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26<sup>th</sup> April 2021

**Subject:** Appeal FAC259/2020 regarding licence CN82826

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 CN82826 is for the construction of a forest road 285 metres in length at Raheen, Co Cork, which was approved by the Department of Agriculture, Food and the Marine (DAFM) on the 22<sup>nd</sup> of May 2020 subject to conditions.

#### **Hearing**

A hearing of appeal FAC259/2020 was held by the FAC on 16<sup>th</sup> April 2021. In attendance:

FAC Members: Mr. Donal Maguire (Deputy Chairperson), Mr. Derek Daly, Mr. Iain Douglas, Mr. Vincent Upton

Secretary to the FAC: Ms. Marie Dobbyn

DAFM Representatives: Ms. Mary Coogan, Mr. Brian Mahony

Applicant Representatives: [REDACTED]

Appellant: [REDACTED]

#### **Decision**

Having regard to the evidence before it, including the record of the decision by the DAFM, the notice of appeal, submissions received including at the oral hearing, and, in particular, the following considerations, the Forestry Appeals Committee (FAC) has decided to affirm the decision of the Minister regarding licence CN82826.

#### **Licence**

The licence decision pertains to 285 metres of forest road works at Raheen, Co. Cork. The application includes road specification details, management plan, species map, bio map, maps showing the area to

be served, the route of the road, the location of the site notice and a location map. The road is described as servicing a forest of 11.40 ha planted in 2000. The predominant soil type underlining the project area is described as predominantly brown podzolics in nature. The slope is predominantly flat to moderate. The vegetation types within the project area comprise conifer plantation/gley soils.

The proposed road will enter the forestry directly from the public road and planning permission was granted by Cork County Council for an access onto the public road from the project site under P.A Ref. No. 18/ 5208 on the 7<sup>th</sup> September 2018. The proposed works consist mainly of culverting a section of the roadside drain at the entrance, felling of some trees (Sitka spruce, Japanese larch and a few small birch) along the footprint of the proposed road and road construction. The road will be constructed using 804 x 300mm aggregate. If ground conditions permit the road will be reversed however the road may be excavated and filled if not. A section of roadside drain will be culverted using 4 x 300mm culverts.

The application was referred to Cork County Council and responses were received on the 04/01/2019 and 14/01/2019. The reply of 04/01/2019 related to roads and states no objection. Response of 14/1/2019 relates to planning and refers to adherence to statutory requirements.

The application was referred to Southern Region Fisheries / Inland Fisheries Ireland 31/01/2019 and the reply received on the 15/04/2019 indicated no objection.

The application was referred to the National Parks & Wildlife Service on the 31/01/2019 and no reply was received.

An initial stage 1 Appropriate Assessment screening was carried out by the DAFM. Three Natura sites were identified within 15 kilometres of the project, the Blackwater River (Cork/Waterford) SAC 002170 Lower River Shannon SAC 002165 and The Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161. The Blackwater River (Cork/Waterford) SAC 002170 was screened in due to the potential for impact arising from potential hydrological connectivity to the Natura site located 560 metres from the project site. The Lower River Shannon SAC 002165 and The Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 were screened out due to the location of the project area within a separate water body catchment to that containing the Natura site, with no upstream connection, and the subsequent lack of any hydrological connection and the nature of the habitats at the project site.

