



[REDACTED]

30<sup>th</sup> June 2021

**Subject:** Appeal FAC023/2021 in relation to felling licence KY10-FL0118

Dear [REDACTED]

I refer to your appeal 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**

Felling licence KY10-FL0118 was issued by the Department of Agriculture, Food and the Marine (DAFM) on the 8<sup>th</sup> January 2021.

#### **Hearing**

The FAC convened a Hearing of appeal FAC023/2021 on the 11<sup>th</sup> May 2021:

**FAC:** Mr Des Johnson (Chairperson), Mr Dan Molloy, Mr Donal Maguire & Mr Luke Sweetman

**Secretary to the FAC:** Mr Michael Ryan

#### **Decision**

The FAC considered all of the documentation on the file, including application details, processing of the application by the DAFM, the grounds of appeal, and all other submissions, before deciding to set aside and remit the decision to grant felling licence KY10-FL0118.

The licence under appeal is for the clearfell and restocking of 11.83ha of 84% Sitka spruce, 14% Lodgepole pine and 2% Noble fir at Coomshanna, Co. Kerry. The proposed restock species is 100% Sitka spruce (11.24ha) with 0.59ha open space retained. The DAFM information states the underlying soil is 100% Blanket Peats and the slope is steep (15%-30%). The applicant states that plants used in restocking will be treated off-site with an approved insecticide. The site will be monitored for damage from Pine weevil and, if deemed necessary, a top-up spot spray may be applied. Fertiliser, in the form of ground rock phosphate, will be applied and the rate of application of elemental phosphate is 42 kgs/ha. If deemed necessary, herbicide will be required to manage competing vegetation through manual spot-spray application.

The site is within the Laune-Maine-Dingle Bay Catchment, the Ferta\_SC\_010 Sub-Catchment and the Faha (Kerry)\_010 River Sub-Basin. The Faha (Kerry)\_010 has not been assigned a Water Framework Directive (WFD) status by the Environmental Protection Agency (EPA). One unnamed EPA-mapped watercourse rises in the southwest of the application site and another rises c.425m to the east of the site and crosses the northern boundary of the proposal. Both of these unnamed watercourses converge

c.200m to the west of the proposal before flowing c.1.9km to the Iveragh Peninsula SPA and then another c.400m to the coast at Dingle Bay. An area of c.1.2ha in the west of the proposal, surrounding the unnamed EPA watercourse, appears to be wind-blown according to the aerial photography available on the DAFM's Forestry Licence Viewer. The project area is part of a wider conifer plantation of various age and class. A large area of recently felled conifer plantation lies adjacent to the north-eastern and south-western boundaries of the project area, while the wider landscape supports large areas of upland blanket bog/open heath habitat with pockets of conifer plantation and agricultural grasslands also occurring.

The applicant submitted an application pack which included maps, a Harvest Plan document, and an Appropriate Assessment (AA) Pre-Screening Report (PSR). The PSR includes an AA Screening (AAS) which screens the six European sites within 15km of the proposal and the following five are screened out for reasons including separation distance, lack of hydrological connection, and the terrestrial nature of the Qualifying Interests (QIs): (i) Castlemaine Harbour SAC, (ii) Castlemaine Harbour SPA, (iii) Dingle Peninsula SPA, (iv) Iveragh Peninsula SPA, (v) Lough Yganavan and Lough Nambrackdarrig SAC.

Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC is located 0.5km from the proposal and is screened in for Stage 2 AA "due to possible effects". The applicant also submitted a Natura Impact Statement (NIS) for this proposal. The NIS, dated 30<sup>th</sup> September 2020, assesses the proposal's individual potential for an adverse effect on the QIs and associated Conservation Objectives of Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC. In respect of each QI it is deemed that there is no potential for the proposed development to directly or indirectly impact on the QI due to the lack of a source-receptor pathway and mitigation measures are not deemed necessary. The NIS also contains an In-Combination statement which considers other plans and projects in the Faha (Kerry)\_010 River Sub-Basin, which has forest cover of 14%, before concluding that "this project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on the QIs of Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC or any other European Sites."

