



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

30th March 2021

Subject: Appeal FAC 684/2020 regarding licence CN85495

Dear [REDACTED]

I refer to your appeal to the Forestry Appeals Committee (FAC) in relation to the above licence issued by the Minister for Agriculture, Food and the Marine. 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 all parties to the appeal.

Background

Licence CN85495 for 1171 metres of forest road at Esk North, Co. Cork was approved by the Department of Agriculture, Food and the Marine (DAFM) on 20th August 2020.

Hearing

An oral hearing of appeal FAC 684/2020, of which all parties were notified, and representatives of the DAFM and a representative of the Applicant attended, was held by the FAC on 24th March 2021.

In attendance at Oral Hearing:

Department Representative(s):

Ms. Mary Coogan, Mr. Brian Mahoney,

Appellant:

Not in attendance,

Applicant / Representative(s):

[REDACTED]

FAC Members:

Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. Iain Douglas and Mr. Seamus Neely.

Secretary to the FAC:

Ms. Marie Dobbyn.

Decision

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made at the oral hearing and all other submissions received, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN85495.

The licence pertains to 1171 metres of forest road to service 46.84 ha of forest at Esk North Co Cork. The Soil type is described in the Natura Impact Statement (NIS) submitted by the applicant as being a well-drained mineral soil. The site is described as being located 800m from the River Blackwater SAC at the

Glen River and adjoins the Glennagurragat Stream at the southern boundary of the area to be serviced. The Glen River has been assigned a 'high' WFD status by the EPA in the 2013-18 assignment period. The NIS sets out that a tributary of the Glennagurragat Stream flows through the site area and crosses the path of the road at the location of an existing culvert on the old farm track. It is stated that a setback was established adjacent to the streams at afforestation stage in 2003 and that the streams have lots of vegetation and trees growing within the 10m setback. It also states that field boundaries consist of Hedgerows (WL1) with linear strips of shrubs with occasional trees on raised banks of earth. There is stated to be an existing entrance onto the public road which currently services an existing farm yard and sheds and which is of an adequate width to accommodate the requirements generated by the forestry activities. The specification of the road was provided with the application and it is to be constructed through excavation on a route that follows the contours of the site and is on the route of an old farm track. An oral hearing of the appeal was held of which all parties were notified and representatives of the DAFM and of the Applicant attended.

The DAFM undertook a screening of the proposal for Appropriate Assessment and found that there were two European sites (Blackwater River (Cork/Waterford) SAC 002170 and Mullaghanish to Musheramore Mountains SPA 004162) within 15km of the proposed road and that there was no reason to extend this radius in this case. The Mullaghanish to Musheramore Mountains SPA 004162 was screened out and the reasons for the screening conclusion reached are provided in the documentation on file. The Blackwater River (Cork/Waterford) SAC 002170 was screened in and proceeded to Appropriate Assessment. The FAC finds that the record in the AAs on file shows that this site was screened out. The FAC queried this with the DAFM representative at oral hearing and it was asserted in response that the AAs showed this site as being screened in when originally completed, and that this was the trigger for the project proceeding to Appropriate Assessment in respect of the European site concerned. It was further stated that a shortcoming in the IT system used at the time resulted in a requirement that the record be manually altered as a 'screen out' in order to let the system proceed through to the approval stage (and when the Appropriate Assessment had been completed). While this is an error in the record, the FAC finds that it is not a significant error having regard to the circumstances as submitted by DAFM at oral hearing and that the project did proceed to Appropriate Assessment for the project in respect of the European Site in question. The DAFM also recorded other plans and projects that were considered in combination with the proposal. The DAFM 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 application was referred to the Cork County Council who responded raising no specific objection and to the National Parks and Wildlife Service who did not make a response. The licence was approved on 20th August 2020.

