COILLTE
GROW · TRANSFORM · SUSTAIN

28th August 2020

BY EMAIL: FORESTRYBILL2020@AGRICULTURE.GOV.IE

Re: Public Consultation on Draft Agriculture Appeals (Amendment) Bill 2020

To whom it may concern

We refer to the public consultation in relation to the Draft Agriculture Appeals (Amendment) Bill 2020 (the "**Bill**"). We welcome the invitation to provide our submissions on the draft Bill and how it proposes to amend the Agriculture Appeals Act 2001 (the "**Agricultural Appeals Act**") before its presentation to the Oireachtas for their consideration, given the Bill's fundamental importance to the forestry sector and to Coillte's operations.

We have divided our submission into two sections:

Section 1 – our comments on the provisions in the Bill, we believe should be retained and / or amended;

Section 2 – our comments on the provisions not in the Bill, we believe should be included.

Forestry has never been more relevant or important to Irish society and our economy. The forestry sector provides 12,000 rural green-tech jobs to support our local communities, sustainable building materials to support the building of new homes and infrastructure, important habitats to support nature and biodiversity, and climate solutions to support our efforts to combat climate change. It is clear that forestry is of fundamental importance to the successful implementation of the programme for Government.

Coillte welcomes good environmental policies and regulations, and believes that these are important to the fundamentals of sustainable forest management. However, it is equally important that these regulations are well balanced and are efficiently implemented, in order to support the continued growth of the forestry sector in Ireland. It should be remembered that forest cover in Ireland is currently only 11% compared to a European average of 40%; therefore it is of strategic national importance that we continue to grow the sector and expand our forest cover in Ireland.

However, the recent implementation of new forestry regulations, particularly regarding the Agricultural Appeals Act, has had a serious negative impact on the efficiency of forestry operations, including the planting of new forests, building of roads and harvesting of trees. Without urgent and meaningful reform of the associated forestry regulations, the forestry sector will shortly come to a standstill; causing job losses in rural communities, shortfalls in building products, and the complete cessation in our planting programme.

Although the amendments that are set out in this Bill are to be welcomed, if passed by the Oireachtas and following their implementation, we would welcome a more fundamental review of forestry planning and legislation, to ensure that there are effective regulations in place to support the continued development of forestry in Ireland, that can best meet all of our strategic goals and objectives.

We would urge that the proposals set out in this submission are adopted in the national interest. It is our view that they are absolute requirements to ensure that Ireland has a functioning and efficient appeals regime for the forestry sector.

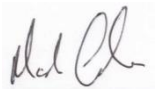
We **enclose** our submissions, for your consideration.

Yours sincerely,

Imelda Hurley

Chief Executive
Coillte

Mark Carlin



Managing Director
Coillte Forest

1. PROPOSED DRAFT PROVISIONS TO BE RETAINED AND / OR AMENDED

1.1 Discretion but no obligation to hold an oral hearing.

(a) We welcome the removal of the requirement for the Forestry Appeals Committee ("**FAC**") to have a *mandatory* public enquiry (i.e. oral hearing) in respect of every appeal.

(b) We welcome and agree with FAC being given the *discretion* to call an oral hearing, only if it needs to. Specifically, the provision for FAC to determine an appeal summarily if, in the opinion of the FAC chairperson, a case is of such a nature that it can be determined without an oral hearing (Head 14C (1)).

Precedent: This will make the forestry appeals regime consistent with the planning appeals and industrial emissions licensing regimes. There is no automatic right to an oral hearing before An Bord Pleanála ("**ABP**") or the Environmental Protection Agency ("**EPA**"). ABP has a discretion. It holds very few oral hearings. The EPA has a discretion. It has not exercised it for approximately 12 years and it determines applications on some very complex and technical facilities.

Recommendations:

(1) Retain proposed Head 14C(1) making an oral hearing discretionary.

