



[REDACTED]

30 March 2021

**Subject:** Appeal FAC 263/2020 in relation to licence CN80642

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 CN80642.

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 CN80642 for forest road of 231 meters(m) at Ballybrit big, Co. Carlow was granted by the Department of Agriculture, Food and the Marine (DAFM) on 15<sup>th</sup> May 2020.

#### Hearing

An oral hearing of appeal FAC 263/2020, of which all parties were notified, was held by a division of the FAC on 1<sup>st</sup> March 2021. In attendance:

FAC Members:	Mr. Myles Mac Donncadha (Chairperson), Mr. James Conway, Mr. Seamus Neely & Mr. Derek Daly
Appellant:	Not present
Applicant / Representative(s):	Not present
Department Representative(s):	Mr. Bill Murren & Ms. Mary Coogan
Secretary to the FAC:	Ms. Emma Guerin

#### Decision

The Forestry Appeals Committee considered all of the documentation on the file, including application details, processing of the application by DAFM, the notice of appeal, and all submissions received including at oral hearing, before deciding to affirm the decision of the Minister to grant this licence (Reference CN80642).

The licence pertains to 231m of forest road at Ballybrit big, Co. Carlow to serve 11.54 hectares of forestry. The forests are comprised of Norway spruce, Sitka spruce, Hybrid larch and Norway maple. The road is to be constructed along the edge of a current tillage field adjacent to the forest with a turning area towards the end of this in the forested area. Maps and specification details were provided with the application.

No watercourse adjoins the proposal area but the Slaney river watercourse runs along the north western boundary of the area to be served. The biomap supplied by the applicant also shows a watercourse connected to the river bisecting the site to be served. The site is located within the Slaney and Wexford Harbour WFD Catchment, the Slaney\_SC\_020 and the river waterbody Slaney\_080, which has a good WFD status (2013-2018).



The application was desk and field assessed by DAFM and referred to Carlow County Council, Inland Fisheries Ireland (IFI), NPWS and Waterways Ireland. Carlow County Council responded making reference to the large road entrance on site and of no record of planning permission for it. IFI replied stating that they had no objection provided adherence to various listed guidelines and commented on the proposed felling. NPWS replied stating they had no comment on the application but provided generic material with regard to the Habitats Directive and EIA. Waterways Ireland did not respond.

A Stage 1 Appropriate Assessment screening in relation to the provisions of the Habitats Directive, is documented as part of the DAFM Inspector's Certification document. This screening listed three European sites within 15km of the proposal and there was no reason to extend this radius in this case. The sites were considered in turn with their qualifying interests listed. A standalone Appropriate Assessment Report dated as completed by DAFM on 20<sup>th</sup> April 2020 is also on file. This document also lists the European sites within 15km of the proposal - Holdenstown Bog SAC 001757, River Barrow and River Nore SAC 002162 and Slaney River Valley SAC 000781. The document gives an 'expert review' of the screening recommendation for each of the sites following the District Inspector's recommendations, and the 'expert review' recommendation is to screen out all the sites for Appropriate Assessment with rationale provided for each site. The document concludes that *"Following the initial screening and subsequent expert verification (as per Table 1 above), and pursuant to Article 6(3) of the Habitats Directive, the European Communities (Birds & Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) (as amended) and the Forestry Regulations 2017 (S.I. No. 191 of 2017), as amended by inter alia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), DAFM has determined that there is no possibility of CN80642 having any likely significant effect, either individually or in combination with other plans and projects, on any European Site. (Determination under Section 42(16) of S.I.477 / 2011: For the purposes of 42(16) of S.I.477/2011, DAFM has determined that the project will not adversely affect the integrity of any European Sites.)"*

The proposal's potential to contribute to in-combination effects on European sites was also considered with other plans and projects in the vicinity. 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 DAFM approved the application on 15<sup>th</sup> May 2020 with conditions.

There is one appeal against the decision. Broadly the grounds of the appeal submitted are;

- this decision does not comply with the Habitats Directive, the Birds Directive and the Environmental Impact Assessment Directive;
- the test for Appropriate Assessment Screening in Irish and EU law is: it is, merely necessary to determine that there may be such an effect, rather than to state that it will not have a significant effect;
- the Appropriate Assessment procedure adopted by the DAFM is flawed, with reference made to the Judgement of the CJEU in case C-323/2017 in regard to the consideration of conditions/measures at the screening stage; and
- it is the duty of the FAC to carry out both a full Appropriate Assessment Screening and a full Environmental Impact Assessment Screening in accordance with the law, with the opinion of Advocate General Kokott in Case C-254/2019 referred to in this regard.

