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18<sup>th</sup> June 2021

**Subject:** Appeal FAC 028/2021 regarding licence KY07-FL0023

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.

#### **Licence Application**

Licence KY07-FL0023 is for the-felling of 19.86 hectares at Cloghane, Co Kerry, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 13<sup>th</sup> of January 2021 with conditions. The species to be felled are 100% Sitka Spruce. Replanting is proposed with the following species: 60% Sitka spruce, 30% Lodgepole pine - South Coastal, 5% Alder and 5% Birch with an open area of 0.99 hectares.

#### **Hearing**

A non-oral hearing of appeal FAC 026/2021 was held by the FAC on the 14<sup>th</sup> of May 2021.

In attendance:

FAC Members: Mr Donal Maguire (Chairperson), Mr. Vincent Upton, Mr. Derek Daly and Mr Iain Douglas

Secretary to the FAC: Ms. Marie Dobbyn

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to vary the decision of the Minister regarding licence KY07-FL0023.

#### **Background**

The project area is made up of three sub-compartments, comprising Sitka Spruce, planted in 1977 and 1978, forming closed canopy over the entire project area. The site is described as having a predominant soil composition of blanket peat with a gentle slope (15% or less) in an easterly direction and the habitat is conifer high forest (WD4). The project area is part of a larger conifer plantation of varying age and class. Agricultural grasslands lie to the north and to the east of the project area. An upland area supporting an expanse of heath habitat, namely Mount Bandon SAC, lies adjacent to the southern boundary of the project area.

An Appropriate Assessment pre-screening report dated the 15<sup>th</sup> of October 2020 accompanied the application in addition to an application form and mapping. It is indicated that an aquatic zone, the Drom West 23 River (order 1), flows through the southern portion of the project area in an easterly direction. A relevant watercourse flows through the site in a southerly direction flowing into the Drom West 23 River. The Drom West 23 River continues to flow east, constituting a hydrological connection with Mount Brandon SAC (downstream distance: approx. 0.2km). The Drom West 23 River continues to flow in an easterly direction, providing a hydrological link with Tralee Bay and Magharees Peninsula, West to Cloghane SAC (downstream distance: approx. 1.4km). The Drom West 23 River then discharges into Brandon Bay approx. 5km downstream from the project area.

The report which included an assessment of other plans and projects determined that the project will have direct, indirect or in combination effects on two European sites, namely Mount Brandon SAC (000375) and Tralee Bay and Magharees Peninsula, West to Cloghane SAC (002070) and that the project should therefore proceed to Appropriate Assessment (Stage 2). All other sites were screened out.

The Applicant also provided a Natura Impact Statement (NIS) for a project comprising of Road Construction CN85632 and also for the Clearfell and Reforestation KY07-FL0023 which is the subject of this appeal in which the qualifying interests and conservation objectives for each designated site are listed, there is an examination of potential threats and considers other plans and projects. Site specific mitigation measures are recommended relating to exclusion zones for machinery, silt and sediment control during felling and reforestation, extraction and removal of felled timbers, brash management, reforestation, chemical use, and monitoring and contingency planning. The NIS concludes

*It is objectively concluded, in light of the above objective scientific information, that, when the above mitigation measure(s) is / are implemented, the project, individually or in combination with other plans and projects, will not have any residual adverse effects on the integrity of any of the European Sites listed in Section 2 above, in view of their conservation objectives and in view of best scientific knowledge.*

#### **DAFM Assessment**

The proposal was referred by the DAFM to Kerry County Council and to Inland Fisheries Ireland. In relation to Kerry County Council no response was received. Inland Fisheries Ireland (IFI) in a response indicated no objections though conditions are recommended.

The DAFM undertook a screening for Appropriate Assessment dated the 3<sup>rd</sup> January 2021 and identified eight sites within 15km of the proposal and that there was no requirement to extend this radius in this case. Each site is considered in turn with its qualifying interests, special conservation interests and conservation objectives and reasons are provided for the screening conclusions. The DAFM considered that the same two sites as identified in the Applicant's prescreening report should proceed to Appropriate Assessment. The DAFM recorded an Appropriate Assessment Determination which refers to the screening process and the NIS submitted. It describes a number of mitigation measures to be implemented through the licencing process in relation to the protection of adjoining / downstream aquatic based species and habitat and is presented in the form of conditions to be attached to any licence issued.