The DAFM completed an AAS, dated 19<sup>th</sup> November 2020, which was completed by a DAFM Forestry Inspector and considered the same six European sites as the NIS. The following sites were screened out for Stage 2 AA:

- **Castlemaine Harbour SPA, Dingle Peninsula SPA:**
  - Due to the separation distance, the absence of a direct hydrological connection, and subsequent lack of any pathway, hydrological or otherwise between the European site and the project.
- **Castlemaine Harbour SAC, Lough Yganavan and Lough Nambrackdarrig SAC:**
  - Due to the absence of a direct upstream hydrological connection, and subsequent lack of any pathway, hydrological or otherwise.

The DAFM determined the following sites should be screened in for Stage 2 AA:

- **Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC:**
  - Possible effect due to the proximity of the project to the Natura site
- **Iveragh Peninsula SPA:**
  - Possible effect due to the proximity of potential habitat for the species listed as the Special Conservation Interest (SCI) of this Natura site.

The DAFM completed an assessment of the proposal's potential to contribute to an in-combination impact on European sites which focussed on the general vicinity of the project area in the River Sub-

Basin Faha (Kerry)\_010. The DAFM consulted various planning websites along with their own records for forestry and non-forestry plans and projects and also consulted the Kerry County Development Plan 2015-2021 regarding objectives relating to Natura sites. The DAFM concluded that “this project, when considered in combination with other plans and projects, will not give rise to any adverse effect on the integrity of any European Site.”

An AA Determination (AAD), dated 27<sup>th</sup> November 2020, was made on behalf of the DAFM by an external Ecologist. The AAD states that the applicant submitted an NIS to facilitate the Minister carrying out an AA and that “the information provided in the NIS was sufficient to derive appropriate conditions for a determination.” The AAD lists prescribed mitigation measures to protect the Peregrine; the Special Conservation Interest of the Iveragh Peninsula SPA, the Otter; a QI of the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, and measures to protect water quality. The AAD also states “adhere to all water protection measure guidance relating to sediment management, felling, cultivation, herbicide application, the location of onsite storage depots and the disposal of waste including:

- i. Environmental Requirements for Afforestation, December 2016 (DAFM, 2016),
- ii. Forestry Standards Manual (DAFM, 2015),
- iii. Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019),
- iv. Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009).

The AAD states that the above conditions will eliminate pathways of impact of significance to the screened in features and that the Minister has determined, based on objective information, that no reasonable scientific doubt remains as to the absence of any adverse effect on the integrity of any European site.

The DAFM referred the application to Kerry County Council and Inland Fisheries Ireland, with no evidence of a response from either, before issuing KY10-FL0118 on the 8<sup>th</sup> January 2021. The licence is subject to relatively standard conditions (1) to (7) plus additional conditions (8) to (14) which include -

- Retention of existing scrub, planting of broadleaves/diverse conifers along aquatic zone boundaries:
  - In the interest of protecting the Peregrine, as per the AAD.
- 25m water setback at reforestation, planting of 20% of aquatic buffer zone with broadleaves:
  - In the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations, as per the AAD.
- 10m machine and timber stacking exclusion zone from any aquatic zone on or adjoining site. Trees within the reach of the harvester arm to be felled by harvester and processed outside the exclusion zone. Trees outside machine reach to be felled manually. Felled/fallen trees to be winched out of the exclusion zone where appropriate and safe to do so, or removed by extended harvester arm, for subsequent processing outside the exclusion zone, avoiding mobilisation of soils. No woody weed removal within 50m of an aquatic zone or 20m of a relevant watercourse. Protection/retention of any areas of wet woodland, Carr, or thick scrub on the site within 50m of an aquatic zone or 20m of a relevant watercourse.
  - To minimise disturbance and protect established habitat potentially used by the Otter, as per the AAD.
- Adherence to specified standards and guidelines:
  - i. Environmental Requirements for Afforestation, December 2016 (DAFM, 2016).
  - ii. Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019).

iii. Appendix 21 of the Forestry Standards Manual (DAFM, 2015), which sets out an agreed protocol for Hen Harrier developed by the Forest Service of the DAFM and the National Parks & Wildlife Service (NPWS), regarding potential disturbance operations.

iv. Forest Harvesting & the Environment Guidelines (DAFM, 2000).

v. Forestry Standards Manual (DAFM, 2015).

vi. Felling & Reforestation Policy (DAFM, 2017).

- o In the interest of the protection of the environment during harvesting and restocking.

