



[REDACTED]

1 June 2021

Subject: Appeal FAC 020/2021 regarding licence KY10-FL0119

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

Licence KY10-FL0119 for the clear-felling of 14.59ha in Coomshanna Co Kerry was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 8th of January 2021 with conditions.

Hearing

A non-oral hearing of appeal FAC 020/2021 was held by the FAC on the 11th of May 2021.

In attendance:

FAC Members: Mr. Des Johnson (Chairperson), Mr. Donal Maguire, Mr. Dan Molloy
and Mr Luke Sweetman

Secretary to the FAC: Mr. Michael A Ryan

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 affirm the decision of the Minister regarding licence KY10-FL0119.

Background

The proposal is for the clear-felling and restocking of a stated site area of 14.59ha at Coomshanna, Co Kerry. An Appropriate Assessment Pre-screening Report dated 30.9.2020 accompanied the application. This states that the project area consists of a plantation of conifer high forest. The project area is made up of two sub compartments planted in 1964, comprising mostly Sitka spruce with Lodgepole pine (inland) and Noble fir occurring to a lesser extent, forming a closed canopy over the entire project area. There are two aquatic zones and one relevant watercourse within the project area.

The first aquatic zone (Order 1), is an unnamed river (EPA RWB code-IE_SW_22F270920, segment code-22_2649), which flows through the southern portion of the project area in a north westerly direction before merging with another aquatic zone (Order 2) (EPA RWB code-IE_SW_22F270920, segment code-22_2618). A second aquatic zone (Order 1), is an unnamed river (EPA RWB code IE_SW_22F270920, segment code-22_2612), which flows through the northern section of the project area in a north westerly direction before also merging with another aquatic zone (Order 2) (EPA RWB code-IE_SW_22F270920, segment code-22_2618). A relevant watercourse flows through the southern portion of the project area in a north westerly direction before merging with an unnamed river (EPA RWB code-IE_SW_22F270920, segment code-22_2649), which lies north west of the project area. The unnamed river (EPA RWB code-IE_SW_22F270920, segment code-22_2618) flows for a short distance north west before merging with another unnamed river (EPA RWB code-IE_SW_22F270920, segment code-22_591) that flows north providing a hydrological connection to Iveragh Peninsula SPA (approx. 2.2km downstream of the project area) before discharging into Dingle Bay.

The project area is located on blanket peats, on a moderate slope, sloping in a westerly direction. The project area is part of a wider conifer plantation of various ages 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 project area is accessible via the existing forestry roads.

The DAFM referred the application to Kerry Co Council on the 13.08.2020 and to Inland Fisheries Ireland (IFI) on the 27.11.2020. There is no record of response from either body.

The applicants prepared a Natura Impact Statement (NIS) dated 30.09.2020. Following on from the Appropriate Assessment Pre-screening Report, the NIS carries out a Stage 2 Appropriate Assessment in respect of two Natura 2000 sites, these are: Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC IE0000365, because of possible effects due to the direct hydrological connectivity that exists between the project area and this SAC and the Iveragh Peninsula SPA IE0004154, because of possible effects due to the proximity of potential habitat for the species listed as the Special Conservation Interests of this Natura site. The qualifying interests and conservation objectives for each designated site are listed and there is an examination of potential threats. 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.

An Appropriate Assessment Determination (AAD) is dated 25.11.2020. The conditions recommended in the AAD are consistent with the recommended conditions in the NIS.

Measures have been set out for peregrine including broadleaf planting along the aquatic zone setback boundaries providing connectivity and a haven for prey species for the European site. Although adjacent to the European site, the aquatic zone separation means no explicit movement restrictions are required. Appropriate aquatic zone and watercourse measure protections have also been set out, including aquatic buffer zone planting, specific otter measures and good practice aquatic measures for the relevant designated features. A 20m setback is required in the interest of the protection of water quality and to ensure the protection of the European sites during harvesting and restocking operations. The AAD concludes that the proposed development individually, or in combination with other plans and projects, will not adversely affect the integrity of any of the listed European sites, having regard to their conservation objectives and subject to compliance with recommended site-specific conditions. The mitigations relate to the protection of the adjoining/downstream aquatic based species and habitat, the Peregrine and the Otter.