There is one appeal against the decision. The grounds contend that there is, a breach of Articles 2 (1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU and submits, that (the) Member state has exceeded its limits of discretion in circumstances where all relevant selection criteria is not taken into account, that a number of criteria set out in Annex III does not form part of the standard FS screening assessment, that the licence is for an area which is part of a larger programme of works, that it does not represent the 'whole' project, and therefore it is in breach of the EIA Directive, that the application has not described any aspects of the environment which are likely to be significantly affected, that the afforestation was carried out on these

lands without adequate screening for EIA, including an AA, that there should be no approval for further works without retrospective assessments for EIA / AA, that the assessment of the inspector for EIA is inadequately reasoned, that there is no foundation for the conclusions in the iforis tick boxes, that there is insufficient information in the application to inform EIA requirement consideration, that the proposed design and construction of the forest road does not take account of soil, terrain and slope in a way that mitigates against environmental damage, that this 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, that the mitigations contained in the AA and consequently in the licence are not written with sufficient precision or clarity to ensure compliance with Article 6 (3) of the Habitats Directive, that residual effects from this project cannot be excluded and therefore the in-combination effect of the project with other plans and projects have not been adequately assessed, grounds submit that the AA in-Combination assessment is flawed as systems in place for approval and monitoring are not sufficiently developed, that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the AAD, that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Birds Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration and that licence conditions do not provide a general system of protection for all species of birds prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with the procedures, S.I. 191/2017 and the 2014 Forestry Act and that the Department is satisfied that all criteria as outlined in the standards and procedures listed in the statement have been adhered to in making a decision on the application. At the oral hearing the DAFM representative outlined the processing of the application, the information submitted by the applicant including maps of the proposal, the NIS and that the project was both desk and field assessed. He described the Appropriate Assessment and EIA considerations undertaken and the conclusions reached and reiterated the broad content of the statement of facts provided to the FAC. He also updated the FAC on some errors in the record in addition to that described earlier regarding the Appropriate Assessment screening document. In particular he pointed out that the answer to question number 16 on the '*Assessment to Determine EIA Requirement*' should have been a 'yes' rather than a 'no' as shown. He asserted that he believed that the record reverted to an original entry in this field (and which had required alteration having regard to further information submitted by the applicant in relation to the project). While this is an error in the record the FAC finds that it is not a significant error having regard to the circumstances and as submitted by DAFM at oral hearing. At oral hearing the applicant's representative described the context of the application and that the delay caused by the appeal had prevented the owners from being in a position to extract some crop already (the first since planting) from the forestry to be served and described the impact of this delay for the owner in this case.

The FAC, in the first instance, considered the Appropriate Assessment screening and Determination report undertaken by the DAFM. The grounds of appeal submit that the mitigations contained in the Appropriate Assessment (and consequently in the licence) are not written with sufficient precision or clarity to ensure

compliance with Article 6 (3) of the Habitats Directive, that residual effects from this project cannot be excluded and therefore the in-combination effect of the project with other plans and projects has not been adequately assessed. The appeal grounds also submit that the Appropriate Assessment In-Combination assessment is flawed as systems in place for approval and monitoring are not sufficiently developed and that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the AA Determination. The FAC finds that the screening of the proposal for Appropriate Assessment established that there were two European sites (Blackwater River (Cork/Waterford) SAC 002170 and Mullaghanish to Musheramore Mountains SPA 004162) within 15km of the proposed road and that the Mullaghanish to Musheramore Mountains SPA 004162 was screened out for the purposes of Appropriate Assessment. The Blackwater River (Cork/Waterford) SAC 002170 was screened in (an error in the AAs relating to this site has been addressed earlier in this letter) and proceeded to Appropriate Assessment. The reasons for the screening conclusion reached in respect of each site are provided in the documentation on file. The Appropriate Assessment (AA) Determination report on file and dated 26th June 2020 sets out the screening decisions for the two European sites in question and proceeds to Appropriate Assessment for the Blackwater River (Cork/Waterford) SAC 002170. The AA Determination sets out that the DAFM has completed the Appropriate Assessment of potential impacts on the European site 'screened in' and has made certain, based on best scientific knowledge in the field 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 cilia the Forestry (Amendment) Regulations 2020 (S.I. No. 31 of 2020), that the activity proposed under CN85495, individually or in combination with other plans or projects, will not adversely affect the integrity of any European site, in particular the Blackwater River (Cork/Waterford) SAC (002170), having regard to their conservation objectives, and will not affect the preservation of these sites at favourable conservation status, if carried out in accordance with specific mitigation to be attached as conditions to the licence (if issued). The FAC finds that the licence as issued contained a specific requirement that the mitigation measures in the AA Determination are conditions of approval in respect of the project. It was established at oral hearing that in a circumstance where the mitigations in a particular AA Determination are conditions of approval then the practice is that the AA Determination is enclosed with the licence issued. In this case the applicant's representative in response to query at oral hearing confirmed having received the AA Determination in this case and further set out the arrangements to be employed by the applicant to ensure that conditions of licence, including the mitigation measures set out in the AA Determination are met. The FAC examined publicly available information from the NPWS and EPA and identified the same two European sites (Blackwater River (Cork/Waterford) SAC 002170 and Mullaghanish to Musheramore Mountains SPA 004162). The DAFM also recorded other plans and projects that were considered in combination with the proposal. The FAC 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 determine the likely significant effects of the proposal itself or in combination with other plans and projects on a European site. The FAC further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The FAC considered the mitigation measures outlined in the AA and found them to be clear and readily implementable by the Applicant and reflective of good forestry practice. The FAC considered that there was no convincing evidence before it that the measures would not be effective in this instance. The