There is one appeal against the licence. The grounds of appeal for FAC023/2021 are as follows:

1. The law requires that the public have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EU Directives relevant to the forestry approval process. The FAC does not fulfil this independent and impartial role.
2. The AA has not assessed the impact of the re-stocking of the site (other than the basic operational details). The failure to assess the potential impacts of the actual re-stocking of the clear-felled site on the conservation interests of the Natura 2000 site is an omission in the AA and is a serious error in the processing of this licence. It means that the Appropriate Assessment does not contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. The generic mitigations presented do not exclude the possibility of a residual impact and no alternatives to the re-stocking have been assessed.
3. This project lies within the River Sub-Basin Faha (Kerry)\_010. There is no evidence that this waterbody has been assigned a water quality status in line with the WFD by the EPA. In the absence of such an assessment, based on the High Court judgement in the case of the Judicial Review of Case 280 (Sweetman v An Bord Pleanála) 2018 the Forest Service (FS) should not have authorised this licence as to do so would be inconsistent with the requirements of Article 4(1)(a) of the WFD. The FS is obliged to ensure that the test articulated by Article 4(1)(a) of the WFD is fully applied in individual authorisation decisions using the detailed and complex framework of the WFD. Where the EPA has not carried out or provided an assessment of a water body's status, it is not sufficient for the FS to apply an alternative (or proxy) assessment. The judgment makes clear that reliance on some type of proxy evaluation does not constitute compliance with the WFD. The specific steps set out in the architecture of the WFD must be identified and followed. There is no evidence that the FS sought information from the EPA in respect of the status of waterbody. In the circumstance the FS was required to refuse consent to the proposal.

The DAFM responded in a written Statement to the FAC, as summarised below:

1. The Agriculture Appeals Act, 2001, along with the Forestry Appeals Committee Regulations 2018 (S.I. No. 68 of 2018) and the Forestry (Miscellaneous Provisions) Bill 2020 provide for the functions of the Forestry Appeals Committee (FAC). The FAC was formally established in 2018 and provides an appeals service where, if a person is dissatisfied with a decision of the Minister or an officer of the Minister, he/she may submit an appeal against a decision on a licence, an approval and/or an entry into a register concerning the following:
  - afforestation;
  - felling;
  - forest road works; and/or
  - aerial fertilisation.

The legislative basis for the FAC is set out in Irish law i.e.:

- Forestry Act 2014;
- S.I. No. 68 of 2018 Forestry Appeals Committee Regulations 2018; and,
- S.I. No 418 of 2020 Forestry Appeals Committee Regulations 2020.

The FAC is independent of the DAFM and is based in the Agriculture Appeals Office in Portlaoise, Co. Laois. The DAFM submits that the FAC carries out its functions in an independent and impartial manner in respect of the appeals process as mandated and required under Irish law.

2. The DAFM submits that the AA has provided sufficient information in relation to the felling and reforestation project to assess the potential impacts of the replanting of the lands in question. The replanting objective as identified by the applicant in their application form and detailed in the associated pre-screening documents and NIS is consistent with the DAFM Felling and Reforestation Policy (2017).

The specific measures detailed in respect of site re-stocking operations and cultivation operations as described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD ensure that the proposed felling and reforestation project KY10-FL0118 will not result in any adverse effect on any European Site.

The site-specific mitigations identified in the AAD were attached as conditions of licence issued for the felling and reforestation project licenced as KY10-FL0118 DAFM submits that the conditions attached to the licence are consistent with best forest practice, national forest policy and protection of the environment.

3. Unassigned waterbody status.

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Note the decision on the related Judicial Review was made Ms. Justice Niamh Hyland on 15th January 2021: [https://www.courts.ie/ga/acc/alfresco/d419e3dd-9590-4671-bbaf-c37ccfb52d28/2021\\_IEHC\\_16.pdf/pdf](https://www.courts.ie/ga/acc/alfresco/d419e3dd-9590-4671-bbaf-c37ccfb52d28/2021_IEHC_16.pdf/pdf)

The licence as listed above predates the decision from the High Court (date of issue is included in brackets). Therefore legal clarity regarding these issues was provided only after the licences had been issued. This appeal was submitted to the FAC on 29/01/2021 by Mr. Foulkes.

