



4<sup>th</sup> September 2024

**Subject:** Appeal FAC 024/2024 against licence decision CK24-FL0117

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 024/2024 was held remotely by the FAC on 24<sup>th</sup> July 2024. In attendance:

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

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 to grant licence CK24-FL0117. The reasons for this decision are set out hereunder.

#### **Background**

The decision under appeal relates to the granting of a felling licence at Aultagh, Shanlaragh, Co Cork. The application as submitted is dated 02/10/2023. The application included operational and environmental information and maps outlining the licence area and operational and environmental features. The application also included a document titled '*CCF Management Plan – Aultagh*'. The proposed replanting provided for in the licence as issued is as follows; '*Replanting shall be carried out as described in the CCF management plan which outlines Coillte's proposals to transition this forest to a continuous cover forestry*

*management regime. In doing so the forest will be thinned over time maintaining the forest canopy at one or more levels without clearfelling. Canopy cover will be achieved via natural regeneration or if required by replanting in line with CCF management plan submitted with the licence application'. The project area is accessible via the existing forest road CK24R0004 that runs through its eastern and south western boundaries. The soil type is comprised of a combination of peaty podzols with shallow rocky soils with some outcropping of rock. The lands are said to lie in the Sub-basin: CAHA\_020 (IE\_SW\_20C010700).*

#### **Appropriate Assessment Pre-Screening Report, dated 4th November 2023 (Applicant's)**

The applicant submitted a document titled Appropriate Assessment Pre-Screening Report, dated 4th November 2023. This report which is marked as being for continuous cover forest project CK24-FL0117, located in the vicinity of Aultagh and Shanlaragh, 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 composed of plantation conifer high forest, Mixed broadleaved/conifer woodland and buildings and artificial surfaces. The project area is made up of four sub-compartments, which consist of predominantly Sitka spruce and to a lesser extent, Birch, Other Broadleaves and Oak planted in 1988 and 1989 and an area of bare plantation comprising artificial surfaces, forming a closed canopy over the project area.

Three relevant watercourses are said to flow through the centre, eastern and southwestern sections of the project area in a southerly direction. The relevant watercourses flowing through the centre and northern boundary of the project area are said to later merge with each other and drain the project area into the Wood Cross Roads River (Order 1) that flows in a south westerly direction. The project area is described as being part of a larger conifer plantation of varying age and class to the north and west. The eastern and southern sections of the project area are bordered by a mixed broadleaved/conifer plantation. The surrounding area and wider landscape support additional conifer plantations, scrub, buildings and artificial surfaces and agricultural grasslands. The project area is said to be located on a steep slope, sloping in a southerly direction. There are three European Sites identified as being located within 15km of this project area, these are, the Bandon River SAC (002171), the Gearagh SAC (000108), and the Gearagh SPA (004109).

All European Sites within a distance of 15km surrounding the project area were identified and considered in relation to hydrological pathways for likely significant effect. In this case, there is said to be one hydrologically connected European site within 15km of the project area that being the Bandon River SAC (Site Code: 002171) at a distance of approximately 1.3 km. In addition, the potential for hydrological pathways for likely significant effect with European Sites at distances greater than 15km was also considered and no hydrologically connected Natura 2000 sites beyond 15km were identified.

The project is described as involving Continuous Cover Forestry (CCF) which is described as a type of forest management approach that allows for the production of commercial timber while retaining a forest cover at all times. CCF is said to involve undertaking a thinning with the aim of harvesting timber and releasing trees (removing competitors for future timber or biodiversity trees). All harvesting operations, including

thinnings, are said to be carried out in accordance with the DAFM Standards for Felling and Restoration (2019) and that thinning operations in conifer and broadleaf commercial species are similar in operation. First thinning of the stand is said to involve cutting lines of trees at intervals through the crop, referred to as racks and that these line thinnings can also be supplemented by selecting individual trees on either side of the line or rack. Generally, 1 in 10 (or more) rows are removed to create CCF thinning racks which creates the infrastructure for subsequent CCF thinning operations. Second and subsequent thinnings are said to involve marking trees by a trained forester to identify timber trees for removal, other trees for removal (that are competing with timber or biodiversity trees), and trees that are suitable for the creation of deadwood through ring-barking. Subsequent CCF thinnings are carried out in a thinning cycle of 5 to 7 years. Thinning operations are to be carried out by specialised mechanical cut to length harvesters and forwarders.

