



[REDACTED]

19th February 2021

Subject: Appeal FAC 228/2019 regarding licence CN83592

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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 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 CN83592 for the construction of a forest road 220 metres in length at Bawnreagh, Co. Tipperary, was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 28th of August 2019.

The appeal was examined by the FAC on 12th February 2021.

FAC Members in attendance: Mr. Donal Maguire (Deputy Chairperson), Mr John Evans, Mr. Vincent Upton and Mr. Derek Daly.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notices of appeal, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister regarding licence CN83592.

Licence

The licence pertains to the construction of a forest road 220 metres in length at Bawnreagh, Co. Tipperary. The application was submitted on the 11th March 2019. The proposed road is an extension of an existing forest road and is to serve 20 ha of woodland and is located within an established forest. The documentation submitted included a Pre-Approval Submission Report; a road specification; copies of site notice and maps.

An Inspector's Certification Report pre Approval indicates that a desk only inspection was carried out. The report records the site as not being located within an NHA, pNHA, SAC, cSAC or SPA. The report also

records the site as not being located within a 3 km buffer zone upstream of, and hydrologically connected to an NHA, SAC, or SPA. The report does record the development as not within or adjoining a listed archaeological site or monument. The report notes referral to Tipperary County Council and no response was received.

The report also records an Appropriate Assessment (AA) Screening decision to screen out the development as the zone of influence centred on this application does not overlap with any Natura site. Therefore, due to spatial separation, the project is screened out for the purpose of Appropriate Assessment. It therefore concludes no likelihood of a significant effect on any European site, and Appropriate Assessment not required.

A separate AA Screening document, for application licence number CN83592, is included in the documents provided to the FAC. A screening for appropriate assessment was undertaken by DAFM and completed on the 5th April 2019 applying v 26th Nov 2018. The radius used to screen for Natura Sites was 3km in this case. In the screening conclusion the project was screened out due to physical separation as the project area is greater than 3 km from any Natura site and does not overlap any FPM catchment (as per the draft Forests & FPM Plan). Furthermore, it was indicated that there is no factor that overrides the protection provided by this physical separation, that there is no possibility that this project will have a significant effect on any Natura site, due to physical separation and the lack of any ecological pathway. Any safeguards within the project, or any conditions attached to any approval issued, are unrelated to the protection of any Natura site and the project for the purpose of Appropriate Assessment was screened out and Appropriate Assessment not required.

Appeal

The decision to grant the Licence is subject to one appeal. The grounds of appeal include, in summary:

- Submits that based on the information supplied it was not possible to make a decision which was in compliance with the requirements of the Habitats and EIA directives, and references the following judgements of the OEU;

Case C-258/11, Peter Sweetman and Others v An Bord Pleanála;

Case C-164/17, Edel Grace and Peter Sweetman v An Bord Pleanála;

Case C-323/17 People Over Wind and Peter Sweetman v Coilite Teoranta;

Case C-461/17 Brian Holohan and others v An Bord Pleanála

The test for Appropriate Assessment Screening in Irish law is as set out by “Finlay Geoghegan J. in; Kelly -v- An Bord Pleanála [2014] IEHC 400 (25 July 2014)

- There is a lack of proper assessment
- There is no assessment of cumulative effects for example.

A statement of facts (SOF) was provided to the FAC in relation to the appeal as submitted which states that the Department is satisfied that all criteria in its standards and procedures have been adhered to in making a decision on the application. This confirms the administrative details of the licence (CN83592) as outlined above. The inspector in an observation in the SOF dated the 17th November 2020 does refer to that the relevant Appropriate Assessment (AA) procedure was applied at the time (Nov2018). Screening for AA was carried out within 3 km radius of the proposed site. The AA procedure has changed since this file was approved.

The FAC consulted with publicly available mapping provided by the Environmental Protection Agency, the OSI, the Forest Service, and other on-line services noting that the site is within an established forestry and the project is an extension of an existing forest road. It noted that there are no European sites within 3 kilometres and there are sites within 15 kilometres. There is a waterbody/watercourse approximately 120 metres to the east of the project and that there is established forest between the project and this waterbody.

In addressing the grounds of appeal, the FAC considered whether the decision was in compliance with the requirements of the Habitats and EIA directives, the assessment of the licence assessment and whether there is an assessment of cumulative effects and 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. A record of these considerations was maintained. The proposal is described as being for the 220 metres of forest road construction in a commercial forest managed for timber production which is considerably sub-threshold for the mandatory submission of an EIAR. While the FAC is satisfied that the range of criteria considered is appropriate and in keeping with the EIA Directive, a number of criteria are incomplete, including details of forest area, or not fully answered. The FAC considers that this

represents an error and is remitting the decision back to the Minister to complete a new Assessment to Determine EIA Requirement

In relation to AA screening, the DAFM screening process did assess as to whether there was sites within 3 kilometres of the project. It is noted that the screening process as carried out did not provide for any assessment of in-combination effects which the FAC is satisfied constitutes a significant error. It is also noted that in the Inspector Certification Pre Approval there is reference to 0% forest cover within 5 kilometres of the project which is within a forestry as clearly indicated on the mapping data with the FAC concluding that there were errors and inaccuracies in the Inspector Certification and that errors have been made. The FAC considers that the information on which the decision to screen out for Appropriate Assessment as required by the Habitats Directive is incomplete based on above.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, in addition to submissions made by parties to the appeal. In the above circumstances, the FAC is satisfied that there was a series of errors in the making of the decision to grant the licence. As a result, the FAC concluded that the decision of the DAFM regarding CN83592 should be set aside and remitted to the Minister to carry out a screening for appropriate assessment including an assessment of in-combination under Article 6 of the Habitats Directive and a new Assessment to Determine an EIA Requirement before a new decision is made.

Yours sincerely,



Derek Daly On Behalf of the Forestry Appeals Committee