



[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

27th September 2021

Subject: Appeal FAC 850/2020 in relation to licence CN84572

Dear [REDACTED]

I refer to the appeal 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 (as amended), has now completed an examination of the facts and evidence provided by the parties to the appeal.

Background

Licence CN84572 for forest road of 240 meters(m) at Derrylosset, Annaghduff, Co. Monaghan was granted by the DAFM on 22nd October 2020.

Hearing

A hearing of appeal FAC 850/2020 was held by a division of the FAC on 14th June 2021. In attendance: FAC Members: Mr. Seamus Neely (Deputy Chairperson), Mr. Derek Daly & Mr. James Conway.

Decision

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, and all submissions received, the Forestry Appeals Committee (FAC) has decided to set aside and remit the decision of the Minister to grant this licence CN84572.

The licence pertains to 240m of forest road at Derrylosset, Annaghduff, Co. Monaghan to serve 10 hectares of forestry. A pre-approval submission report, photographs of the site notice, maps, the specifications of the road, river crossing drawings, piping details and management plan were found on the DAFM file as part of the application process. Construction is to be by excavation.

The proposal area is in the Erne WFD Catchment (ref 36), Dromore_SC_020 Sub Catchment and Dromore_070 River Sub Basin. The proposed road is crossed by the Dromore_070 river waterbody, which has a poor WFD status for the assessment period 2013-18 with agriculture identified as a pressure. The proposal was desk assessed by DAFM and referred to Monaghan County Council, but no reply is recorded on file from the Local Authority.

The DAFM's Inspector Certification document described the site details as this project comprises 240 metres of forest road works, the predominant soil type underlining the project area is predominantly highly modified peat & peaty podzols in nature, the slope is predominantly flat to moderate (<15%), the project area is crossed by / adjoins an aquatic zone(s) and the vegetation type(s) within the project area comprise improved grassland, broadleaf woodland and conifer plantation.

The DAFM undertook a stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, and found one European site, Kilroosky Lough Cluster SAC, within 15km of the proposal and that there was no reason to extend this radius in this case. The site was considered with its qualifying interests listed and the reasons for screening it out are provided. The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity of the site listed. The DAFM also considered the environmental effects of the proposal across a range of criteria and determined that the project was not required to undergo the EIA process. The licence issued on 22nd October 2020 subject to conditions, including the following;

- *Adhere to Coford's Forest Road Building Manual,*
- *No harvesting operations shall commence without a valid Felling Licence,*
- *All guidelines to apply.*

The decision to grant the licence is subject to one appeal. The grounds of appeal broadly are:

1. Breach of Article 2(1) and Article 4(3) of the EIA Directive 2014/52/EU.
2. Breach of Article 4(4) of the EIA Directive 2014/52/EU.
3. The Determination of the Inspector in terms of the Requirement for an EIA is inadequately reasoned.
4. Approval is not consistent with the requirements of Article 4 of the Water Framework Directive.
5. Approval is not consistent with the requirements of Article 6 of the Habitats Directive.
6. Approval is not consistent with the requirements of Article 5 and 9 of the Birds Directive.
7. The COFORD Forest Road Manual (2004) referred to in the conditions of approval ("Adhere to Coford's Forest Road Building Manual") is out of date and its content is not consistent with the current regulatory framework.
8. The Monitoring & Inspection regime implemented by DAFM is not sufficiently robust to ensure that any required mitigation or conditions appended to this approval will be carried over into action and therefore it cannot be assumed there will be practical conformance of this development with the overall environmental regulatory framework.
9. The conditions appended to this approval (including indirectly via Guideline documents) are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure they will result in compliance of this development with the overall environmental regulatory framework.

In a statement 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. It also submitted that the application is assessed based on the information provided by the applicant and all relevant SOPs and all

Forest Service Guidelines, and that felling licence for the forest is assessed separately. The proposal area is not within any NPWS referral buffer (according to IFORIS mapping service), Drumgloe Lough pNHA (001601) is 2km downstream from the proposal area but is not recognised on NPWS protected site list. The Forest Road application was not referred to NPWS in accordance to 'NPWS referral matrix'. The proposal was screened for Appropriate Assessment. The only Natura 2000 designated area within 15km is Kilroosky Lough Cluster SAC, 12.3km away and has no hydrological connection. It is assumed that the applicant and the registered forester will adhere to all Forestry Service Guidelines and Conditions attached to approval. After considering the Grounds of Appeal, no change to the original approval is recommended.