The AA pre-screening exercise concludes that the Bandon River SAC is screened in on the basis that significant effects cannot be excluded for Freshwater Pearl Mussel (*Margaritifera margaritifera*) [1029], Brook Lamprey (*Lampetra planeri*) [1096], water courses of plain to montane levels with the *Ranunculus fluitans* and *Callitriche-Batrachion* vegetation [3260], and Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (Alno-Padion, Alnion incanae, Salicion albae) [91E0] and that the project should proceed to Appropriate Assessment (Stage 2) to determine if the project will adversely impact the integrity of this European Site. No pathways for significant effect on any other European Site or QIs/SCIs were identified and the screening report concluded beyond reasonable scientific doubt, that the proposed project, individually or in combination with other plans and projects, will not have a significant effect on any European Site other than the Bandon River SAC.

### **NIS (Applicant's) 4th December 2023**

The application also included a Natura Impact Statement for project comprising of Clearfell and Reforestation CK24-FL0118 and Continuous Cover Forestry CK24-FL0117, located in the vicinity of Aultagh, Aultaghreagh and Shanlaragh, Co. Cork. The NIS on its fifth page (marked as page 43) in Section 1 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 in the vicinity of Aultagh, Aultaghreagh and Shanlaragh, Co. Cork. This report forms part of the supporting documentation for a forestry licence application in conjunction with two pre-screening reports.'* The potential significant effects on the screened in site are outlined in relation to the interests identified in the pre-screening document and mitigations are outlined including exclusion zones for machinery, silt and sediment control during felling and reforestation, requirements for extraction and removal of felled timber, brush management, requirements for temporary water crossings, requirements for chemical use, and monitoring and contingency planning. The NIS at section 1 on its sixth and seventh pages (marked 44 and 45) provides details of the NIS authors and their qualifications.

### **Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project CK24-FL0117. (DAFM)**

There is an In-combination report for Felling and Reforestation project CK24-FL0117 dated 22/01/2024 on file which the FAC understands is an appendix to the DAFM AASRD dated 23/01/2024 and therefore appears to be the In Combination report for the screened-out sites. It includes the following statement:

*'It is concluded that there is no likelihood of the proposed Felling and Reforestation project CK24-FL0117, 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'.*

### **Appropriate Assessment Screening Report & Determination (AASRD) dated 23/01/2024. (DAFM)**

An Appropriate Assessment Screening Report & Determination (AASRD) is to be found on file as prepared by a Forestry Inspector, Department of Agriculture, Food and the Marine on behalf of the Minister. It is dated 23/01/2024. The screening refers to 'Felling for felling and reforestation project CK24-FL0117, at Aultagh, Shanlaragh, Co. Cork'. This AASRD states that in undertaking this 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 report also records that combined with the project details and site characteristics as summarised previously in the AASRD, 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 three European sites namely the Bandon River SAC IE0002171 (824 metres west southwest of the project area), the Gearagh SAC IE0000108 (10.3 km north of the project area), and the Gearagh SPA IE0004109 (12.2 km north of the project area). The AASRD considers each site in turn and records a screening conclusion and reasons. The screening document concludes that an Appropriate Assessment was required in relation to one European Sites, ie the Bandon River SAC IE0002171. This report references an 'Appendix A: In-Combination Report for felling and reforestation proposed under CK24-FL0117' with the commentary 'See File'.