procedures adopted by the DAFM in their assessment are considered to be acceptable. The DAFM Determination concludes that;

'the Department of Agriculture, Food & the Marine has determined, 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), and based on objective information, that no reasonable scientific doubt remains as to the absence of adverse effects on the integrity of any European site.

For the purposes of 42(16) of 5.1.477/2011, the DAFM has determined that the project will not adversely affect the integrity of any 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 provided.

The FAC considered the contention in the grounds of appeal 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 2018-2021. In doing so the FAC noted the content of the DAFM statement, the submissions made at oral hearing and that the licence includes a requirement to adhere to the mitigation measures set out in the AA Determination which deal extensively with site specific requirements in relation to water quality. The Appellant did not submit any specific information regarding effects on water quality or specific matters relating to the pathways related to the proposal. Based on the information available to it and having regard to the scale, nature and location and the conditions under which operations would be undertaken, the FAC is not satisfied that the proposal poses a significant threat to water quality. In relation to the ground that the mitigation measures are written with insufficient clarity the DAFM representative in response to question at oral hearing asserted the view that the mitigation measures set out in the AA Determination are site specific and reiterated her view that they are written with sufficient clarity and are clearly set out as requirements of the licence. The FAC also noted the response of the applicant's representative when queried at oral hearing as to the process the owner will follow to ensure compliance with the conditions and requirements of a granted licence including the onsite briefings and supervision provided to contractors engaged to carry out works relating to the licence. Based on the information available to it, including submissions and clarifications made by DAFM and the applicant's representative at the oral hearing, the FAC finds that the mitigation measures are provided for as a requirement of the licence. The FAC is therefore not satisfied that the Licence conditions are not written with sufficient precision or clarity regarding their requirements such that they will result in non-compliance of the project with the overall environmental regulatory framework. The FAC is therefore not satisfied that a serious or significant error or a series of errors was made in making the decision as it relates to this ground of appeal.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds including that there is insufficient information in the application and available to inform EIA requirement consideration, and

that the proposed design and construction of the forest road does not take account of soil, terrain and slope in a way that mitigates against environmental damage, the FAC noted the submission by the DAFM representative at oral hearing that the answer to question number 16 on the '*Assessment to Determine EIA Requirement*' should have been a 'yes' rather than a 'no' (ie confirming that proposed design and construction of the forest road take into account soil, terrain and slope in a way that mitigates against any environmental damage). In considering these grounds, 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. Neither afforestation nor deforestation is 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 felling of trees, as part of a forestry operation, with no change in land use, does not fall within the classes referred to in the Directive, and is similarly not covered by the Irish regulations (S.I. 191 of 2017). The decision under appeal relates to a licence for a forest road of 1171m, and so is sub threshold for mandatory EIA as set in Irish Regulations. The road would be built on the line of an old farm track and following the contours of the site 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, designated areas, archaeology, landscape and cumulative effects, and determined that the project was not required to undergo the EIA process. The DAFM in their considerations on this, in the section focusing on the cumulative effect, recorded answers to questions on both the length of the proposed forest road and the length of forest road in the area when the proposed road is considered in combination with other recent, ongoing or planned work, and the responses indicated lengths of less than 2000m. The DAFM also included the approximate % forest cover in the underlying waterbody (or waterbodies) and within 5km, both currently and five years previous. The DAFM concluded that based on the extent of the forest cover and the forest road network that the cumulative effect of this proposal was not likely to have a significant impact. At the oral hearing and in response to questions relating to the availability of sufficient information to inform EIA requirement consideration the DAFM representative asserted that he considered that there was sufficient information available to the DAFM to enable an informed decision in relation to these matters. The DAFM expressed their satisfaction that they had considered the criteria appropriately, explained their considerations with regard to soil, terrain and slope (describing the proposal as being on a low-risk site) and that they had sufficient information from the applicant in order to make their determinations. The FAC noted that this was a proposal for a forest road to serve 46.84 hectares, notwithstanding that a felling or thinning licence would have to be processed under a separate application(s). 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 DAFM in relation to their EIA consideration and concurs with the conclusion reached regarding EIA and that breaches of Articles 2 (1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU had not occurred in this case.