The judgement in the case of Sweetman v An Bord Pleanála, Ireland and the Attorney General [2021] IEHC 16 (and the elaboration on and interpretation of the requirements on a Competent Authority for issuing a statutory consent vis-à-vis the Water Framework Directive therein) post-dates the consideration of the applications and granting of the tree felling licence in question by DAFM (i.e. Licence Ref: KY10-FL0118).

In any event, DAFM applies a wide range of checks and balances during its evaluation of felling licence applications in relation to the protection of water, as set out in the DAFM document Forests & Water: Achieving Objectives under Ireland's River Basin Management Plan 2018-2021 (2018). Critically, 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. These measures cover a wide range of issues, including pre-commencement awareness, contingency plan, exclusion zones, silt and sediment control, temporary water crossings, managing extraction, timing operations, monitoring, the preparation, storage and use of potentially hazardous material, and post-operation works.

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. Further setbacks are also required along relevant watercourses and water-related hotspots throughout the site, where present. With the

application of this restructuring, the level of protection regarding water will increase. The specific measures as described in the application documentation, together with adherence to relevant environmental guidelines/requirements/standards and to the site-specific mitigation measures set out in the AAD and attached as licence conditions ensure that the proposed felling and reforestation project KY10-FL0118 will not result in any adverse effect on any European Site nor on the water quality or the water body status regardless of hydrological connectivity.

The FAC convened a Hearing of FAC023/2020 on the 11<sup>th</sup> May 2021 at which the FAC sat remotely. The FAC considered the written grounds of appeal, and the response received from the DAFM. The FAC noted the appellant's submission that the FAC does not have an independent and impartial role as required by law. The appellant did not provide any evidence to substantiate this contention. The FAC operates under the Agriculture Appeals Act 2001 as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The FAC considered the appellant's contention that the restocking of the site was not assessed by the DAFM and that this represents a serious flaw in the processing of the licence. The FAC noted that the proposed development, including planned restocking operations, was subject to AAS and, subsequent to the submission and consideration of a PSR and an NIS, was the subject of an AAD by an external Ecologist on behalf of the DAFM. Based on the evidence before it, the FAC found no reason to conclude that the proposed restocking was not properly assessed. The FAC is satisfied that the DAFM's procedures in the making of the decision to grant KY10-FL0118 were in line the requirements of Article 6(3) of the Habitats Directive.

The appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence contains what are relatively standard conditions 1-7 plus additional conditions 8 - 14. The additional conditions are attached for stated reasons including the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations, to protect the Special Conservation Interest of the Iveragh Peninsula SPA, to minimise disturbance and protect established habitat potentially used by the Otter in the Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC, and the protection of the environment during harvesting and restocking. The FAC considers that the additional conditions contain site-specific requirements and based on the information before it, the FAC finds no convincing evidence for the appellant's contention on this issue.

However, the FAC noted that there is a discrepancy between the list of specific guidelines to be adhered to as prescribed by the AAD and what was included in condition 14 of the licence issued. The AAD states "adhere to all water protection measure guidance relating to sediment management, felling, cultivation, herbicide application, the location of onsite storage depots and the disposal of waste" and lists four standards/guidelines, including the Forestry and Otter Guidelines (DAFM, 2009). The licence which was issued contains a list, in condition 14, of six standards/guidelines. This list includes three documents prescribed by the AAD in addition to two others related to harvesting but does not include the Forestry and Otter Guidelines. This condition also makes reference to Appendix 21 of the Forestry Standards Manual which sets out a protocol for Hen Harrier that is not relevant to the proposed development. The FAC considers the failure of the DAFM to transpose the specific standards and guidelines listed in the AAD to the conditions of the licence to be a significant error.

The appellant contends that no alternatives to restocking have been considered. In this case, the proposed development has been subject to AAS and AAD and it was concluded that no significant effects would arise on any European site, having regard to the QIs and conservation objectives of such sites and having considered the potential for in-combination effects. In these circumstances, the FAC

concludes that there is no obligation to consider alternatives to the proposed restocking on the project lands.