(2) In addition, make a universal change to all of the provisions of the draft Bill to reflect this change that FAC can determine an appeal without "hearing" it (i.e. without holding an oral hearing). Some provisions in the draft Bill still refer to an appeal being "heard". This should be amended to say "determined" only. For example, proposed Head 14A(4)(a) states that:

"(4) (a) A person referred to in paragraph (b) (in this subsection referred to as a relevant person) who is dissatisfied with a decision made by the Minister or an officer of the Minister under an enactment specified in Schedule 2 may appeal to the Forestry Appeals Committee against the decision ***and, on the hearing of the appeal,*** *the Committee may confirm, cancel or vary the decision as it thinks fit. [Emphasis added]*

We propose that Head 14A(4)(a) be amended to state "… on the determination of the appeal…":

"(4) (a) A person referred to in paragraph (b) (in this subsection referred to as a relevant person) who is dissatisfied with a decision made by the Minister or an officer of the Minister under an enactment specified in Schedule 2 may appeal to the Forestry Appeals Committee against the decision ***and, on the determination of the appeal,*** *the Committee may confirm, cancel or vary the decision as it thinks fit. [Emphasis added]*

(3) In addition, make the same universal change to all of the provisions of the Forestry Appeals Committee Regulation 2018. Similar clarifying amendments may also need to be made to the Agricultural Appeals Act.

1.2 **Explicitly include the Applicant as a person to whom notice should be given of an oral hearing**

Proposed section 14C(2) does not explicitly require the Chairperson to give notice of an oral hearing to the applicant who holds the licence under appeal. The principles of natural and constitutional justice require this.

Existing Head 14C(2) provides:

> *"Where, in the opinion of the Chairperson of the Forestry Appeals Committee, an oral hearing is required he or she shall, as soon as may be, fix a date and place for the oral hearing, and give reasonable notice of the said oral hearing to the appellant, the Minister, and any other person appearing to the Chairman to be concerned in the appeal."*

Recommendation: This provision should be amended to explicitly include the applicant to ensure there is a statutory obligation to provide reasonable notice of the appeal to the licence holder.

1.3 **Enabling FAC to sit in divisions**

We welcome and agree with the introduction of the provision allowing FAC to sit in divisions to determine appeals (Head 14A(2A)). The Bill does not, however, indicate what powers and functions a division of FAC will have. This provision should be refined to ensure that a division of FAC has all of the same powers and functions of FAC.

To enable FAC to effectively perform its functions, this new power is absolutely essential. It is a core component of any efficiently functioning administrative regime.

Precedent: An Bord Pleanála can meet in divisions (section 111 of the Planning Acts). The Planning Act expressly indicates that each division of ABP has the same functions as ABP. Section 112 (1) provides: *"(a) The chairperson shall assign to each division the business to be transacted by it, and (b) for the purpose of the business so assigned to it, each division shall have all the function of the Board."*

Recommendations:

(1) Retain proposed Heads 14A(2A) in relation to sitting in a number of divisions simultaneously.

(2) Include an additional provision which specifies that a division of the FAC has the same functions as the FAC, to mirror section 112 (1) of the Planning Acts.

1.4 **Enable FAC to exercise its functions under a quorum of 2**

We welcome and agree with the provision which sets a quorum for meetings of FAC. However, we believe the proposal that FAC should also be enabled to make decisions with a quorum of 2 people for forestry appeal applications (Head 14A(2B).

Precedent: The standard quorum for a meeting of ABP is three for strategic infrastructure developments and developments which would materially contravene a development plan, for example (section 108(1) of the Planning Acts). However, An Bord Pleanála can sit in quorums of 2 people, when dealing with standard planning applications (Section 108(1A – 1D) of the Planning Acts). It is appropriate for FAC sit in quorums of 2 people when determining standard forestry appeals because they do not involve any greater level of complexity than standard planning application.

Recommendation: Amend 14A(2B) to include a provision to enable a division of the FAC to meet, under a quorum of two people (as opposed to a quorum of three currently proposed), when it is necessary to ensure the efficient discharge of the business of FAC. A consequential amendment may also need to be made to Article 3(2) of the Forestry Appeals Committee Regulations 2018 which provides that "*The chairperson and any 2 ordinary members of the Forestry Appeals Committee **may** hear an appeal*" (Emphasis added).

1.5 Power of Minister to appoint ordinary members to deputise for Chairperson

We welcome and agree with the proposal to give the Minister power to appoint one or more ordinary members of FAC to deputise for the chairperson for the purposes of determining appeals (14A(3A)). This section will allow for several divisions to sit at once and ensure that each division may be chaired by a deputy chairperson.

However, the Bill as currently drafted does not specifically allow for FAC, or a division of FAC to act without the Chairperson or deputy chairperson. Ideally, a provision should be included which states that FAC, or a division of FAC, can act without the Chairperson or deputy chairperson.

