



5<sup>th</sup> October 2022

**Subject:** Appeal FAC 071/2022 relating to Licence CN89533

Dear Sir or Madam,

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 14A (1) of the Agriculture Appeals Act 2001 (as amended) has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Decision**

Having regard to the evidence before it, including the full Department of Agriculture, Food and the Marine (DAFM) record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM, all materials on file, and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence CN89533.

#### **Licence**

Licence CN89533 is for 9.75 Ha. of GPC 3 afforestation in the townland of Ballynahulla, Co. Kerry and was submitted to the DAFM on the 27<sup>th</sup> of September 2021. On the 14<sup>th</sup> of June 2022 the DAFM issued a notice granting the licence with conditions including the retention of all existing trees and hedgerows on the site.

#### **Forestry Appeals Committee.**

The appeal was considered at the sitting of the FAC held on the 21<sup>st</sup> of September 2022. The FAC members present were: Mr. John Evans (Deputy Chairperson), Mr Vincent Upton, and Mr. Iain Douglas. Also in attendance was the Secretary to the FAC: Mr. Michael Ryan.

#### **Background**

The proposal consists of the planting of 9.75 Ha. of GPC 3 forestry in three plots. Plot 1 Sitka spruce and Additional Broadleaves, Plots 2 & 3 are bioplots. The site is some 160 m west of the Munster Blackwater River and separated from it by a public road and agricultural land.

The licence was not referred to any statutory body or the local authority.

The application documents included a Pre-Approval Submission Report, a Bio Diversity/ Operational Map, a Location Map, Site Notice, a photograph of the Site Notice in Situ, a Fencing map, an Appropriate Assessment Pre-Screening Report and a Natura Impact Statement (NIS).

On the DAFM file there is an Inspector's Certification Report, an Appropriate Assessment Screening Report (AASR), an Assessment to Determine EIA Requirement and an In-combination Statement.

The District Inspector's AASR of the 8<sup>th</sup> of June 2022 determined that all four Natura 2000 identified as being within 15k of the site should be screened out.

The Inspector's Certification Report dated the 8<sup>th</sup> of June 2022 recommends that the licence be approved subject to three conditions; all existing trees and hedgerows within the site shall be retained; the submission of any necessary additional documentation to enable the DAFM to verify compliance with the Licence and attached conditions and the carrying out and completion of the afforestation in accordance with the measures set out in the Environmental Requirements for Afforestation and the Forestry Standards Manual.

The Inspector's Assessment to Determine EIA Requirement dated the 8<sup>th</sup> of June 2022 concludes that the proposed afforestation is not required to undergo EIA.

The licence was subject of both a Desk and Field Inspection. The Field Inspection took place on the 9<sup>th</sup> of February 2022.

There were no third-party submissions on the licence.

## **Appeal**

There is one third-party appeal against the decision to approve the licence.

The grounds of appeal are summarised as follows:

1. Undue Process.

The licence was issued on the 14<sup>th</sup> June 2022 but the decision was not known to the public until 15<sup>th</sup> June 2022. The Aarhus Convention Compliance Committee found that, in a NI case, that the timeframe for the public to challenge a decision should be calculated from the date the decision becomes known to the public and not the date of the decision itself. The delayed publication of the decision to award this licence within the already narrow window is manifestly unfair and contrary to due process.

2. AA Screening.

The AA Screening Determination for this project is flawed for the two Natura Sites.

*SPA 004161 (the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA)*

The DAFM Appropriate Assessment Screening Report in screening out Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA has not complied with the "screen out scenario" in the DAFM "AA Screening protocol" for the Hen Harrier (which the FAC has taken to mean the Bird Foraging Table version 6<sup>th</sup> Jan. 2020) in spite of the fact that the NIS identifies that the site is less than 1km from the SPA and that there may be suitable foraging habitat on the site.

The reasons given in the for screening out the SPA in the DAFM AASR are not relevant to the Qualifying Interest of the SPA ie. the Hen Harrier.

*SAC 002170 (the Blackwater River (Cork/Waterford) SAC)*

The project site is hydrologically connected to the Blackwater River (Cork/Waterford) SAC and a significant effect cannot be eliminated. The test for degree of certainty required to screen out this project for a possible impact on the SAC has not been met.

## **Hearing**

At the sitting, the FAC it had before it the full DAFM record of the decision, the notice and grounds of appeal and a Statement of Fact (SoF) provided by the DAFM and all materials on file. Having regard to the particular circumstances of the appeal, the FAC considered that it was not necessary to conduct an oral hearing in order to properly and fairly determine the appeal.