#### **Appropriate Assessment Report Appendix A: In-combination report for Felling project CK24-FL0117 (DAFM)**

This is an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project CK24-FL0117' on file which is dated 25/01/2024. While described as an Appendix to an Appropriate Assessment Report no such report is to be found on file. This In Combination assessment appears to be in respect of the screened-in site. It includes the following statement:

*'It is concluded that there is no possibility that the Felling and Reforestation project CK24-FL0117, 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 CK24-FL0117 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'.*

### **Appropriate Assessment Determination (AAD) dated 14/02/2024. (DAFM)**

A separate Appropriate Assessment Determination (AAD) for Felling and Reforestation project CK24-FL0117, at Aultagh, Shanlaragh, Co. Cork, (marked as prepared by Robbie Mc Namara, Ecologist, Envirico Ltd, on behalf of the Minister for Agriculture, Food and the Marine and dated 14/02/2024, records what was taken into account in undertaking the Appropriate Assessment. The AAD 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 CK24-FL0117 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 13/10/2023 as part of a list of projects and described the project as being at Aultagh, Shanlaragh, West Cork. There is no record of a response on file from the Local Authority.

### **The Licence**

The licence was granted with conditions and bears the date 16/02/2024.

### **Appeal**

One third party appeal was made against the decision to grant the licence and was notified to the applicant by the FAC on 05/03/2024. The Notice of Appeal and full grounds of appeal were provided to the parties. The grounds submitted state:

- There is no evidence of an Appropriate Assessment available on file. No evidence that the FPM was considered in the Appropriate Assessment.
- The Natura Impact Statement does not fulfil the requirements of Margaritifera Guidance Ireland (attached).
- The Natura Impact Statement does not fulfil the requirements of Commission Notice 2021C 43701'.

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

The Minister provided a statement responding to the appeal which was provided to the parties. This statement sets out the relevant processing dates for the application and states that the Department is satisfied that all criteria as outlined in the following standards and procedures have been adhered to in making a decision on the application. The Department disputes the appellant's assertion that *'there is evidence of an Appropriate Assessment process'*. The SOF sets out that the Appropriate Assessment Determination is created following a detailed and thorough process that delivers precise, complete and definitive findings and the steps taken by the Department underpinning its compliance with article 6(3) of the Habitats Directive.

Part of the detail provided by the DAFM in relation to the AA process in this case is as follows; *'Where the site is screened in for second stage appropriate assessment a Natura Impact Statement (NIS) is submitted by the applicant or where an NIS has not been prepared the Department will prepare an Appropriate Assessment Report (AAR). In either case the NIS or AAR is posted to the FLV and stakeholders and members of the public have a further 30 days to make submissions. The opportunity to make submissions on these documents is also advertised on the Department's website and any submissions received are taken into account in preparing the Appropriate Assessment Determination (AAD). Prior to signing of (sic) on the AAD a second 'In combination' is prepared. This demonstrates that the project in combination with other plans and projects with conditions doesn't have an adverse impact on the European sites.'*

In relation to Freshwater Pearl Mussel (FPM) the SOF sets out four bullet point paragraphs which it contends demonstrates that Freshwater Pearl Mussel was taken into account in the Departments AA process both at screening and during the second stage of the AA process.

### **Post Appeal Correspondence**

At its hearing of appeal FAC 024/2024 on 24th July 2024 the FAC noted the grounds of appeal make reference to *'Margaritifera Guidence Ireland'* and indicate that same is attached (to the Notice of Appeal Form). The FAC, for completeness, sought from the appellant a copy of the documentation referenced as being attached to the NOAF. The appellant responded to the FAC and provided documentation which was subsequently circulated to the DAFM and the applicant. An opportunity was afforded to both parties to make a submission relating to the documentation circulated and none were made by either party.

### **Considerations of the FAC**

The FAC in the first instance considered whether an oral hearing was required in the case of this appeal and having regard to the particular circumstances of the appeal the FAC concluded that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

The FAC considered the grounds in the appeal relating to Appropriate Assessment (AA) and related matters. The FAC finds on file an Appropriate Assessment Screening Report & Determination (AASRD) as

prepared by a Forestry Inspector, Department of Agriculture, Food and the Marine on behalf of the Minister which is dated 23/01/2024. The said screening refers to '*Felling for felling and reforestation project CK24-FL0117, at Aultagh, Shanlaragh, Co. Cork*' and sets out what was taken into account in undertaking the screening for Appropriate Assessment.

