



[REDACTED]

29th March 2021

Subject: Appeals FAC 264/2020 and 295/2020 regarding licence KY10-FL0117

Dear [REDACTED]

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

Background

Licence KY10-FL0117 for tree felling on a site of 8.78ha at Garrane South, Kealafrehane East, County Kerry, was approved by the Department of Agriculture, Food and the Marine (DAFM) on 22nd of May 2020. An oral hearing of the above appeal was held by the FAC on 17th of February 2021.

The following were in attendance at Oral Hearing:

Department Representative(s):	Mr. Luke Middleton, Ms. Eilish Keogh
Appellant (FAC 264/2020):	Not present,
Appellant (FAC 295/2020):	Not present,
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway, Mr. Iain Douglas, and Mr. Seamus Neely.
Secretary to the FAC:	Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, submissions received including at the oral hearing, clarifications obtained, and the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence KY10-FL0117.

Summary of Departmental File

The application, dated the 2nd of December 2019, indicates that the current stock is 100% Sitka Spruce (SS) and was planted in 1972. Replanting is to be 95% Sitka Spruce and 5% Birch. Approximately 5% of the total site area is to be open space. The application includes site maps, a harvest plan and a preliminary AA Pre-screening report.

A record of a request for files relating to a number of licences, including the licence under appeal here, from one of the appellants is on file.

A referral to Kerry Co. Co. is on file dated the 27th of December 2019, with no response on file. A referral to Inland Fisheries Ireland (IFI) is on file dated the 12th of December 2019, and a response was received on the 22nd of January 2020. This notes that the river is an important salmonid river sensitive to phosphorus and silt. It requests that felling take place during dry weather/soil conditions and that logging and stacking only take place when there are good ground conditions. Six recommendations are given with a request that the Macroom IFI office be notified prior to works commencing.

Screening for Appropriate Assessment.

An Appropriate Assessment Screening (AAS) was carried out by the DAFM and is on file, the last review of which is by the Forestry Inspector dated the 19th of May 2020. The report describes the site as follows:

The Underling [SIC] soil type is approx. Blanket Peats (80%), Peaty Gleys (17%) & Surface water Gleys, Ground water Gleys (3%) The slope is predominantly moderate 0-15%. The habitat is predominantly WD4. Inny (Kerry)_020 (100%)

The AAS identifies six Natura sites as being within 15km of the project site. These are:

1. Killarney National Park, Macgillycudd's Reeks & Caragh River Catchment SAC [0365]
2. Ballinskelligs Bay and Inny Estuary SAC [0335]
3. Valencia Harbour/Portmagee Channel SAC [2262]
4. Castlemaine Harbour SAC [0343]
5. Iveragh Peninsula SPA [4154]
6. Castlemaine Harbour SPA [4029]

These are recorded as being screened out for the following reasons:

- Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise (Site no. 1 above)
- Having considered the expert opinion and the rationale presented in Pre-Screening Report (regarding hydrological distance, project area, soil type and depth, site slope and project separation distance) submitted by the applicant in respect of the proposed felling and reforestation project, DAFM has concluded that there is no likelihood of the project itself (i.e. individually) having a significant effect on this European site. (Site no. 2 above)
- Due to the separation distance between the Natura site and the project. (Sites no. 5 and no. 6 above)

- Due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any pathway, hydrological or otherwise (Sites no. 3 and no. 4 above)

As noted above, the AAS refers to the expert opinion provided by the applicant in a Pre-Screening Report. This pre-screening report is on file and is dated the 14th of May 2020.

The AAS also refers to an In-combination report, which states it was run on the week of the 21st of May 2020. This notes that the River Sub Basin Inny (Kerry)_020 has approximately 33% forest cover which is higher than the national average of 11%. The report notes searches and results of licence applications to Kerry County Council (15), An Bord Pleanála (0), the Environmental Protection Agency (0), Afforestation projects (1), Forest road projects (6), and felling licences (29). The report also references the County Kerry Development plan.

Grounds of Appeal

The decision to grant the Licence is subject to two appeals.

The first appeal (FAC 264/2020). Briefly the grounds for this appeal are: that the application is for felling and reforestation and as no Environmental Impact Assessment Screening has ever been carried out it is necessary to establish if the planting of this forest complied with the law; and that no Appropriate Assessment screening has been carried out according to the requirements of the EU Directive and Irish implementing law.

The second appeal (FAC 295/2020). Briefly the grounds for this appeal are: breach of article 4 (3) of the EIA Directive 2014/52/EU through failure to carry out screening for EIA; breach of article 4 (4) of the EIA Directive 2014/52/EU through failure to consider the whole project; that the licence and its associated operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework Directive River Basin Management Plan for Ireland 2018-21; that the Stage 1 AA conclusion is not legally valid as it has relied on an inadequate pre-screening report Coillte; that number of the licence conditions are not verifiable and enforceable conditions; that the licence conditions do not provide a system of protection for wild birds that are consistent with Article 5 of the Birds Directive 2009/147/EC; that the licence should contain a condition to notify the Minister of the commencement and conclusion of operations; that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals.