In addressing the grounds of appeal, 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 240m, so is sub threshold for mandatory EIA as set in Irish Regulations. 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. The DAFM's consideration of designated areas and non-designated areas recorded 'no' answers to the forest road being within a SAC, SPA, National Park, NHA, pNHA or Nature Reserve, or within a 0.5km or 3km buffer zone, upstream of, and hydrologically connected to, a SAC, SPA, National Park, NHA, pNHA or Nature Reserve. The FAC finds that based on the evidence before it, that the proposal is for 240 metres of forest road construction to facilitate the management of commercial forest for timber production and outside of any area designated for conservation. The nearest European site to the proposal area is Kilroosky Lough Cluster SAC at a distance of c. 12.3km. The Drumgloe Lough pNHA is however c. 2km downstream and hydrologically connected to the proposed forest road area. Therefore, the DAFM erred in answering no to the forest road being within a 3km buffer zone, upstream of, and hydrologically connected to, a SAC, SPA, National Park, NHA, pNHA or Nature Reserve. The FAC having considered all of the evidence before it, considered that the DAFM had sufficient information in respect of the characteristics of the proposal, the location, and types and characteristics of potential impacts, in order to make a determination as to whether an EIA is required and the FAC 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. The DAFM, in this case, undertook a Stage 1 screening, and found one European sites within 15 km of the proposal area, and that there was no reason to extend the zone of influence in this case. The site identified was Kilroosky Lough Cluster SAC. The FAC consulted publicly available information from the NPWS and EPA and identified the same site. The FAC also identified Magheraveely Marl Loughs N.I. SAC and Upper Lough Erne N.I. SAC within 15km, each at a distance of c. 13km.

The DAFM considered the Kilroosky Lough Cluster SAC site and listed the associated qualifying interests and the reason for the screening conclusion reached for the site; as the position of the project area downstream from the Natura site and the subsequent lack of any hydrological connection, the project area is 12.2km from SAC and will have no effect on any of the qualifying interests. The Magheraveely Marl Loughs N.I. SAC adjoin or are in close proximity to the Kilroosky Lough Cluster SAC and have similar qualifying interests. The qualifying interest of the Upper Lough Erne N.I. SPA is Whoopering Swan wintering population. Having regard to the nature, scale and location of the proposal and the qualifying interests of the Upper Lough Erne N.I. SPA and that the Magheraveely Marl Loughs N.I. SAC adjoin or are in close proximity to the Kilroosky Lough Cluster SAC and have similar qualifying interests, the FAC is not satisfied that the DAFM made a serious error in not screening for these two sites, even though there are within 15km of the proposal area.

The grounds of appeal include that the project area is hydrological connected to the Lough Oughter SAC, that there is no reference to Lough Oughter in the AA screening and as a consequence the AA screening conclusion is flawed. The FAC finds Lough Oughter and Associated Loughs SAC to be at a direct distance in excess of 18km but hydrologically connected, albeit at a greater distance due to the meandering flow of the relevant rivers and via some other loughs. The qualifying interests of Lough Oughter and Associated Loughs SAC are the natural eutrophic lakes with magnopotamion or hydrocharition type vegetation, bog woodland and otter. The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, on the week of 23rd September 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 an effect on any Natura site. The FAC considered that the DAFM had sufficient information available to it, in order to determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. Based on the information available to it, the FAC is not satisfied that a serious or significant error or series of errors were made in the making of the decision regarding Appropriate Assessment in this case and concurs with the conclusions reached.

The FAC considered the contention in the grounds of appeal that approval is not consistent with the requirements of Article 4 of the Water Framework Directive in granting the licence; adding that under Article 4(1)(a)(i) to (iii) of the WFD Member States are required, unless a derogation is granted, to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological

potential and good surface water chemical status by the date laid down by the directive (Case C-461/13 The Weser Case). This ground was elaborated on to also include additional elements, including that the mitigations for protecting water quality contained in Coford's Forest Road building Manual are not written with sufficient precision and clarity regarding their requirements and permitting procedures or substantiated with adequate scientific evidence to ensure that they will eliminate or reduce the adverse impacts of this project and result in compliance of this development with Article 4 of the WFD. It is further elaborated that in the absence of an adequate assessment of the cumulative impact of this project with other projects approved or planned in the same catchment the compliance of this project with Article 4 of the WFD cannot be assured.