The FAC also finds that the AASRD records considerations of three European sites namely the Bandon River SAC IE0002171 (824 metres west southwest of the project area), the Gearagh SAC IE0000108 (10.3 km north of the project area), and the Gearagh SPA IE0004109 (12.2 km north of the project area) and concludes that an Appropriate Assessment was required in relation to one European Sites, ie the Bandon River SAC IE0002171. This report also references an In-Combination Report for felling and reforestation proposed under CK24-FL0117 which is dated 22/01/2024 and therefore predates the AASRD. The FAC considered that it is a serious error to complete an In-combination report which relies on a screening report which had not been completed at the time of completing the said In-Combination report.

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. Notwithstanding the serious error identified by the FAC in relation to the sequencing of the In-Combination report dealing with the screened out site and the screening report that reached that conclusion, it appears to the FAC that it is not clear that the wording in the In-combination statement relating to the screened out sites demonstrates that the potential for significant effects to arise from the proposal in-combination with other plans and projects was considered by the DAFM as the wording refers to consideration 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 on file dated 22/01/2024, that appears to deal with the screened-out sites, (notwithstanding the sequencing error referenced above) 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 an In-Combination assessment on file dated 25/01/2024 which relates to the screened in site is described as being an Appendix to an 'Appropriate Assessment Report' and that no Appropriate Assessment Report is to be found on file. The FAC considers that the reliance on an In-combination report which is described as being an appendix to a report that is not to be found on the face of the record for the licence application is a further error in the processing of the application.

The FAC considered the contention in the grounds that the Natura Impact Statement (submitted by the applicant) does not fulfil the requirements of 'Margaritifera Guidance Ireland' nor does it fulfil the requirements of 'Commission Notice 2021C 43701'. The FAC understands that the guidance document referenced in this case is 'Guidance on Assessment and Construction Management in Margaritifera Catchments in Ireland' bearing the date December 2023 and 'Supplementary Guidance on Assessment and Construction Management in Margaritifera Catchments in Ireland: Blackwater River (Cork/Waterford) SAC' also bearing the date December 2023.

The FAC notes the content of the DAFM SOF as submitted to the FAC wherein it states that in relation to Freshwater Pearl Mussel that the following points demonstrate that Freshwater Pearl Mussel was taken into account in the Departments AA process both at screening and during the second stage of the AA process;

- *'Bandon River SAC which has Freshwater Pearl Mussel as a QI was screened in during the AA Screening phase. Coillte's pre screening document also identifies a possible impact on the freshwater pearl mussel.*
- *Under table 2.1.1 of Coillte's NIS, the components of the conservation objectives are listed. The potential threats of project CK24-FL0117 specific to Freshwater Pearl Mussel are described within in the same table. This highlights potential issues to the Department, ensuring that mitigations are drafted in a manner that addresses these threats. The NIS includes mitigations that address Freshwater specifically See Schedule 3.1.1. and 3.1.2).*
- *There are 35 conditions listed on the AAD, more than 30 of these relate to measures to protect water quality. Many of these relate to relevant watercourses which provide the hydrological connection to the Bandon River SAC. There are no aquatic zones on site and therefore the usual setbacks and broadleaf planting measures that would apply along aquatic zones are not present in this licence.*
- *As an additional measure, the planting of broadleaves along relevant watercourses is generally associated with freshwater pearl mussel sites.*

*'Retain if present or plant a minimum of 2 rows of broadleaves at 2 m x 2 m spacing, directly outside the relevant watercourse setback. For sites susceptible to deer damage use tree guards and plant at 3.3 m x 3.3 m spacing. For unsuitable sites extend the setback*

*to 7m. Reason: In the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations.'*

The licence in this case is being set aside and remitted to the Minister for reasons set out elsewhere in this letter. The DAFM should, before issuing a new decision in this case, take the opportunity to consider the guidance documents referenced in the appeal grounds which the FAC notes were not in circulation at the time the applicants Pre-screening report was prepared (4<sup>th</sup> November 2023) and may not have been available at the time the NIS in this case was completed (4<sup>th</sup> December 2023). However, the grounds of appeal do not substantiate any specific basis for suggesting how the Minister has erred in relation to these documents.

The FAC concluded that the decision in relation to licence CK24-FL0117 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 prior to the making of a new decision.

Yours sincerely,

  
Seamus Neely

On Behalf of the Forestry Appeals Committee