Precedent: At a meeting of ABP if neither the chairperson nor the deputy chairperson is present, the ordinary members who are present must choose one of their number to be chairperson of the meeting (s.111(3)(c) of the Planning Acts). This allows ABP to act without the Chairperson or deputy chairperson.

Recommendations:

(1) Include a provision to allow FAC or a division of FAC to act without the Chairperson or deputy chairperson.

(2) In addition, another example of a universal change that needs to be made to reflect the fact that oral hearings will now be discretionary needs to be made to proposed subsection 14A(3A). This provision needs to be amended to clarify that the Minister can designate an ordinary member of FAC to deputise for the chairperson for the purpose of **determining** appeals, even where oral hearings are not held. This is not clear in the draft wording of subsection 14A(3A) because of the reference to this power being exercised for "*hearing **and** determining appeals*", and it does not reflect the proposal to make oral hearings discretionary. [Emphasis added].

1.6 **Power of Minister to make regulations to provide for casual vacancies**

We welcome and agree with the proposal to give the Minister power to make regulations to provide for casual vacancies on the Committee (s. 14F(g)).

However, the Bill as currently drafted does not specifically allow for FAC to act where there is a vacancy in the office of chairperson or deputy chairperson or among the ordinary members. Ideally a provision should be included which states that FAC can act notwithstanding such a vacancy.

Precedent: ABP can act where there is a vacancy in the office of the Chairperson, the deputy chairperson or an ordinary member of ABP. An equivalent of Sections 108(2), (3) and (4) of the Planning Acts should be specifically included to avoid delays in the event that the Chairperson's or deputy chairperson's office is vacant.

Section 108 (2): "*Subject to subsection (1), the Board may act notwithstanding a vacancy in the office of chairperson or deputy chairperson or among the ordinary members."*

Recommendation: Include a provision to allow FAC to act where there is a vacancy in the office of the Chairperson, the deputy chairperson or an ordinary member.

1.7 **Definition of who is a "relevant person" with the right of appeal to FAC**

We welcome and agree with the proposal to define who is a "relevant person" for the purposes of bringing an appeal to FAC (Section 14A (4)). Our overriding observation is that any right to an appeal should reasonably be limited to persons who have participated in and made representations in respect of a licence application process and who are **affected** by a particular decision; not to undefined persons "dissatisfied" with a Minister's grant of consent, as section 5 of the Agricultural Appeals Act currently provides.

(a) **Prior Participation Requirement**: We welcome and agree that a third party must have made submissions or observations on an application to the Minister in order to be entitled to bring an appeal. We believe a person should also be affected by a particular decision.

Precedent: The requirement to have made submissions or observations to be entitled to appeal is in section 37(1) of the Planning Acts.

(b) **No prior participation requirement where interest in adjoining land**. We agree that a person with an interest in adjoining land who can demonstrate to FAC that:

(i) a licence will differ materially from a licence applied for because of conditions imposed / varied; **and**

(ii) the conditions will materially affect their enjoyment of the land or reduce the value of the land (section 14A (4)(b)(iv)),

should be entitled to appeal.

Precedent: This entitlement is in section 37(6)(d) of the Planning Acts.

(c) **No prior participation for consultations bodies where they were not consulted but should have been**. We agree that a prescribed consultation body (as defined) who ought to have been but was not consulted on an application should be entitled to appeal.

Precedent: A similar entitlement is in section 37(4) of the Planning Acts, where a statutory consultee which should have been notified but was not is entitled to appeal. However, it is qualified by the entitlement of An Bord Pleanála to dismiss any appeal where it considers the body concerned was not entitled to be sent notice.

"(a) Notwithstanding subsection (1), where in accordance with the permission regulations any prescribed body is entitled to be given notice of any planning application, that body shall be entitled to appeal to the Board before the expiration of the appropriate period within the meaning of that subsection where the body had not been sent notice in accordance with the regulations.

(b)The Board may dismiss any appeal made under paragraph (a) where it considers the body concerned was not entitled to be sent notice of the planning application in accordance with the permission regulations." [Emphasis added]

Recommendation: We believe FAC should be given the power to dismiss any appeal made by any consultation body which was not entitled to be consulted, similar to An Bord Pleanála's power to dismiss under section 37(4)(b) (above).

(d) **No prior participation for NGOs, subject to requirements.**

We accept that an environmental body (as defined) subject to the requirements specified in the Bill, may appeal to FAC without having submitted an observation in respect of an application.