The DAFM after the initial screening for Appropriate Assessment (AA) requested the applicant to submit a Natura Impact Statement (NIS) which was subsequently submitted. The DAFM engaged a consultant to review the submitted NIS and prepare an AA Report to inform the basis for the DAFM's AA Determination Statement. The AA Determination Statement (AAD) concluded that individually and in-combination with other plans and projects in-combination 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 favourable preservation of these sites at favourable



conservation status if carried out in accordance with specific mitigation to be included as conditions in any grant of permission for the licence. The AAD outlines the conditions and the basis for the determination. Additionally, consideration of the proposal across a series of criteria are recorded. The application was approved on the 22<sup>nd</sup> May 2020 with conditions including,

- Environmental & Silvicultural Conditions;
- Site mitigation measures in appropriate assessment determination are conditions of approval.
- Move the road 20m to the south to avoid any interference with the drain along the northern boundary of the plantation.
- Use a roadside culvert of at least 500mm to avoid any interference with flow in small stream along the road.
- Excavate to road. Have roadside drains either side. Divert drains into forest. They must not directly connect to the stream.
- Adhere to forestry & water quality guidelines,
- All guidelines to apply.

### **Appeal**

There is one appeal against the decision.

The grounds contend that the test for Appropriate Assessment screening it is necessary merely to determine that there may be an effect rather than to state it will not have a significant effect. If the development is within 15 kilometres of a Natura 2000 it must be screened in. The licence does not comply with the Habitats Directive and reference is made to the stated judgement EUCJ 323-17. A map showing all SACs and SPAs and the site of the proposed development should be attached in relation to a screening. Details of all forestry in the area should be given to show there is not a cumulative afforestation of more than 50 hectares and all forest roads should be shown. Reference is made to the judgement EUCJ 254-19. It also references the Court of Justice stating that it has repeatedly held that the Member States' obligation arising from a directive to achieve the result envisaged by the Directive and their duty to take all appropriate measures, to ensure fulfilment of that obligation which is binding on all the authorities of Member States and the grounds also set out that this must apply to the FAC as the obligation is binding on all the authorities of Member States.

In a statement to the FAC, the DAFM submitted that decision was issued in accordance with our procedures, S.I. 191/2017 and the 2014 Forestry Act. The Statement from the Forestry Inspectorate indicates that the site was field inspected. The site was 'screened-in' and was sent to ecology with a recommendation for an NIS. An NIS was completed and the Appropriate assessment report and determination were completed by ecology and subsequently the Inspector approved the application with conditions.

An oral hearing of the appeal was held on 16<sup>th</sup> April 2021, of which all parties were notified, and attended by representatives of the DAFM and the Applicant. The DAFM outlined their processing of the application and read through their written statement. The DAFM outlined the screening assessment

undertaken; that three Natura sites were identified and that the Blackwater River (Cork/Waterford) SAC 002170 was screened in due to the potential for impact arising from hydrological connectivity to the Natura site and the preparation of an NIS was recommended. After the submission of the NIS this was reviewed by a consultant ecologist and an AAD was prepared by the DAFM ecologist which identified that individually and in-combination with other plans and projects in-combination will not adversely affect the integrity of any European Site. The inspector recommended the project subject to the conditions specified in the AAD. The inspector considered that the road itself was straightforward but recommended a number of additional conditions relocating the road to permit for natural drainage within the site and for increased diameters of culverts and length of culverts to accommodate anticipated potential frequency of high rainfall events and that it represented good practice to avoid risk of flooding.

The applicant indicated the site was the subject of desk and field survey, that there was no risk to water, drainage would occur to the forest floor and no flows would occur to a drain or road and consequently a watercourse.

At the hearing the FAC raised issues relating to the road construction, the drainage pattern in the area with particular reference to hydrological connection to the Allow River and the Blackwater River (Cork/Waterford) SAC 002170 and qualifying interests in particular the Pearl Water Mussel species. The overall process and the chronology of the AA screening was also examined by the FAC. In response it was indicated that the site was field inspected and all aspects of hydrological connections were examined. Clarification was sought by the FAC in relation to a stream and road drains in the area immediate to the project site and in relation to the conditions included in the licence relocating the road and the provision of roadside culverts. In response it was indicated that the relocation of the road and the additional culverting were applied as a precautionary measure to accommodate any potential discharge arising from any flooding event which may occur. Regarding the design of the road, it was submitted that the DAFM is satisfied that the proposed road design was acceptable and appropriate in this case. The conditions as outlined in the NIS and in the AAD were examined and clarification was sought in relation to avoidance of chemical discharge on the site and potentially to water. The issues raised were addressed by DAFM to the satisfaction of the FAC. The inspector's determination and recommendation were also reviewed by the FAC at the hearing and are considered adequately reasoned based on the responses received and the application details.

