



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

7<sup>th</sup> April 2021

**Subject:** Appeal FAC646/2020 regarding licence CN86301

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, as amended, has now completed an examination of the facts and evidence provided by all parties to the appeal.

#### **Background**

Licence CN86301 for 355 metres of forest road works at Cummeennabuddoge, Co. Kerry was approved by the Department of Agriculture, Food and the Marine (DAFM) on 7<sup>th</sup> August 2020.

#### **Hearing**

A hearing of appeal FAC646/2020 was held by the FAC on 31<sup>st</sup> March 2021. In attendance:

FAC Members: Mr. John Evans (Deputy Chairperson), Mr. Derek Daly, Mr. Seamus Neely, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms. Mary Coogan, Mr. Eugene Curran

Applicant Representatives: [REDACTED]

Appellant: Not present [REDACTED]

#### **Decision**

Having regard to the evidence before it, including the licence application, processing by the DAFM, the notice of appeal, submissions made 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 CN86301.

The licence pertains to 355 metres of forest road works at Cummeennabuddoge, Co. Kerry. The application included a description and specification of the road works and maps showing the route of the proposed road and the lands to be served. No aquatic features are marked in the vicinity of the forest road works. Photo of site notice and map showing location was submitted. The road would

service a forest area of 10.05 ha stated to be 42 years old and the site is described as being on a shallow peat soil at 430-470 metres in elevation. Construction would be through excavation. The application was referred to Kerry County Council and no response was provided. Two submissions were made by members of the public. The DAFM recorded a screening for Appropriate Assessment and identified seven European sites within 15km of the proposal and that there was no need to extend the radius in this case. The identified sites are Blackwater River (Cork/Waterford) SAC 002170, Killarney National Park, Macgillycuddys Reeks And Caragh River Catchment SAC 000365, Mullaghanish Bog SAC 001890, Mullaghanish to Musheramore Mountains SPA 004162, St. Gobnets Wood SAC 000106, The Gearagh SAC 000108 and The Gearagh SPA 004109. Each site is considered in turn with its qualifying interests and conservation objective and a conclusion with reasons is provided. The DAFM concluded that the proposal should not proceed to Appropriate Assessment in relation to any European site. The DAFM also recorded a consideration in relation to Environmental Impact Assessment. The DAFM recorded a consideration of other plans and projects dated 23rd July 2020. A series of criteria are identified and the DAFM concluded that the proposal should not be subject to the EIA process. The last EIA Spatial run is dated 6th August 2020. The licence was issued on 7th August 2020.

The approval is subject to one appeal. The grounds, in summary, contend that there has been a breach of Articles 2(1), 4(3), 4(4) and 4(5) of the EIA Directive 2014/52/EU. The FAC understands this to be Directive 2011/92/EU as amended by Directive 2014/52/EU. In particular, it is submitted that some of the criteria under Annex III do not form part of the assessment undertaken by the DAFM, that the proposal application does not represent the whole project and that, subsequently, the DAFM could not make a determination of the whole project. It is submitted that the application contains false or erroneous responses by the Registered Forester in relation to Environmental Considerations. It is submitted that there is insufficient information on which to make a decision regarding EIA and that the determination of the DAFM is inadequately reasoned. It is submitted that the Stage 1 AA (Appropriate Assessment) is not legally valid as there is an aquatic zone within the site boundary that has direct hydrological connectivity to an SAC. It is submitted that the licence and its associated operations threaten the achievements of the objectives of the River Basin Management Plan for Ireland 2018-2021 with reference to adequate consultation and consideration of cumulative effects. It is submitted that the licence conditions do not provide a system of strict protection for the animal species listed in Annex IV (a) of the Habitats Directive or a general system of protection for all species of birds under Article 5 of the Birds Directive.

In a statement to the FAC, the DAFM submitted that the decision was issued in accordance with their procedures, S.I. 191/2017 and the 2014 Forestry Act. It is submitted that there are no apparent hydrological or environmental threats and that the application consists of a proposed internal road in the Applicant's plantation.

