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30th April 2021.

Subject: Appeal FAC 776/2020 regarding licence CN85867

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 CN85867 is for the construction of a forest road 770 metres in length at Byrnesgrove, Co Kilkenny, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 17th of September 2020 subject to standard conditions and there is also a condition specific to archaeology.

Hearing

An oral hearing of appeal FAC 776/2020 was held by the FAC on 23rd April 2021.

In attendance:

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

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms Mary Coogan, Mr. Robert Windle.

Applicant: [REDACTED]

Appellant: [REDACTED]

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN85867.

Licence.

The licence pertains to the construction of a forest road of 770 metres in length in length to serve 31.1 hectares of forestry at Byrnesgrove, Co Kilkenny. The proposed road commences as an extension of an existing forestry road. The Site is within the Cloghnagh_10 River Waterbody WFD. The Cloghnagh_10 River Waterbody has a good WFD status (2013 -2018). and in terms of risk is indicated as not at risk. The method of construction is excavation with fill and top finished with a class 804 material. The Inspector Certification refers the predominant soil type underlying the project area as predominantly brown earths in nature and the slope as predominantly flat to moderate (<15%), The project area does not adjoin or contain any aquatic zones, the vegetation type within the project area is comprised of woodland (WD4).

The proposal was referred to Kilkenny Co Council and the response received indicated no objections and comments that the proposed road will connect to a permitted road.

An Appropriate Assessment screening was carried out and recorded on the file. Four Natura sites were found to be within 15kms of the project site, Cullahill Mountain SAC 000831 which was screened out due to the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site; Lisbigney Bog SAC 000869 screened out due to the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site; River Barrow And River Nore SAC 002162 screened out due to the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site and the River Nore SPA 004233 which was screened out due to the absence within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the Natura site concluding no likelihood of a significant effect on any European site, and therefore Appropriate Assessment was not required.

In-combination assessments dated the 16th March 2020 and 11th September 2020 are on the file concluding that the project does not have a pathway individually to any of the listed Natura Sites and no potential to contribute to any effects when considered in-combination with other plans and projects.

The licence was also assessed in relation to archaeology and a report was received indicating no objections but recommending the inclusion of a condition which was included in the conditions of the licence to protect a listed monument.

The licence was issued on the 17th of September 2020 subject to standard conditions.

Appeal.

There is one appeal against the decision to grant the licence.

The grounds of appeal are summarised as:

- The afforestation of these lands was carried out without appropriate screening for the requirement for an EIA or an AA under Article 6 (3) of the Habitats Directive. A retrospective

assessment of the need for an EIA and an AA should be carried out prior to any new licence being granted. Reference is made to significant contiguous planting in the area between 1999 and 2002 and in subsequent years.

- Breach of Article 4 (3) of the EIA Directive 2014/52/EU.
- The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned and in consequence, an error of law in the processing of this application. There is insufficient information in responses to the iFORIS to permit the Inspector to make a conclusive determination as to whether an EIA is required.
- The design details submitted in relation to the construction of the road in relation to soil, terrain and slope have not taken into account mitigation against environmental damage.
- The Stage 1 AA conclusion is not legally valid as there is direct hydrological connection to a Natura site.
- The licence and its associated operations threaten the achievement of the objectives set for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-21.
- There is insufficient clarity in relation to in-combination to enable a definite decision in relation to cumulative effect.
- Licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration as required by Article 12 of the Habitats Directive.
- Licence conditions do not provide a general system of protection for all species of birds as required by Article 5 of the Birds Directive prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

In a statement to the FAC, the DAFM indicated that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act and the Department is satisfied that all criteria as outlined in the relevant standards and procedures had been adhered to in making a decision on the application. The Statement from the Forestry Inspectorate indicates that the standard operational activities of a) thinning or b) clear-felling and replanting already established forest areas are not so categorised and therefore a screening assessment for sub-threshold EIA does not need to be carried out by the Department in the case of applications for TFLs for these particular activities. In regard to Article 4(3) of the EIA Directive a screening assessment for sub-threshold EIA did not need to be carried out by the Department in this case and thus Article 4(3) of the Directive is not applicable. The application for 770 m of Forest Road was considered under a detailed process and the location, type, and characteristics of the potential impact of the project applied for were considered by the Department in the following processes: The *Assessment of Afforestation Proposal for EIA Requirement Form* as completed by the certifying Inspector and recorded on iFORIS and the findings and conclusions therein and approved by District Inspector with conditions 10/09/20. Cumulative impact in relation to the project was also assessed. It was also indicated that a field visit was conducted on 10/03/2020.

