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30th April 2021

Subject: Appeal FAC 687/2020 regarding licence CN77144

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 CN77144 for a forest road of 390m at Carrighmore, Co. Carlow was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 21st of August 2020.

An oral hearing of appeal FAC 687/2020, of which all parties were notified, and representatives of the DAFM and the Applicant attended, was held by the FAC on the 14th of April 2021.

In attendance at Oral Hearing:

Department Representative(s):	Ms. Mary Coogan, Mr. Kevin Collins, Mr. Billy Murren,
Appellant:	[REDACTED]
Applicant / Representative(s):	[REDACTED]
FAC Members:	Mr. John Evans (Deputy Chairperson), Mr. Vincent Upton, Mr. James Conway 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 CN77144.

Summary of licence and file

The licence pertains to 390m of forest road at Carrighmore, Co. Carlow. An Appropriate Assessment (AA) Screening document prepared for DAFM describes the site to be serviced by the road as follows:

WD4 Conifer plantation, River Barrow and River Nore SAC [2162] ca 10km downstream. Blackstairs Mountains SAC [0770] ca 6km south east. Slaney River Valley SAC [0781] is ca. 11km west. WB Catchment: BLACK(BORRIS)_010. Existing forest drains connect to the Corries River which discharges to the Mountain River (part of the River Barrow and River Nore SAC).

The application was accompanied by a site location map and a biomap. From these it can be observed that the proposed road would exit onto the L7005 at its northern end, and that it would run in a near straight line on an almost north-south direction. A number of documents on file refer to the Corries River, which flows to the Black River and ultimately discharges to the Mountain River. The Corries River is separated from the project site by another plot. This other plot is managed, but not owned, by the applicant and there is a separate licence application (CN85149) for a forest road to service that plot with access from the south from the nearby L7007. The names of the rivers above are as per OSI mapping. EPA mapping indicates that the Corries River is part of the Black (Borris)_010 waterbody which is recorded as having a Good Ecological Status which is Not At Risk under the 2013-2018 Water Framework Directive monitoring cycle.

The original application for this licence was received by DAFM on the 13th of December 2016. Various correspondence is on file showing DAFM requesting additional information, and this being supplied by the applicant. There is a record of two roadside notices, one dated the 23rd of August 2018, with a second dated the 6th of September 2018. In addition to the location map and biomap, a road specification is also on file which outlines that construction will be of an excavation, grade, and compact nature.

A referral to Carlow County Council dated the 27th of September 2018 is on file, to which the Local Authority replied on 22nd of October 2018. In the reply, Carlow County Council observed that where an EIA is not required the proposed road would be an exempt development under Section 4(i)(a) of the Planning and Development Act 2000 (as amended) and Article 8(g) of the Planning and Development Regulations 2001-2018. The response also noted that planning permission has been granted for the creation of an entrance onto the public road under file reference 18/189.

A referral to NPWS is also on file dated the 18th of October 2018. NPWS responded to this on the 14th of December 2019 providing general guidelines in relation to forestry activity and the environment and noting potential impact on The Slaney River Valley SAC [0781], and the potential for impact on a population of *Margaritifera margaritifera* (freshwater pearl mussel) in that SAC.

On the 29th of May 2019 (and by reminder dated 29th August 2019) DAFM requested the applicant to provide a Natura Impact Statement (NIS) for the proposed development, and this was provided by the applicant on the 12th of September 2019.

A Screening for Appropriate Assessment (AAS) is on file with a completion date by the Forestry Inspector of the 27th of May 2019. This used a screening radius of 3km and concludes that the Inspector was not in a position to confirm that the project in combination with other plans or projects will not have a significant effect on the River Barrow and River Nore SAC [2162] and that as a result the proposed project should proceed to Stage 2 Appropriate Assessment.

The NIS received from the applicant includes a section on the identification of European sites and concludes that River Barrow and River Nore SAC [2165] is the only such site that could be potentially be affected by the project. The NIS notes it considers the project which is the subject of this appeal together with the proposed project immediately to the south (CN85149). The NIS then goes on to consider potential impacts on the Qualifying Interests of the SAC, and to propose mitigations which focus on the prevention of water from the site entering watercourses connected with the SAC.

