



26<sup>th</sup> June 2024

**Subject:** Appeal FAC 091/2023 regarding Licence Ref: KY15-FL0046

Dear

I refer to the appeal to the Forestry Appeals Committee (FAC) in relation to the above licence granted by the Minister for Agriculture, Food and Marine (The Minister). 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 the parties to the appeal.

**DECISION.**

Having regard to the evidence before it, including the Department of Agriculture, Food, and the Marine (DAFM) record of the decision, the Statement of Fact (SoF) provided by the DAFM, all materials on file, the notice, and grounds of appeal and in particular the following considerations, the FAC has decided to set aside and remit the decision of the Minister regarding licence KY15-FL0046

**THE LICENCE.**

Licence KY15-FL0046 is for felling (Thinning only) of 118.21 Ha. of Sitka spruce, Japanese larch and Lodgepole pine in five plots located in the townlands of Cummeenavrick, Derrymaclavlude, Derryreag, Glashacormick Co. Kerry.

The application for the licence was submitted to the DAFM on the 11<sup>th</sup> of October 2021. A decision approving the licence was issued on the 12<sup>th</sup> of October 2022. The licence was appealed (FAC 161/2022) and remitted to the Minister on the 8<sup>th</sup> of June 2023. A further decision approving the licence was issued on the 22<sup>nd</sup> of November 2023 with a requirement for adherence to a series of conditions including adherence to the mitigation measures specified in an attached Appropriate Assessment Determination Document. It is the decision of 22<sup>nd</sup> of November 2023 which is the subject of this appeal.

**FORESTRY APPEALS COMMITTEE.**

A sitting of the FAC was held remotely on the 14<sup>th</sup> of May 2024 which considered the appeal (FAC 091/2023) against the decision to issue the licence on the 22<sup>nd</sup> of November 2023. The FAC members present were: Mr. Donal Maguire (Deputy Chairperson), Mr. Vincent Upton and Mr. Iain Douglas.

Secretary to the FAC: Ms. Vanessa Healy.

**BACKGROUND.**

The proposal consists of the felling (Thinning only) of 118.21 Ha. of Sitka spruce, Japanese larch and Lodgepole pine which appear to have been planted between 1993 and 1997. The licence was the subject of a previous appeal (FAC 161/2022) which was set aside and remitted to the Minister to carry

out a new AA Screening of the proposal itself and in combination with other plans and projects under article 6(3) of the EU Habitats Directive, before a new decision was made.

The soils on the site are described as predominantly blanket peat with Surface water gleys, ground water gleys, podzols, Mineral alluvium and Shallow acid brown earths soils are also on the site. The slope is moderate (<15%) and the site adjoins aquatic zone(s). The habitat on the site is 90% conifer plantation high forest and 10% mixed broadleaved woodland.

The site lies in the Water Framework Directive (WFD) Laune-Maine-Dingle Bay Catchment and the Flesk[Kerry]\_SC\_010 Sub-catchment. The site is located within the Flesk (Kerry)\_030 & Flesk (Kerry)\_020 River Sub-Basins. The Flesk (Kerry)\_030 WFD River Waterbody forms the western site boundary and partially the southern site boundary. This river water body had High status in the period 2016-2021 and its status is Not at Risk in the WFD 3<sup>rd</sup> cycle. There is an unnamed first order EPA stream on the south-eastern boundary which had High status in the period 2016-2021 and its status is Not at Risk in the WFD 3<sup>rd</sup> cycle. The Flesk (Kerry)\_020 river waterbody adjoins northern site boundary and had Good status in the period 2016-2021 and is At Risk in the 3<sup>rd</sup> cycle) but lies in a different sub-basin. Forestry is not identified as a pressure in the sub-catchment. The underlying groundwater body is the Cahersiveen IE\_SW\_G\_022 which was of Good status in the 2016-2021 monitoring period and is stated as Not at Risk in the WFD 3<sup>rd</sup> cycle.

The application documents before the FAC included an Application Form dated the 11<sup>th</sup> of October 2021, Felling & Location Maps printed on the 9<sup>th</sup> of October 09/10/2021 an undated Harvest Plan uploaded on the 19<sup>th</sup> of September 2021 and an Appropriate Assessment Screening Report (AASR)/Natura Impact Statement (NIS)/Harvest Plan Map dated the 19<sup>th</sup> of January 2022

The licence application was referred to the National Parks & Wildlife Service (NPWS) no response was received.

The DAFM file on the Forestry Licence Viewer (FLV) relating to the licence issued on the 22<sup>nd</sup> of November 2023 comprises of a DAFM Appropriate Assessment Screening Report & Determination (ASSRD) dated the 4<sup>th</sup> of October 2023, an Appropriate Assessment Determination (AAD) dated the 16<sup>th</sup> of November 2023, an In-combination Report for the AASRD dated the 4<sup>th</sup> of October 2023 and an In-combination Report for an Appropriate Assessment Report (AAR) dated the 5<sup>th</sup> of October 2023 which the FAC has taken to be in support of the AAD.

