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9<sup>th</sup> July 2021

**Subject:** Appeal FAC 223/2020 regarding licence CN84403

Dear [REDACTED]

I refer to the 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**

Licence CN84403 is for the afforestation of 4.99 hectares and associated 500 metres of fencing at Kinard East, Co Kerry. The proposal comprises two plots the first of which is 4.9 hectares of mixed deciduous woodland and the remaining other plot of 0.09 hectares is proposed for biodiversity. The proposal was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 30<sup>th</sup> of March 2020 subject to conditions. Conditions of note specify willow not to be planted and adherence to Inland Fisheries Ireland (IFI) recommendations.

#### **Hearing**

An oral hearing of appeal FAC 223/2020 was held by the FAC on the 10th May 2021.

In attendance:

FAC Members; FAC Members: Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely and Mr Derek Daly.

Secretary to the FAC: Ms. Heather Goodwin

DAFM Representatives: Ms. Mary Coogan, Mr. Eugene Curran.

Applicant / Representative(s): [REDACTED]

Appellant: [REDACTED]

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN84403.

## Licence

The licence pertains to the afforestation of 4.99 hectares and associated 500 metres of fencing at Kinard East, Co Kerry. The afforestation area comprises two plots. In the first plot which has an overall area of 4.9 hectares a mixed deciduous woodland is proposed comprising 2.45 hectares of birch, 1.47 hectares of alder and 0.98 hectares of pedunculate oak. In the remaining plot which has an area of 0.09 hectares a bio area is proposed. It is also indicated by the applicant that the proposal is a native woodland establishment, no drainage is envisaged, no fertiliser will be used and manual vegetation control will be carried out. The project site is located within the sub catchment of the Emlaghmore\_010 River Sub Basin which has a moderate WFD status (2013-2018).

The inspector certification refers to the soil type underlying the project area as predominantly podzolic in nature. The slope is predominantly flat to moderate. The project area is crossed by / adjoins an aquatic zone(s). The vegetation type(s) within the project area comprise grass/rush.

The licence application was referred to Shannon Region Fisheries Board on the 6th March 2020 and the reply (Inland Fisheries Ireland) dated the 20<sup>th</sup> March 2020 indicated no objections and recommended conditions. The application was also referred to the DAFM archaeologist who responded indicating no objections.

An Appropriate Assessment screening was carried out and recorded on the file and seven Natura sites were found to be within 15kms of the project site. Ballinskelligs Bay and Inny Estuary SAC 000335 was screened out referring to *mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures, in particular. Support for the project expressed by* (with nothing further referred to in this regard). Deenish Island and Scariff Island SPA 004175, Iveragh Peninsula SPA 004154, Kenmare River SAC 002158, Killarney National Park, Macgillicuddys Reeks And Caragh River Catchment SAC 000365, Puffin Island SPA 004003 and Valencia Harbour/Portmagee Channel SAC 002262 were screened out for the same finding due to *the absence of any significant relevant watercourse(s) within or adjoining the project area and mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures in particular.*

Individually in relation to each Natura site it was indicated that furthermore, as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e., individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects. Screening concluded no likelihood of a significant effect on any European site, and Appropriate Assessment not required. An In-Combination report date stamped 17<sup>th</sup> Febuary 2020 indicates no effects on any Natura site.

The licence was issued on the 30<sup>th</sup> March 2020 subject to conditions. Condition no 13 refers to Additional Environmental & Silvicultural Conditions which include do not plant willow but allow it to



colonise naturally but subject to control, observe recommendations by the Inland Fisheries Ireland (IFI), Public Road Setback, Broadleaves 10m, Conifers 20m, and all guidelines to apply.

## **Appeal**

There is one appeal against the decision to grant the licence.