The Bill provides that an environmental body should be entitled to appeal where an appeal relates to an application for consent, or a Minister's decision to suspend or revoke a consent or vary conditions and where an EIA screening / EIA (submission of an EIAR), AA screening/ AA (submission of a NIS) is involved.

This entitlement is also subject to the Minister being entitled to make regulations setting out other qualifying requirements which an environmental body must meet, including in relation to its membership, not for profit status, and its environmental protection aims (Head 14F).

Precedent: Section 37(4)(c) and (d) of the Planning Acts provides that an body or organisation which promotes environmental protection and has done so for 12 months before making an appeal, is entitled to appeal where an EIAR was required for an application, even where the body or organisation has not made any prior submissions.

1.8 **Power of the Minister to issue General policy directives**

We welcome and agree with providing the Minister with a power to issue general policy directives (Head 14E). This is similar to the Ministerial power to issue policy directives to planning authorities under the Planning Acts. Section 14E provides:

> "*14E.—(1) The Minister may from time to time issue such general directives as to policy in relation to forestry appeals as the Minister considers necessary and the Forestry Appeals Committee shall, in performing its functions, have regard to any such directives."*
>
> *(2) Nothing in this section shall be construed as enabling the Minister to exercise any power or control in relation to a particular appeal with which the committee is or may be concerned. "*

Precedent: Section 29 of the Planning Acts.

Recommendation: This power should be retained.

2. PROPOSED PROVISIONS FOR INCLUSION IN DRAFT BILL

2.1 **Provide for a mandatory statutory timeframe for determination of appeals**

We believe that a mandatory statutory timeframe for determination of appeals is necessary for the speedy dispatch of the business of FAC, and to clear the existing back-log.

The effectiveness of a mandatory statutory decision making timeframe has been proven in the context of the consenting of strategic housing development ("**SHD**"), where An Bord Pleanála has consistently determined SHD applications within the mandatory 16 week timeframe. This is in contrast to non-SHD applications where the statutory decision making timeframe of 18 weeks is aspirational only and An Bord Pleanála regularly does not meet the timeframe.

Precedent: Applications for strategic housing developments have a mandatory statutory deadline of 16 weeks from lodgement of an application under section 9(9)(a) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended. Section 9(9)(a) provides:

> "*The Board shall make its decision under this section on an application under section 4—*
>
> *(a) where no oral hearing is held, within 16 weeks beginning on the day the planning application was lodged with the Board or within such other period as may be prescribed under subsection (10),*
>
> *(b) where an oral hearing is held, within such period as may be prescribed*."

Recommendation: Include a mandatory statutory deadline of 8 weeks for the determination of appeals to FAC specifically. If FAC sit in multiple divisions simultaneously, with a quorum of ideally 2 persons for standard application or 3 persons for any complex applications, and there is no longer a requirement for a mandatory oral hearing, there is no justifiable reason why a mandatory 8 week timeframe for determination of appeals is not achievable for forestry appeals. An 8 week decision-making timeframe is achievable for standard planning applications.

2.2 **Provide that FAC must have regard to national, regional, strategic, economic and social considerations when determining appeals**

We believe that FAC should be required to have regard to the national interest and issues of strategic economic or social importance to the State when determining appeals.

Precedent: Section 143 of the Planning Acts requires An Bord Pleanála to have regard to certain things when performing its decision-making functions, including considerations of strategic economic or social importance to the State. Section 143 provides:

> *"(1) The Board shall, in performing its functions, have regard to—*
>
> *(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,*
>
> *(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and*
>
> *(c) the National Planning Framework and any regional spatial and economic strategy for the time being in force."*

Recommendation: Include a provision equivalent to section 143 of the Planning Acts. The above considerations are particularly relevant when appeals to forestry consents are being determined, for the following reasons:

(a) From a national perspective, timber as a material plays a critical contribution to sustainable building of the infrastructure required to be delivered under the National Planning Framework

(b) From a national perspective, afforestation plays an essential strategic role in climate action, that is of significant social and environmental importance to the State

(c) From a regional perspective, forestry supports 12,000 rural green-tech jobs in a sustainable sector, that is of fundamental strategic economic importance to the regions and, in turn, the State

2.3 **If an Appeal is rejected on the merits, provide FAC with the power to dismiss all associated similar appeals without needing individual hearings in respect of each appeal.**

We believe, given the nature of the appeals being made to FAC, that FAC should have the power to regulate how it deals with appeals and a duty to deal with appeals efficiently. Part of this would justify dealing with appeals, which deal with the same issue, at the same time.