Regarding the contention in the grounds of appeal that the afforestation on the lands to be served by the road, subject of this appeal, was carried out on these lands without adequate screening for EIA, including an AA, and that there should be no approval for further works without retrospective assessments for EIA / AA, the FAC noted the assertion by the DAFM representative at oral hearing that the afforestation in question was subject to the consenting process of the relevant Department at the time of its planting. No evidence was provided by the Appellant to substantiate their grounds. The FAC having considered all of the evidence before it, including the grounds of appeal, submissions made including at oral hearing, is not satisfied that a serious or significant error or a series of errors was made by DAFM in the making of the decision in this case as it relates to this ground of appeal. Regarding the conditions that the appellant suggested should be attached to the licence relating to protections for animal species listed in Annex IV (a) of the habitats directive, in their natural range, prohibiting deliberate disturbance of these species and in relation to a general system of protection for all species of birds, the FAC had regard to the assertions made by the DAFM representative at oral hearing that these grounds had been considered and that the conditions suggested are not warranted in this case and that the Appellant had not provided any specific information regarding the presence of any species or habitats in the area. The FAC considered the existing legislative safeguards in place with regard to the matters raised in these grounds and that the Minister may attach conditions, including the erection of site notices and any other environmental or silvicultural requirements, as the Minister considers appropriate. The FAC further considered the nature, scale and location of the proposal being for forest road works along an existing farm track in an area of managed agricultural and forestry land, and the Appropriate Assessment and associated measures required by the DAFM. The FAC finds that the granting of the licence for the road in this case does not exempt the holder from meeting any legal requirements set out in any other statute. The FAC is satisfied, based on the information available to it, that the inclusion of the conditions as raised in these grounds of appeal in this case, was not required.

In considering the appeal the FAC had regard to the record of the decision and the submitted grounds of appeal, 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 is thus affirming the decision of the Minister regarding licence CN85495 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In deciding to affirm the decision, the FAC considered that the proposed development would be consistent with Government policy and Good Forestry Practice.

Yours sincerely,

—
Seamus Neely On Behalf of the Forestry Appeals Committee



An Coiste um Achomhairc
Foraoiseachta
Forestry Appeals Committee

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

7th April 2021

Subject: Decision Letter for appeal FAC 684/2020 regarding licence CN85495 (copy attached)

Dear [REDACTED]

I wish to advise you that it has come to attention that the attendance of one of the Department of Agriculture, Food and the Marine (DAFM) representatives, Ms Orla Coffey, who attended the oral hearing of appeal FAC 684/2020, held by a division of the Forestry Appeals Committee on 24th March 2021, was not recorded on the decision letter dated 30th March 2021 and as issued to you. This omission was due to an oversight.

I want to take this opportunity to confirm that Ms Orla Coffey (DAFM representative) was in attendance at the oral hearing of appeal FAC 684/2020 held by the FAC on 24th March 2021 and I apologise for any inconvenience caused by this oversight.

This letter should be read in conjunction with the decision letter issued to you dated 30th March 2021, a copy of which is attached herewith.

Yours sincerely,


Seamus Neely On Behalf of the Forestry Appeals Committee