The DAFM AASR identified eight Natura 2000 sites within 15 km of the proposed forest thinning and one Natura 2000 site greater than 15Km but which is connected hydrologically to the site of the proposed forest thinning. The eight sites within 15Km are Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC (Site Code 000365), Blackwater River (Cork/Waterford) SAC (Site Code 002170), Mullaghanish to Musheramore Mountains SPA (Site Code 004162), Mullaghanish Bog SAC (Site Code 001890), St. Gobnet's Wood SAC (Site Code 000106), Old Domestic Building, Curraglass Wood SAC (Site Code 002041), Kilgarvan Ice House SAC (Site Code 000364), Killarney National Park SPA (Site Code 004038). The site greater than 15Km is Castlemaine Harbour SAC (Site Code 000343). The FAC noted that in addition to the above, Castlemaine Harbour SPA (Site Code 004029) was identified in the applicant's Appropriate Assessment Pre-Screening Report.

Of the nine sites identified in the DAFM AASRD, only one, Killarney National Park, Macgillycuddy's Reeks and Caragh River Catchment SAC was deemed to progress to AA.

The file records that there were no third-party submissions on the licence.

## **THE APPEAL.**

There is one third-party appeal against the decision to approve this licence application. The grounds of appeal are in summary:

1. That “No assessment has been carried into the replanting of this SAC”.
2. That the screenings for Old Domestic Building, Curraglass Wood SAC, Kilgarvan Ice House SAC, Killarney National Park SPA, Castlemaine Harbour SAC do not comply the requirements of the High Court
3. That there is no evidence original planting complied with Birds and EIA Directives.

## **CONSIDERATION BY THE FAC.**

At its sitting on the 14<sup>th</sup> of May 2024, the FAC had before it the full DAFM record of the decision as made available on the Forestry Licence Viewer (FLV), the Notice of Appeal Form, the grounds of appeal, the Statement of Fact (SoF) provided by the DAFM and all materials on file. The FAC having reviewed all the documentation and submissions, including that of the appellant, considered that there was sufficient information to enable it to assess and determine the appeal without recourse to an oral hearing. In the interest of clarity and for the avoidance of doubt this sitting of the FAC considered appeal ref. FAC 091/2023 only in relation to the licence issued on the 22<sup>nd</sup> of November 2023.

## **DAFM STATEMENT OF FACT.**

The SoF provided by the DAFM for the appeal which is dated the 22<sup>nd</sup> of February 2024 confirms the administrative details of the licence application. The SoF states that the DAFM was satisfied that all criteria in its standards and procedures were adhered to in making the decision on the licence application.

The SoF also contains a statement from the Forestry Inspectorate dated the 31<sup>st</sup> of January 2024 submitting that the AA process was carried out using the procedures of November 2019, that the standard operating procedures were applied, and containing a response to the grounds of appeal.

## **GROUND OF APPEAL.**

The FAC considered the appeal under the headings as presented in the grounds of appeal for FAC 091/2023 received on the 11<sup>th</sup> of December 2023.

### **No assessment has been carried into the replanting of this SAC.**

The FAC noted that felling licence KY15-FL0046 is for thinning of forestry only and that replanting does not form part of the licence. The FAC further noted that there is an Appropriate Assessment on file for the proposed forest thinning and that in Schedule 3 of the licence “*Replanting (where applicable)*” issued on 22<sup>nd</sup> of November 2023 the response “*Not Applicable*” is indicated. The FAC considers that the application, assessments and licence as issued is for thinning only and this ground of appeal, as articulated in the Notice of Appeal Form refers to replanting is therefore not pertinent to this licence.

### **That the screenings for Old Domestic Building, Curraglass Wood SAC, Kilgarvan Ice House SAC, Killarney National Park SPA, Castlemaine Harbour SAC do not comply the requirements of the High Court.**

This ground of appeal contends that the AA Screenings for Old Domestic Building, Curraglass Wood SAC, Kilgarvan Ice House SAC, Killarney National Park SPA, Castlemaine Harbour SAC do not comply the requirements of the High Court. The ground cites a paragraph from CJEU Case 258/11 (that an AA must not have lacunae) and IEHC 400 Kelly v An Bord Pleanala (that at AA Screening stage the competent authority has only to determine that the development may have a significant effect on a Natura 2000 site to trigger AA).

