



27th September 2024

Subject: Appeal FAC 025/2024 against licence decision DL24-FL0104

Dear

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

Hearing and Decision

A hearing of appeal FAC 025/2024 was held remotely by the FAC on 19th September 2024. In attendance:

FAC Members: Mr. Seamus Neely (Chairperson), Mr. Derek Daly & Mr. Luke Sweetman.
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. 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 DL24-FL0104. The reasons for this decision are set out hereunder.

Background

The decision under appeal relates to the granting of a felling licence at Loughesk Demesne, Co Donegal. 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 operations would involve the felling in 2025 of an existing plantation area of 24.24 ha comprising mainly Sitka spruce. The proposed replanting is set out in the application as 91% Sitka spruce, 4% Broadleaf and 5% open space.

Appropriate Assessment Pre-Screening Report, dated 13th November 2023 (Applicant's)

The applicant submitted a document titled Appropriate Assessment Pre-Screening Report, dated 13th November 2023. This report which is marked as being for Clearfell and Reforestation project DL24-FL0104, located at Loughesk Demesne, Co. Donegal and describes the site, including hydrology, and operations in further detail and screens the proposal for potential significant effects on European sites. The project site is described as being covered in WD4 Conifer Plantation and Mixed broadleaved/conifer woodland (6%). The harvest block (HB) is said to be spread across three sub-compartments which are largely comprised of Sitka spruce with smaller amount of Birch towards the northeast and Beech, Ash, Willow, and Other Broadleaves towards the southwest. All species are said to have been planted between 1910 and 1988.

Plants used in restocking the project area are to be treated off site in the nursery with an insecticide (acetamiprid) approved by Pesticide Registration and Control Division, DAFM. The site is said to be monitored for any damage to young trees from newly-emerged pine weevil (*Hylobius abietis*), and if deemed necessary following an appraisal of the project area through Coillte's Integrated Pest Management Policy, a top up spot spray may be applied to prevent excessive levels of damage and tree losses. It is also proposed that fertiliser, in the form of ground rock phosphate, will be applied as part of this project at the rate of application of elemental phosphate of 30 kgs/ha.

There is also a Biodiversity Area (DL24B0024) located adjacent to the eastern, western and southern boundaries of the project site and a small portion of the northeast of the project area is described as overlapping within this area. There is an area of biodiversity (approx. 1.21 hectares) in the centre of the HB which is not part of this operation. Three temporary water crossing points are said to be required within the south-western portion of the project site.

The project site is described as being entirely underlain by surface water gleys and ground water gleys. The site is described as being accessible via Forest Road DL24R1031 which extends south through the HB for approximately 220 metres and joins Forest Road DL24R0190 to the immediate south. It is also accessible via Forest Road DL24R0190 at the southern boundary of the project site and which travels south for approximately 120 metres and joins the L-1945-3. Forest Road DL24R0056 is said to extend south along the eastern boundary for approximately 150 metres and southwest along the southern boundary for approximately 560 metres. Forest Road DL24R0190 (ii) is said to leave the vicinity of the project site and joins Forest Road DL24R0055 approximately 190 metres west of the site and travels south for approximately 140 metres and joins the L-1945-3.

The project site is said to be within the River Sub-basin ESKE_010 (IE_NW_37E050200) and there are no aquatic zones identified within/adjacent to the project site. Mapping published by the Environmental Protection Agency (EPA) shows that the project site is underlain by two Ground Waterbodies, the Donegal-Ballintra and the Donegal South Ground Waterbodies. Both are stated to have 'Good' status and are 'Not at Risk'. The *Cycle 3 HA 37 Donegal Bay North Catchment Report, May 2024* states that the ESKE_010 River Waterbody also has 'Good' status and is 'Not at Risk'. It is stated that there are three relevant

watercourses within the project site namely DL24-W-0013 which flows southwest through the south-western portion of the project site for approximately 285 metres, DL24-W-0043 which flows south through the south-western end of the project area for approximately 140 metres and leaves the site and flows southeast for approximately 80 metres and into aquatic zone DL24-W-0044, and DL24-W-0045 which flows southeast through the southwest of the project site for approximately 125 metres, leaves the site and flows southeast for approximately 120 metres and into aquatic zone DL24-W-0044. The project site is said to be entirely located within the Eske Margaritifera Catchment, and Habitats suitable for FWPM Population (Red).