The grounds of appeal refer to:

- The conditions are vague difficult to understand and potentially misleading.
- It is unclear what species are proposed.
- Are there setbacks from third party properties similar to the setback from the road?
- Issues of discrepancies in mapping are referred to.
- It is unclear what Guidelines apply.
- Reference is made to different GPCs in the licence what are the difference between these classifications.
- Clarification is sought in relation to whether Scots Pines are or are not included in the Licence approval.
- Reference is made to the original objection where the visual impact on her property and an adjoining plot of land is outlined with loss of views, impact on daylight, and the devaluation of the value of the property.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. The Statement from Inspectorate indicates this plantation is for native woodlands. Having carried out an assessment in the field and on IFORIS the Inspector believes this plantation will enhance the environment and pose no threat to the local Natura sites. Iveragh Peninsula SPA 004154 has 5 listed bird species, 3 of which are primarily marine species (Fulmar, Kittiwake and Guillemot). The statement also sets out that the chough and Peregrine falcon nest and primarily frequent areas adjacent to cliffs, that there is no hydrological link to the Ballinskelligs Bay and Inny Estuary SAC 000335 and that the native trees will enhance rather than block any views.

An oral hearing was held of which all parties were notified and representatives of the DAFM, the applicant and the appellant attended. The DAFM presented an overview of their processing of the licence and clarified that the assessment was desk only, that the project was assessed and all data reviewed and there was no hydrological connection to a Natura site or qualifying interest and no issue in relation to archaeology. It was further asserted that the proposal was for a native woodland and no referral on the grounds of ecology was considered necessary.

The applicant indicated that he had recently purchased the land but had a long association with the area. He wished to plant a native woodland and was aware of the appellant's concerns. He asserted that the project will not negatively impact on the appellant and the lands are at a lower level than the appellant's land. He indicated that the primary views are to the south and not the north and that the proposal will be a well-managed woodland and will be better for rodent control.

The appellant restated her concerns and impacts on her property and on the lands adjoining which was intended as a second site for her children. She asserted that the views to the north were also important and she questioned what constituted a well-managed woodland.

At the hearing the FAC reviewed the inspector's determination and recommendation including in particular the responses in the Environmental Considerations in relation to section 1.2 relating to sensitivity to fisheries and the response was it was referred to IFI as it was identified on data sets as fisheries sensitive and IFI had no objections. In relation to percentage of forest cover at present in the townland in which the application is situated it was indicated that IFORIS had indicated no coverage (Qs 6 and 7 of certification). The issue of watercourses and aquatic zones was reviewed and it was indicated by the applicant's forester that there were wet areas within the site but that water is contained within the site and reference was made to the establishment of the bio area in this regard. The applicant's forester also referred to the presence of a vegetated drain at the very north of the site.

The issue of setback from dwellings, other boundaries including roads and hedgerows was raised. It was clarified that the licence application was not referred to Kerry County Council. The issue of connection with the Ballinskelligs Bay SAC was also raised. The nature of the species proposed was raised including Scots Pine and impacts arising from the proposed development on the appellant's property and lands. The applicant stressed that this was a proposed native woodland and not a conifer plantation, that this native conifer species would take a lot longer to grow and there would be no use of nutrients and fertiliser. The inspector restated his opinion that the project would visually enhance the area.

In addressing the appeal, the FAC, in the first instance examined the procedures followed by the DAFM before concluding that EIA is not required in this case. Afforestation is a class of development to which EIA applies and a preliminary screening conclusion in respect of EIA is required. The decision under appeal relates to an afforestation of 4.99 hectares, which is significantly sub-threshold for mandatory assessment under Irish Regulations (S.I. 191 of 2017) which set a threshold requirement for such mandatory assessment at 50 hectares.

In the assessment of the licence the DAFM carried out an assessment of the project under a range of criteria including cumulative effects, water, soils, species, ecology and visual impacts before concluding that EIA was not required. The FAC is satisfied that the DAFM had adequate information before it in respect of the characteristics of the proposed development, the location and the type and potential impacts arising from the proposed development to enable a screening for EIA and concurs with the conclusion that EIA is not required.

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 or projects, having regard to the conservation objectives of that designated site.



In considering the appeal the FAC examined the Appropriate Assessment screening undertaken by the DAFM. The FAC examined publicly available information from the EPA and NPWS and identified the same seven sites; Ballinskelligs Bay and Inny Estuary SAC 000335; Deenish Island and Scariff Island SPA 004175; Kenmare River SAC 002158; Iveragh Peninsula SPA 004154; Killarney National Park, Macgillicuddys Reeks And Caragh River Catchment SAC 000365; Puffin Island SPA 004003 and Valencia Harbour/Portmagee Channel SAC 002262 as the DAFM within 15km from the proposal. The FAC is satisfied that there was no need to extend the radius in this case.