A separate document, entitled "Appropriate Assessment Screening Report and Determination", prepared for the DAFM by an Environmental Scientist is on file dated the 17th of July 2020. This identifies three European sites within a radius of 15km of the project site, namely: River Barrow and River Nore SAC [2162], Blackstairs Mountains SAC [0770], and Slaney River Valley SAC [0781]. The River Barrow and River Nore [2162] is screened in because of the possibility of the project having a significant effect on an Aquatic Habitat or Aquatic Species listed as a qualifying interest of the SAC, and because of the possibility of the project impacting negatively on a supporting habitat and species. The Blackstairs Mountains SAC [0770] is screened out because of the absence, within and adjacent to the project area, of any habitat(s) listed as a qualifying interest of the European site. It is noted that the Blackstairs Mountains SAC is designated for two terrestrial habitats and is located ca. 6km from the project site. The Slaney River Valley SAC [0781] is screened out for the same reason as the Blackstairs Mountains SAC and *also because of the location of the project area within a separate water body catchment to that containing the European site, with no upstream connection, and the subsequent lack of any hydrological connection.* It is noted that the project area is located in the Barrow Catchment, WFD sub catchment BLACK (BORRIS)_010, that the project area drains to a tributary of the Corries River which discharges to the Black River and then the Mountain River and finally to the River Barrow, ca. 10km downstream, and that there is no hydrological connection with the River Slaney system. The screening for both the Blackstairs Mountains SAC and the Slaney River Valley SAC considers the conclusion of an in-combination assessment dated the 7th of July 2020 and attached as an appendix. This concludes that there is no likelihood of the project itself having a significant effect on the European sites, and there being no potential for it to contribute any cumulative adverse effects on the site when considered in-combination with other plans and projects. On the basis of these screenings, the document concludes

that the project must advance to Appropriate Assessment for possible effects on the River Barrow and River Nore SAC [2162].

An Inspector's Certification report is on file. This includes a further screening for Appropriate Assessment, identifying the same three Natura sites within 15km of the project site. In this case all three of the Natura sites are recorded as being screened out, with reasons for doing so being not recorded, and that as a consequence Appropriate Assessment not being required. In relation to screening to determine Environmental Impact Assessment requirement, a spatial search relating to the site is recorded as having been carried out on the 20th of August 2020. A number of answers to questions on the certification are marked as "N/A", including: Q3, in relation to the total combined length of roads within the area; Q10 in relation to the level of forestry-related traffic on public roads in the locality; Q11 in relation to the sufficiency of adherence to water quality guidelines to prevent impact to aquatic zones; and Q13 in relation to Freshwater Pearl Mussel. The Inspector concluded that in this instance, an EIA was not required.

Grounds of Appeal

There is one appeal against the decision to issue the licence. Briefly, the grounds of appeal include a breach of Article 2(1) and Article 4 (3) of the EIA Directive 2014/152/EU by reason of failure to consider a number of criteria set out in Annex III of the directive in the FS screening assessment with the appellant submitting that a Member State exceeds the limits of its discretion under Article 2(1) and 4(2) of the EIA Directive in circumstances where it does not take into account all relevant selection criteria listed in Annex III; a breach of Article 4 (4) of the EIA Directive 2014/152/EU through failure to submit details of the whole project, and that the Forest road is not the whole project; a breach of Article 4 (5) of the EIA Directive 2014/152/EU through similar grounds to above; that the requirement for an EIA is inadequately reasoned with reference to how the responses to the IFORIS checkbox queries relate to the conclusion made; that the checkbox responses of the Inspector in respect of the EIA screening contain errors; that there is insufficient information included with the application to permit the inspector to make a conclusive determination as to whether an EIA is required; that the details in the application are not an accurate representation of those required under Regulation 6 (2) of the Forestry Regulations (2017) and that the application was not legally complete and could not have been processed legally; 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 for Ireland 2018-21 through inadequate consultation and an absence of consideration cumulative impact in the same catchment, and that statutory bodies as indicated in the NIS have not been consulted; that the mitigations contained in the AA Determination (and consequently the licence) are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with Article 6 (3) of the Habitats Directive; that residual effects from this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed; that the AA In-Combination assessment is flawed

as the regulatory systems in place for the approval, operations and monitoring of the effects of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the Integrity of the Natura 2000 site in view of that sites' conservation objectives; that the Minister has not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination; that the licence conditions do not provide, as would be required by Article 12 of the Habitats Directive, a system of strict protection for the animal species listed in Annex IV (a) of that Directive in their natural range, prohibiting deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; and that the licence conditions do not provide a general system of protection for all species of birds as would be required by Article 5 of the Birds Directive and referred to in Article I of that Directive; prohibiting in particular the deliberate destruction of, or damage to, their nests and eggs or removal of their nests.

Statement of Fact and Oral Hearing.

In a statement to the FAC, the DAFM confirms the timeline of the application as outlined above and states that the application was the subject of both a desk and field assessment. The differing conclusions in relation to AAS arising from the Inspector's Certification, the initial screening document and the subsequent screening are noted and addressed. The individual grounds of appeal are not addressed.

