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31st May 2021

Subject: Appeals FAC 668 and 676/2020 in relation to licence CN85586

Dear [REDACTED]

I refer to the appeals to the Forestry Appeals Committee (FAC) in relation to the above licence issued by Department of Agriculture, Food and Marine (DAFM). 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

Licence CN85586 for forest road of 345 meters(m) at Killoe, Co. Kerry was approved by the DAFM on 18th August 2020.

Hearing

An oral hearing of appeals FAC 668/2020 and FAC 676/2020, of which all parties were notified, was held by the FAC on 5th May 2021. In attendance:

FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Seamus Neely & Mr. James Conway
Appellant FAC 668/2020:	Not present
Appellant FAC 676/2020:	Not present
Applicant / Representative(s):	Not present.
Department Representative(s):	Mr. Eugene Curran & Ms. Mary Coogan
Secretary to the FAC:	Ms. Marie Dobbyn

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions at the oral hearing, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister to grant licence CN85586.

Summary of licence and file

The licence relates to the construction of a forest road comprising a single section of 345 metres to serve 13.79 ha of forestry for the purposes of thinning trees planted in 1999 and 2000. Various documentation including application forms with details of construction, site notice, photo of the site notice in situ, bio-map, location maps, site management plan, a pre-approval submission and the specifications of the road were observed by the FAC to be on the DAFM file which records the application

process. These show that the proposed road will traverse existing farmland and run along the northern edge of forest, passing by an existing farm building. The road will exit to the public road via an existing farm entrance.

A ringfort is identified in proximity to the site on the application biomap. The application was referred to the DAFM archaeology section, who responded on the 18th May 2020 stating that the nearest recorded archaeological feature is 310m to the west of the site, and as a result the proposed road is not considered adjacent to any archaeological site. The letter recommends, for the purposes of EIA screening and the Forestry Regulations 2017 that the licence required adherence to the normal standards of the Forestry and Archaeology Guidelines.

A Forest Service Inspector's certification report is on file which notes both desk and field assessments of the application. This contains a screening for Appropriate Assessment for the purposes of the Natura Directives, which references an in-combination report. This in-combination report is on file, and refers to searches of various planning systems including the EPA, Kerry County Council, An Bord Pleanála, and DAFM as having taken place on the week of the 19th June 2020.

The Inspector's certification describes the site as having a predominant soil type underlining the project area that is predominantly podzols in nature. It gives the slope as predominantly flat to moderate (<15%), and states that the project area is crossed by /adjoins an aquatic an aquatic zone(s). The vegetation type(s) within the project area is stated to comprise grass/forestry.

The screening for Appropriate Assessment was based on a buffer distance of 15km from the project site, which was deemed as sufficient with sites outside that distance not being required to be included in the screening. Within that radius, four sites were identified as follows:

1. Ballinskelligs Bay and Inny Estuary SAC [0335]
2. Iveragh Peninsula SPA [4154]
3. Killarney National Park, Macgillycuddys Reeks And Caragh River Catchment SAC [0365]
4. Valencia Harbour/Portmagee Channel SAC [2262]

Following consideration of the qualifying interests and special conservation interests all sites were screened out for appropriate assessment. Sites 1,2 and 3 above were screened out because: *The location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection.* Site 4 was screened out because: *The absence of any significant relevant watercourse(s) within or adjoining the project area.*

The Inspector's certification report also includes a consideration of requirement for Environmental Impact Assessment which includes consideration of spatial information in the vicinity of the site carried out on the 17th August 2020. This considers the project across a range of criteria including general project characteristics, water, archaeology, landscape and visual amenity, non-designated and designated sites and habitats, social factors, safety, and public participation. The assessment concludes that an EIA is not required.

The DAFM issued a licence to the applicant on the 18th August 2020 which contains conditions of a standard nature.

Grounds of Appeal and Statement of Fact.

There are two appeals against the decision to grant the licence.

In summary, the grounds of appeal in FAC 668/2020 are:

1. That no legal Appropriate Assessment screening has taken place.
2. That the cumulative forest roads in this forest exceeds 2km.
3. That no legal screening for Environmental Impact Assessment has taken place.
4. That no Environmental Impact Assessment has taken place.

