a new screening for AA and, if required, request a new NIS or prepare an AA 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. 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 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