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12 May 2021

**Subject:** Appeal FAC 641/2020 regarding licence CN83834

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 14A (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 CN83834 for afforestation of 5.89ha, in Banard, Co Kerry was approved by the Department of Agriculture, Food and the Marine (DAFM) on 30 July 2020.

#### **Hearing**

An oral hearing of appeal FAC 641/2020 of which all parties were notified, was held by a division of the FAC on 4 May 2021.

#### **In attendance**

FAC Members: Mr Des Johnson, Mr Donal Maguire and Mr Dan Molloy  
Secretary to the FAC: Michael Ryan  
Appellants: [REDACTED]  
Applicant: [REDACTED]  
DAFM Representatives: Ms Mary Coogan and Mr Michael O'Brien

#### **Decision**

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM and the grounds of appeal, submissions made at the Oral Hearing and all other submissions, before deciding to affirm the decision to approve the licence (Reference CN 83834).

The proposal is for afforestation on a stated site area of 5.89ha (2 plots) and 250m fencing at Banard, C. Kerry. Proposed stocking is Sitka spruce (5.01ha) and Broadleaves (.88ha). The

Broadleaves are to be focused on public roads and house setbacks. Soils are stated to be mineral and the site is exposed and at 100 – 110m elevation. The lands are enclosed and with a northerly aspect. Mounding is proposed and planting method is angle notch, pit and slit. Silt traps would be provided. No fertiliser is required and there would be herbicide control in years 1 and 2. The site is crossed by powerlines.

The Inspector's certification states that the application was desk and field assessed. The site does not contain or adjoin an aquatic zone. It is not prone to flooding, is not acid or fisheries sensitive. The site is free of shell marl or highly calcareous soils. It is not in an area of high nutrient sensitivity and not in a Freshwater Pearl Mussel catchment. There are no archaeological sites on the project lands and there are no High Amenity issues to address. It is stated that there is 23.97% forest cover in the townland and 0.88% forest cover in the underlying waterbody. A screening for Appropriate Assessment was undertaken of Natura 2000 sites within a 15km radius, and 8 sites were assessed. All sites were screened out - Blackwater River (Cork/Waterford) SAC, Castlemaine Harbour SAC, Killarney National Park SPA, Killarney National Park, Macgillycuddys Reeks and Caragh River Catchment SAC, Mullaghanish Bog SAC, Mullaghanish to Musheramore Mountains SPA, Sheheree (Ardagh) Bog SAC and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. Reasons given for the screening conclusion for the SACs are that the project area is downstream from the Natura 2000 site and lack of hydrological connection, and unsuitability of project area for use by any qualifying interest of the Natura 2000 site. The reasons given for the screening out of the SPAs are the unsuitability of the project area for use by any species listed as a qualifying interest of the Natura 2000 site and reference to the DAFM Bird's table. An in-combination report dated 27.07.2020 focuses on the River Sub Basin Blackwater (Munster)\_040. Non-forestry projects listed include dwellings, sheds/units, and a commercial building. Forestry projects (since 2017) listed are afforestation (5), forest roads (5), and private felling (6). The DAFM confirmed that the in-combination projects were considered in an assessment prior to the decision being made to grant the licence. It is stated that the River Sub Basin has approximately 15% forest cover.

The DAFM referred the application to the National Parks and Wildlife Service (NPWS) and Inland Fisheries Ireland (IFI). There is no response recorded from the NPWS. The IFI state that the site is phosphorus sensitive and specific measures are required to ensure that phosphorus does not discharge to waters. Conditions are recommended including a minimum of 10m buffer for all watercourses with vegetation to be left intact, no machinery movement along the buffer zone, mound drains to drain into the buffer zone and contour mounding to be followed, existing drainage systems to be left as at present, codes of Good Practice to be followed, and no solids or phosphorus to be discharged to waters.

The DAFM requested further information on 20.05.2019. This related to a revised Bio Map/Operational Map showing the location of Broadleaves, mounding direction, fire break in the southern section, neighbouring bogland and ESB lines. The revised Bio Map was submitted, considered by the DAFM and is on file.

The licence issued on 30.07.2020. The development is to be completed not later than 30.07.2023. The licence is subject to standard conditions plus:

- Broadleaf component must consist of rows of downy birch and pedunculate oak planted at the edge of the plantation
- Adherence to forest biodiversity, water and environmental guidelines
- Adherence to Inland Fisheries letter dated 24.05.2019
- Adherence to forest and landscape guidelines
- All guidelines to apply.

The species approved for Plot 1 is 1.9ha Sitka Spruce and 0.33ha Broadleaves, and for Plot 2 is 3.11ha Sitka Spruce and 0.55ha Broadleaves.

There is one appeal against the decision to grant the licence. In summary, the grounds of appeal contend that there is a breach of Article 2(1) and 4(3) of the EIA Directive. A number of criteria in Annex III of the Directive do not form part of the screening assessment. The Inspector's EIA screening determination is inadequately reasoned. There is an error in law in the processing of the application. The details of the Inspector's Certification and the EIA screening on IFORIS contain contradictions. The checkbox responses of the Inspector in respect of EIA screening contains errors. An adequate EIA screening has not been conducted. There is insufficient evidence of consideration of impacts on protected species and habitats. The requirements of Regulation 5(2) of the Forestry Regulations have not been met. The application was not legally complete. The application lands are within a referral zone for the NPWS and there is no evidence of referral to that body. The Stage 1 Appropriate Assessment conclusion is not legally valid. Licence conditions do not provide for the strict protection of Annex IV species in their natural range, prohibiting deliberate disturbance of these species, particularly during periods of breeding, rearing, hibernation and migration. Licence conditions do not provide for the strict protection of all species of wild birds, prohibiting in particular, destruction of, or damage to their nests, eggs or removal of their nests.