In summary, the grounds of appeal in FAC 676/2020 are:

1. A breach of Article 2(1) and Article 4(3) of the EIA Directive 2014/52/EU on the basis that the Directive requires that where a case-by-case examination for screening is carried out the relevant selection criteria set out in Annex III shall be taken into account, that a number of these criteria do not form part of the standard FS screening assessment, and that a Member State exceeds the limits of its discretion under Article 2(1) and 4(2) of the EIA Directive in circumstances where it does not take into account all such relevant criteria.
2. A breach of Article 4 (4) of the EIA Directive 2014/52/EU on the basis that the Directive requires a developer to submit details of the whole project, that the application for this licence does not represent the whole project therefore it is in breach of the EIA Directive.
3. A breach of Article 4 (5) of the EIA Directive 2014/52/EU Article 4(5) on similar grounds to the above.
4. That the Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned, as there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries or any other basis upon which this conclusion is made and there is, in consequence, an error of law in the processing of this application.
5. That there is insufficient information included with the application to permit the Inspector to make a conclusive determination as to whether an EIA is required.
6. That 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 on the basis that in the absence of adequate consultation and assessment of the cumulative impact of this project with other forestry activities approved or planned in the same catchment the achievement of the objectives set for the underlining waterbody or waterbodies under the River Basin Management Plan for Ireland cannot be assured, that the forestry in a River Sub-basin in which Forestry is noted as a significant pressure, and that the application was not referred to IFI or the EPA for their feedback.
7. That the Stage I AA conclusion is not legally valid on the basis that an 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 area concerned, that where there are lacunae the precautionary principle applies, and that the screening conclusion for SAC 002262 is based on an error of fact.

8. That the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, 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.
9. That the licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article I of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

In statements to the FAC, the DAFM submitted that the decision was issued in accordance with DAFM procedures, Statutory Instrument 191/2017 and the 2014 Forestry Act. The statement in relation to FAC 676/2020 addressed those grounds of appeal relating to the EIA Directive. These statement for FAC 675/2020 states, inter alia, that: the various responses provided by the inspector are informed by a number of sources that cover a wide range of considerations that are relevant to the criteria set out in Annex III of the Directive; that when applying a screening procedure for sub-threshold EIA and making a determination the Competent Authority is required to take in to account where relevant the results of preliminary verifications or assessments carried out pursuant to legislation other than the EIA directive; that information submitted by the developer, together with these other sources of information, formed part of the consideration of the requirement for EIA; that a detailed list of existing or approved projects around the application was available to inform the determination in relation EIA requirement; and that as part of the Appropriate Assessment process a detailed list of existing or approved projects around the application which formed the basis of an in-combination that considered whether if the project would individually or in combination with others have and significant effect on any European site. Both statements further assert that the correct procedures were followed with respect to Appropriate assessment, and that the proposed road is substantially sub-threshold for consideration of EIA requirement.

Oral Hearing

At Oral Hearing the DAFM summarised the processing of the licence application as recorded in the Statement of Fact, highlighted the role of the single consent process for Forestry Roads and the role it played in relation to the application. It was submitted that the forest road was being constructed effectively at the furthest point possible from the watercourse that bounds the site to be served, and that a site visit confirmed that there was no possible hydrological connection to the forest road or the area of its construction over what is an effectively flat site. It was also submitted that an existing road entrance was to be used, that this was generous in its existing dimensions, and that the majority of traffic approaching the entrance would be from the west.

In response to questions from members of the FAC, the DAFM representative agreed that a reference in the Statement of Fact provided in relation FAC 676/2020 to a Stage 2 Assessment was in error, and that the list of existing or approved projects produced for the purposes of an in-combination assessment was produced as part of a Stage 1 Assessment (screening). DAFM clarified that the response given for Question

33 relating to whether the road design meets health and safety requirements had been answered in error as “no”, and should be “yes” as asserted by the DAFM representative at the oral hearing.

Consideration by the FAC

In addressing the grounds of appeal the FAC had regard for the Grounds of Appeal, the Statement of Fact, submissions at oral hearing, the DAFM file recording the processing of the licence application, and publicly available sources of information such as mapping provided by the EPA, OSI and DAFM.

The FAC considered, in the first instance, as to the completeness of the assessment to determine for EIA requirements. In considering this aspect, the FAC notes that the EU EIA 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. 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 decision under appeal relates to a licence for a forest road of 345m, so is sub threshold for mandatory EIA as set in Irish Regulations. The road would be built to and through managed forest land outside of any area designated for conservation. The DAFM recorded a consideration of the application across a range of criteria, including water, soil, terrain, slope, designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process.