An oral hearing was held of which all parties were notified and representatives of the DAFM, the applicant and appellant attended. The DAFM presented an overview of their processing of the licence. The appellant made a submission outlining issues in relation to overall assessment of the licence, to the issue of hydrological connection to a Natura site; to other forest road licences in the vicinity; to the impact on the townland boundary; issues relating to the site notice and to responses outlined on the iFORIS. The applicant clarified the position regarding the site notice and that the project was not connected to the other forest roads referred to by the appellant. It was indicated that no watercourse would be crossed and there was no hydro connectivity to a watercourse.

At the hearing the FAC reviewed the inspector's determination and recommendation in particular Q3 of Assessment to determine EIA requirement in the context of other forest roads in the vicinity and also the responses to Qs,13,16,18,22 and 23 noting that Q22 and 23 responses were errors and yes should have been the response. The reference in the SOF to thinning and clear felling in relation to felling licences was agreed by the DAFM should be omitted. The issue of watercourses and potential hydro connectivity was raised. The issue of road construction, the source of material and measures to address any issues relating to archaeology were raised and also matters relating to in-combination. The appellant restated objections relating to the overall level of roads in the vicinity and the long term implications of these roads not solely during the construction phase. In response it was indicated that drainage along the proposed road does not cross a watercourse and there is no pathway to a Natura site and the construction details were outlined and the procedures which are followed in the construction of the road. The issues raised were addressed to the satisfaction of the FAC. The inspector's determination and recommendation is also considered adequately reasoned based on the responses received at the oral hearing and the application details.

In addressing the grounds of appeal, the FAC considered *inter alia*; the requirements of the Habitats and EIA directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In considering the appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that Annex II contains a list of projects for which member states must determine through thresholds, or on a case-by-case basis (or both), whether or not EIA is required. Forest roads are not referred to in Annex I or Annex II. The Irish Forestry Regulations 2017, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to the construction of a forest road of a length greater than 2000 metres and any afforestation or forest road below the specified parameters where the Minister considers such development would be likely to have significant effects on the environment.

The DAFM considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects and determined that the project was not required to undergo the EIA process. The proposal is for 770 metres of forest road construction to facilitate the management of

commercial forest for timber production, which is considerably sub-threshold for the mandatory submission of an EIAR. Having regard to the record of the decision and the submitted grounds, submissions at the oral hearing and the nature, scale and location of the proposal the FAC is satisfied that the proposal would not result in any likelihood of significant effects on the environment and that the DAFM did not err in its decision concerning EIA.

In considering the appeal the FAC examined the Appropriate Assessment undertaken by the DAFM including the initial screening. The FAC considered that the decision of the Minister before it related to the 770 metres of forest road works. The FAC considered that the decision of the Minister before it related to the 770 metres of forest road works. The FAC examined publicly available information from the EPA and NPWS and identified the same four sites; Cullahill Mountain SAC 000831; Lisbigney Bog SAC 000869; River Barrow And River Nore SAC 002162 and the River Nore SPA 004233 as the DAFM within 15km from the proposal. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for appropriate assessment. Details of other plans and projects were also examined. The proposed road works are located outside of any European site and there is no evidence of a pathway of effects to a European site. There is no evidence of protected habitats or species on the site. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment and concurs with the conclusions reached.

Specifically, in relation to potential hydrological impacts on Natura sites and on water quality generally, at the oral hearing the DAFM and the applicant submitted that field inspections clearly identified there was no watercourse on the site and no pathway to any Natura site, The FAC also examined this issue and from an assessment of the topography of the site and the pattern of contours and slopes, mapping and aerial imagery of the area concludes that surface water from the proposed road would not drain directly to a watercourse and there was no direct pathway to any watercourse. The FAC is satisfied based on the responses received that the construction measures and the accompanying method of drainage as proposed will not impact on any Natura sites or any receiving waters.

In relation to the ground of appeal that the licence conditions do not provide a system of protection for wild animals and birds during the period of breeding and rearing consistent with the requirements of the Habitats and Birds Directives. The FAC note that the granting of a licence for a forest road does not exempt the holder from complying with any legal requirements set out in any other statute. The FAC noted that the appellant did not submit any specific details in relation to animals or bird nesting or rearing on the proposed site. The FAC considered that the DAFM had completed a screening for Appropriate Assessment and had undertaken a site inspection prior to making the decision. Based on

the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant are not warranted.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, and submissions received including at the oral hearing. 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 procedure. The FAC is thus affirming the decision of the Minister regarding licence CN85867 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm 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 the official.

Derek Daly On Behalf of the Forestry Appeals Committee