## **DAFM Statement of Fact provided to the FAC**

The SoF provided by the DAFM dated 11<sup>th</sup> of July 2022 confirms the administrative details of the licence application and indicates that the licence application was desk assessed and a field assessment was carried out on the proposed afforestation on the 9<sup>th</sup> February 2022. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on this licence application. The SoF included a statement dated the 11<sup>th</sup> February 2022 from the Forestry Inspector confirming that the AASR was carried out using the procedures of November 2019, that the standard operating procedures were applied, and contained a response to the grounds of appeal which recommended that ***“the afforestation licence be remitted back to the Minister for reassessment to carry out a new AA screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites, in combination with other plans and projects”***.

## **Consideration by FAC.**

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the DAFM, and other on-line services. Aerial photography and mapping, including that submitted with the application show that the vegetation on the lands appears to be primarily agricultural grassland with hedgerows, scrub and semi natural woodland and semi natural grassland. Soil mapping shows the soil underlying the site as Poorly Drained Mineral soils.

## **Appropriate Assessment.**

The FAC noted that the applicant’s AA Pre-Screening Report dated 7<sup>th</sup> of May 2021 identified 4 Natura 2000 sites within 15Km of the proposed afforestation; The Blackwater River (Cork/Waterford) SAC (Site Code 2170); Killarney National Park, Macgillicuddy’s Reeks and Caragh River Catchment SAC (Site Code 0365); Lower River Shannon SAC (Site Code 2165) and the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (Site Code 4161) and determined that there was no likelihood of the proposed afforestation project having a significant effect, individually, on the Blackwater River (Cork/Waterford) SAC, the Killarney National Park, Macgillicuddy’s Reeks and Caragh River Catchment SAC and the Lower River Shannon SAC. The applicant’s AA Pre-Screening Report did identify that there was a possibility of the project itself having a significant effect on the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA, namely the Hen Harrier Qualifying Interest (QI) of the SPA. The applicant proceeded to prepare an NIS for the Stack’s to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The NIS identified a series of mitigation measures for the Hen Harrier and badgers and included an In-combination Statement. The NIS concluded that, when the mitigation measures are implemented, the project individually or in-combination with other plans

and projects, would not have an adverse effect on the integrity of the SPA, in view of its conservation objectives and in view of best scientific knowledge.

The FAC noted that the DAFM's AASR of the 8<sup>th</sup> of June 2022 determined that all four Natura 2000 identified as being within 15k of the site were screened out on the basis of them being in a separate water body catchment to that of the project site, with no upstream connection, and the subsequent lack of any hydrological connection and/or the absence of any significant relevant watercourse(s) within or adjoining the project site.

The FAC noted that according to the Bird Foraging Table (version 6<sup>th</sup> Jan. 2020) used by the DAFM to screen out the possibility of any significant effect arising from the project *itself* (i.e. 'individually') in the case of the Hen Harrier the "screen out scenarios" for afforestation are (i) For afforestation, where the project is over 11 km from the SPA or (ii) where the project is less than 11 km from the SPA, not overlapped by a Red Area (High Likelihood of Nesting Area) and does not contain the described foraging habitat. The FAC further noted that the site is located c. 600m south of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA and that the NIS states that the proposed afforestation lands may provide some suitable foraging (and possible nesting) habitat for the Hen Harrier, the QI of that SPA. The FAC considers that the site of the proposed afforestation does not meet the DAFM's own criteria for screening out the potential for any significant effect on the Hen Harrier as set out in the Bird Foraging Table (version 6<sup>th</sup> Jan. 2020) and should not have been screened out in the DAFM Appropriate Assessment Screening Report and that this represents a serious error in the making of the decision.

The FAC noted that the reasons given for screening out the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA in the DAFM AASR are that (i) the location of the project area is within a separate water body catchment to that containing the Natura site, with no upstream connection, and there is subsequently a lack of any hydrological connection, (ii) the absence of any significant relevant watercourse(s) within or adjoining the project area. The FAC considers that these reasons do not relate to the possible impacts of the proposal on the Hen Harrier, the QI of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The FAC considers that this represents a serious error in the making of the decision.

The FAC noted that the District Inspector, in his SoF recommends that the licence be remitted to the Minister to *"carry out a new AA screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed development on Natura sites, in combination with other plans and projects"*.