A DAFM in-combination report, dated 25.11.2020, was included on the file. It states that this project lies in the River Sub Basin Faha (Kerry)_010. The River Sub Basin Faha has approximately 14% forest cover which is higher than the national average of 11%. At 14.59 ha the project is considered medium in scale. Forestry activity including afforestation, forest roading and felling, in the last 5 years and are listed. These are subject to environmental protection measures. A number of non-forestry related developments in the River Sub Basin Faha (Kerry)_010 have been granted planning permission over the last five years and these are listed also and are also subject to appropriate environmental protection measures.

The licence was issued on 08.01.2020 and is subject to standard conditions plus a number of site-specific conditions as per the AAD, including a 20m setback at reforestation.

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 restocking of the site has not been assessed, other than basic operational details. This is a serious error in the processing of the licence. The Appropriate Assessment does not contain complete, precise and definitive findings capable of removing all reasonable scientific doubt as to the effects of the works proposed on designated sites.
- Generic mitigations do not exclude the possibility of residual impacts and no alternatives to restocking have been assessed

- The site is in the River Sub basin Faha (Kerry)_010. There is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive (WFD). Based on a recent High Court judgment, the licence should not have been granted
- 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 EPA has been consulted regarding the status of the waterbody.

In response, the DAFM state as follows:

- The FAC is independent of the DAFM and carries out its functions in an independent and impartial manner in regard to the appeal process
- Sufficient information was provided to allow for an assessment of the potential impacts of the replanting of the lands
- The Hyland JR decision is dated 10.01.2021. The licence pre-dates this. The appeal was submitted on 29.01.2021.
- 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 non-oral hearing

At a hearing of the appeal held on 11 May 2021, the FAC considered 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 NIS, was the subject of an AAD by the DAFM. In addition, a referral submission from Kerry Co Council was sought and considered prior to the making of the decision to grant the licence. Based on the information before it, the FAC finds no reason to conclude that the proposed restocking was not properly assessed. The FAC are satisfied that the procedures followed leading to the making of the decision to grant the licence were consistent with 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 issued contains 31 conditions in total. Conditions 1-7 are of a standard nature. The 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, and to minimise disturbance and 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 appellant contends that no alternatives to restocking have been considered. In this case, the proposed development has been subject to Appropriate Assessment screening and Determination and this concluded that no significant effects would arise on any Natura 2000 site, having regard to the qualifying interests and conservation objectives of such sites and having considered the potential for in-combination effects. In such circumstances, the FAC concludes that there is no obligation to consider alternatives to the proposed restocking on the project lands.

The appellant contends that the site is in the River Sub basin Faha, and that there is no evidence that this waterbody has been assigned a status in line with the Water Framework Directive. Based on a recent High Court (Hyland) judgment, the licence should not have been granted. 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, Faha 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:

- Water setback to be applied and maintained during reforestation is 20m
- 20% of buffer zone to be pit planted with broadleaves. No trees permitted within 10m of an aquatic zone
- Establishment of a clearly marked exclusion zone of 10m around identified water hot spots

- Location of timber landing bays at least 50m from nearest aquatic zone
- 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
- Geotextile silt traps to be installed in new and existing drains
- No discharge of roadside drains into aquatic zones
- 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.

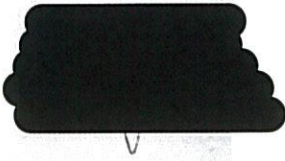
The decision before the FAC relates to a felling licence granted by the Minister for Agriculture, Food and the Marine under the Forestry Act 2014. The evidence before the FAC would suggest that the operations would not involve any exploitation of a waterbody while the FAC understands that poorly sited 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, the submitted grounds of appeal, and submissions received. The FAC is not satisfied that a serious or

significant error or a series of errors was made in making the decision or that the decision was made without complying with fair procedures. The FAC is thus affirming the decision of the Minister regarding licence KY10-F0119 in line with Article 14B of the Agricultural Appeals Act 2001. In affirming the decision, the FAC considered that the application would be consistent with Government Policy and Good Forestry Practice.

Yours sincerely

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Donal Maguire, on Behalf of the Forestry Appeals Committee