The conditions recommended in the AAD are consistent with the recommended conditions in the NIS by the application of appropriate water quality protection measures including extended setbacks; the planting of species; provision is also made in relation to identified water hot spots; the



exclusion of machinery from the identified exclusion areas and operational procedures in relation to the use of machinery. Measures are also outlined in relation control of sediment and the use of fertiliser. Measures have also been set out for the protection of the otter including specifying by condition an exclusion zone for machinery and timber stacking. Measures by way of conditions are also outlined in relation to the protection of *Trichomanes Speciosum* (Killarney Fern) / blanket bogs / Northern Atlantic wet heaths with *Erica Tetralix* / European dry heaths. The AAD concludes,

*Therefore, the Minister for Agriculture, Food & the Marine has determined, pursuant to Regulation 42(16) of the European Communities (Birds and Natural Habitats) Regulations 2011 (as amended) and Regulation 19(5) of the Forestry Regulations 2017 (as amended), 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 was also carried out an In-Combination report with a date of the 5<sup>th</sup> January 2021 which was included on the file. It states that this project lies in a rural landscape in Cloghane, Co Kerry in the River Sub-Basin Cloghane (Kerry)\_010. The River Sub-Basin Cloghane (Kerry)\_010 has approximately 19% forest cover, which is higher than the national average of 11%. At 19.86 ha the project is considered medium in scale. Forestry activity (including afforestation, forest roading and felling) within the sub-basin, which have either been submitted and still under evaluation, licenced / approved or completed in the last 5 years, are listed in the report. A number of developments in the River Sub Basin Cloghane (Kerry)\_010 which have been or were in the process of being granted planning permission over the last 5 years are also listed. It concludes there is therefore no potential for the proposed works to contribute to any cumulative adverse effects on European sites, when considered in-combination with other plans and projects.

The licence was issued on the 13<sup>th</sup> January 2021 subject to conditions which reflect the site specific conditions stated in the AAD and also general standard conditions.

## **Appeal**

There is a single appeal against the decision to grant the licence. The grounds of appeal are summarised as follows:

- The FAC does not have an independent and impartial role as required by law.
- 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. 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 designated site concerned.
- Generic mitigations do not exclude the possibility of residual impacts and no alternatives to restocking have been assessed
- This project lies within the River Sub-Basin Cloghane (Kerry)\_010. There is no evidence that this waterbody has been assigned a water quality status in line with the Water Framework Directive (WFD) by the EPA. Based on a recent High Court judgement the Forest Service (FS) should not have authorised this licence.



- A proxy evaluation does not constitute compliance with the WFD. Specific steps in the architecture of the WFD must be followed. There is no evidence that the Forestry Service (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.

In response, the DAFM state as follows:

- The decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act. The Department is satisfied that all criteria outlined in its standards and procedures policy have been adhered to in making a decision on the application.
- The FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process as mandated and required under Irish law
- Sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands. The site-specific mitigations identified in the AA Determination were attached as conditions of licence issued for the felling and reforestation project licenced as KY07-FL0023 and the DAFM submits that the conditions attached to the licence are consistent with best forest practice, national forest policy and protection of the environment.
- The Hyland JR decision is dated the 10<sup>th</sup> January 2021. The licence decision pre-dates this decision and the appeal was submitted on 29<sup>th</sup> January 2021.
- DAFM applies a wide range of checks and balances during the evaluation of felling licence applications in relation to the protection of water. Adherence to specific measures 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 conditions to the licence, ensure that the proposed development will not result in any adverse effect on any European site not on water quality or on waterbody status, regardless of hydrological connectivity.

#### **FAC Hearing**

At a hearing of the appeal held on 14 May 2021, the FAC considered the record of the decision, written grounds of appeal and response received from DAFM.

The appellant contends that the FAC does not have an independent and impartial role as required by law. There are no other arguments presented to substantiate this contention. The FAC operates under the Agricultural Appeals Act 2001, as amended and, as required by the legislation, is independent and impartial in the performance of its functions.

The Appellant contends 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 project (clear-fell and restocking) was subject to Appropriate Assessment screening and, following the submission and assessment of a Natura Impact Statement (NIS), was the subject of an Appropriate Assessment Determination (AAD) by the DAFM. In addition, a referral submission from Kerry Co Council and IFI was sought and considered prior to the making of the decision to grant the licence. The FAC considered that the information provided by the Applicant through the application, pre-screening report and NIS is sufficiently detailed to facilitate the assessment of the application by the DAFM. The replanting of the lands is identified and described in the documentation and certain



measures are included that are specific to the replanting phase. The AAD concludes that the integrity of a European site will not be impacted by the proposal as licenced having regard to the qualifying interests and conservation objectives of such sites and having considered the potential for in-combination effects. In such a circumstance, the DAFM were not obliged to consider alternatives to the proposal. Based on the information before it, the FAC finds no reason to conclude that the proposed restocking was not properly assessed and that there is no obligation to consider alternatives to the proposed restocking on the project lands.

The appellant contends that generic mitigations do not exclude the possibility of residual impacts. The FAC noted that the licence issued contains 34 conditions in total. Conditions 1-7 inclusive and 33 and 34 are of a standard nature. The remaining additional conditions are attached for reasons relating to the protection of water quality, the protection of European sites during harvesting and restocking, protection of soil stability, to minimise disturbance and to protect established Habitat in designated European sites. Many of these conditions contain site specific requirements. Considering the information before it, the FAC finds no basis for the appellant's contention on this issue.