One appellant submits that there is insufficient information included with the application to permit the Inspector to make a conclusive determination as to whether an EIA is required, and further that the Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned, as there is no foundation for the conclusion reached on the basis of the responses to the IFORIS checkbox queries. In considering this ground, the FAC has regard for the Statement submitted by the DAFM that the various responses provided by the inspector are informed by a number of sources that cover a wide range of considerations that are relevant to the criteria set out in Annex III of the Directive; that when applying a screening procedure for sub-threshold EIA and making a determination the Competent Authority is required to take in to account where relevant the results of preliminary verifications or assessments carried out pursuant to legislation other than the EIA directive. The FAC notes that the Inspector’s certification considers a wide range of factors when considering the requirement for EIA including general characteristics of the project, cumulative effect, water, soil and terrain, archaeology, landscape and visual amenity, designated and non-designated areas, social factors, safety, and public participation.

The FAC having considered all of the evidence before it, is not satisfied that a serious or significant error or a series of errors was made by the DAFM in relation to their EIA consideration and concurs with the conclusion reached.

In addressing the Appropriate Assessment grounds of appeal, the FAC considered, 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 and projects, having regard to the conservation objectives of that designated site. In the grounds of appeal, the appellant submits that the screening for Appropriate Assessment is not legally valid because of the possibility of lacunae and the need to remove reasonable scientific doubt through the provision of complete, precise, and definitive findings; but provides no detail of where such lacunae may arise. The DAFM, in this case, undertook a Stage 1 screening, and found four European sites within 15 km of the proposal area as outlined above, and that there was no reason to extend the zone of influence in this case. The sites identified were considered together with their qualifying interests or special conservation interests, and in each case the possibility of impact was screened out and reasons for this conclusion were recorded. The FAC consulted publicly available information from the NPWS and EPA and identified the same four sites. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects on the week the 19th June 2020 in a stand-alone document, and they concluded that the project, when considered in combination with other plans and projects, will not give rise to the possibility of a significant effect on any Natura site. On the basis of the foregoing, the FAC is not satisfied that an error was made by DAFM in the processing of the application in relation to Appropriate Assessment as required by the Natura Directives.

The FAC considered the contention in the grounds of appeal that the application and its associated operations threaten the achievement of the objectives set for the underlining waterbody under the WFD River Basin Management Plan for Ireland in 2018-21. In doing so, the FAC reviewed EPA maps and data and find the proposal area is in the *22_Laune-Maine-Dingle Bay catchment* and the *Boola_SC_10* sub catchment. The *Oghermong* stream, part of the *Boola_010* waterbody, can be observed to bound the site to be serviced to the south, some 280m to the south of the southernmost part of the proposed road. EPA mapping indicates the *Boola_010* to have an unassigned status for the purposes of Water Framework Directive monitoring in the 2013-2018 monitoring cycle. OSI maps indicate the absence of drains on the site that are in proximity to the proposed road. OSI contour maps confirm the site description in the Inspector's certification of the site being on a flat to moderate slope. The granted licence includes standard conditions relating to the adherence to practices designed to protect water quality. In summary based on the information available to it and having regard to the nature of the proposal, namely construction of a forest road, the location of it and its terrain and the conditions under which operations would be undertaken, and the submission at Oral Hearing that no possible pathway exists to the watercourse bounding the site to be served, the FAC is not satisfied that there was inadequate consideration of water matters by DAFM in their decision making as it relates to this ground of appeal and is not satisfied that the proposal poses a threat to water quality.

In relation to the submitted grounds of appeal that the licence conditions do not provide a system of protection for wild birds during the period of breeding and rearing consistent with the requirements of the Birds Directive and relating to the requirements of Article 12 of the Habitats Directive, the notes that the granting of a felling licence does not exempt the holder from meeting any legal requirements set out

in any other statute. The FAC noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. The FAC also notes that the licence conditions contain reference to standards of good forestry practice. Based on the evidence before it, the FAC concluded that no error arose in relation to the licence conditions of the nature described by the appellant.

In considering the appeals the FAC had regard to the record of the decision, 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 regarding licence CN85586 nor that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision in relation to licence CN85586, considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

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John Evans, On Behalf of the Forestry Appeals Committee