Nineteen European Sites, namely fourteen SACs and five SPAs, were identified within 15km of the project. The nearest designated European site is said to be the Lough Eske and Ardnamona Wood SAC (000163) which is located 65 metres northeast and south of the project site while the furthest designated European site of the nineteen is said to be Lough Golagh and Breesy Hill SAC (002164) which is located 14,781 metres south of the project site. In addition, the project site is described as being potentially hydrologically connected to three European Sites downstream namely Lough Eske and Ardnamona Wood SAC (Site Code: 000163) at a distance of 706 metres, Donegal Bay (Murvagh) SAC (Site Code: 000133) at a distance of 7,780 metres, and Donegal Bay SPA (Site Code: 004151) at a distance of 7,780 metres.

The pre-screening exercise concludes that the Lough Eske and Ardnamona Wood SAC, Donegal Bay (Murvagh) SAC, and Donegal Bay SPA are screened in and that the project should proceed to Appropriate Assessment (Stage 2) to determine if the project will adversely impact the integrity of these European Sites. No pathways for significant effect on any other European Site were identified and it is concluded in the report 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 those listed as being screened in in the Pre-Screening report.

Natura Impact Statement (NIS) (Applicant's) 13th November 2023

The application also included an NIS for Clearfell and Reforestation project DL24-FL0104, located at Loughesk Demesne, Co. Donegal. The NIS on its fourth page 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 at Loughesk Demesne, Co. Donegal. This report forms part of the supporting documentation for a forestry licence application in conjunction with a pre-screening report*'. It also states that the NIS takes into consideration '*one PSR, namely DL24-FL0104 located in the townlands of Loughesk Demesne, Co. Donegal that occurs in the River Subbasin ESKE_010 (IE_NW_37E050200)*'. The potential significant effects on the screened in sites are outlined in relation to the interests identified in the pre-screening document and mitigations are outlined. The NIS on its fifth and sixth pages provides details of the NIS authors and their qualifications.

Appropriate Assessment Screening Report & Determination (AASRD) dated 11th January 2024. (DAFM)

An AA screening Report & Determination dated 11th January 2024 is to be found on file as prepared by a Forestry Inspector, Department of Agriculture, Food and the Marine and on behalf of the Minister. The screening refers to 'Felling for felling and reforestation project DL24-FL0104, at Loughesk Demesne, Co Donegal. 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);
- 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 nineteen European sites. The AA screening considers each site in turn and records a screening conclusion and reasons. The screening document concludes that an AA was required in relation to three European Sites, namely, Lough Eske and Ardnamona Wood SAC IE0000163, Donegal Bay SPA IE0004151, and Donegal Bay (Murvagh) SAC IE0000133. This report references an 'Appendix A: In-Combination Report for felling and reforestation proposed under DL24-FL0104' with the commentary 'See File'.

Appropriate Assessment Screening Report Appendix A: In-combination report for Felling and Reforestation project DL24-FL0104 dated 11th January 2024. (DAFM)

There is an In-combination report for Felling and Reforestation project DL24-FL0104, which is dated 11th January 2024 and which the FAC understands is an appendix to the AASRD dated 11th January 2024 on file

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 DL24-FL0104, 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 Report Appendix A: In-combination report for Felling project DL24-FL0104 (DAFM) (undated)

The is an 'Appropriate Assessment Report Appendix A: In-combination report for Felling and Reforestation project DL24-FL0104' which is undated and 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 sites. It includes the following statement.

'It is concluded that there is no possibility that the Felling and Reforestation project DL24-FL0104, 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 DL24-FL0104 only. Any subsequent forestry-related activity shall be subject to the DAFM Appropriate Assessment Procedure, including an incombination assessment, prior to any future consent being granted'.