The DAFM responded to the grounds of appeal stating that the licence application had been processed according to their procedures, SI 191 of 2017 and the Forestry Act 2014, and that all procedures/guidelines were adhered to. At the oral hearing, the DAFM opened by summarising their approach to processing the application and issuing the licence. In response to queries, raised the DAFM inspector gave some context and clarifications on the additional conditions attached to the licence, including an account of a conversation with the adjoining landowner/resident to the proposal area. This led to the inclusion of the condition that the proposed turntable be sited at least 30m back from his property boundary while also avoiding the lime kiln. In response to the local authorities' response to the application citing the need for planning permission for the creation/widening of the entrance/exit to the public road, DAFM instructed the applicant to seek planning permission for it. The DAFM also described the site as being a relatively good, flat site on dry land, that there is no issue with the proposed road area



but suggested that any proposed application for thinning or clearfelling of the area to be served would have to be considered separately as the centre drain identified on the biomap is hydrologically connected to the Slaney River Valley SAC which also adjoins the area to be served.

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 decision under appeal relates to a licence for a forest road of 231m, so is sub threshold for mandatory EIA as set in Irish Regulations. The road would be built along the edge of a field which is currently used for agricultural purposes and 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, archaeology, designated areas, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The grounds of appeal do not outline any specific concerns regarding significant effects on the environment of the proposal. The proposal area lies outside of any conservation area and the DAFM completed a screening for Appropriate Assessment and determined that no significant effects would occur on any SAC or SPA. Having regard to the record of the decision and the submitted grounds and the nature, scale and location of the proposal the FAC is not satisfied that the DAFM erred in relation to their EIA considerations and concurs with the conclusion.

In addressing the Habitat Directive 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 projects, having regard to the conservation objectives of that designated site. In this case, the DAFM undertook a Stage 1 Appropriate Assessment screening, found three European sites within 15km of the proposal - Holdenstown Bog SAC 001757, River Barrow and River Nore SAC 002162 and Slaney River Valley SAC. The FAC consulted publicly available information from the NPWS and EPA and identified the same three sites within 15km of the proposal area.

The DAFM Appropriate Assessment screening determination was to screen out all the sites for Appropriate Assessment with rationale provided for each screening conclusion. The closest site is the Slaney River Valley SAC and the DAFM, in screening it out for Appropriate Assessment gave their reasons as; the proposed road project is located entirely outside of the boundary of the European Site; there is no potential for direct effects; the proposed road footprint is restricted to a tillage field; no watercourses were identified within or adjacent to the proposed development footprint which could provide a pathway for surface water pollution; therefore, no potential for surface water pollution exists, the proposed development is restricted to highly modified habitats and is buffered from the SAC by over 250m of mature conifer forest; no potential supporting habitat for otter was identified within or adjacent to the proposed development; therefore, no disturbance related effects on QI species are anticipated; and no potential pathways for effect between the proposed development and the European Site exist. The DAFM in screening out the Holdenstown Bog SAC for Appropriate Assessment gave their reasons as; the proposed road project is located entirely outside of the boundary of the European Site; there is no potential for direct effects; due to the size and scale of the proposed project and its distance from the SAC, in addition to the lack of a hydrological connection, no pollution related effects are anticipated; and no potential pathways for effect between the proposed development and the European Site exist. The DAFM in screening out the River Barrow and River Nore SAC for Appropriate Assessment gave their reasons as; the proposed road project is located entirely outside of the boundary of the European Site;

there is no potential for direct effects, the proposed development is located in a separate surface water catchment (Slaney) to the European Site (Barrow and Nore); therefore, no potential for hydrological impacts exists; and no potential pathways for effect between the proposed development and the European Site exist.

The DAFM also undertook and recorded a consideration of other plans and projects, including forestry and non-forestry projects, 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. The FAC considered the nature and scale of the proposal, the description given of the site and its location, including that it is outside of any conservation area or Freshwater Pearl Mussel catchment, and based on all the evidence before it, the FAC consider the procedures adopted by the DAFM in their screening are acceptable and the FAC is not satisfied that a serious or significant error or series of errors was made in the making of the decision regarding Appropriate Assessment and concurs with the conclusions provided.

In considering the appeal 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 or that the decision was made without complying with fair procedure. The FAC in deciding to affirm the decision considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

A large black rectangular redaction box covering the signature of Mr. James Conway.

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Mr. James Conway (on behalf of the Forestry Appeals Committee)