An oral hearing of the appeal was held, of which all parties were notified, and attended by representatives of the DAFM and the Applicant. The DAFM provided an overview of the submission and processing of the application and the screening undertaken in relation to Appropriate Assessment and EIA. It was submitted that the DAFM considered the road project as submitted and that there was no



evidence of any aquatic zones in of adjoining the area and that other plans and projects were considered in-combination with the proposed road. Due to exceptional circumstances and having been considered appropriate and accepted by the Chairperson, a statement submitted by the Appellant was read out in relation to their submitted grounds. This statement contended that the felling licence KY15-FL0036 should have been considered as part of the assessment and that the incorrect test for Appropriate Assessment had been employed by the DAFM. Reference was made to the general obligations on public authorities identified by the NPWS, text from the Natura Impact Statement of the Forestry Programme in relation to pollution threats to water, and the Pontbren Project Report of 2013. It was submitted that a direct hydrological link to an SAC was present. The Applicant described the Application that they made and submitted that they had considered the road design and route following and desk and field based examination. They submitted that the purpose of the project was to gain access to an unroaded part of the forest for all management purposes from a long-established portion of forest road that leads to the public road where an entrance is currently in place. It was submitted that no watercourse would be crossed and that the closest watercourse lay 400 metres to the west. The land to be crossed was submitted to be forest replanted in 2018 and mature forest to the north. Aerial imagery of the area was queried by the FAC and it was submitted that the existing forest road lay to the south of the proposal and that ride-lines and fire breaks are also present in the forest. It was submitted that the site lies outside of a Hen Harrier "red zone" based on information submitted by the NPWS. A number of responses provided in the Application were queried by the FAC. It was submitted that the DAFM considered the area to be landscape sensitive based on information from in the County Development Plan and that the project lay within 3km from an SAC but was not hydrologically connected to it. It was submitted that a mistake had been made in describing the proposal in the Inspectors Certification and that the proposal would not cross or adjoin a watercourse and that the record may have a technical error on it.

The FAC considered in the first instance the grounds that relate to the information provided in the application. The grounds contend that the application contains erroneous and insufficient information while no specific reference or example is provided. In considering the record of the decision, the FAC noted that questions 3.2 and 5.1 contain contradictory responses from the Applicant and the Inspector. Question 3.2 relates to the upstream proximity of the proposal in relation to areas designated for conservation. The Forestry Standards Manual (DAFM, 2015) provides context to these questions and specifies that this relates to upstream direct hydrological connection to a European site. It was submitted by the DAFM and by the Applicant that they did not consider there to be any direct hydrological connection. Question 5.1 relates to the landscape designation of the area. The FAC consulted the Kerry County Development Plan and found the area to be classified as secondary special amenity and not prime special amenity and that there were no marked views and prospects in the vicinity. The proposal would occur in a managed forest area that is well-setback and screened from the public road. The FAC concluded that the contradictory responses provided in the Environmental Considerations section of the record stemmed from a difference in interpretation of the question and that, given the facts of the matter, the issues were not of a degree of seriousness or significance that they should affect the decision.



Regarding the information submitted, the application included a number of maps showing the route of the proposed road and the area to be serviced, watercourses and other features and its position in the wider landscape. The DAFM deemed the maps to be acceptable. Environmental details were also submitted and a road specification outlining the construction method that would be employed. It was also submitted that the road works would be undertaken in line with the COFORD Forest Roads Manual. Aside from questioning the scale and parts of the project, the grounds do not identify any specific shortcomings of the information. The felling licence identified by the Appellant in their written submission is situated at the Northern section of the road. The FAC noted that this Application was submitted after the DAFM had completed its assessment and therefore did not form part of the identified plans and projects. The proposal is described as facilitating all management activities in the area. The FAC considered that the information submitted and available to the DAFM was sufficient to assess and decide on the Application for forest road works.