While every appeal must be decided on its own merits, a single oral hearing could group all appeals with the same issue together. This approach would be consistent with FAC's discretion to treat two or more appeals as a single appeal under Article 5 of the Forestry Appeals Committee Regulations 2018.

An appellant could be required to go through each proposed application individually to ensure that each appeal has been decided on its own merits and also that the broader issue common to all appeals have been determined in the same way. FAC, as a decision-making body is required as a matter of administrative law to ensure consistency in its decision-making.; i.e. that like decisions are made in a like manner. The principle of consistency in decision making is also supported by the line of authority that a planning authority or An Bord Pleanála cannot overrule their previous determinations unless there is a material change in circumstances. (see *Athlone Woollen Mills Co. Ltd v Athlone Urban District Council* [1950] I.R. 1; *The State (Kenny & Hussey) v An Bord Pleanála* (Unreported, Supreme Court, 20 December 1984) *Grealish v An Bord Pleanála* [2007] 2 I.R. 536 and *Mone v An Bord Pleanála* (Unreported, High Court, McKechnie J., 18 May 2010). The same reasoning equally applies to FAC, as a decision maker.

We also believe that FAC should have the power to dismiss an appeal having regard to the nature of the appeal, including any question which in An Bord Pleanála's opinion is raised by the appeal, and any previous consent granted.

Precedent: Section 138(1)(b) of the Planning Acts (as set out above). Section 138 of the Planning Acts provides:

> *"(1) The Board shall have an absolute discretion to dismiss an appeal or referral—*
>
> *...*
>
> *(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—*
>
> > *(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or*
> >
> > *(ii) any previous permission which in its opinion is relevant."*

Recommendation: Include a provision equivalent to section 138(1)(b) of the Planning Acts (as set out above).

2.4 Regulations for decision making

There is provision for the Minister to prescribe, by way of regulations made under the Agriculture Appeals Act 2001, as amended, what procedure should be followed on forestry appeals. See, e.g. sections 7 (2) and 15 of Agriculture Appeals Act 2001.

Recommendation: For good administrating decision making, the Minister's entitlement to make regulations should be broadened to require what an appeal should contain, including:

(i) that the precise grounds of the appeal be stated for each individual appeal;

(ii) how the stated grounds relate to the particular licence being challenged as distinct from other licences or licences generally;

(iii) that competent scientific evidence be provided in support of the appellant's allegations / complaints;

(iv) the personal or proprietary interest of the appellant on the matter be stated (to identify vexatious applicants, not limit appeals); and

(v) why the person is dissatisfied by the decision challenged to be stated.

Currently Article 4(3) of the Forestry Appeal Committee Regulations 2018 requires an appeal to contain only:

(i) the name and address of the appellant and his or her nominated agent, if any,

(ii) the full grounds of appeal including a statement of the facts and reasoning on which the appellant relies, and

(iii) such documents, particulars or other information relating to the appeal that the appellant considers necessary or appropriate.

2.5 **Impose reforms of the judicial review process proposed for the planning regime to the forestry appeals regime**

Provide that judicial reviews may not be sought in respect of an alleged deficiency falling within any of the following categories:

(i) clerical or typographical errors in the order or determination which is sought to be quashed,

(ii) unintentional errors or omissions in the order or determination,

(iii) text, or an omission of text, which has the effect that the determination or order as issued does not on its face accurately express the determination or order as intended, unless it can be shown that the applicant had previously applied for rectification of the deficiency concerned and had wrongly been refused that relief.

This is very important because errors of language in appropriate assessment screening and appropriate assessment are often made and several judicial reviews have quashed planning decisions for this reason, notwithstanding the fact that substantively the law was complied with, but a mistake was simply made in the language used in the decision granting consent.

Precedent: This has been proposed in the General Scheme of the Housing and Planning and Development Bill 2019 (Head 3(ii)).

Recommendation: Include provision similar to Head 3(ii) of the General Scheme of the Housing and Planning and Development Bill 2019. The Forestry Regulations 2017, Reg. 17(2) (judicial review of forestry decisions) would also have to be amended.

END.