In addressing the grounds of appeal, the FAC considered *inter alia*; whether or not the decision was in compliance with the requirements of the Habitats and EIA directives, the completeness of the assessment of the licence application, whether there was an adequate assessment of cumulative effects and an examination of the procedures applied which led to the decision to grant the licence.

In considering the appeal the FAC noted that the EU EIA Directive sets out in Annex I, a list of projects for which EIA is mandatory and that 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. Forest roads are not referred to in Annex I or Annex II. The Irish Forestry Regulations 2017, in relation to



forestry licence applications, require the compliance with the EIA process for applications relating to 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 DAFM considered the application across a range of criteria, including water, designated areas, landscape and cumulative effects and determined that the project was not required to undergo the EIA process. The proposal is for 285 metres of forest road construction to facilitate the management of commercial forest for timber production, which is considerably sub-threshold for the mandatory submission of an EIAR. Having regard to the record of the decision and the submitted grounds and the nature, scale and location of the proposal the FAC is satisfied that the proposal would not result in any likelihood of significant effects on the environment and that the DAFM did not err in its decision concerning EIA.

In considering the appeal the FAC examined the Appropriate Assessment screening and Appropriate Assessment undertaken by the DAFM, the NIS submitted, the review of the NIS undertaken by the DAFM and the AA Determination. The FAC examined publicly available information from the EPA and NPWS and identified the same three sites; the Blackwater River (Cork/Waterford) SAC 002170 Lower River Shannon SAC 002165 and The Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 as the DAFM within 15km from the proposal. The FAC is satisfied that there was no need to extend the radius in this case. The FAC considered the nature, scale and location of the proposal, the European sites identified, and their conservation objectives and the reasons provided by the DAFM in the AA Determination for screening them out. The DAFM considered each site in turn and provided the reasons for screening all the sites out for appropriate assessment. Details of other plans and projects were also examined.

In relation to the Lower River Shannon SAC 002165 there is no evidence of a direct hydrological connection to the site. In relation to The Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA 004161 there is no evidence of a direct hydrological connection to the site and or of the presence of the related species and habitats on the lands of the proposed forest road works.

In relation to the Blackwater River (Cork/Waterford) SAC 002170, the FAC considered the documentation received including the reasons provided by the DAFM in the AA Determination for screening this Natura site out. The proposed road works are located outside of any European site. There is no evidence of protected habitats or species on the site. The FAC is satisfied that the DAFM did not make any serious or significant error in their decision regarding Appropriate Assessment Determination and concurs with the conclusions reached. The FAC considered that the design and specification and the

conditions applied in the licence decision to be appropriate and acceptable and that there is no evidence that significant environmental damage would occur.

Specifically, in relation to potential hydrological impacts on Natura sites and on water quality generally, at the oral hearing the DAFM submitted that the field inspection clearly identified, from an assessment of the topography of the site, that surface water from the road would drain internally within the site and that the additional conditions as included would represent a prudent and precautionary measure to avoid any potential for localised impacts and would be in addition to measures required to avoid any impacts on European sites as described in the Appropriate Assessment. The FAC is satisfied based on the responses received that the construction measures and the accompanying method of drainage, as proposed, will not impact on any Natura sites or any receiving waters and that the DAFM did not err in its assessment in this regard.

In considering the appeal the FAC had regard to the record of the decision and 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 is thus affirming the decision of the Minister regarding licence CN82826 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,

A black rectangular redaction box covering the signature of Derek Daly.

Derek Daly On Behalf of the Forestry Appeals Committee