The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for Appropriate Assessment. Details of other plans and projects were also examined.

As stated in the Inspectors Certification for AA screening, the conclusion for all sites was *"as set out in the in-combination assessment attached to this AA Screening, as there is no likelihood of the project itself (i.e. individually) having a significant effect on this European Site, there is no potential for it to contribute to any cumulative adverse effects on the site, when considered in-combination with other plans and projects"*. This finding is based on a conclusion that each site can be excluded, based on objective scientific information, that the project itself (i.e. individually) will not have a significant effect on this European Site due to (in six of the seven sites) the following findings: *"the absence of any significant relevant watercourse(s) within or adjoining the project area" and "mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures, in particular"*. In relation to the remaining European site, Ballinskelligs Bay and Inny Estuary SAC 000335, the findings state *"mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures, in particular" and "support for the project expressed by"* with no further details outlined in relation to this matter. The absence of any significant relevant watercourse(s) within or adjoining the project area is not referred to in the finding for Ballinskelligs Bay and Inny Estuary SAC 000335.

The Statement of Fact (SOF) submitted by the DAFM to the FAC presents the view that the project will pose no threat to the local Natura sites referring in particular to Iveragh Peninsula SPA 004154 which has 5 listed bird species, 3 of which are primarily marine species (Fulmar, Kittiwake and Guillemot). The SOF also states that there is no hydrological link to the Ballinskelligs Bay and Inny Estuary SAC 000335.

Having considered the AA screening carried out, the statement and conclusions reached in outlining reasons why the project will or will not have a significant effect on any of the European Sites and based on the written record on file, the FAC concluded that the record as available to it does not fully comply with legal requirements in relation to Appropriate Assessment screening.

In reaching this conclusion specifically in relation to Ballinskelligs Bay and Inny Estuary SAC 000335 the FAC finds that there is no clarification as to what is (or the meaning of) "support for the project as expressed by" to reach a conclusion to screen out the site.

The FAC also examined the issue of hydrological connection relating to Ballinskelligs Bay and Inny Estuary SAC 000335. Although the Inspectors (desk) assessment was that the site contained no relevant watercourses, the applicant's forester acknowledged at the oral hearing the presence of a vegetated drain at the at the very north of the site. It is noted by the FAC that on the biomap there is a drain flowing northwards which would appear to enter a watercourse which is part of the Emlaghmore\_010 River Sub Basin and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area the FAC concluded the project site has a direct hydrological connection to the Ballinskelligs Bay and Inny Estuary SAC 000335. The FAC, therefore, is not satisfied that the DAFM has complied with legal requirements as they relate to Appropriate Assessment Screening in outlining reasons why the project will or will not have a significant effect on this European Site.

In relation all European sites there is an absence of clarity in relation how the stated finding "*mandatory adherence to standard safeguards integral to the project, as set out in the application and in published Forest Service guidelines, requirements and procedures, in particular*" can be considered in screening out the Natura sites as this decision must be made without considering mitigations that may or may not be planned.

In relation to the contention by the appellant that the project adversely impacts on her dwelling and future potential of her lands the FAC notes that Forestry standards provide for adherence to minimum setbacks from dwellings and also in relation to roads. It is noted that no statutory view or prospect is impacted by the project and forestry is not precluded on the site. It is also noted that the project is for the planting of native trees. The FAC is not satisfied that the grounds as stated constitute a reason to preclude the afforestation of the lands.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, submissions received including at the oral hearing. The FAC is satisfied that a serious or significant error or a series of errors were made in making the decision in relation to this licence application. The FAC is therefore setting aside and remitting the decision regarding licence CN84403 to the Minister to undertake a new Appropriate Assessment screening of the likely significant effects on European sites of the proposed afforestation itself and in-combination with other plans and projects.

Yours sincerely,

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Derek Daly On Behalf of the Forestry Appeals Committee