The FAC considered the appellant's submission that the site is in the River Sub-Basin Faha (Kerry)\_010 and that there is no evidence that this waterbody has been assigned a status in line with the WFD and that, based on a recent High Court (Hyland) judgment, the licence should not have been granted. The FAC noted that the project lands are proximate to the Faha (Kerry)\_010 and that this has a waterbody code of IE\_SW\_22F270920. The Faha (Kerry)\_010 has an unassigned status (2007-09, 2010-12, 2010-15, 2013-2018), is listed as not being under 'Significant Pressure'. The 'Hyland' judgment concluded that, in circumstances where there would be a direct impact on an unassigned lake waterbody, the efficacy or appropriateness of mitigation measures could not be evaluated by reference to the requirements of the WFD. The adoption of 'some type of proxy evaluation' which did not follow steps identified in the WFD for the assignment of status to all waterbodies does not constitute compliance with the WFD.

The FAC considered the implications of the 'Hyland' judgment for the current case under appeal. The FAC noted that, in the 'Hyland' case, it is accepted by all parties that there would be a direct physical impact on the unassigned lake waterbody, and that the mitigations proposed were designed to reduce the impacts on the ecological and chemical status of the waterbody. The appellant's contention in the current appeal appears to be based on an assumption that the licensed development would give rise to an impact or impacts on the unassigned waterbody, Faha (Kerry)\_010, but does not submit any evidence to demonstrate how or why this would be the case.

The FAC considered the possibility of the licensed development giving rise to impacts on the Faha (Kerry)\_010. The project area is located on blanket peats on a steep slope (15%-30%), sloping in a westerly direction. An Order 1 stream rises in the south-west of the proposal and another rises c.425m to the east of the site and passes through the tip of the northern boundary of the project lands.

The FAC examined the conditions attached to the licence granted and, in particular, those requiring site-specific measures designed to protect water quality and European sites during harvesting and restocking operations. These measures are in addition to condition 1 which requires, inter alia, that the licenced operations are carried out in accordance with the Forestry and Water Quality Guidelines. The additional conditions include the following:

- 25m water setback to be applied and maintained during reforestation.
- 20% of buffer zone to be pit planted with broadleaves. No trees permitted within 5m of an aquatic zone.
- A 10m exclusion zone from any aquatic zone on or adjoining site is to apply during felling, extraction and reforestation. Machine traffic and timber stacking are not permitted within this zone.
- There will be no woody weed removal within 50m of an aquatic zone or 20m of a relevant watercourse. Do not remove or disturb any areas of wet woodland, Carr (woodland growing on wet ground or waterlogged soil usually dominated by alder or willow species) or thick scrub on the site within 50m of an aquatic zone or 20m of a relevant watercourse.

As outlined previously, the FAC noted that licence condition 14 of the licence issued does not reflect the list of specific standards and guidelines that are prescribed in the AAD. The FAC noted that the AAD specifically stipulates that the proposed operations should adhere to all water protection measure guidance relating to sediment management, felling, cultivation, herbicide application, the location of onsite storage depots and the disposal of waste including:

- i. Environmental Requirements for Afforestation, December 2016 (DAFM, 2016),
- ii. Forestry Standards Manual (DAFM, 2015),
- iii. Felling & Reforestation Standards (v. Oct. 2019) (see Forest Service Circular 14 / 2019),
- iv. Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009).

The FAC noted that the prescribed guidelines contain robust water protection measures aimed at avoiding impacts from forestry operations on water features. However, the FAC noted that these guidelines also contain a range of measures that may apply in particular circumstances. For example, in relation to silt and sediment management, the (Interim) Standards for Felling and Reforestation (October, 2019) state "silt trap design can vary, from depressions added to the drain bed, to log sections laid lengthways into the drain, to the use of geotextile barriers". Having regard to the particular circumstances of this case and the nature and scale of the proposed development, including the steep slope, the blanket peat soils and the direct connection between the application site and two EPA-mapped watercourses, the FAC are not satisfied that the water protection measures contained in the AAD are sufficiently precise and site-specific to ensure there will not be a direct impact on the Faha (Kerry)\_010 waterbody and that this constitutes a significant error on behalf of the DAFM in light of the 'Hyland' judgement.

Based on the information before it, as outlined above, the FAC decided to set aside and remit the decision of the Minister in order for the DAFM to complete a Stage 2 AA of the screened-in European sites and, if appropriate, to identify precise, site-specific mitigation measures sufficient to protect the unassigned waterbody (Faha (Kerry)\_010) from any impacts arising from the proposed development, before making a new decision in respect of KY10-FL0118.

Yours sincerely,

A redacted signature consisting of two thick black horizontal bars.

Luke Sweetman on behalf of the Forestry Appeals Committee