Oral Hearing

At Oral Hearing, the DAFM outlined the processes followed in awarding the licence and drew attention to the Statement of Fact provided to the committee. In particular it was noted that the AAS on which the decision was based had truncated qualifying interests listed for some Natura sites. The DAFM drew attention to the two Statements of Fact provided to the FAC in relation to each of the appeals. The DAFM pointed out that the updated AAS which had been provided to the FAC and stated that the full list of qualifying interests was available and used in the decision-making process and confirmed that this Screening had in part regard to a pre-screening report produced by the Applicant dated the 14th of May

2020. The DAFM confirmed to the FAC that the specific requests made by IFI in their response of the 22nd of January 2020 were captured through reference to guidelines and standards where possible.

The applicant provided background to the application. In relation to the stated ground of appeal relating to the objectives of the Water Framework Directive River Basin Management Plan for Ireland, the applicant noted that the application and licence included the removal of existing conifers close to the watercourse to the east of the site, and that this would be done in a sensitive manner. This would be followed by subsequent planting of broadleaves as required in the licence in an aquatic buffer zone, and that as a result the granted licence would avoid pressure on the water course leading to an overall improvement.

Consideration by FAC

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the Statements of Fact provided by the DAFM to the FAC relating to the appeals and both dated the 20th of January 2020, and the record of the application and licensing process.

The FAC also consulted with several publicly available information sources such as mapping from the EPA, the DAFM and the OSI. These reveal that a local road bounds the site to the south. What appears to be a well-established forest road based on OSI aerial imagery initially bounds the site to the east before crossing the site diagonally to the North East. The Islandboy_21 river, a branch of the Inny(Kerry)_020, can be observed to bound the east (on the far side of the forest road) and much of the north of the site. The EPA describes this waterbody as having Moderate Ecological Status and WFD risk status of At Risk. The Sub catchment is the Inny[Kerry]_SC_010 and the Catchment is the Dunmanus-Bantry-Kenmare [21]. The Ground Waterbody is the Beara Sneem [IE_SW_G_019] which has WFD risk of Not at Risk. Forestry is not a listed pressure for this Ground Waterbody. The Knockroe Bog NHA is about 1.5 km to the East, which is designated for Peatlands (SI 508/2007). Soils mapping from Teagasc indicates Peat confirming the details in the AAS.

In the first instance, the FAC noted that the stock in question was planted in 1972 predating the Environmental Assessment Directive, the Birds Directive, and the Habitats Directive.

The FAC then considered the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU EIA Directive sets out in Annex I a list of projects for which EIA is mandatory. Annex II contains a list of projects for which member states must determine, through thresholds or on a case by case basis (or both), whether or not EIA is required. Neither afforestation nor deforestation is referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use" (Class 1 (d) of Annex II). The Irish Regulations in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment. The felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for the felling and replanting of an area of 8.78 ha. The FAC does not consider that the proposal comprises

deforestation for the purposes of land use change and neither that it falls within the classes included in the Annexes of the EIA Directive or considered as requiring EIA in Irish Regulations. The FAC therefore agrees that screening for EIA was not required in this case and that breaches of Article 4(3) and 4(4) had not occurred.

In relation to the contention that the licenced operations threaten the achievement of the objectives set for the underlining waterbody or waterbodies under the Water Framework Directive River Basin Management Plan for Ireland 2018-21, the FAC notes the content of the DAFM statement dated 8th October 2020, wherein it outlines the checks and balances that DAFM applies during the evaluation of felling licence applications in relation to the protection of water, and the confirmation therein that any felling licence issued is conditional on adherence to the Interim Standards for Felling and Reforestation (DAFM, 2019), which set out a wide range of operational measures to prevent direct and indirect impact on water quality arising from the operation. The statement also sets out that in relation to reforestation, those Standards stipulate water setbacks adjoining aquatic zones, and these, together with the silt trapping and slow-water damming of forest drains required during felling, introduce a permanent undisturbed semi-natural buffer along the watercourse, developed primarily to protect water. The FAC noted the response from the Inland Fisheries Ireland in relation to the project which raised no objection to the proposal while requesting adherence to the Guidelines for Harvesting and Water Quality and requesting specific measures which are reflected in licence conditions requiring adherence to named guidelines and standards. The grounds of appeal did submit that the presence of peat soil has the potential to result in effects on water quality and the FAC noted that the project is proximate to the Islandboy_21 river, a branch of the Inny(Kerry)_020, for which the EPA report a Moderate Ecological Status and WFD risk status of At Risk during the the most recent WFD cycle. The project is partially separated from Islandboy river by an existing forest road. The current stock is 100% conifer and the proposed restocking includes 5% broadleaf accompanied by 95% conifer. The licence contains general conditions to protect water quality and implement water quality protection measures which encompass suggestions made by the relevant statutory authority, including the implementation of an aquatic buffer zone in line with the Forestry and Water Quality Guidelines. The licence also requires that implementation of these guidelines is to be carried out in consultation with that statutory body. Based on the information available to it and having regard to the nature, scale and location of the proposal and the licence under which the operation would be required to be undertaken, the FAC is satisfied that the proposal would not pose a significant threat to water quality and is not satisfied that an error was made in the making of the decision in this regard.

In addressing the Appropriate Assessment grounds of appeal, the FAC considered, under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening, and found six European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The sites identified were as noted above in the section summarising the DAFM file. The DAFM considered each site in turn and listed the associated qualifying

interests and conservation objectives and the reasons for their screening conclusions. DAFM's reasons for screening out the different sites were site specific, and these are also noted above. At oral hearing and in a statement to the FAC, the DAFM clarified that while some Qualifying Interests were truncated in the screening document as a result of an error in automated process that supports the creation of the document, the full list of Qualifying Interests were considered in carrying out the screening itself. The DAFM undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, and concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site.

The grounds of one of the appeals submitted specifically contended that that the Stage 1 Appropriate Assessment conclusion is not legally valid as it relied on an inadequate pre-screening report. The applicant submitted two pre-screening reports. One is contained within the application on 2nd December 2019 and a second stand-alone document dated 14th May 2020. The DAFM at oral hearing confirmed that it was this pre-screening report dated 14th May 2020 that they had regard to in their Appropriate Assessment screening. The FAC notes that this second pre-screen report gives detailed consideration of the Qualifying Interests/Special Conservation Interests for each the six relevant European Sites. The Appropriate Assessment Screening document states that it relies on this pre-screening report with respect to the expert opinion given in relation to project area, soil type, site slope and project hydrological distance relating to the Ballinskelligs Bay and Inny Estuary SAC [0335]. The pre-screening records these, respectively, as: 8.78 ha; Peaty gleys (3%), Blanket peats (80%) and Surface water gleys/ground water gleys (17%); Gentle (15% or less); Conifer plantation (WD4); and 8.75km hydrological distance. The FAC independently verified these details using publicly available information sources and determined them to be correct. Consequently, the FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The procedures adopted by the DAFM in their assessment are considered to be acceptable. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision regarding appropriate assessment and concurs with the conclusions provided.

In considering the stated ground of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of Article 5 of the Birds Directive the FAC, the FAC observed that the appellant did not provide any site-specific details in relation to any species of concern. The FAC had regard to the DAFM statement and note that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out in any other statute. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant were not required.

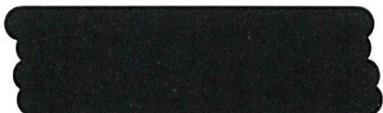
In relation to the appellant's grounds that the licence should contain conditions to notify the Minister of the commencement and conclusion of operations, the FAC finds that the licence includes a condition that a site notice must be completed and erected in accordance with directions provided. The FAC is

satisfied, based on the information available to it, that the inclusion of conditions relating to this ground in the appeal in this case, was not required. In relation to the ground of appeal that the licence conditions are in a form that they could be regarded as guidelines, the FAC is satisfied that the applicant has been provided with sufficient information in order to determine what is required to adhere to the intent of the conditions.

In relation to the appellant's grounds that the licence should include stringent and enforceable conditions regarding notification to appropriate bodies, groups and the public concerned in the case of any spraying of chemicals, the DAFM in their statement outlined that the use of plant protection products (PPPs) in Ireland, is governed by Statutory Instrument 155 of 2012 and Statutory Instrument 159 of 2012, which give effect to EU legislation on PPPs and that users of PPPs shall apply the principles of Good Plant Protection Practice (GPPP), as provided for in S.I. 155 of 2012. In addition they set out that there is no legal requirement for forest owners to inform adjacent land owners of their intention to spray, and gave reassurances as to the use of the PPP approved for use. Based on the information available to it, the FAC is satisfied that licence conditions as proposed by the appellant are not required in this case.

Conclusion

In considering the appeal in this case the FAC had regard to the record of the decision and the submitted grounds in the appeal, other submissions received, and the submissions and clarifications obtained at the oral hearing. The FAC concluded that a serious error or series of errors were not made in the decision of the DAFM regarding KY10-FL0117 and accordingly affirm the decision of the Minister.



John Evans On Behalf of the Forestry Appeals Committee