In doing so, the FAC reviewed EPA maps and data and find the proposal area is in the Erne WFD Catchment (ref 36), Dromore_SC_020 and Dromore_070 River Sub Basin. The Dromore_070 river waterbody has a poor WFD status (2013-2018 monitoring cycle) and crosses the area to be served by the proposed road. In DAFM's consideration of water, a 'no' answer was recorded for the question 'will adherence to water quality guidelines, harvesting guidelines, and any condition to be attached to approval be sufficient, to prevent any potential significant impact to aquatic zones and water quality arising from the project'. However a 'yes' was recorded in relation to the question regarding underlying waterbody or waterbodies in answer to the question 'is the project, together with any condition to be attached to approval, compatible with the Water Framework Directive objectives, i.e. to prevent any deterioration in waterbody status and to restore the waterbody to at least good status'. The DAFM referred the proposal to Monaghan County Council and no response is recorded on file from the Local Authority. The DAFM included as a condition on the licence to adhere to Coford's Forest Road building manual and all guidelines to apply. The percentage forest cover figure for the River Sub Basin Dromore_070 was given as approximately 3% in the in-combination statement, this was similar to the 2.6% forest cover current figure in the underlying waterbody (or waterbodies) recorded in the Assessment to Determine EIA Requirement and which was recorded as being fractionally lower five years previous. The specifications of the road, river crossing drawings and piping details are on the DAFM file. Special construction works of €3,000 are estimated with the use of two 1200mm diameter Paladex pipes. In summary based on the information available to it and having regard to the nature of the proposal, namely construction of a forest road with special construction works involving a culvert to cross a river, with a poor WFD status, the 'no' answer recorded in relation to the question 'will adherence to water quality guidelines, harvesting guidelines, and any condition to be attached to approval be sufficient, to prevent any potential significant impact to aquatic zones and water quality arising from the project', and despite this, the lack of specific conditions beyond guidelines and the Coford Forest Road building manual, the FAC is therefore not satisfied that there was adequate consideration of the requirements of the WFD by DAFM in their decision making in relation to this proposal and considers that this constitutes a serious error in the processing of the application by DAFM.

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 Article 5 and 9 of the Birds Directive, the FAC notes that the granting of a forest road licence does not

exempt the holder from meeting any legal requirements set out in any other statute. The FAC further considered the nature, scale and location of the proposal being for forest road works in an area of managed agricultural and forestry land, and the measures required by the DAFM, and noted that the appellant did not submit any specific details in relation to bird nesting or rearing on the proposed site. Based on the evidence before it, the FAC concluded that additional conditions of the nature described by the appellant are not warranted in this case and should not be attached to the licence.

In relation to the appellant's grounds of appeal regarding the COFORD Forest Road Manual (2004) referred to in the conditions of approval and its inadequacy as a piece of reference material to form a condition for the approval of this forest road. The FAC considers that the inclusion of the licence condition 'Adhere to Coford's Forest Road Building Manual' does not constitute a serious error in the making of the decision in this case.

In relation to the appellant's grounds regarding the monitoring and inspection regime implemented by DAFM and that the conditions appended to this approval are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure they will result in compliance of this development with the overall environmental regulatory framework the FAC finds that the DAFM have powers to undertake inspections in line with Forestry legislation as is considered appropriate, that compliance with approval conditions is outside the scope of the FAC. The FAC therefore is satisfied, based on the information available to it, that the inclusion of any further conditions relating to these grounds in the appeal in this case, was not required.

In considering the appeal the FAC had regard to the record of the decision, the submitted grounds of appeal and submissions received. The FAC is satisfied that a serious error or a series of errors was made in making the decision regarding licence CN84572 and is setting aside and remitting the decision to the Minister for the consideration of the application for assessment of the potential for the proposed development to have an impact on the Dromore_070 river waterbody which has a poor WFD status (2013 – 2018 assessment) having regard to the requirements of the Water Framework Directive, before making a new decision in respect of the application.

Yours sincerely,

A large black rectangular redaction box covering the signature of the official.

Seamus Neely, On Behalf of the Forestry Appeals Committee