The FAC is satisfied that the procedures adopted by the DAFM are generally appropriate and in keeping with obligations on public authorities under Article 6 of the EU Habitats Directive. However, in considering the record of the decision, the FAC noted that the Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009) were not transferred to the licence conditions while being identified as necessary in the Appropriate Assessment Determination. While of a clerical nature, the FAC is satisfied that this represents a serious error as it relates to the mitigation measures identified in the Appropriate Assessment. The FAC is therefore varying the licence decision to include the Forestry and Otter guidelines with the guidelines and documents with which the proposal must adhere in licence condition 34.

The appellant contends that the site and project lies within the River Sub-Basin Cloghane (Kerry)\_010 and that there is no evidence that this waterbody has been assigned a water quality status in line with the Water Framework Directive. Based on a recent High Court judgement the Forest Service (FS) should not have authorised this licence. The 'Hyland' judgment, delivered on 15 January 2021, 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, 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, the Cloghane River, but does not submit any evidence to demonstrate how or why this would be the case.

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 include the following:

- The required width of the water setback, to be applied and maintained at reforestation is 20 metres.

- 20% of the aquatic buffer zone is to be pit planted with broadleaves along the setback border and no trees are permitted to be closer than 10 metres of an Aquatic Zone.
- Retaining existing native broadleaves present within the water exclusion zone, where safe to do so.
- Establishment of a clearly marked exclusion zone of 10 metres around identified water hot spots and extraction routes are to be planned to avoid hotspots.
- Location of timber landing bays at least 50m from nearest aquatic zone.
- Brash and branch wood to be utilised to create and maintain brash mats along all machine routes during harvesting operations.
- No brash mats within environmental setbacks along aquatic zones
- Historic drains with direct connectivity to relevant watercourses or aquatic zones to be identified and blocked before commencement of operations
- Avoidance of machinery crossing internal drains and watercourses will be not be directly traversed by machines.
- Appropriate sediment trapping measures must be installed and maintained both during and following operations to provide sufficient buffering before reaching setback area and geotextile silt traps should be installed in new and existing drains.
- Historic mound drains with direct connectivity to relevant watercourse or aquatic zones must be identified prior to commencement of operations and these pathways must be blocked with ongoing monitoring during operations to ensure a pathway does not develop.
- No discharge of roadside drains into aquatic zones.
- Maintenance of internal and roadside sediment traps.
- Restriction on fertiliser application to elemental phosphate at no more than 42kg/ha.
- Storage of chemicals, fuel and machinery oils etc. at a dry, elevated location onsite at least 50m from nearest aquatic zones.
- During felling, extraction and reforestation, application of a 10m exclusion zone from an aquatic zone on or adjoining site.

The decision before the FAC relates to a felling licence granted by the Minister for Agriculture, Food and the Marine under the Forestry Act 2014. The evidence before the FAC would suggest that the operations would not involve any exploitation of a waterbody, while the FAC understands that poorly sited and managed forestry operations, including felling, have been identified as a potential source of water pollution by the EPA and DAFM, including through sedimentation, eutrophication and acidification. Regarding the specific decision, the felling operations would occur over a limited period of time while provision is made for long term setback from any waterbodies at the replanting stage. In addition to the specific measures set out above, the licence conditions include adherence with the DAFM's Felling & Reforestation Standards (v. Oct. 2019) and Felling & Reforestation Policy (DAFM, 2017) which require other good practice measures.



In summary, the FAC considers that there is no evidence before it that the DAFM have attempted to assign a proxy status to a waterbody or put in place mitigation measures to reduce impacts on such a status. It appears to the FAC that the operations would be required to adhere to a range of conditions designed to prevent impacts on waterbodies and water quality generally. It is contended by the DAFM that the conditions include operational measures to prevent direct and indirect impact on water quality arising from the operation. The grounds do not articulate how a waterbody or water quality might be impacted in this case or contest the effectiveness of the proposed measures. The FAC considers that there is no evidence before it that a waterbody may be affected by the authorisation, for the purposes of the Water Framework Directive. Taking all of the above into consideration, the FAC is not satisfied that the Minister has erred in making the decision to authorise this application.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received. The FAC is satisfied that a serious error was made in making the decision. The FAC is thus varying the decision of the Minister regarding licence KY07-FL0023 in line with Article 14B of the Agricultural Appeals Act 2001, as amended, to include adherence with the Forestry and Otter guidelines (Department of Agriculture, Fisheries and Food, 2009) in licence condition 34. In deciding to vary the decision, the FAC considered that the proposed development would be consistent with Government Policy and Good Forestry Practice.

Yours sincerely,

A black rectangular redaction box covering the signature of Derek Daly.

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Derek Daly On Behalf of the Forestry Appeals Committee

