



[REDACTED]

31 December 2020

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Department of Agriculture, Food and Marine in respect of Forest Road approval CN86174.

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 the parties to the appeal.

Background

Forest Road CN86174 was granted by the Department on 29 July, 2020.

Hearing

A hearing of appeal 592/2020 was conducted by the FAC on 16 November, 2020.

FAC Members: Mr. Myles Mac Donnacatha (Chairperson), Ms. Claire Kennedy and Ms. Bernadette Murphy.

Decision

The Forestry Appeals Committee considered all of the documentation on the file, including application details, processing of the application by DAFM, and the grounds of appeal before deciding to affirm the decision to grant this Forest Road (Reference CN86174).

The proposal is for a licence to construct a forest road 499 metres in length in the townland of Kilnagrange, Co Waterford. The documentation submitted indicates that the forest road is required to facilitate the clear-felling of an area of 20.16 hectares of forest. The plans submitted indicate that the road would run contiguous to and through an existing plantation. It is a Forest Road with T style turning area and will follow the existing track along the eastern boundary of the forest. The entrance of the road begins in the applicant's private farmyard. The lane and entrance that leads to the yard currently offers adequate access to timber lorries. The predominant soil type underlying the project area is noted as mainly brown podzolic in nature. The slope is predominantly flat to moderate (<15%). The project area does not adjoin or contain an aquatic zone. The vegetation type within the project area comprises both semi-mature broadleaved and coniferous plantation with hedgerows. It is c. 70m away from an aquatic zone (a tributary of Mahon River which is not designated for any Natura site) at its nearest point. The information submitted indicates that the carriageway width would be 3.4 metres and the formation width 5.5 metres. Formation type is silty clay and it is well drained.

DAFM referred the license to Inland Fisheries Ireland (IFI) and Waterford County Council for consultation. There are no responses on file from IFI. Waterford County Council responded indicating that they had no objection to the construction of the forest road.

On 28 July 2020 the Forest Service Inspector undertook an AA screening assessment for each of the six individual Natura sites within the 15km zone in accordance with the provisions of the Habitats Directive. They also carried out an in-Combination Assessment on the 17 July 2020.

DAFM issued a licence on 29 July 2020 together with the standard licence conditions and additional conditions relating to installing roading, road drains, culverts/piping, turning area and the approach road from the north east to be upgraded at applicant's own expense.

There is a single appeal against the decision to grant the licence. The grounds contend that, before granting a license, it was necessary for the Minister to establish the legitimacy of the actual forest and that the FAC should do this. The appellant queries the authority on which the FS and the FAC overruled the judgement of Finlay J. It is submitted that by requesting further information from the Forest Service, the FAC has upheld the appeal. It is submitted that incomplete decisions should be returned to the Forest Service.

The submission document from the NPWS is attached to the appeal. The FAC is requested to note that if the Department is not in a position to make specific comments on a particular referral at the time, no inference should be drawn that the Department is satisfied or otherwise with the proposed activity. The FAC should not rely on the fact that the NPWS did not make an individual objection. It is necessary for the FAC to carry out an Environmental Impact Assessment screening. To do that it is submitted that all roads in the forest and the distance of each must be listed.

It is submitted that the decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive or the basic guidelines of the NPWS. The test for Appropriate Assessment Screening in Irish and EU law is that it is merely necessary to determine that there may be an effect on a Natura site rather than to state that it will not have a significant effect. It is submitted that if the development is within 15km of a Natura 2000 site it has to be screened in for Appropriate Assessment. The EU judgement in case C-323/17 stated that Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications of a plan or project, for a site concerned, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site. The court also stated, in the judgement, that this conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

It is submitted that the EU Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned. i.e. If it is said to be in a different catchment, the screening must state the catchment that the application is in. It is also necessary to realise that birds can fly and they do all rely on watercourses to move. A map showing the SACs and SPAs and the site of the proposed development should be attached.

In screening for Environmental Impact Assessment, it is necessary to give details of all forestry in the area and show that the cumulative afforestation does not exceed 50ha. It is also necessary to give the total length of the forest roads in the area and show that no roads which are not included in the application will be needed to carry out the development which includes thinning and clear-felling. It is the duty of the FAC to carry out both a full Appropriate Assessment Screening and a full Environmental Impact Assessment

An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

Kilminchy Court,
Portlaoise,
Co Laois
R32 DWT5

Eon/Telephone 076 106 4419
057 863 1900

Screening in accordance with the law. The opinion of advocate general Kokott in Case C-254/19 is referenced to support this submission.

In a statement to the FAC, DAFM responded to the grounds of appeal stating that the decision to issue the licence was in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. DAFM carried out AA Screening for each of the six individual Natura sites within the 15km zone of consideration on 28 July 2020 and were fully recorded in AA Screening conclusions for individual Natura sites in the final IFORIS certification page on foot of a detailed and comprehensive In-Combination Assessment carried out by Department personnel drawing from all licensed and proposed forestry activity on IFORIS and all Planning Permission information available from the online WDCC and An Bord Pleanála planning information systems as well as the EPA Licence Information System, as recorded. DAFM stated that it could be concluded there is no potential for the proposed project to contribute to any adverse effects on any of the Natura sites either when considered alone or in-combination with existing land use and other plans and projects. Some technical and operational conditions were attached to final certification for approval.

The FAC has examined the file. The site for the proposed road is located in a rural area in unzoned lands with agriculture being the primary landuse. The project area does not adjoin or contain an aquatic zone. The area does not contain or adjoin a listed archaeological site or monument. There are 4 SAC's and 2 SPAs within 15km of the site - Comeragh Mountains SAC 001952, Dungarvan Harbour SPA 004032, Glendine Wood SAC 002324, Lower River Suir SAC 002137, Mid-Waterford Coast SPA 004193 and Nier Valley Woodlands SAC 000668.

In addressing the grounds of appeal, the FAC considered, in the first instance, the contention that the proposed development should have been addressed in the context of the EIA Directive. The EU Directive sets out, in Annex I a list of projects for which EIA is mandatory. 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. Neither afforestation nor deforestation (nor clear-felling) are referred to in Annex I. Annex II contains a class of project specified as "initial afforestation and deforestation for the purpose of conversion to another type of land use". (Class 1 (d) of Annex II). The Irish Regulations, in relation to forestry licence applications, require the compliance with the EIA process for applications relating to afforestation involving an area of more than 50 Hectares, 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 construction of the proposed forest road and subsequent clear-felling of trees in the harvest area, will give rise to some vehicular traffic and, in a later phase, the transport of timber on the local roads. This will cause some inconvenience in the short term but it would not of itself result in such likely significant effects on the environment as to require compliance with the full Environmental Impact Assessment process. The forest road proposed is significantly less than the 2000 metre length for which Environmental Impact Assessment would be mandatory according to the Irish regulations.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of a European site, must be subject to an assessment of the likely significant effects the project may have on such a designated site, either individually or in combination with other plans projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 screening including in-combination effects in relation to the listed Natura 2000 sites and concluded that the proposed project would not have a significant effect on these sites and its Qualifying Interests.

The FAC had regard to the record of the decision under appeal and the submitted grounds. The FAC is satisfied that the procedures adopted by the DAFM in reaching the conclusion that the proposed development would not be likely to give rise to significant effects were correct based on the AA screening process in use at the time.

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In deciding to affirm the licence decision, on the balance of evidence, the FAC is satisfied that there was no serious or significant error or series of errors made in making the decision or that the decision was made without complying with fair procedures. The FAC concluded that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely

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Ms. Claire Kennedy (on behalf of the FAC)

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