At the Oral Hearing representatives from DAFM restated the contents of the Statement of Fact. In response to questions from the FAC, the DAFM confirmed that there are a number of screenings for Appropriate Assessment on file, and that this is reflective of the age of the application which was initially submitted in 2016 and that in the interim DAFM has updated its procedures. DAFM confirmed to the FAC at oral hearing that the screening relied upon was that finalised on the 17th of July 2020 on behalf of DAFM, and that an Appropriate Assessment Determination was carried out which relied on the contents of the NIS prepared by the applicant.

The FAC questioned the DAFM in relation to the screening for EIA in the Inspector's Certification, and specifically those questions which were answered with an "N/A". On Q3, relating to the total combined length of roads within the area, the DAFM representatives submitted that this would accurately have been marked "No", but drew the attention of the hearing to the In-combination assessment appended to the AAS of the 17th of July 2020 which considered various planning systems on the 7th of July 2020. This includes two other forest road applications, one of which relates to the other road considered in the NIS. These, together with the licence under appeal, total 1,070m. In relation to Q10 regarding the level of forestry-related traffic on public roads in the locality it was submitted that the issue of traffic was not raised by Carlow County Council and that no third-party submissions had been made raising this as an issue. DAFM also submitted that in relation to Q11 and Q13 which consider the sufficiency of adherence to water quality guidelines to prevent impact to aquatic zones, and the presence of Freshwater Pearl Mussel, the location of the proposed road is dry and that in any event the licence

conditions would ensure no impact. The Inspector also submitted that his own check sheet did indicate that the site was in a Freshwater Pearl Mussel area and that the answer given for Q13 was an error but that this did not alter the conclusion.

The FAC questioned DAFM in relation to the NPWS response, and in particular the reference to Freshwater Pearl Mussel in The Slaney River Valley SAC [0781]. The DAFM representatives stated that the Department regarded this response by NPWS as an error as it refers to an SAC to which the project has no hydrological connection. The FAC also queried why a suggested referral to Inland Fisheries Ireland in the NIS was not carried out. The DAFM observed that the NIS covered two proposed projects, and that in the case of this project the dry nature of location of the proposed road made such a referral unnecessary.

The FAC noted that the Statement of Fact submitted by DAFM did not explicitly address certain grounds of appeal and invited the DAFM to address those grounds. DAFM submitted that in respect of those grounds relating to EIA the application was considered in its own right in line with the requirements of SI 191/2017, and that other forestry activities would trigger their own consent processes which if occurring after this licence was granted would have to consider the licence as part of their in-combination assessment. DAFM further submitted that in relation to Article 4(3) and the criteria listed in Annex III, the Department is satisfied that these are adequately considered across the entirety of the licencing process and at screening for EIA.

DAFM also submitted with respect to the ground of appeal, that the details in the application are not an accurate representation of these required under Regulation 6(2) of the Forestry Regulations of 2017, that DAFM ensured the requisite information was available to make a determination, and that this requirement has to be considered in light of all information provided by the applicant during the consent process.

In relation to the ground that the Minister had not sought the opinion of the general public under Article 6(3) of the Habitats Directive on the Appropriate Assessment Determination, the DAFM submitted that the licencing process afford the public multiple opportunities to engage with the consent process and that the Department is satisfied that it has met the requirements of the Directive.

Consideration by the FAC

In addressing the grounds of appeal, the FAC had regard for the grounds of appeal, contributions at the oral hearing, the Statement of Fact provided by the DAFM, and the record of the application and licensing process. The FAC also consulted with several publicly available information sources such as mapping from the EPA, the DAFM and the OSI. These confirm the details of the project site as outlined above including the same three European sites within 15 km of the site as recorded by DAFM.

In addressing the grounds of appeal, the FAC considered, in the first instance, as to the completeness of the assessment in the context of 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 390m, so is sub threshold for mandatory EIA as set in Irish Regulations. The road would be built through managed forest land 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.

In the grounds of appeal, the appellant submits that criteria set out in Annex III of the directive were not considered as part of a screening assessment for EIA, while not submitting which of those criteria were not considered. For the reasons as set out above, in this instance such a requirement was determined in the first instance by reference to thresholds set under national legislation followed by consideration as to whether the project is likely to have significant effects on the environment. The FAC has regard for the submission made by DAFM at the oral hearing that the licence was processed in accordance with SI 191/2017 and that this has regard for the Directive. In relation to the question of whether the application represents the whole project, the FAC also has regard for the submission by DAFM at the oral hearing that the application relates to a forest road, that other forestry related activity is the subject of further consent processes and where these occur after the granting of a forest road licence, will be considered in-combination with the forest road project.

In relation to the grounds of appeal that the requirement for an EIA is inadequately reasoned with reference to how the responses to the IFORIS checkbox queries relate to the conclusion made and that the checkbox responses of the Inspector in respect of the EIA screening contain errors, the FAC is satisfied with the responses submitted by DAFM at the oral hearing. DAFM acknowledge that an error was made in relation to Q13 relating to Freshwater Pearl Mussel area but that this did not alter the conclusion. 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 the DAFM in relation to their EIA consideration and concurs with the conclusion.