The FAC noted that the applicant's Pre-Approval Submission Report indicates that a drainage survey is not required and that the NIS states that there are old field drainage channels on the site but that they are little to non-functional and that there is no natural watercourse on site connecting to the Blackwater River SAC. The FAC considers that, given the proximity of the site to the Blackwater River SAC, (less than 500m) and the response from the DAFM that a new screening should be undertaken.

The FAC noted that the DAFM had recorded an In-combination Statement of 10<sup>th</sup> February 2022 which states *"It is concluded that there is no likelihood of the proposed afforestation project CN89533 itself, i.e. individually, having a significant effect on certain European Site(s) and associated Qualifying Interests / Special Conservation Interests and Conservation Objectives, as listed in the main body of this report. In light of that conclusion, there is no potential for the proposed project to contribute to any significant effect on those same European Site(s), when considered in-combination with other plans and project."*

The FAC considers this conclusion to be an error as it does not consider the potential for the proposal itself to have an effect which in-combination with other plans and projects could result in a significant effect on a European site.

#### ***Environmental Impact Assessment (EIA).***

The FAC noted that the DAFM, in advance of making the decision to grant the licence, the Inspector's Assessment to Determine EIA Requirement recorded a consideration of the application across a range of criteria relevant to the proposed afforestation, including water, soil, terrain, slope, designated areas, or landscape and cumulative effects, and determined that the project was not required to undergo EIA. The FAC noted that the proposed afforestation is not located in an area of Prime or Secondary Special Amenity the Kerry County Development Plan 2015-2021. The FAC is satisfied that the range and type of criteria considered is appropriate for DAFM to determine whether an Environmental Impact Assessment Report (EIAR) was required having regard to the nature, scale, and location of the proposal. However, the FAC considers that such a consideration should have regard to any preliminary or other assessment undertaken such as the screening for Appropriate Assessment (AA). Therefore, the FAC considers that this process should be undertaken again having regard to the AA screening and any AA that is considered necessary.

#### ***Water Framework Directive (WFD).***

EPA mapping shows the site lying within Catchment 18 Upper Blackwater (Munster). The relevant sub catchment is the Blackwater [Munster]\_SC\_010. Forestry not identified as a pressure in this part of the sub-catchment. EPA mapping shows the site in close proximity to the Blackwater (Munster)\_SC\_020 WFD river water body (a SAC) which was of Good Status in the 2013-2018 period and Not at Risk in the 3<sup>rd</sup> cycle. The underlying Ground Water body is the Rathmore West IE\_SW\_G\_070 which was of Good Status 2013-2018) and Not at Risk in the 3<sup>rd</sup> cycle.

#### ***FAC Consideration of the Grounds of Appeal.***

In addressing the grounds of appeal, the FAC considered the following:

##### ***Undue Process.***

The FAC noted that the date of the decision to grant the licence was 14<sup>th</sup> June 2022 and that the public was notified of the decision the following day 15<sup>th</sup> June 2022. The FAC does not consider that there was undue delay, and notes that the appellant has submitted an appeal for consideration by the FAC. The FAC is satisfied that the DAFM has complied with its obligations under the Forestry Act and Regulations with respect to notification of the public of its decision and no error has occurred in this regard.

##### ***Appropriate Assessment Screening.***

##### ***Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA.***

The FAC noted that (a) in screening out the possible impacts on the Hen Harrier QI of the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA the DAFM had not followed the criteria as set out in the "Screen Out Scenarios" contained in the Bird Foraging Table (version 6<sup>th</sup> Jan. 2020) and (b) that the reasons stated for screening out the Stack's to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA are not pertinent to the Hen Harrier QI. The FAC considers that these are serious errors in the decision-making process.

***The Blackwater River (Cork/Waterford) SAC.***

The FAC noted that the appellant has adduced no evidence of a hydrological connection between the site and the Blackwater River (Cork/Waterford) SAC, however the NIS identifies that there are old field drains on the site but that they are little to non-functional and that there is no natural watercourse on site connecting to the Blackwater River SAC. The FAC noted that in the NIS it is also stated that this SAC holds populations of Freshwater Pearl Mussel, the FAC considers. The FAC considers that the screening process should be undertaken again in relation to this SAC.

**Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal and the Statement of Fact submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals Act 2001(as amended) the FAC is satisfied that a serious or significant error or series of errors was made in the making of the decision. The FAC is thus setting aside the decision of the Minister regarding licence CN89533 and remitting it to the Minister for DAFM to undertake a new AA screening under Article 6 of the Habitats Directive, for any likely significant effects of the proposed afforestation, by itself would have on Natura sites, and in-combination with other plans and projects and a new Assessment to Determine EIA Requirement.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee