



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

29 January 2021

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FAC ref: 708/2020
Subject: Appeal in relation to licence CN83990

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) against the decision by the Minister for Agriculture, Food and Marine in respect of licence CN83990.

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 licence CN83990 was granted by the Department of Agriculture, Food and Marine (DAFM) on 26 August 2020.

Hearing

An oral hearing of appeal 708/20 was conducted by the FAC on 07 January 2021.

Attendees:

FAC:	Mr Des Johnson (Chairperson), Ms Paula Lynch & Mr Pat Coman
Secretary to the FAC:	Mr Michael Ryan
Appellant:	[REDACTED]
Applicant representatives:	[REDACTED]
DAFM representatives:	Mr Michael O'Brien & Ms Mary Coogan

Decision

The Forestry Appeals Committee (FAC) considered all of the documentation on the file, including application details, processing of the application by DAFM, the grounds of appeal and all submissions and observations, including submissions made at the Oral Hearing, before deciding to affirm the decision regarding the licence (Reference CN 83990).

The proposal is for a forestry road, 255m in length, to serve a stated area of 5.81ha at Glanawaddra, Co. Kerry. The road would adjoin an existing spur road leading to a wind turbine in the Cordal Wind Farm. A 'Build on top' method of construction is proposed. The formation width is 5.5m minimum and the carriageway width is 3.4m. The road would be finished with limestone capping, compacted

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and rolled. Soil drains 750mm deep would be provided at a minimum of 2 metres from the road edges. The soil type is stated to be peat and the elevation 340-365m. The wider area has extensive forestry cover in addition to the windfarm.

The DAFM referred the application to the National Parks and Wildlife Service (NPWS) and Kerry County Council but no responses are recorded.

Prior to the making of its decision, the DAFM completed an Appropriate Assessment Report (AAR) leading to an Appropriate Assessment Determination (AAD). The AAR was prepared by a DAFM ecologist and completed on 12 August 2020. It states that the proposed development is not connected with or necessary to the management of any European sites. There is adequate information available to undertake an Appropriate Assessment. The AAR notes that the proposed forest road would extend from an existing spur road leading to an operational turbine within Cordal Wind Farm. The site is predominantly within the Laune-Maine-Dingle Bay WFD catchment area, and partly within the Blackwater (Munster) WFD catchment area (50m of forest road). The closest river/stream is over 500m to the west draining into the Brown Flesk River, with a first order stream over 750m to the east, ultimately forming the River Blackwater (Munster) a further 1km downstream.

The AAR screens out the following Natura 2000 sites for Appropriate Assessment – Blackwater River (Cork/Waterford) SAC, Killarney National Park, Macgillicuddy's Reeks and Caragh River Catchment SAC and the Lower Shannon SAC. Following 'expert input' the Castlemaine Harbour SAC is also screened, and screened out for reasons related to linear separation distance (c.17km) and the downstream hydrological connection distance of greater than 40kms, and the intervening landscape. In applying the Precautionary Principle, the AAR screens in for Appropriate Assessment the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA. The site is designated for the Hen Harrier. An Appropriate Assessment is undertaken in respect of the listed SPA – listing the qualifying interest (Hen Harrier), conservation objectives, potential for adverse impact and prescribing mitigation measures. The following are the mitigation measures prescribed:

- No forestry operations associated with the licence during the period 1 April to 15 August
- Proposed works to adhere to COFORD Forest Road Manual, Forest & Environmental Guidelines, Appendix 21 of the Forestry Standards Manual setting out agreed protocol regarding breeding Hen Harriers.

An assessment of potential residual impacts is made. The AAR concludes that, in view of the best scientific knowledge and based on objective information, the proposed project itself, will have no adverse effect on the integrity of any European site(s), in view of its conservation objectives. The AAR addresses other plans and projects for possible in-combination effects. Planning projects include dwellings, slatted sheds/agricultural buildings, overhead power line and underground cable from Cordal 110kV station to Scartaglen Wind Farm. Other forestry related projects are afforestation (5), forest roads (4), felling (2), and Coillte felling (18). The AAR further concludes that there is no potential for the proposed works to contribute to any cumulative adverse effects on the listed European site when considered in combination with other plans or projects, due to the prescribed mitigation measures.



Following on from the AAR, the DAFM completed an Appropriate Assessment Determination. The DAFM Determination is that the proposed development individually or in combination with other plans or projects will not adversely affect the integrity of any listed European sites, having regard to their conservation objectives, provided that the prescribed mitigation measures are implemented.

The licence issued on 26 August 2020. It is subject to standard conditions, with additional conditions requiring that no operations commence during the Hen Harrier breeding season from 1 April to 31 August, no operations to commence until wind farm power lines have been turned off, adherence to Forest Biodiversity and Environmental Guidelines and adherence to Forestry and Water Quality Guidelines.

There is a single appeal against the decision to grant the licence. The grounds contend that there is a breach of Articles 4(3), 4(4) and 4(5) of the EIA Directive. Criteria from Annex III of the EIA Directive are not taken into account. Details of the whole project are not submitted. The Forest Road is not a whole project. The determination of the inspector in terms of the requirement for EIA is inadequately reasoned. There is an error in law. Insufficient information is included with the application to permit the inspector to make a conclusive determination regarding EIA. No account is taken of soil, terrain and slope in a way that mitigates against environmental damage. The licence threatens the achievement of the objectives of the River basin Management Plan for the underlying waterbody or waterbodies. Inland Fisheries Ireland (IFI) and the EPA were not consulted. The Stage 1 conclusion for Appropriate Assessment is not legally valid as it is based on an error of fact. The mitigations in the AA Determination are not written with sufficient precision or clarity. Residual effects cannot be excluded. The in-combination assessment is inadequate. The Minister did not seek the opinion of the general public before making the Appropriate Assessment Determination in accordance with Article 6(3) of the Habitats Directive. The licence conditions do not provide for the strict protection of Annex IV species. The licence conditions do not provide a general scheme of protection for wild birds prohibiting deliberate destruction or damage to their nests and eggs or removal of their nests.

In response, the DAFM state that this application was desk and field assessed. An Appropriate Assessment Report and Appropriate Assessment Determination were completed prior to the decision being made.

An Oral Hearing was held on 7th January 2021. The Committee sat partly in person and partly remotely. All parties participated in the Oral Hearing remotely. The DAFM referred to the procedures followed in the making of the decision and stated that the application had been both desk and field assessed. The appellant noted that the DAFM Appropriate Assessment screening, Appropriate Assessment Report and Determination appeared to all have been completed on the same date. He queried why the DAFM ecologist had not visited the site and stated that the absence of any hydrological connectivity to Natura 2000 sites had not been established by the ecologist, and the proposal is within a river sub basin that drains to a SAC.. The construction of the adjacent windfarm could have had a destabilising effect and this had not been assessed as an in-combination effect. There is a material difference between the mitigations contained in the Appropriate

Assessment Determination and the licence conditions. No assessment had been undertaken of emissions and possible impact on climate change. The source of the aggregate required for the proposed development was not identified. The percentage of forest cover referred to in the Inspector's certification on iForis (13.63% within the waterbody) significantly differed from the percentage cover given in the in-combination assessment (32% within Brown Flesk_10 waterbody and 66% within Blackwater (Munster)_10 waterbody). The Appellant contended Q27 on the certification should have a 'yes' answer, and without a reply from the County Council Q23 should not be a 'yes'. The applicants stated that the proposed road would be a branch off a spur road leading to a wind turbine. No works could be carried out during the Hen Harrier breeding season. There is no relevant watercourse on the site and water from this site drains to the south and not towards the Blackwater River (Cork/Waterford) SAC. There is no linkage to the Blackwater River (Cork/Waterford) SAC. The project lands are in the Laune-Maine-Dingle Bay catchment. A 'build on top' option for the road was proposed as being the best option as there is deep peat on the site.

Addressing the grounds of appeal, the FAC noted that the proposed forestry road is significantly sub-threshold for the purposes of mandatory environmental impact assessment. The FAC considered that there is adequate information before it in respect of the characteristics of the proposed development, the location and the types and characteristics of potential impacts to allow for an EIA screening. The FAC considered the screening carried out in respect of EIA and the basis for the conclusion reached that EIA is not required. In particular, the FAC noted that there are no archaeological features on the project lands, that the site is flat to moderate and that there are no aquatic zones on or adjoining the site. This is a High Amenity Area but in a heavily forested area and the proposed development would have no significant visual impact. There are no populations of FWPM likely to be impacted. The area is sensitive to fisheries but there is no direct hydrological connection that could lead to a significant impact on fisheries. There is an existing access and forestry related traffic is not known to be a significant issue in the area. The proposed road design (Build on top) takes into account soil, terrain and the slope. Aggregate is to be sourced from local certified quarries. This is not a densely populated area. The appellant contended that the DAFM assessment appears to have been based on an inaccurate percentage of forest cover in the underlying waterbody, with indications that the coverage may be greater than assumed. The FAC considers that any such error, in the circumstances of this case and having regard to the nature and scale of the proposal, could not be considered a significant or serious error, as there is no likelihood of significant effects on the environment arising from the proposed development alone, or in combination with other projects and land uses. Having regard to the characteristics of the site, and to the nature and scale of the proposed development, the FAC considers that there is no reason to conclude that there is any likelihood of the proposal, in combination with the adjacent windfarm, giving rise to ground instability leading to landslide. The FAC concluded that there is no convincing evidence before it to indicate that the DAFM decision is in breach of the EIA Directive.

The project lands are stated to be predominantly in the Laune-Maine-Dingle Bay catchment and partly in the Blackwater (Munster) catchment. Information confirmed at the Oral Hearing is that there is no hydrological connection to the Blackwater and that any surface water on the project lands would flow south towards the Brown Flesk River, which is approximately 750m separated. The grounds of appeal do not provide any specific evidence to indicate that the proposed development would directly impact on any underlying waterbody or waterbodies. Having regard to the nature and scale of the proposal, the characteristics of the site, and separation distances, the FAC concludes



An Coiste um Achomhairc
Foraoiseachta

Forestry Appeals Committee

that the proposed development would not have an impact on any waterbody and would not threaten the achievement of the objectives of the River Basin Management Plan.

The FAC considered the procedures adopted by the DAFM in its Appropriate Assessment Report and Determination and concluded that there is no evidence before it to conclude that they were inconsistent with the provisions of the Habitats Directive or that the overall conclusion reached is not correct. The issue of percentage forest cover in the underlying body has previously been addressed in this decision.

On the other issues, the FAC considered that the procedures adopted by the DAFM in coming to its decision were consistent with the provisions of Article 6(3) of the Habitats Directive, which does not include a mandatory requirement to consult with the general public. No specific information was submitted by the appellant in respect of Annex IV species or wild birds likely to be affected by the proposed development and, in these circumstances the FAC considered that specific conditions should not be attached to the licence requiring their strict protection.

In deciding to affirm the decision to grant the licence, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours Sincerely,

Pat Coman, on behalf of the FAC