The FAC noted that the DAFM in its AAD determined that there was no likelihood of the thinning project KY15-FL0046 having any significant effect, either individually or in combination with other plans or projects on the Natura 2000 sites referred to in this ground of appeal. The FAC further noted that the appellant contends that the AA screenings for those sites do not comply with the requirements of the High Court *“As the development may have an effect”* but has adduced no evidence to contradict the DAFM determination that there was no likelihood of the forest thinning having any significant effect on the Natura 2000 sites referred to in this ground of appeal. The FAC considers that the DAFM has not erred with regard to this ground of appeal.

**There is no evidence original planting complied with Birds and EIA Directives.**

This ground of appeal questions whether the original planting of the lands was in compliance with the Birds Directive & Environmental Impact Assessment Directive. The grounds provide no basis for considering that the planting of the lands was regulatorily deficient. The FAC noted the comments of the DAFM in its SoF dated 28/02/2024 regarding this ground of appeal. The role of the FAC is to consider whether the DAFM made a serious or significant error, or a series of errors in making the decision under appeal, in this case felling licence KY15-FL0046, therefore the issues raised in this ground of appeal are not within the remit of the FAC to determine.

**APPROPRIATE ASSESSMENT SCREENING REPORT & DETERMINATION**

In reviewing the documentation on file, the FAC noted that the DAFM AASRD for this appeal is dated 16/11/2023 and relies on an in-combination report (Appendix A of the AASRD completed on the: 04/10/2023) which includes the statement:

*“Similarly, there is no likelihood of residual effect(s) that might arise, which are not significant in themselves, creating a significant effect in-combination with other plans and projects”.*

The FAC consider that an in-combination assessment conducted at AA screening stage should not consider the potential “residual effects” of a proposed plan or project. The FAC consider that this wording is ambiguous as it is not clear whether “residual effects” are being considered after the consideration of some mitigation measures contained in the NIS dated the 19<sup>th</sup> of January 2022 which pre-dates the DAFM AASRD of 4/10/2023 and that as a result it is unclear if the proper test has been applied.

**LICENCE**

In reviewing the documentation on file, the FAC noted that the licence includes conditions that relate requiring adherence with a number of published standards and guidelines developed by the DAFM. The FAC noted that the wording of some of these documents appeared with errors. There is a reference to *“forestry biodiversity”* whereas the FAC would understand this should be Forest Biodiversity Guidelines. The FAC would consider that such documents should be clearly identified, ideally with the associated date to avoid any confusion, and readily available. However, the FAC considers this to be a minor error as these documents are, in general, well recognised in practice. Of more significance is the absence of the requirement for full compliance with the Standards for Felling and Reforestation (DAFM, 2019). These standards state, ‘This document sets out the universal standards that apply to all felling (thinning, clearfelling) and reforestation projects on all sites throughout Ireland, undertaken under a felling licence issued by the Department of Agriculture, Food & the Marine under the Forestry Regulations 2017 (S.I.191 of 2017)’.

The FAC understand this to be a policy statement and that it is the adopted policy of the Minister for Agriculture, Food and the Marine to condition adherence with these standards on felling licences unless there was a stated reason otherwise. In addition, the Forestry Regulations 2017 require the Minister to have regard to such standards in making licencing decisions. The FAC noted that the AAD

does refer to measures provided for in the Standards for Felling and Reforestation but that this is conditioned in manner that makes it unclear as to whether the adherence with the Standards as whole is a condition. The FAC considers the failure to include full compliance with these standards as a condition on the licence represents a serious error.

#### **IN-COMBINATION REPORT.**

In reviewing the documentation on file, the FAC noted that the In-Combination assessment dated 05/10/2023 is described as being Appendix A to an Appropriate Assessment Report however no AA Report is to be found on file, further, this In-Combination assessment contains the following passage as part of its statement;

*"It is concluded that there is no possibility that the proposed Felling project KY15-FL0046, with mitigation measures set out in Section 4 of the AAD, will itself, i.e. individually, giving rise to an adverse effect on the integrity of any European Sites and their associated Qualifying Interests /Special Conservation Interests and Conservation Objectives".*

From this passage the FAC noted that the In-Combination assessment which is dated 05/10/2023 relies on an AAD dated 16/11/2023 which postdates the In-combination assessment. The FAC considers that this is a significant error in the processing of the application.

FAC noted that the DAFM In-Combination assessment recorded plans and projects considered in-combination with the felling application that occur within the general vicinity of the felling site. This included both forestry and non-forestry plans and projects. In considering this document the FAC noted that forest road project CN90771 was not considered by the Minister. This project constitutes 1,370 metres of forest road works that run through the site of KY15-FL0046. While the application for CN90771 post-dated that for the felling, the forest road was applied for and approved before the undertaking of the Appropriate Assessment screening and Appropriate Assessment by the Minister. A second shorter road section licenced in November 2022, CN90779, that overlaps the site was also not considered. While the FAC has not determined that consideration of these projects would change the outcome of the assessment, the FAC does consider that the failure to consider projects of this nature that overlap KY15-FL0046 as part of the in-combination considerations of the tree felling represents a serious error, given the nature and scope of both activities and the likely effects of the felling identified by the Applicant and the Minister.