Appropriate Assessment Determination (AAD) dated 14th February 2024. (DAFM)

A separate AA Determination for felling and reforestation project DL24-FL0104, at Loughesk Demesne, Co. Donegal, (marked as made by Niall Phelan, Environmental Facilitation Ltd and prepared by Chris Brennan on behalf of the Minister for Agriculture, Food and the Marine) and dated 14th February 2024, records what was taken into account in undertaking the Appropriate Assessment.

The AA Determination states that *'It was determined that adequate information was available to enable an Appropriate Assessment Determination to be reached for this project. The Minister has carried out the Appropriate Assessment of the potential impacts of the likely significant effects of felling and reforestation project DL24-FL0104 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 / Inland Fisheries Ireland (IFI) referrals

The application was referred to Donegal County Council and IFI on 13th October 2023 as part of a list of projects. There is no record of a response on file from the Local Authority. IFI made a response setting out some suggested material to inform conditions of the licence while noting that the proposed felling could have potential impacts upon the Lough Eske and Ardnamona Wood SAC as the felling is occurring immediately adjacent to that SAC and it therefore advised that the NPWS should be consulted before any felling takes place.

The Licence

The licence was granted with conditions and bears the date 16th February 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 6th March 2024. The Notice of Appeal and the full grounds were provided to the parties. The grounds which are mainly in relation to the Appropriate Assessment of the project contend that there is no evidence available on the Forestry Licence Viewer that the Appropriate Assessment referenced in the AAD was carried out by the Minister. The grounds also include contentions in relation to the reasons stated for screening out certain European Sites and reference is made to the 'Courts of Justice of the European Union Decision' in case 258/11. The grounds include the statement that it would be prudent for the FAC to have an oral hearing and also included a request that the FAC award the appellant costs (sic) (understood by the FAC to refer to costs) in the matter of the appeal.

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 SOF sets out that evidence that the Minister carried out an Appropriate Assessment can be found in documents such as Coillte's Pre-screening Report, Coillte's NIS, referral letters to IFI and the Local Authority, In Combination at screening stage, AA Screening Report and Determination, In Combination at AAR stage and AAD Determination. The SOF states that all of these documents appear in the FLV and points out that Section 3 of the AAD lists the sources of information underpinning the Minister's assessment and final determination. The Department in the SOF disputes the appellant's assertion that there are lacunae in the screening of DL24-FL0104 and then goes on to describe the screening process undertaken by the Department as a demonstration of significant analysis and public consultation that is applied to every felling licence application.

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 11th January 2024. The said screening refers to '*felling and reforestation project DL24-FL0104, at Loughesk Demesne, Co Donegal*' and sets out what was taken into account in undertaking the screening for Appropriate Assessment. This report references an 'Appendix A: In-Combination Report for felling and reforestation proposed under DL24-FL0104' with the commentary 'See File'.

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. 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 11th January 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'.

The FAC considers that the wording in the In-combination statement relating to the screened out sites represents an error in the processing of the as the said 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 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 undated In-Combination assessment on file, which relates to the screened in sites, 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 in an In-combination report to a report that is not to be found on the face of the record for the licence application is a serious error in the processing of the application. The FAC also considers that the absence of a date on the said In - Combination Assessment Report is a further error in the processing of the application.

The FAC finds that mitigation no 15 in the AAD refers to a Harvest Plan, (as set out below) and that no Harvest Plan appears on the face of the application record for this application.

'Prior to the commencement of operations onsite, install silt and sediment controls at the locations marked on the Harvest Plan. Additional silt and sediment control measures shall be installed immediately and prior to commencement of operations, where required, along the channel of all relevant watercourses that are connected, directly or indirectly, to any aquatic zone. Silt and sediment control measures must be of an appropriate type, (including porosity where a geotextile is used), of sufficient number and size to provide adequate interception and retention time for the deposition of silt, with consideration of the weather and site conditions in the area. Reason: In the interest of the protection of water quality'

The FAC considers that it is an error to rely on a document that is not available on the face of the record of the application as an integral element of a mitigation or condition of licence. The FAC considered the

ground in the appeal relating to the award of costs to the appellant. The FAC has no function in the hearing of appeals to the award of costs.

The FAC concluded that the decision in relation to licence DL24-FL0104 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