The FAC is satisfied that at the time of making a decision in relation to this licence, DAFM had the information required under Regulation 6(2) of the Forestry Regulations and accepts the DAFM submission at Oral Hearing in this regard. Consequently, the FAC does not agree with the ground of appeal that the application was not legally complete and could not have been processed legally.

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 for Ireland 2018-21 through inadequate consultation and an absence of consideration cumulative impact in the same catchment, and that statutory bodies as indicated in the NIS have not been consulted. In doing so, the FAC reviewed EPA maps and other publicly available data and find the nearest watercourse to the proposed project is the Corries River which is part of the Black (Borris)_010 waterbody, which is recorded as having a Good Ecological Status and to be Not At Risk under the 2013-2018 Water Framework Directive monitoring cycle.

The proposal area is also in a Freshwater Pearl Mussel catchment; however, no watercourse adjoins or crosses the proposed road. The NIS observes that drainage from the plantation area is to the Corries River via forest drains, but no such drain can be seen in OSI or EPA mapping in the vicinity of the road proposed in this application. The DAFM referred the proposal to Carlow County Council and NPWS, with Carlow County Council making no reference to water quality issues, and NPWS making an erroneous reference to the River Slaney Valley SAC. At oral hearing, the DAFM stated that a discretionary referral to Inland Fisheries Ireland was not required in this case due to the dry nature of the proposed location which was verified during a site inspection. The licence conditions include reference to mitigation measures outlined in the AAD which in turn include several mitigations designed to protect water quality and prevent contamination from the site impacting on the qualifying interests of The River Barrow and River Nore SAC [2162]. In summary, based on the information available to it and having regard to the nature of the proposal, namely construction of a forest road, the location of it and its terrain and the conditions under which operations would be undertaken, the FAC is not satisfied that there was inadequate consideration of water matters by DAFM in their decision making and is not satisfied that the proposal poses a significant threat to water quality and to the achievement of the objectives set out for the underlying waterbody or waterbodies under the River Basin Management Plan for Ireland 2018-2021.

The FAC also finds that the mitigations within the AAD, which the FAC is satisfied form part of the licence conditions, include reference to specific and named standards and guidelines. As a result, the FAC does not agree with the ground of appeal that the mitigations contained in the AA Determination (and consequently the licence) are not written with sufficient precision or clarity regarding their requirements and permitting procedures to ensure that they will result in compliance of this development with Article 6 (3) of the Habitats Directive.

When considering the ground of appeal that residual effects from this project cannot be excluded and therefore the in-combination effect of this project with other plans and projects has not been adequately assessed, the FAC had regard to the assessments carried out by the DAFM. This included an AAS which considered in-combination effects and, *inter alia*, residual effects. A conclusion of this assessment was that there is no potential for the project to contribute to any effects, when considered in-combination with other plans and projects. The project was also considered from the perspective of EIA and was deemed to be sub-threshold for the purposes of EIA. The assessment for EIA considers a wide range of criteria, including the potential for post-consent effects, and this resulted in a determination that an EIAR was not required. Based on the information before it, the FAC is satisfied that the process employed by DAFM for the assessment of environmental impact, including residual effects, was appropriate in this case.

The FAC considered the ground of appeal that the AA in-combination assessment is flawed as the regulatory systems in place for the approval, operations, and monitoring of the effect of this and other plans and projects are not sufficiently developed and implemented such as to ensure that there will be no direct or indirect impact on the integrity of any Natura 2000 sites in view of those sites' conservation objectives. In doing so, the FAC considered the process operated by the DAFM in conducting an Appropriate Assessment as outlined in its statement and at oral hearing, and as evidenced in the record of the file of the decision-making process. Under Article 6(3) of the Habitats Directive, a 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 or projects, having regard to the conservation objectives of that designated site. In addition to consideration of each Natura Site within a defined search radius, and the qualifying interests and conservation objectives in each case, a Stage 1 assessment identified, described and considered other plans and projects considered in-combination with the proposal. The FAC considered that the DAFM had sufficient information in respect of the characteristics of the proposal itself, 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.

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. 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 further considers that the procedures adopted by the DAFM provide for opportunities for the public to make submissions on the proposal. The

procedures adopted by the DAFM in their assessment are considered to be acceptable. The FAC is not satisfied that an error was made in making the decision in relation to these grounds.

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 in this case. The FAC is thus affirming the decision of the Minister regarding licence CN77144 in line with Article 14B of the Agricultural Appeals Act 2001, as amended.

Yours sincerely,

A black rectangular redaction box covering the signature of John Evans.

John Evans On Behalf of the Forestry Appeals Committee