In response, the DAFM state that Annex III criteria of the EIA Directive were adequately considered. The reasons for the Inspector's determination that EIA is not required are given. A detailed list of existing or approved projects was considered and the legal requirements of Article 4(3) of the EIA Directive were met.

An Oral Hearing was convened on 04.05.2021 and all parties were invited to attend. The FAC sat remotely. The DAFM participated remotely. The applicant and the appellant did not attend. The DAFM detailed the procedures followed in the assessment of the application and the making of the decision. It confirmed that the application was desk and field assessed. The Appropriate Assessment screening followed the DAFM procedures and all Natura 2000 sites examined were screened out for Stage 2 assessment and reasons given for the screening conclusion. Information ascertained from the DAFM Bird's Table included habitat types for the Qualifying Interests and the implications of separation distances. The Broadleaf component of the licensed development would be most suitable around the edges of the site. All IFI requirements had to be complied with under the terms of the licence. There is no watercourse on the site. Responding to FAC questions, the DAFM stated that compliance with the IFI recommendations would be checked at Form 2 stage. The site is relatively flat but would drain to the south-east into a scrub area, and this would contain any sediment. All drains on the site were dry at the time of inspection but under heavy rainfall collected water would drain to the heavily vegetated area to the south of the site. There are no existing hedgerows on the

main section of the site and the only hedgerow is at the southern end. The hedgerows appeared to have been removed years ago – predating ortho imaging of the site.

Addressing the written grounds of appeal, the FAC considered firstly, the requirements of the EIA Directive. The proposed development is of a class covered by the provisions of the Directive. It is significantly sub-threshold for mandatory EIA but requires screening. The FAC considered that the DAFM had adequate information before it in respect of the characteristics of the project, the location, and the type and characteristics of potential impacts for the purposes of EIA screening. The Inspector's certification assessed likely impacts arising from the proposed development under a broad range of headings and based its conclusion on this assessment. Based on the information before it, including the written submissions and evidence ascertained at the Oral Hearing, the FAC finds no reason to conclude that the DAFM screening for EIA was inadequate or that the conclusion reached was not correct. The FAC concluded that the proposed development alone, or cumulatively with other plans or projects in the vicinity, would not be likely to have a significant effect on the environment as defined in Directive 2011/92/EU as amended by Directive 2014/52/EU. The FAC further concluded that the decision to grant the licence was not in breach of the provisions of the EIA Directive.

The appellant contends that the application site is within a referral zone for the NPWS and that there is no evidence of any referral to that body. Information before the FAC indicates that the application was referred to the NPWS but that no response is recorded.

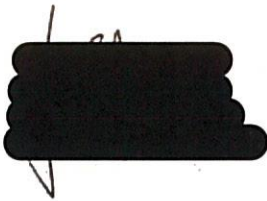
It is contended that the Stage 1 Appropriate Assessment screening conclusion is not legally valid but there is no elaboration of this contention. The FAC considered the procedures adopted by the FAC in carrying out Stage 1 screening as detailed above. The FAC noted that Natura 2000 sites within a 15km radius were assessed and considered that there was no convincing reason to suggest that a wider radius should have been applied, having regard to the nature and scale of the proposed development. The FAC noted that each of the listed sites had been assessed, having regard to their qualifying interests and conservation objectives together with the potential for adverse effects arising from the proposed development. Reasons for the screening conclusion were given in each case. Based on the information before it, the FAC considered that the procedures followed in the DAFM screening were consistent with the requirements of Article 6(3) of the Habitats Directive and that the overall conclusion is soundly based.

It is contended that licence conditions do not provide for the strict protection of Annex IV species in their natural range, prohibiting deliberate disturbance of these species, particularly during periods of breeding, rearing, hibernation and migration. No details are given of the Annex IV species referred to, and no convincing reason provided to indicate that the proposed development would have any adverse impact on any Annex IV species. It is also contended that the licence conditions do not provide for the strict protection of all species of wild birds, prohibiting, in particular, destruction of, or damage to their nests, eggs or removal of their nests, but no evidence is provided in respect of the wild bird species concerned or reasons why the proposed development would adversely impact on any wild bird species.

The appellant contends that the requirements of Regulation 5(2) of the Forestry Regulations have not been met and that the application was not legally complete. Having considered the information submitted by the applicant, including the response to the DAFM request for further information, the FAC concluded that the information before the DAFM was adequate for the purposes on making its decision.

In deciding to affirm the decision to grant the licence, the FAC concluded that there was no significant or serious error or series of errors in the making of that decision and that it was made in compliance with fair procedures. The FAC concluded that the proposed development would be consistent with Government Policy and Good Forestry Practice.

Yours sincerely

A black rectangular redaction box covers the signature area. A handwritten mark, possibly the initials 'DJ', is visible above the redaction. A small arrow points downwards from the bottom left corner of the redaction box.

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Des Johnson

On behalf of the Forestry Appeals Committee