Under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. As noted the DAFM recorded a screening for Appropriate Assessment that included plans and projects considered in-combination with the proposed forest road works. The FAC consulted publicly available information provided by the NPWS and EPA and identified the same seven sites within 15km of the proposal. The land is situated in the Flesk[Kerry]\_SC\_010 sub catchment of the Laune-Maine-Dingle Bay Catchment. A stream is marked in EPA data to the west at, the FAC estimated, c.300 metres from the proposed road and the land slopes towards the watercourse. The stream (unnamed by EPA) forms part of Flesk (KERRY) 010 waterbody which has been assigned a Good status (2013-2018) and Not at Risk in regards the Water Framework Directive. The stream flows north to meet the Flesk River after some 2.3km and the boundary of the Macgillycuddy's Reeks And Caragh River Catchment SAC 000365. The DAFM screened out this site due to *'The absence of any significant relevant watercourse(s) within or adjoining the project area'*. No evidence to contradict this statement was submitted and there is no evidence that the habitats or species associated within SAC are present on lands having regard to the description of the lands and the DAFM record. The FAC questioned the Applicant at the oral hearing and it was submitted that the land is moderately sloped and consists of replanted forest and that there are no drains leading from the forest road towards the stream. The road would be built in a south-north direction parallel to the contours of the land. The FAC considered the nature, scale and location of the proposal and the general site and the degree and nature of separation from the SAC and is satisfied that the DAFM did not err in its conclusion. The closest European site to the proposed forest road works is Mullaghanish Bog SAC 001890 which lies some 1.5km to the south and its qualifying interest are Blanket Bogs. The SAC lies in a general upstream direction from the proposal with no hydrological connection and at the confluence of the Lee, Cork Harbour and Youghal Bay and Laune-Maine-Dingle Bay Catchments. The FAC considered the other European sites identified by the DAFM, their conservation objectives, relative location and the reasons provided for the screening conclusion, the nature, scale and location of the proposal and the submitted grounds. The FAC considered the range and type of plans and projects considered in-combination with the proposed road and concluded that they were acceptable. The FAC concurs with



the conclusions reached and is not satisfied that the DAFM have erred in concluding that the proposal was not required to proceed to Appropriate Assessment under Article 6(3) of the Habitats Directive.

Regarding Environmental Impact Assessment (EIA) and related matters in the grounds, the EU EIA Directive sets out in Annex II 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. 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. In this instance the proposal is considered across a number of criteria including the Project Description, Cumulative effect and extent of project, Water, Soil, terrain, slope and other factors. The DAFM also completed a screening for Appropriate Assessment and considered other conservation sites and issues. Answers are provided to the listed questions. At 355 metres the forest road works are considerably sub-threshold for the mandatory submission of an EIA Report. As noted the forest road would be located in an area of managed forest and is outside of any areas designated for nature conservation. The general area is not classified as prime special amenity landscape but as secondary special amenity landscape but is well setback from the public road and there are no marked views and prospects in the vicinity. The closest marked watercourse is c.300 metres to the west and the FAC is satisfied that given the distance and the nature and scale of the proposal, including the specification details, that this waterbody would not be impacted. The FAC is satisfied that, having regard to the nature, scale and location of the proposal, that the DAFM conclusion is sufficiently reasoned and the FAC concurs with the conclusion reached.

In relation to the appellant's stated 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 or animals listed under Annex IV (a) of the Habitats Directive. The FAC had regard to the DAFM record, including the screenings and assessment undertaken which include reference to datasets provided by the NPWS, such as Hen Harrier red zones or areas of higher likelihood of nesting in relation to SPAs and the conditions under which the operations would be undertaken. The FAC noted that no details or evidence of the presence of species on the site was provided by the Appellant. The FAC considered 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 is not satisfied that an error was made in making the decision in this regard in relation to CN86301.

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 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 CN86301 in line with Article 14B of the Agricultural Appeals Act 2001, as amended. In affirming the decision, the FAC considered that the proposal would be in keeping with Good Forestry Practice and Government policy.

Yours sincerely,

[Redacted Signature]

Vincent Upton / On Behalf of the Forestry Appeals Committee