The FAC also noted that the Minister has limited the consideration of other plans and projects to five years but has not provided a reason for doing so. The document also refers to a County Development Plan that was replaced in 2022 and the Forestry Programme 2014-2020 which appears to only have been extended to 2022 and has been replaced.

#### **NATURA IMPACT STATEMENT**

In reviewing the documentation on file, the FAC noted that the DAFM considered the NIS as submitted by the applicant and made specific reference to it in the DAFM AAD wherein it states,

*"Accordingly, the Minister determined that an Appropriate Assessment of the activity proposed under KY15-FL0046 was required in relation to the above 'screened in' European sites. For this reason, The applicant submitted a Natura impact Statement (19<sup>th</sup> of January 2022) to facilitate the Minister carrying out an appropriate assessment. Niall Phelan, acting on behalf of the DAFM, subsequently evaluated the submitted NIS, defined as "a report comprising the scientific examination of a plan or project and the relevant European Site or European Sites, to identify and characterise any possible implications of the plan or project individually or in combination with other plans or projects in view of the conservation objectives of the site or sites, and any*

*further information including, but not limited to, any plans, maps or drawings, scientific information or data required to enable the carrying out of an Appropriate Assessment".*

The FAC finds that the DAFM has not indicated that it has adopted the NIS as submitted nor has it indicated the sufficiency or otherwise of the NIS, having assessed it to fully inform an AAD relating to the project. For example, the AAD includes specific measures that relate to the possible spread of invasive species and diseases (A and B). However, the NIS does not identify likely significant effects on a European site related to invasive species or diseases or propose these measures. This issue is also not identified in the screening prepared by the Minister. It is therefore not clear as to how or when the Minister determined that the spread of invasive species or diseases constitute likely significant effects of the project or whether the effectiveness of the measures has been assessed.

The FAC considered that in the context of the above (absence of adopting applicant's NIS or the availability of an AAR) the DAFM has erred in its processing of the licence in so far as AA is concerned and that this constitutes a significant error.

The Applicant and the Minister have concluded that the proposal will result in likely significant effects on otter but have relied on post-approval surveys in assessing these effects. The Department of the Environment, Heritage and Local Government has published a guidance document on Appropriate Assessment Appropriate Assessment of Plans and Projects in Ireland Guidance for Planning Authorities (DEHLG, 2009). This document states,

*"The timing of the AA is critical and it must precede the decision to authorise, adopt or proceed with a plan or project (i.e. the formal or legal consent stage where that exists) and must inform the overall decision made. The NIS and the AA must be completed prior to any decision being made to authorise a plan or project. It is entirely unacceptable for a planning authority to approve a plan or project conditioned on the undertaking or completion of surveys, research or data-gathering of relevance in assessing the likely effects." (page 24)*

While the FAC understands that this document may not be legally binding as such, this view in relation to the standards of decision making that must be met in the undertaking of an Appropriate Assessment appears to be reflected in the established law. The FAC would understand that the reliance by the Minister on post-approval surveys in this manner is not in keeping with the requirements of an Appropriate Assessment and that this constitutes a serious error. Relatedly, the FAC noted that the AAD refers to an "otter aquatic zone" but that this does not appear to be defined or identified in the documentation. While there may be situations in which further surveys before the commencement of operations are warranted such as if there was an extended period before operations commenced, the FAC would understand that where an Appropriate Assessment has been determined to be necessary that this should be based on the best available scientific information and be supplemented by surveys and data-collection as needed to reach the required standard of confidence. Where operations overlap or adjoin an SAC, the FAC would consider it reasonable that this should include identifying whether the relevant species and/or habitats are present on the site of operations. Even where post-approval surveys are considered necessary the FAC would anticipate that, in circumstances such as those under consideration, the Applicant would be required to provide the surveys and conclusions to the DAFM. This would be particularly relevant where the measures identified are related to specific aspects of the life-cycle of the species as is relevant in this instance.

### **Conclusion**

In considering the appeal, the FAC had regard to the record of the decision, the submitted grounds of appeal, and the SoF submitted by the DAFM. In accordance with Article 14B of the Agricultural Appeals

Act 2001 (as amended) the FAC is satisfied that a series of significant or serious errors was made in the making of the decision in relation to licence KY15-FL0046. The FAC is thus setting aside and remitting the decision of the Minister in relation to licence KY15-FL0046 to ensure that the project is subjected to the screening and Appropriate Assessment process such that the requirements of the law are met and to address other errors identified by the FAC earlier in this letter before a new decision is made.

Yours sincerely,

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Iain Douglas,  
On Behalf of the Forestry Appeals Committee

